APPELLATE CRIMINAL.

Before U San Maung and U Aung Tha Gyaw, JJ.

OHN MAUNG (APPELLANT)

v.

THE UNION OF BURMA (RESPONDENT).*

H.C. 1948 Nov. 12.

High Treason Act, 1948, s. 3 (1)—S. 302 and s. 34 of the Penal Code—Ss. 237 and 238, Criminal Procedure Code—When re-trial to be ordered.

Held: Where it is not established that persons attacking a truck were aware it was a truck carrying a party of Police Officers they cannot be convicted under s. 3 (*1*) of the High Treason Act, 1948, even though murders are committed. Then the accused should be convicted under s. 302 read with s. 34 of the Penal Code.

When the charge is altered it is not always necessary that there should be a re-trial. In this case the alternative charges under s. 302/34, Penal Code and under s. 3 (*1*) of the High Treason Act, 1948, have been rightly framed. As there was no doubt about the evidence on which appellant is being convicted, and the accused has not been prejudiced it is not necessary that there should be a re-trial.

Lala Ojha v. *Queen-Empress*, I.L.R. 26 Cal. 863 ; *Ko Set Shwin* v. *King-Emperor*, (1902-03) U.B.R. P.C. 9, referred to.

Nga Po Kyone v. *King-Emperor*, I.L.R. 11 Ran. 354, followed.

Begu and others v. *The King-Emperor*, (1925) I.L.R. 6 Lah. 226, referred to.

King-Emperor v. *Po Thin Gyi*, I.L.R. 7 Ran 96 ; *Abdul Hamid* v. *King-Emperor*, I.L.R. 14 Ran. 24, distinguished.

Po Aye for the appellant.

Shein Woon for the respondent.

The judgment of the Bench was delivered by

U SAN MAUNG, J.—In Criminal Regular Trial No. 22 of 1948 of the Second Special Judge (U Hla Nyun) of Pyinmana, the appellant Ohn Maung, who is a youth of about 17 years of age, has been convicted under sub-section (*1*) of section 3 of the High Treason Act,

* Criminal Appeal No. 1036 of 1948 being appeal from the order of 2nd Special Judge of Pyinmana, dated the 15th September 1948, passed in Criminal Trial No. 22 of 1948.

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1948 (Act No. XIV of 1948) and has been sentenced to death.

The facts of the case, briefly put are as follows :—

At about 6 p.m. of the 18th of April, 1948, U Kyaw San (P.W. 5) the then Circle Inspector of Police, Lewè, came with a party of police officers in a police truck to Pyinmana for the purpose of interviewing the then District Superintendent of Police, U Kyaw Myint, at Pyinmana Railway Station. After the interview the party returned to Lewè in the same truck and arrived at Nyobin bridge near Thetkegyin village at about 10 p.m. The truck, which had to slow down owing to the S bend on the road at the site of the bridge, was ambushed by a party of men. Consequently the driver Chit Pe (P.W. 3) had to swerve to the left and thus bring the truck to a stop at a low lying ground by the side of the road. Thereafter, on the face of the incessant firing by the attackers, the police party had to take whatever cover they could before returning the fire. As a result of the encounter, three members of the police party namely, P.Cs. Sein Maung, Saw Po Tu and Aung Din received gun-shot wounds to which they succumed, Aung Din dying almost immediately after he received the injuries. The first information report (Ex. E) relating to the incident was lodged by U Kyaw San (P.W. 5) the same night and on the following morning U Kyaw San revisited the scene of occurrence with S.I.P. Maung Win Maung (P.W. 2) and the Investigating Officer U Thein Nyun (P.W. 6). They found some stumps of cheroots, forty ·303 empty cartridges, nineteen empty Japanese cartridges, eleven empty tommy-gun cartridges, eleven empty sten-gun cartridges, etc., besides marks indicating that several people had sat on the soft ground beside the road. On the morning of the 21st April, 1948, three days after the occurrence, U Ba Maung (P.W. 8)

Subdivisional Police Officer, Pyinmana raided the house of Maung San Gyaw (D.W. 1), the husband of the maternal aunt of the appellant Ohn Maung and there arrested the appellant. Thereafter, a telephone message was sent to U Thein Nyun (P.W. 6) at Lewè about the arrest of Ohn Maung and U Thein Nyun arrived at Pyinmana to find that the appellant was willing to give a confession. The appellant was, therefore, taken to Lewè the same day and was produced before U Saw Lwin (P.W. 1), Township Magistrate of Lewè at about 1 p.m. for the purpose of having his confession recorded. The confession (Ex. A) of the appellant was then recorded by U Saw Lwin in the presence of two witnesses after the appellant was given one hour's time for reflection and after the questions have been put to him with a view to ascertain whether he was giving a confession of his own free will and without any inducement, threat or promise on the part of any person in authority. In that confession, the appellant stated *inter alia* that at about 8 p.m. on the day of occurrence he was at home after having had an attack of fever during the day, one Aung Yin, son of U Po Yaung, came and asked him to come to Nyobin bridge without telling him for what particular purpose. He, therefore, accompanied Aung Yin to the house of Maung Pyu, brother-in-law of Aung Yin, where Maung Pyu lay dead. From that house Aung Yin went with one Maung Shwe to the west and came back with about sixteen other persons. When the party had assembled, one of them Maung Shwe was found to have with him a big gun on a stand, Hla Baw a tommy-gun, Aung Khin a sten gun. Of the rest, some had English rifles and others Japanese. He (Ohn Maung) himself was armed with a Japanese rifle with 15 cartridges. The party then proceeded from the funeral house to Nyobin bridge where they

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separated into two groups, one commanded by Maung Shwe proceeding to the ditch on the east side of the road and the other, comprising of four men only to the west side of the road. While they were waiting, Maung Shwe told them that a car would be coming that way and that if he started shooting others should do likewise. About half an hour later, a car was seen coming from the direction of Pyinmana and a shot was fired at it. Thereupon, the rest of the party concentrated their fire on that car which was then seen to leave the road towards the east side. He (Ohn Maung) himself fired four or five shots from his Japanese rifle after which one Maung Htein relieved him of his rifle. Thereafter, Aung Yin told those who had no firearms with them to flee and he (Ohn Maung) and four others ran back to the village. That night he slept at the house of Ko Shwe Myo and on the next day he left Thetkegyin to come to Pyinmana for the purpose of receiving medical treatment at the house of Ko San Gyaw.

On the confession of the appellant Ohn Maung coupled with the fact that the car which was in fact ambushed by the party, of which the appellant Ohn Maung was one, was a truck carrying police officers from Pyinmana to Lewè and that the villagers of Thetkegyin were in the main either Communist or Communist sympathizers, the learned trial Judge framed two alternative charges against the appellant under section 3 (*1*) of the High Treason Act, 1948, and under section 302 read with section 34 of the Penal Code. The appellant pleaded not guilty to both these alternative charges and gave evidence on behalf of his own defence, which was to the effect that he was induced by U Ba Kyaw (P.W. 10), Sub-Inspector of Police, Pyinmana, to give a confession by holding out to him a promise of pardon, saying that even those

who had assassinated the late U Aung San were pardoned because they gave confessions. In this he is supported by his uncle U San Gyaw (D.W. 1) who stated that U Ba Kyaw had asked him to tell Ohn Maung that even some of the murderers of the late U Aung San were pardoned because of their confession and that U Ba Kyaw himself turned to Ohn Maung to say that if he confessed nothing would happen to him. Maung Thein Maung (D.W. 2), a tonga driver of Thetkegyin, who was the appellant's own brother-in-law, and his friends and neighbours Maung Po Nyan (D.W. 3) and Ko San (D.W. 4) gave evidence in support of the appellant's *alibi* which was to the effect that during the attack on the police truck at Nyobin bridge, they and Ohn Maung had hidden under the granary of U Ye, father of Thein Maung.

On the evidence the learned trial Judge came to the conclusion that the confession was voluntary and true ; that the appellant's *alibi* was unreliable and that an offence under section 3 (*1*) of the High Treason Act, 1948, had been established against the appellant on his own confession and other circumstances appearing in the case.

In this appeal, the learned Counsel for the appellant has strenuously contended that on the evidence adduced in the case, no offence under section 3 (*1*) of the High Treason Act, 1948, has been established by the prosecution as against the appellant Ohn Maung. In our opinion, this contention must be allowed to prevail. The confession of the appellant which, apart from certain corroborative circumstances which will be mentioned later, is the sole evidence against the appellant, is specific in that the appellant was not aware that the car which they were attacking was a truck carrying a party of police officers from Pyinmana to Lewè. This fact must be taken into

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consideration in his favour. From the fact that most of the villagers of Thetkegyin were either Communists or were in sympathy with the Communists and the fact that the police truck which was in fact ambushed had passed through Thetkegyin *en route* to Pyinmana at about dusk on the day of occurrence are in themselves insufficient to warrant a conclusion that the party which had ambushed the police truck intended to attack the police truck (and no other) with a view to disrupt the morale of the police force or even if that had been the intention of the leader of the party, the appellant Ohn Maung, who was only one of the members of the party, had a prior knowledge of the intention of his leader. The most that can be inferred from the confession of the appellant is that he, in common with the rest of the party, had the intention of attacking a car with passengers as it came along the road towards Nyobin bridge with such lethal weapons as tommy guns, stens guns and rifles, and that therefore he had the common intention with the rest of the party to cause the death of the passengers of the car to be attacked. Therefore, if the confession given by the appellant is considered to be voluntary and true the offence with which the appellant should be convicted is one punishable under section 302 read with section 34 of the Penal Code.

As regards the confession, we have no hesitation in coming to the conclusion that it was voluntarily made. The appellant was arrested on the morning of the 21st of April, 1948, and he was produced before the Township Magistrate of Lewè at about 1 p.m. the same day for the purpose of having his confession recorded. It is difficult for any confession to be given more promptly than this. No doubt the appellant and his uncle U San Gyaw would have it that the appellant had been induced by U Ba Kyaw (P.W. 10)

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Sub-Inspector of Police, Pyinmana, to give the confession by promise of pardon, an allegation which U Ba Kyaw has denied. However, it is but natural that the appellant and his uncle should take up this line of defence as this is the appellant's only hope of escaping punishment for his crime. It must have been well known to both the appellant and his uncle U San Gyaw that some of the persons involved in the murder of the late U Aung San were ultimately let off with a lesser penalty and this fact could have weighed in the minds of both without any inducement on the part of the police office As regards the appellant's *alibi*, it is clear that it has been hurriedly concocted with a view to save him. For instance, the evidence of Ko San (D.W. 4), who said that he abandoned his wife and children who remained in hiding under his house in order to go to the granary of U Ye about 10 cubits away from his house, is on the face of it most unconvincing. In time of danger like this it is most improbable that a person would have left his wife and children in order to hide elsewhere. Ko San's evidence must have been produced in order to bolster up the defence story.

The confession is so full of circumstantial details that we have no doubt as to its truth. It is also corroborated in several particulars. Firstly, the appellant said that he had an attack of fever on the day when this case occurred and it is still his case that he was suffering from smallpox at that time. However, he was not so ill as not to be able to come all the way from Thetkegyin to Pyinmana the next day. Secondly, the appellant stated in his confession that the rendezvous was the funeral house of Aung Yin's brother-in-law Maung Pyu. It is an admitted fact that that night there was the funeral of Maung Pyu in Thetkegyin Village. Thirdly, the appellant stated that the attackers

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were armed with Tommy guns, Sten guns, Japanese rifles and English rifles. It is in evidence that when U Kyaw San and other police officers visited the scene of occurrence the next day they found empty '303 cartridges, empty Japanese cartridges, empty tommy gun cartridges and empty sten gun cartridges. The appellant stated that when the car was attacked it suddenly swerved to the east side of the road. The police truck which was attacked in fact swerved to the east side before coming to rest on the low ground by the side of the road.

The question now to be considered is whether we can, in this appeal, alter the finding to one under section 302/34 of the Penal Code or whether we should order a re-trial of the appellant for an alleged offence under these sections. The general trend of judicial opinion is that the Appellate Court can alter the finding if the alternative offence is one for which an accused person could have been convicted under the provisions of sections 237 and 238 of the Code of Criminal Procedure, although it has also been held in some cases that the only restriction on the Appellate Court's power is that the accused is not prejudiced by the alteration of the charge and that the Appellate Court could alter the finding even though the case does not fall within section 237 or section 238 of the Code of Criminal Procedure. See *Lala Ojha* v. *Queen-Empress* (1) and *Ko Set Shwin* v. *King-Emperor* (2). In this case it is not necessary to decide whether we should adopt the extended view taken in *Lala Ojha*'s case because on the facts of this particular case we consider that alternative charges under section 302/34 of the Penal Code and under section 3 (*1*) of the High Treason Act, 1948, have been rightly framed against the appellant by the learned trial Judge under

(1) I.L.R. 26 Cal. p. 863. (2) (1902-03) U.B.R. P.C. 9.

the provisions of section 236 of the Code of Criminal Procedure. The facts proved in the case were not in doubt and the only doubt was as to whether an inference could be safely drawn from these facts that the appellant had prior knowledge that the car which he and his companions were attacking was a truck carrying a number of police officers from Pyinmana to Lewè. In regard to section 236 of the Code of Criminal Procedure, although there is preponderance of authority that this section does not apply where there is any doubt as to the facts but applies where there is a doubt as to the law applicable to certain set of facts which have been proved, we must say that we are considerably attracted by the line of reasoning adopted by Brown J. with whom Das J. concurred in *Nga Po Kyone* v. *King-Emperor* (1). In that case Brown J. after setting out the provisions of sections 236 and 237 of the Code of Criminal Procedure said :

" These sections do not say that they are applicable only when the facts are clear but the law is doubtful. Two illustrations are given under section 236 and in each of those illustrations the facts are clearly doubtful. The facts necessary for the offence of theft are entirely different from the facts necessary for the offence of receiving stolen property. As regards the second illustration, it is quite clear that what is doubtful is not the law applicable but the facts, that is to say, whether the statement in the Sessions Court was true, or the statement before the Magistrate was true. This restricted interpretation of sections 236 and 237 of the Code of Criminal Procedure does not seem to be the interpretation put on those sections by Their Lordships of the Privy Council. In the case of *Begu and others* v. *The King-Emperor* (2) Their Lordships after setting out the provisions of sections 236 and 237 of the Code of Criminal Procedure remarked :

> ' The illustration makes the meaning of these words quite plain. A man may be convicted of an offence, although there has been no charge in respect of

(1) I.L.R. 11 Ran. 354. (2) (1925) I.L.R. 6 Lah. 226.

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it, if the evidence is such as to establish a charge that might have been made.'

In that case the charge was under section 302 of the Indian Penal Code, and Their Lordships decided that a conviction could legally be passed under section 201 of the Indian Penal Code."

Contrary views were expressed in *King-Emperor* v. *Po Thin Gyi* (1) and *Abdul Hamid* v. *King-Emperor* (2).

However, even adopting the narrower view, we do not find any real difficulty in coming to the conclusion that the joinder of the two charges under section 3 (*1*) of the High Treason Act, 1948, and under section 302/34 of the Penal Code in the alternative as against the appellant in this case was justified on the facts proved.

For these reasons we would alter the conviction of the appellant under section 3 (*1*) of the High Treason Act, 1948, to one under section 302/34 of the Penal Code and confirm the sentence of death passed upon him, which is the only sentence permissible by law in view of the fact that the murder was premeditated within the mischief of section 302 (*1*) of the Penal Code as substituted by Burma Act No. XXXIII of 1947.

While we naturally deplore the fact that a sentence of death has perforce to be passed on a youth of 17 years of age who is convicted on the strength of his own confession, we have no doubt that his case will be carefully considered by those upon whom rests the prerogative of mercy.

U AUNG THA GYAW, J.—I agree.

(1) I.L.R. 7 Ran. 96. (2) I.L.R. 14 Ran. 24.