APPELLATE CRIMINAL.

Before Mr. Justice Carr and Mr. Justice Godfrey.

1924
Nov. 7.

KING-EMPEROR
v.
PO YIN AND ONE.*

Criminal Procedure Code (V of 1898), Section 110—Repute—Evidence need not be restricted to neighbours—Magistrates whether bound to make local enquiry—Ability of police and village authorities to ensure good behaviour, whether to be considered.

Held, that the repute necessary to be proved under section 110, Criminal Procedure Code, need not necessarily be proved by the evidence of immediate neighbours, but that the evidence of witnesses living sufficiently near to be in a position to know the accused's real reputation was admissible in evidence.

Held also, that it was not necessary for the magistrate to make a local enquiry and examine witnesses other than those sent up by the police.

Held also, that it was not necessary for the magistrate to consider whether the police and village authorities could not ensure good behaviour on the part of the accused if they exerted themselves more in executing their duties.

Crown v. *Nga Nyein*, 1 L.B.R., 90 ; *King-Emperor* v. *Nga Shwe U*, 2 L.B.R., 166—*referred to and explained.*

Gaunt, Assistant Government Advocate—for the Crown.

This was a reference by Baguley, J., sitting as a Judge in Revision from the order of the Subdivisional Magistrate of Bassein in Criminal Miscellaneous Trials Nos. 55 and 56 of 1924. The facts appear from the order of reference made by Baguley, J., reported below.

"The respondent Po Yin was directed by the Subdivisional Magistrate, Bassein, to enter into a bond in the sum of Rs. 200 with two sureties under section 110, Criminal Procedure Code. Before passing the order, he recorded evidence in the usual way. Po Yin lives at Taungbotaya. The headman of Htandawgyi within whose jurisdiction Taungbotaya

* Criminal Reference Nos. 78 and 79 of 1924 arising out of Criminal Revision Nos. 551-B and 552-B of 1924 of this Court.

lies is one of the witnesses against him. It is clear then that the accused lives within the village-tract of Htandawgyi. There is another witness in Htandawgyi named Maung Kan Saing. There is also the evidence of Maung Thu Daw, a carpenter, aged fifty-eight, of Htandawgyi. He says that Htandawgyi is about two calls' distance from Taungbotaya. There is also the evidence of Maung On Bu of Htandawgyi who says he suspected the accused of being concerned in a theft of clothes from his house; and there is also the evidence of Maung San Ya, headman of Anangôn. Anangôn is described as being more than a call from Taungbotaya from which I deduce that it is less than two calls.

"The accused cited no witnesses, and the Subdivisional Magistrate passed an order as I have stated.

"The accused appealed to the Sessions Judge, Bassein; and in his order the learned Sessions Judge draws attention to the cases of *Crown* v. *Nga Nyein* (1) and *King-Emperor* v. *Nga Shwe U* (2). He points out that in these cases it is stated that the magistrate should require more evidence than that of policemen and local authorities, and that he should, if possible, conduct the enquiry at the place where the accused lived. He also points out that in the first of the two cases cited, it is laid down that a man's general reputation is the reputation which he bears in the place in which he lives amongst the inhabitants of that place. He then goes on to point out that the Subdivisional Magistrate made no attempt to call a single witness from the appellant's village, and for these reasons he set aside the order passed by the magistrate.

Against this order of discharge, the Crown now applies in revision.

(1) (1900-02) 1 L.B.R., 90. (2) (1903-04) 2 L.B.R., 166.

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"It appears to me that the Sessions Judge has gone out of the way to strain the rulings quoted in favour of the accused. It is stated in evidence that in Taungbotaya there are only four or five houses. It is scarcely worthy of the name of a village, and the respectable persons, who live within the same village-tract or as near as one call's distance from the accused's village, are perfectly capable of giving evidence of the accused's general repute. It appears to me, however, that the two rulings of Sir Charles Fox, to which reference have been made, do go, or can be made to go, too far.

In a recent General Letter No. 12 of 1924, which, I take it, represents the considered opinion of the Hon'ble Judges of this Court, directions are issued with regard to the evidence required in cases under the Habitual Offenders' Restriction Act; and these directions appear to me to be not altogether in accord with the principles laid down by Sir Charles Fox in the two rulings quoted.

"I would, therefore, refer this case to a Bench in order that an authoritative ruling may be obtained with regard to the evidence required in these cases, for I take it that magistrates, when they find published rulings differing from a General Letter issued from this High Court, will find themselves in difficulties as to which of the two they are to follow. The Bench will be an ordinary two-Judge Bench or a Full Bench as the Hon'ble the Chief Justice may direct."

The matter came up for hearing in due course before a Bench composed of Carr and Godfrey, JJ., with the result reported below.

CARR, J.—The facts of these two cases are almost identical and it is not necessary to discuss them separately.

The respondents were called upon by the Subdivisional Magistrate to furnish security for one year under section 110, Criminal Procedure Code, and in default were committed to prison. On appeal the Sessions Judge set aside the orders. In the case of Po Yin there were five witnesses who spoke to his general reputation as an habitual thief. None of those witnesses actually resided in the same hamlet as Po Yin. The first witness was the village headman of the tract within which Po Yin resides. He speaks of his village as being "about half an hour's walk" from Po Yin's. The next witness resides in the same village as the headman. He gives the distance as "over a call." The third and fourth also live in this village. They say it is "about two calls" from accused's village. The last witness is the headman of a neighbouring village, which he says is "over a call" from accused's. There were no witnesses who lived actually in the same hamlet as the accused, which, it is stated, contains only four or five houses. The accused himself called no witnesses. In allowing the appeal the Sessions Judge relied mainly on the dicta of Fox, J., in *Crown* v. *Nga Nyein* (1) and *King-Emperor* v. *Nga Shwe U* (2).

In the first of these cases the learned Judge following a Calcutta case, said that "A man's general reputation is the reputation which he bears in the place in which he lives among the inhabitants of that place." That definition may be accepted as correct in the great majority of cases, but I can hardly recognize it as conclusive. It is quite possible for a cunning rogue to conceal his real character from his immediate neighbours. That question, however, hardly arises in this case. Where the

(1) (1900-01) 1 L.B.R., 90. (2) (1903-04) 2 L.B.R., 166.

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Sessions Judge has erred, I think, is in attaching a too-restricted meaning to the word "place." It is not possible to set any definite bounds to the meaning of this term. The meaning must necessarily vary with the circumstances of the case. It certainly cannot rightly be restricted to the group of houses in which the accused happens to reside, however small that may be. Nor is it right to discard the evidence of witnesses who speak to the reputation of the accused merely because they are not his immediate neighbours. What the Court has to do is to satisfy itself that the evidence of the witnesses is true, and if it is satisfied on this point, then it is entitled to accept the evidence. Where a witness lives at a considerable distance from the person of whose reputation he speaks, the Court should of course enquire how he came by that knowledge and should take the answers into consideration in framing its estimate of the value of the evidence.

In the present cases it is clear that all the witnesses lived sufficiently near to the accused to be in a position to know his real reputation and their evidence should not have been rejected merely on the ground that they were not his immediate neighbours.

At the same time the fact that no such immediate neighbours were called should have been explained and the magistrate should have gone into this question.

In the second case quoted the learned Judge said, "If it is proposed to prove by evidence of general repute that a person called on to give security is an habitual offender of one of the types mentioned in section 110, the form which the chief question put to the witnesses should take should be 'What, as far as you know, is the repute of the accused amongst

the body of villagers of the village in which he has been living ?' In order to satisfy himself that an accused's *general repute* is that of an habitual offender of one of the types mentioned, a magistrate should require more evidence than that of policemen and village authorities. Inquiries under section 117 should, if possible, be conducted in the place where the accused has lived, and the magistrate should himself pick out at haphazard some of the villagers, and examine them as to the accused's general repute. He should not be contented with the evidence of merely such witnesses as the police or village authorities choose to send up to him. He should also consider in every case whether the necessity for putting the alleged habitual offender on security has been proved, and whether the police and village authorities could not ensure good behaviour on the part of the accused if they exerted themselves more in executing their duties"

With most of this I agree. But I do not think that the learned Judge meant to lay down that in every case all these steps must necessarily be taken. Nor can I hold that if they have not all been taken, the proceedings are bad. If the evidence actually taken is sufficient to prove that the accused is a fit person to be placed on security, that is all that the law requires.

From the learned Judge's dictum that the magistrate "should also consider . . . . whether the police and village authorities could not ensure good behaviour on the part of the accused if they exerted themselves more in executing their duties," I must respectfully dissent. It seems to me to be not justified by anything in the law. It is impossible for the police or the village authorities to keep such a vigilant watch over a known criminal as to leave

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him no opportunity of committing crime, and it is for just that reason that the preventive provisions now in question have been enacted. I do not think that it is necessary to interfere in the two cases now before us. Nearly six months have elapsed since the original orders were passed, and, if the accused persons have not mended their ways, it will be open to the authorities concerned to institute fresh proceedings.

I would therefore direct that the proceedings be returned with these remarks.

GODFREY, J.—I agree. It is obvious that in cases where the accused person lives in one of an outlying collection of two or three houses, evidence as to his general repute could not properly be confined to the statements of their occupants, nor could it be expected to be independent or reliable, if it were.

G.B.C.P.O.—No. 129, H.C R., 21-1-25—2,500.