SUPREME COURT.

MAUNG OHN KYAING (APPELLANT)

v.

THE UNION OF THE GOVERNMENT OF BURMA (RESPONDENT).*

† S.C. 1948

Aug. 1.

[On appeal from the High Court by Special Leave.]

Union Judiciary Act, s. 22—S. 434, Code of Criminal Procedure—Reservation of point of law—Whether can be made after conviction and sentence.

Held: That under s. 434, Code of Criminal Procedure, read with s. 22, Union Judiciary Act, the point or points arising in the course of trial may be noticed in course of trial or almost immediately after the trial is over or even sometimes after the trial is over. The Presiding Judge, either of his own motion or at the instance of a party after the trial is over, may make a reference under s. 434 of the Code of Criminal Procedure, even though he did not reserve any point or points of law for reference at the time of passing the sentence.

Rex v. *Brown*, L.R. (1890) 24 Q.B.D. 357, followed.

Queen Empress v. *Durga Charan*, I.L.R. 7 All. 672; *Queen-Empress* v. *C. P. Fox*, I.L.R. 10 Bom. 176; *In re Kunhammad Haji*, I.L.R. 46 Mad. 382; *King-Emperor* v. *Nga Tin Gyi*, I.L.R. 4 Ran. 488, referred to.

B. W. Ba Tun for the appellant.

San Sein (Government Advocate) for the respondent.

The judgment of the Court was delivered by

BA U, C.J.—The point that arises in this appeal for decision is—

> "whether a reference under section 434 of the Code of Criminal Procedure can be made by the Presiding Judge, either on his own motion or at the instance of a party, after the trial is over if the Judge did not reserve for reference any point or points of law at the time he passed the sentence."

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* Criminal Appeal No. 1 of 1948.

† *Present:* SIR BA U, Chief Justice of the Union of Burma, E MAUNG, J., and KYAW MYINT, J., of the Supreme Court.

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The appeal is by special leave filed against an order passed by Mr. Justice Aung Tha Gyaw in Criminal Miscellaneous Application No. 9 of 1948 of the High Court.

The appellant was tried by Mr. Justice Aung Tha Gyaw, with Jury, at the Third Criminal Session Trial, under section 302 of the Penal Code. He was, however, found guilty under section 304 of the Penal Code and sentenced to suffer seven year's rigorous imprisonment. He filed an appeal against the conviction and sentence on the Appellate Side of the High Court, but his appeal was rejected on the ground that there was no right of appeal in cases tried by a Judge of the High Court in exercise of criminal original jurisdiction; whereupon he filed an application under section 22 of the Union Judiciary Act read with section 434 of the Code of Criminal Procedure. The application was rejected by Mr. Justice Aung Tha Gyaw on the ground that, since he had not reserved any point or points of law arising in the course of the trial, section 22 of the Union Judiciary Act did not apply.

The learned Judge did not, however, deal with the question of the applicability or otherwise of section 434 of the Code of Criminal Procedure. Section 22 of the Union Judiciary Act is only an enabling section. It says:

> "Subject to the provisions contained in the Code of Criminal Procedure, there shall be no appeal to the High Court from any sentence or order passed or made in any criminal trial before the Court of original criminal jurisdiction, which may be constituted by one or more Judges of the High Court:
>
> Provided that any such Court may reserve any point or points of law for the opinion of the High Court."

It does not provide what is to happen after a reference has been made. It must therefore be read with section 434, Criminal Procedure Code.

Section 434 is in the following terms :

"434. (1) When any person has, in a trial before a Judge of the High Court acting in the exercise of its original criminal jurisdiction, been convicted of an offence, the Judge, if he thinks fit, may reserve and refer for the decision of a Court consisting of two or more Judges of such Court any question of law which has arisen in the course of the trial of such person, and the determination of which would affect the event of the trial.

(2) If the Judge reserves any such question, the person convicted shall, pending the decision thereon, be remanded to jail, or, if the Judge thinks fit, be admitted to bail, and the High Court shall have power to review the case or such part of it as may be necessary, and finally determine such question, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment or order as the High Court thinks fit."

Now, what is to be observed in sub-section (1) is the use of the language "When any person has * * * been convicted of an offence, the Judge, if he thinks fit, may reserve and refer * * * any question of law * * *."

What is meant by the word "convicted" is not defined in the Code. But the meaning is clear ; it denotes the finding of guilty as distinct from acquittal or discharge on a finding of not guilty. But this word "convicted" is not used in section 305 of the Code. What is used there is the word "judgment." Under the said section, if the Jury are unanimous in their opinion, or when as many as six are of one opinion, and the Judge agrees with them, the Judge shall give judgment in accordance with such opinion. The word "judgment" as used therein, like the word "convicted" is not defined. But having regard to the provisions of sections 366 and 367 of the Code, the word "judgment" means a decision in a trial which decides a case finally, so far as the Court trying the case is concerned, and

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terminating in either a conviction or acquittal of the accused.

Bearing in mind the meaning of these two terms "convicted" and "judgment" as explained above, if we refer to section 434 (1), we shall find what it really means. It means that, if the Jury are unanimous in their opinion, or as many as six are of one opinion, and if the Judge agrees with them, the Judge must convict the accused and sentence him according to law, and thereafter he can reserve a question or questions of law which have arisen in the course of the trial and refer such question or questions for the decision of a Court consisting of two or more Judges.

Now, what is to be noticed is that reference can be made only after the trial is over and that no time is fixed within which such a reference is to be made. Sub-section (2), however, contemplates a reservation and a reference being made almost immediately after the conclusion of the trial, because thereunder the Judge can postpone the passing of sentence on the accused and he can even release him on bail during the pendency of the reference.

Section 434, therefore, deals with two classes of cases :

(1) where a point or points arising in the course of the trial is noticed some time after the trial is over, and

(2) where such a point or points is noticed either in the course of the trial or almost immediately after the trial is over.

This is as it should be ; otherwise no innocent man will have any kind of redress since he has no right of appeal and the trial Court has no right to review its own judgment.

Several High Courts in India in dealing with section 369, Criminal Procedure Code, before its

amendment in 1923 pointed out that the exclusion of the judgment of the High Court from the purview of section 369 could not be read as conferring upon the High Court any such power, and that the Legislature in thus excluding High Court from the purview of the said section had in mind section 434, Criminal Procedure Code, see *Queen-Empress* v. *Durga Charan* (1), *Queen-Empress* v. *C. P. Fox* (2), *In re Kunhommad Haji* (3).

There is no case either in Burma or India where the point now under discussion has been directly dealt with ; but one case in Burma, *King-Emperor* v. *Nga Tin Gyi* (4), which has been brought to our notice by the learned Advocate for the appellant in a way supports our view.

There is also one English case where the same view as ours was held, and the case is the case of *Rex* v. *Brown* (5). The case was dealt with under 11 and 12 Vict. c. 78 (Crown cases Act, 1848), section 1 of which is in material particulars the same as section 434 of the Code of Criminal Procedure. It states, *inter alia*, as follows :

> "When any person shall have been convicted of any treason, felony, or misdemeanor, before any court of oyer and terminer or gaol delivery, * * * the judge or commissioner * * * before whom the case shall have been tried, may, in his * * * discretion, reserve any question of law which shall have arisen on the trial for the consideration of the justices of either bench and barons of the exchequer ; and thereupon shall have authority to respite execution of the judgment on such conviction, or postpone the judgment, until such question shall have been considered and decided * * *"

Relying on this section, Lord Coleridge C.J. referred the above case for decision by a Bench of the

(1) I.L.R. 7 All. 672 at p. 674.
(2) I.L.R. 10 Bom. 176 at p. 180.
(3) I.L.R. 46 Mad. 382.
(4) I.L.R. 4 Ran. 488.
(5) L.R. (1890) 24 Q.B.D. 357.

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High Court. In stating his case, the learned Chief Justice said :

"The prisoner was convicted before me upon his own confession at the last assizes for the county of Essex, on an indictment charging him with an attempt to commit unnatural offences with domestic fowls. * * *

On his confession I sentenced him to twelve months' imprisonment with hard labour. Afterwards I was informed that the Court of Criminal Appeal in an unreported case had unanimously held that a duck was not an animal within 24 and 25 Vict. c. 100, s. 61.

If I had been aware of that decision it would have been my duty to defer to it, whatever my own opinion on the matter might be. In the present case, however, there exists a conviction which, if the case of *Reg* v. *Dodd* (unreported) is to be followed, must be quashed. I request "the opinion of the Court of Criminal Appeal whether it should be affirmed or quashed * *."

In delivering the judgment of the Court, the learned Chief Justice, who himself presided over the Court, said:

"In *Reg* v. *Clark* (1) the prisoner pleaded guilty, but the evidence on the depositions did not make out any offence. The decision was that of a strong Court, which seems to have held that because he pleaded guilty, and pleaded guilty to that which, if he had known it, was not an offence, and not supported by any evidence of an offence, nevertheless he must be taken to have known the law, and his plea of guilty estopped him from afterwards disputing the conviction. Cockburn C.J., delivered a very short judgment, saying : 'In this case we have no jurisdiction. It was not a question arising on the trial, for the man pleaded guilty, and he must be taken to know the law. The power to state a case for the consideration of this Court only applies to questions of law which arise at the trial.'

If it is intended by that judgment that because a man pleads guilty, * * * that he is absolutely concluded for ever after from taking any point upon it, and that the judge who tries him cannot state a case for the opinion of this Court, we respectfully differ from that view, * * *

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(1) L.R. 1 C.C.R. 54.

We are of opinion, first, that we have jurisdiction to entertain this case, and, secondly, that upon the facts, and clearly upon the general law, the boy was properly convicted upon his own confession of an attempt to commit an unnatural offence. * * *"

For all these reasons, we answer the question propounded in the affirmative, and we set aside the order passed by Mr. Justice Aung Tha Gyaw in Criminal Miscellaneous Application No. 9 of 1948 of the High Court. We remit the case to the learned Judge for disposal of the application filed by the appellant in the light of the above observations.