

## APPELLATE CRIMINAL.

*Before U Thein Maung, Chief Justice.*

U WA GYI (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).\*

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Aug. 13.

*Criminal Procedure Code, ss. 197 and 439—Prosecution under s. 409, Penal Code—Power of revision of the High Court.*

*Held* : It is undesirable and impossible to lay down a rigid rule as to when the High Court in its Revisional Jurisdiction will interfere with a pending case ; but the High Court will do so only in exceptional cases where there is no legal evidence to establish a *prima facie* case against the accused.

Where the Superintendent of Government Printing Works sold condemned machinery at a price mentioned in the Dead Stock Ledger and the value of the machinery were credited to the Government, and it was not suggested that the sale was made dishonestly the mere fact that the sale was at an under-value does not make the Superintendent of the Printing Works liable for criminal breach of trust.

When the Court finds that there is no legal evidence of criminal breach of trust against the accused a *de novo* trial of the accused owing to the transfer of the Magistrate should not be allowed, and under these circumstances, the Court would quash the proceedings.

*Khan Bahadur Hajee Gulam Sherazee v. The King*, (1941) R.L.R. 599 at p. 601.

*Maung Ba Yon v. Ma Hla Kin*, A.I.P. (1933) Ran. 297 at p. 298 ; *Hari Cheran v. Girish Chandra Sadhukan*, (1911) I.L.R. 38 Cal. 68 ; *Abdul Wali v. Emperor*, A.I.R. (1933) Oudh 387 at p. 391, referred and followed.

*Dr. Ba Han* for the appellant.

*L. Choon Fong* (Government Advocate) for the respondent.

U THEIN MAUNG, C.J.—This is an application to quash the proceedings against the applicant in Criminal Regular Trial No. 9 of 1948 in the Court of the District Magistrate, Rangoon. The applicant, who is Superintendent, Government Printing Press under suspension, is

\*Criminal Appeal No. 80B of 1948 being <sup>appeal</sup>revision from the order dated the 24th June 1948 passed in Criminal Regular Trial No. 9 of 1948.

prosecuted in that case with sanction under section 2 of the Sanction for Prosecution (War-Time Offences) Act, 1946, and section 197 of the Code of Criminal Procedure for an offence under section 409 of the Penal Code in respect of two printing machines, namely, printing machines Nos. 8065 and 7492. The case for the prosecution has been closed and a date has actually been fixed for hearing as to whether a charge should be framed or not. However, the learned District Magistrate who tried the appellant has gone on leave and his successor in office has decided *suo motu* to try the case *de novo*.

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With reference to a similar application Mosely J. observed in Khan Bahadur *Hajee Gulam Sherazee v. The King* (1),—

"It is undesirable and impossible, of course, to lay down any rigid rules as to when interference can or should be made, but the guiding principles are quite clear. The High Court will only interfere in exceptional cases such as where a person is being harrassed by an illegal prosecution; where there is some manifest and patent injustice apparent on the face of the proceedings and calling for prompt redress; where the evidence on record for the prosecution clearly does not justify a charge of any offence (*Ba Yon v. Ma Hla Kin*, Criminal Revision 171B of 1933 of this Court), or where the trial is on the face of it an abuse of the process of the Court. It has well been said that one test of the exceptional nature of the application is that a bare statement of the facts without any elaborate argument should be sufficient to convince the High Court that the case is a fit one for its interference at an intermediate stage. There are numerous rulings to this effect by other High Courts."

Dunkley J. also observed in *Maung Ba Yon v. Ma Hla Kin* (2),

"It has been repeatedly laid down that a Court of revision should be most reluctant to interfere in a pending case but where upon the alleged facts, there is no justification for the charge

(1) (1941) R.L.R. 599 at p. 601.

(2) A.I.R. (1933) Rap. 297 at p. 298.

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against the accused, he should not for a moment longer than is necessary be allowed to remain in the position of a person accused of an offence and forced to defend himself against a charge which there is no legal evidence to establish. Consequently if there are any allegations of fact to support the charge which has been brought by the respondent against the applicant, then I shall not be justified in interfering ; but it is my duty to interfere and to quash the proceedings of the Magistrate if, even were all the allegation set out in the complaint and in the examination of respondent upon her complaint to be proved, they would not substantiate the charge which she has made against the applicant."

In the present case the complainant U Oung Khine (a) U Bon Khain has merely stated in his First Information Report (Exhibit A), dated the 2nd October 1947, "There are no records that U Wa Gyi, the Superintendent of Government Printing and Stationery Department, has the power to dispose of or sell the Government property." He has not stated therein that U Wa Gyi did not, as a matter of fact, have power to sell the Government property or that U Wa Gyi disposed of the Government property dishonestly. It was only in his examination-in-chief on the 24th May 1948, *i.e.* over seven months after the First Information Report that he stated : "I seized them because they were sold at an under-value and contrary to Government instructions, that is, they should be sold by a public auction after due advertisement." He has practically admitted that U Wa Gyi had authority to sell the machines. His complaint at the hearing is that U Wa Gyi sold them at an under-value and contrary to Government instructions ; but he has not alleged even at the hearing that U Wa Gyi did so dishonestly. The alleged Government instructions are contained in Exhibit B which is a copy of Department of Commerce and Industry letter dated the 12th October 1939, the original of which cannot be found by the complainant

although he has made a search for it. He seized Exhibit B on the 21st October 1947, from Maung San Shein, Stationery Clerk in Insein Jail (P.W. 9) who had received the file containing it from his predecessor-in-office U Hla Baw Zan (P.W. 8); and according to U Hla Baw Zan "Exhibit B was found in a file in a rubbish heap." It is admitted that U Wa Gyi was not the Superintendent, Government Printing and Stationery, Burma, in 1939 when instructions as per Exhibit B were alleged to have been issued and there is no express allegation of U Wa Gyi having been aware of them. The allegation is implied in the complainant's statement; "It may be that U Wa Gyi himself did not remember Exhibit B;" but this statement must be read with the statement immediately preceding it which is "None of them [referring to U Hla who is acting in U Wa Gyi's place and U Khin Maung, Assistant Superintendent, Government Press (P.W. 10)], remembered an order like Exhibit B." Besides, apart from the concession that U Wa Gyi might not have remembered the instructions (even if they were issued) there is no allegation of U Wa Gyi having been aware of them before the sale or of any circumstance to show that he must have been aware of them or of his having sold the machines dishonestly.

The case for the prosecution as stated by the learned Government Advocate is that by virtue of the instructions as per Exhibit B, an implied legal contract has been made by U Wa Gyi, touching the discharge of the trust and that U Wa Gyi has dishonestly disposed of the machines in violation of the implied legal contract. However, the allegations made by the complainant and the evidence led by him are not to that effect. Even if all the allegations set out in the First Information Report and the evidence of U Oung Khine were proved, they would not substantiate the charge of an

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offence under section 409 of the Penal Code. Besides, the allegation that the machines were sold at an under-value has not been proved at all. U Oung Khine has stated in his examination-in-chief, "I cannot say the original value of the machines. I cannot also say their values at the time of the sale." It is true that he has added "I know that they are worth more than the price at which the accused has sold them ;" but he has to admit under cross-examination, "I have never effected sale of printing machines. By looking at the size of the exhibit machines and its (sic ? their) usefulness, I formed my estimate of them." On the other hand U On Kin (P.W. 2), who bought them from U Wa Gyi, found them in very bad condition and "did not think the price to be a bargain." U Ba Ohn Overseer, Government Press (P.W. 7) has stated, "Those machines that could not be used were classed as unserviceable machines. The exhibit machines were of the class. They were very old. When machines were unserviceable, I had to send a report to U Wa Gyi through the Overseer and Deputy Superintendent. On receipt of the report, U Wa Gyi, who was Superintendent ordered the Engineer U Shwe Gaung to inspect and examine the machines. The same procedure was followed in connection with the exhibit machines." Moreover U Oung Khine has admitted that the machines were sold at the prices mentioned in the Dead Stock Ledger (Exhibit D, page 173) at their book value and that "the value of the machines were all credited to Government."

Under the circumstances further trial of the applicant on the complaint will not serve any useful purpose. [Cf. *Hari Cheran v. Girish Chandra Sadhukan* (1).] Nay, it will certainly be unjust to compel him to

stand further trial thereon. [Cf. *Maung Ba Yon v. Ma Hla Kin* (1)]. In the words of Wazir Hasan, C.J., in *Abdul Wali v. Emperor* (2) "If I were to allow these proceedings to continue, I would be allowing a farce to be enacted to the great harassment of the applicant."

This is enough to dispose of the application and it is not necessary for me to go into the question as to the legal effect of the sanction under section 197 of the Criminal Procedure Code having been obtained—unlike the sanction under the Sanction for Prosecution (War-Time Offences) Act, 1946, only after the learned District Magistrate had taken cognizance of the case, granted bail to the accused and fixed a date for hearing.

I accordingly direct that the prosecution be quashed.

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