

CRIMINAL REVISION.

Before U Aung Tha Gyaw, J.

BA NYUN AND FIVE OTHERS (APPLICANTS)

v.

MAUNG KAUK (RESPONDENT).*

H.C.
1948

Aug. 30.

Criminal Procedure Code, s. 435—Revision to the Sessions Judge whether competent when District Magistrate has called the case on its own motion and refused to interfere—Whether competent.

Held: Under s. 435 (1) of the Criminal Procedure Code Sessions Judge or District Magistrate or Subdivisional Magistrate empowered by the Governor in this behalf may call for proceedings and pass such orders as the justice requires.

Sub-s. 4 of that section provides if application for revision has been made to the District Magistrate and rejected by him a second application to the Sessions Judge will not lie but where no application has been made to the District Magistrate but he on his own motion called for the records and refused to interfere an application to Sessions Judge will lie.

If application has been made to the District Magistrate and he refused to interfere and a subsequent application has been made to the Sessions Judge who thinks that the District Magistrate was wrong he may submit the proceedings to the High Court.

Darbari Mandar v. Jagoo Lal, I.L.R. 22 Cal. 573 ; *King-Emperor v. Po Gyi*, 8 L.B.R. 361, referred to.

Sein Daing for the applicants.

Kyaw Din for the respondent.

U AUNG THA GYAW, J.—The six applicants in this case were prosecuted for an offence under section 382 of the Penal Code before the Headquarters Magistrate at Mònywa in his Criminal Regular Trial No. 72 of 1948 and were discharged by him. Orders were also passed in respect of the properties involved in the charge directing that the same be returned to the applicants. The proceedings were examined by the

* Criminal Revision No. 104B of 1948, review of the order of the Sessions Judge of Sagaing, dated the 5th July 1948, passed in Criminal Revision No. 25 of 1948.

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District Magistrate in his Criminal Revision No. 42 of 1948 in exercise of his powers under section 435 (1) of the Criminal Procedure Code, and were returned with certain remarks as to the impropriety of settling civil disputes in criminal Courts and the want of English equivalent dates against Burmese dates in the depositions.

The complainant Maung Kauk, the respondent in this application, then applied to the Sessions Judge, Mònywa Sessions Division, asking for a further enquiry into the offences alleged against the applicants and for setting aside the order relating to the return of the exhibits to them. The learned Sessions Judge in his Criminal Revision No. 25 of 1948, acting under section 520 of the Criminal Procedure Code, set aside the order regarding the return of the exhibits, and directed, under section 436 of the Code, that a further enquiry be made against the present applicants in respect of the charge brought against them.

The applicants have now contended that this order of the learned Sessions Judge was incompetent in view of the fact that the District Magistrate had already dealt with the matter under section 435 of the Criminal Procedure Code.

Section 435 (1) provides :

"The High Court or any Sessions Judge or District Magistrate, or any Subdivisional Magistrate empowered by the Governor in this behalf, may call for and examine the record of an proceeding before any inferior criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court and may, when calling for such record, direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record."

Sub-section (4) further provides that if an application under this section has been made either to the Sessions Judge or District Magistrate, no further application shall be entertained by the other of them. It is clear from this provision that the Sessions Judge and the District Magistrate exercise concurrent jurisdiction in respect of the powers which they may exercise under this section. What the District Magistrate had done in regard to the present matter was not in consequence of any application made to him by the party concerned, and, to that extent, the facts of this case will not appear to fall within the prohibition set out in sub-section (4) of this section. The District Magistrate had, on his own motion, called for and examined the record and passed whatever remarks he thought fit relating more about the irregularities noticed in the proceedings than on the actual merits of the decision passed by the trying magistrate. He had not evidently exercised his mind as to the propriety and correctness of the findings arrived at by the trying magistrate, and the question of the expediency or otherwise of ordering a further enquiry into the charges brought against the applicants was not considered by him. The remarks made by the District Magistrate in his revisional proceedings were not made as a result of any application made under the section, and they would not, therefore, deprive the Sessions Judge of entertaining the application made by the respondent and passing the order now complained against. If any such application had previously been made to the District Magistrate and the latter had refused to order a further enquiry, the Sessions Judge would be incompetent to deal with the matter and order such enquiry under the provisions of this section, but it would, however, be open to him to submit the proceedings to the High Court under the provisions of section 438, Criminal Procedure Code—

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see *Darbari Mandar v. Jagoo Lal* (1). The District Magistrate's action in calling for the record was not equivalent to entertaining an application, and there is nothing in section 435 (4) of the Criminal Procedure Code to render the Sessions Judge's order invalid—see *King-Emperor v. Po Gyi* (2). This application will accordingly be dismissed.

(1) I.L.R. 22 Cal. 573.

(2) 8 L.B.R. 361.