

CRIMINAL REVISION.

Before U San Maung, J.

THE UNION OF BURMA (APPLICANT)

v.

BET KAI AND FIVE OTHERS (RESPONDENTS).*

H.C.
1948

Aug. 19

Distinction between Special Judge—A Magistrate—Case taken cognizance of by a Magistrate and evidence partly recorded by him—Case later transferred to a Special Judge who does not try de novo—Effect—Ss. 3 and 5, Special Judges Act, 1946 and s. 3 of Special Judges (Third Amending) Act, 1947.

Held: That where an offence is taken cognizance of by a Magistrate and the case is partly heard by him, and the case is later transferred to another Magistrate who is also a Special Judge, the Special Judge is bound to take cognizance as a Special Judge and he cannot use the evidence recorded by the Magistrate.

Powers and jurisdiction of a Special Judge and Magistrate are distinct and different. A Magistrate can exercise ordinarily territorial jurisdiction throughout a district or over part of a district under s. 12 of the Code of Criminal Procedure, whereas a Special Judge ordinarily exercises jurisdiction within the Sessions division under s. 3 of Special Judges Act; under s. 4 of Special Judges Act, a Special Judge can try any offence and pass any sentence as provided in the section, whereas a Magistrate even if specially empowered under s. 3 of the Code of Criminal Procedure cannot try offences punishable with death.

S. 5 (3) of Special Judges Act applies only when one Special Judge is succeeded by another.

U SAN MAUNG, J.—Bet Kai and five others were prosecuted by the Armed Police for offences punishable under sections 436 and 395 of the Penal Code, and the case was at first tried by the Additional District Magistrate, Kyaukpyu, in his Criminal Regular Trial No. 14 of 1947. On the 23rd March 1948 it was withdrawn by the District Magistrate, Kyaukpyu, from the file of the Additional District Magistrate and forwarded to the 1st Additional Magistrate, Kyaukpyu, for disposal. At that time the 1st Additional Magistrate, Kyaukpyu,

* Criminal Revision No. 82-B of 1948 being review of the order of the Special Judge of Kyaukpyu, dated the 10th May 1948, passed in Criminal Regular Trial No. 15 of 1948.

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was U Ba Tun, who was a Special Judge appointed under the Special Judges Act, 1948. Thus the District Magistrate, who can only transfer a case before one subordinate Magistrate to another, had no power to transfer the case to U Ba Tun. Nevertheless U Ba Tun took the case on his file and proceeded to try it in his Criminal Regular Trial No. 15 of 1948. He took cognizance of the offence as a Special Judge, and, in fact, he was bound to take cognizance as such. However, instead of trying the case *de novo*, he continued it from the stage where it was left off by the Additional District Magistrate. Apparently he was under the impression that he could act on the evidence partly recorded by the Additional District Magistrate under the provisions of sub-section (3) of section 5 of the Special Judges Act, as added by section 2 of the Special Judges (Third Amendment) Act, 1947. At the conclusion of the trial he convicted Bet Kai, Kha Maung Thee, Maung Ni Ni, Maung Sein Thee, Maung Tun Sein and Shwe Tha Aung under section 436 of the Penal Code and sentenced each of them to four years' rigorous imprisonment. He also convicted Bet Kai, Kha Maung Thee, Maung Ni Ni and Maung Sein Thee under section 395 of the Penal Code and sentenced each of them to four years' rigorous imprisonment, the sentence to run concurrently with that under section 436 of the Penal Code. Only two out of the six accused appealed to the Sessions Judge, Arakan. However, the Sessions Judge took up the case on revision and has recommended to this Court that the trial before the Special Judge, Kyaukpyu, be quashed and that the convictions and sentences on the accused be set aside and a retrial ordered. He also noted that it would not be necessary for him to pass orders on the appeal of two of the accused if his recommendations are accepted by this Court.

Now, the question which arises for determination is: "Can a Special Judge in taking cognizance of an offence act on the evidence partly recorded by a Magistrate who had taken cognizance of the same offence before he himself took cognizance of it?" The territorial jurisdiction of a Magistrate and that of a Special Judge are entirely different. A Magistrate can only ordinarily exercise jurisdiction throughout the district to which he is appointed or to such part of that district to which his jurisdiction may be specifically limited—see section 12, Criminal Procedure Code. On the other hand, a Special Judge appointed under the Special Judges Act, 1946, ordinarily exercises jurisdiction within the sessions division to which he is appointed, although, of course, his jurisdiction may be either limited to part of that sessions division or to embrace two or even more sessions divisions—see section 3 of the Special Judges Act, 1946. As regards powers, a Special Judge may try any offence punishable under any law for the time being in force and may pass any sentence which is authorized by law under section 4 of the Special Judges Act, whereas a Magistrate, even though he may be specially empowered under section 30 of the Criminal Procedure Code, cannot try offences punishable with death. Therefore, one cannot envisage a Special Judge being regarded as a successor of a Magistrate within the meaning of the words "is succeeded by" occurring in section 350 (1) of the Criminal Procedure Code. Therefore, when sub-section (3) of section 5 of the Special Judges Act enacts:

"Notwithstanding anything contained in this Act, the provisions of sub-sections (1) and (3) of section 350 of the Code of Criminal Procedure, except proviso (a) to sub-section (1) of the said section, shall apply to the trials before a Special Judge as if the Special Judge were a Magistrate for the purposes of the said sub-sections (1) and (3) of section 350 of the Code."

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the only cases contemplated are that the provisions of section 350 (1) of the Criminal Procedure Code, which allows a Magistrate who succeeds another to act on the evidence partly recorded by his predecessor, should apply to cases where a Special Judge is transferred from a sessions division and is succeeded by another in the same division or where a case is withdrawn from one Special Judge and transferred to another Special Judge. It will be noted that section 6A of the Special Judges Act, 1946, as inserted by section 3 of the Special Judges (Third Amendment) Act, 1947, gives a Sessions Judge of the division the power to transfer a case from one Special Judge in his sessions division to another in the same division.

Therefore, in my opinion, a Special Judge cannot, in taking cognizance of an offence, make use of any evidence recorded by a Magistrate who has taken cognizance of the same offence before he himself took cognizance of it.

For these reasons, the conviction of all the accused in Criminal Regular Trial No. 15 of 1948 of the Special Judge (U Ba Tun) and the sentences imposed on these accused are set aside and the case against them directed to be retried by the Sessions Judge, Arakan, or by such other Special Judge in his division other than U Ba Tun as he may direct.