

CRIMINAL REVISION. .

Before U San Maung, J.

MA THEIN YIN (APPLICANT).

v.

MA KYIN SHEIN (RESPONDENT).*

H.C.
1948

Aug. 18.

Criminal Procedure Code, s. 261.—Trial by bench invested with second class powers—Appeal lies to District Magistrate—Whether revision competent—S. 439 (5), Criminal Procedure Code.

Held: Every bench of Magistrates invested with the powers of a Magistrate of the Second Class can try summarily under s. 261, Criminal Procedure Code but the decision is subject to appeal to the District Magistrate under s. 407 (1), Criminal Procedure Code.

Queen-Empress v. Narayanasamy, I.L.R. 9 Mad. 36, referred to.

As the applicant filed revision before the learned Sessions Judge it could not be entertained at the instance of a party who could have appealed. In the present case s. 439 (5), Criminal Procedure Code is clearly in the way of the applicant, as the reference is not on a report by the Sessions Judge or a District Magistrate.

King-Emperor v. Appulsamy, 1 L.B.R. 209, distinguished.

Ba Shun (Government Advocate) for the respondent.

U SAN MAUNG, J.—This is a recommendation by the learned Sessions Judge of Bassein that the conviction of the applicant Ma Thein Yin under section 278 of the Penal Code and the sentence of fine of Rs. 8 or seven days' imprisonment passed upon her by a Bench of Honorary Magistrates at Yegyi in Criminal Regular Trial No. 4 of 1948 be set aside. The Honorary Magistrates at Yegyi were invested with powers of a magistrate of the third class but when they sit as a Bench, the Bench is invested with the powers of a magistrate of the second class. See Rule 3 of the Rules and Orders for regulating the

* Criminal Revision No. 92 (B) of 1948 being review of order of Honorary Magistrates of Yegyi, dated the 18th May 1948, passed in Criminal Regular Trial No. 4 of 1948.

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powers and procedure of Benches of Magistrates reproduced in paragraph 380 of the Courts Manual. Every Bench invested with the powers of a Magistrate of the second class is empowered to try summarily the offences mentioned in section 261 of the Code of Criminal Procedure. See Rule 7 of the aforesaid rules. However, whether the Bench invested with the second class powers tries a case summarily or in a regular way its decision is subject to appeal to the District Magistrate under section 407 (1) of the Code of Criminal Procedure. See *Queen-Empress v. Narayanasami* (1). Instead of appealing against the conviction and sentence before the District Magistrate, Bassein, the applicant has filed an application for revision before the learned Sessions Judge who has apparently overlooked the provisions of sub-section 5 of section 439 of the Code of Criminal Procedure. It reads :

“Where under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed.”

No doubt, in the case of *King-Emperor v. Appul-samy* (2) it was held that sub-section (5) of section 439, Criminal Procedure Code, does not debar the Chief Court from dealing with a case on revision reported by the Sessions Judge or District Magistrate of his own motion and not on the application of the accused who could have appealed but did not do so. However, in the present case, section 439 (5) of the Criminal Procedure Code is clearly in the way. The application for revision should have been dismissed by the learned Sessions Judge. His recommendation cannot therefore be accepted, and I direct that the proceedings be returned to him.

(1) I.L.R. 9 Mad. 36.

(2) 2 L.B.R. 209.