## APPELLATE CRIMINAL.

*Before Mr. Justice Heald, and Mr. Justice Maung Ba.*

1926
Dec. 6.

U HTIN GYAW AND EIGHT OTHERS,
*v.*
KING-EMPEROR.*

*Criminal Procedure Code (Act V of 1898), sections 162 and 476—Whether section 162 prohibits use of statements made to police-officer, in proceedings under section 476.*

*Held*, that section 162 of the Code of Criminal Procedure does not prohibit the use of statements, made by any person to a police-officer in the course of an investigation under chapter 14 of that Code, in proceedings under section 476 of the Code, in cases where the alleged offence which is under consideration in the proceedings under section 476 was not under investigation at the time when the statements were made.

*A. Eggar* (Government Advocate)—for the Crown.
*McDonnell*—for Appellants.

Reference under Rule 12 of Appellate Side Rules of Procedure (Criminal). Facts leading to the reference and the terms thereof are set out in the order of reference below which was made by—

CUNLIFFE, J.—"These appeals are from an order of the Additional Sessions Judge, Mr. J. P. Doyle, sitting specially at Myaungmya, by which he directed the 1st appellant, Maung Htin Gyaw, to stand his trial for conspiracy under sections 211 and 193 of the Indian Penal Code. The remaining appellants, six in number, are complained of in relation to offences under section 120 (*a*), read with sections 194 and 109, Indian Penal Code. Two of the appellants were released on bail, but the remaining, at the commencement of this appeal, were in custody.

* Criminal Reference No 161 of 1926 arising out of Criminal Appeal No. 1375 of 1926.

The learned Sessions Judge made this complaint after hearing and dismissing a charge of murder made against two persons, Maung Po Sein and Maung Po Chein. The complaint was made by virtue of the provisions of section 476 of the Code of Criminal Procedure.

It does not seem necessary to detail the facts leading up to this action on the part of the learned Sessions Judge in great detail, but they must be referred to shortly. At the beginning of the year 1924, an old and rich Burman, by name U Po Thet, died at Wakèma. A dispute at once arose concerning his estate. On the one hand, Maung Po Sein and Maung Po Chein, his nephews claimed rights over the estate, and on the other hand, the 1st appellant, U Htin Gyaw, and his son also made claims. A civil action is, I have been informed, pending between these two parties. A number of prosecutions were instituted by U Htin Gyaw against Maung Po Sein and Maung Po Chein both before and after the old man's death. There was some retaliation on the part of Maung Po Sein and Maung Po Chein in like manner against U Htin Gyaw. These cross attacks culminated in a charge of murder being brought against Maung Po Sein and Maung Po Chein by U Htin Gyaw before a Magistrate at Myaungmya. After a somewhat lengthy investigation, this charge was dismissed. U Htin Gyaw then applied to this Court under section 439 in revision. His application was admitted by Mr. Justice Duckworth in chambers. The hearing of the matter was before Mr. Justice Otter in open Court, both sides being represented. Mr. Justice Otter ordered the re-arrest of Maung Po Sein and Maung Po Chein and they were committed to stand their trial by him on the capital charge before the Sessions Judge. Mr. Justice Otter refused them bail, but owing to

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circumstances which I do not pretend to understand, bail was subsequently applied for at Myaungmya and the Magistrate who heard the application, on the direction, it is said, of the Commissioner of Bassein, permitted these two men to be released on bail some substantial time before the hearing of the case. If the facts referred to in respect of this interference of the Commissioner of Bassein are correct I am of the opinion that such an interference ought never to have been made in the face of Mr. Justice Otter's order. It may have been that new facts came into the possession of the authorities, and the course of the trial for murder rather suggests that new facts did come into their possession. Nevertheless, these new facts should have been placed before the Judge of this Court who dealt with the question of bail and a fresh application should have been made to him.

The evidence of the prosecution in their two first witnesses as to the death of Po Thet was so inconclusive that the prosecution asked leave to withdraw the case. It should be said that the alleged cause of Po Thet's death was poisoning by means of dhatura. The learned Sessions Judge, however, refused to accede to the prosecution's request to withdraw. The remainder of the prosecution witnesses were heard and as a result he acquitted Maung Po Chein and Maung Po Sein of the charge brought against them. He then proceeded to call upon seven of the prosecution witnesses, headed by U Htin Gyaw, to show cause why a complaint should not be made against them for making a false case and abetting the making of a false case and for giving false evidence. His judgment in the substantive trial refers both in its body and in its annexures to the various earlier criminal cases between U Htin Gyaw and Maung Po Chein and Maung Po Sein. I can find no record that the proceedings in these cases

were ever proved at the substantive trial and when the time came for the procedure under section 476, the learned Judge went on to rely not only upon these proceedings but also on the various information given to the Police in the earlier prosecutions. So, indeed, had the Magistrate who had originally dismissed the murder charge against Maung Po Chein and Maung Po Sein on a *primâ facie* basis. It was contended before me by counsel for the appellants that any reference to Police proceedings was inadmissible in such a case. The Government Advocate argued the contrary. It seems to me most desirable that this matter, which in my view is of far reaching importance, should be decided by a Full Bench. Without having heard the full arguments on the point and without having considered the question exhaustively, I think that on an ordinary construction of section 162 such evidence is inadmissible from the wording of the section. If, however, I am wrong in this view, it seems to me that it is very desirable to have the opinion of a Full Bench upon this point, which I believe to be a novel one.

Accordingly, I make the following reference : (1) May a statement made to a police-officer in the course of his investigation in one case be used, considered, or put in evidence against accused persons in any other separate trials or proceedings whether directly or indirectly or in no way connected with the trial in which that statement was originally made ?

(2) If not, does the fact that the separate proceeding is not a substantive criminal trial but a preliminary investigation under section 476 of the Code of Criminal Procedure, in any way alter the application of the general principle ?

I may add that it was admitted by the Crown (and certainly this was the view I had formed) that

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the learned Sessions Judge had for the most part based his *primâ facie* case against the appellants on such information as is contemplated by section 162."

The Bench decision on the reference was given by—

HEALD AND MAUNG BA, JJ.—In Trial No. 22 of 1926 of the Court of Session, Myaungmya, the Additional Sessions Judge acquitted the two accused persons, Po Chein and Po Sein, and called on a number of persons, who had given evidence for the prosecution at the trial in the Sessions Court, to show cause why he should not take action against them under the provisions of section 476 of the Code of Criminal Procedure in respect of offences alleged to have been committed by them in or in relation to the trial.

The Additional Judge seems to have opened a number of proceedings which by some neglect have not been sent to this Court.

In one the appellant Htin Gyaw was called on to show cause why a complaint should not be made against him in respect of the offence of making a false charge with intent to injure, the said offence being alleged to have been committed by him in or in relation to the Sessions trial.

In another the same Htin Gyaw was called on to show cause why a complaint should not be made against him in respect of the offence of giving false evidence, alleged to have been committed by him in or in relation to the same Sessions trial.

In a third the same Htin Gyaw, and the appellants Ma Te, Po Tun, Po Myit, Tun Sein, Ma Thet Yon, Po Thaung, San Pe and Po U, were called on to show cause why a complaint should not be made against them for offences of giving false evidence, abetting the giving of false evidence, and conspiring to give false evidence, alleged to have been

committed by them in or in relation to the same Sessions trial.

In a fourth Ma Twe was called on to show cause why a complaint should not be made against her for giving false evidence in or in relation to the Sessions trial.

In a fifth a Sub-Inspector of Police, Po Kyan, was called on to show cause why a complaint should not be made against him for giving false evidence in or in relation to the Sessions trial.

In the first case the Additional Judge recorded his opinion that Htin Gyaw had falsely charged Po Chein and Po Sein with murder and had thereby committed an offence under the second part of section 211 of the Indian Penal Code.

In the second he recorded that in his opinion certain statements in Htin Gyaw's evidence, read with that evidence as a whole and with the evidence of the other witnesses, were *primâ facie* false and disclosed an offence under section 193 of the Indian Penal Code.

In the third he said that the reasons for making a complaint against the nine persons concerned would be found in his judgment in the Sessions trial.

In the fourth he said that he was satisfied that there was a *primâ facie* case against Ma Twe under section 193 of the Indian Penal Code.

In the fifth he said similarly that he was satisfied that there was a *primâ facie* case against Po Kyan under section 193.

As a result of these findings he filed three complaints before the District Magistrate of Myaungmya.

In one he accused Htin Gyaw of offences under sections 211 and 193 of the Indian Penal Code, and he also accused Htin Gyaw, Ma Te, Po Tun, Po Myit, Tun Sein, Ma Thet Yon, Po Thaung, San Pe and

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Po U of conspiracy to give false evidence and to abet the giving of false evidence in the Sessions trial, offences punishable under section 194 read with sections 120A and 109 of the Code.

In another he accused Ma Twe of making certain false statements, which he specified, at the Sessions trial, and as regards one of those statements he said that its falsity would be seem by examining the papers in connection with the investigation of a poisoning charge which was brought by Po Thet against Po Sein, and was the subject of Criminal Regular Trial No. 100 of 1923 in the Court of the Special Power Magistrate of Myaungmya.

In the third he accused Po Kyan of giving false evidence in the Sessions trial and said that the falsity of the statement, which he specified, was clear from the evidence of one Thet Hnan, given in a case in which Po Chein prosecuted Htin Gyaw and Po Kyan and a number of others for house trespass, and in which Thet Hnan was called as a witness for the defence, that case being Criminal Regular Trial No. 23 of 1924 of the Court of the 1st Additional Magistrate of Wakèma.

Htin Gyaw has filed appeals under the provisions of section 476B of the Code of Criminal Procedure against the orders passed by the Additional Judge under section 476 in the first two of the five cases mentioned above, and has also filed a third appeal jointly with the rest of the persons accused along with him in the third of those cases.

Ma Twe and Po Kyan have also filed separate appeals against the orders in the cases in which they were concerned.

The grounds of appeal in Htin Gyaw's two separate appeals were that there was no justification for the Additional Judge's order, that Htin Gyaw's

application for revision in the High Court would not lay him open to prosecution under section 211, and that there was nothing to show that his evidence was false.

The main grounds of appeal in the joint appeal were that there was no legal evidence on which the charges could be based and that the Additional Judge's order was based on statements recorded by the Police which he had admitted in evidence contrary to the provisions of section 162 of the Code of Criminal Procedure.

In Ma Twe's appeal the ground was taken that the record of her statement to the Police could not be considered as a basis for a finding that the evidence which she gave in Court was false.

Po Kyan's ground of appeal was merely that there was no evidence that his statement was false.

The learned Judge of this Court by whom the appeals were heard recorded that it was contended before him by counsel for the appellants that any reference to police proceedings was inadmissible in cases under section 476 of the Code, and that the Government Advocate argued the contrary. The learned Judge then made the following references, presumably under Rule 12 of the Appellate Side Rules of Procedure :—

(1) May a statement made to a police-officer in the course of his investigation in one case be used considered or put in evidence against accused persons in any other separate trials or proceedings whether directly or indirectly or in no way connected with the trial in which that statement was originally made ?

(2) If not, does the fact that the separate proceeding is not a substantive trial but a preliminary investigation under section 476 of the Code of Criminal Procedure in any way alter the application of the general principle ?

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It seems clear that the terms of these references are unduly wide. Rule 12 allowed the learned Judge to refer only such questions of law as arose in the appeals before him. No question whether statements made to police officers can be used in separate trials or in any proceedings other than proceedings under section 476 of the Code arose in the appeals, and the only statements made to the Police about which any question could arise in the appeals were the particular statements which the Judge of the Court of Session is alleged to have used in his proceedings under section 476.

The learned Advocate for the defence says that the Additional Judge based certain of the orders which he made under the provisions of section 476 on his judgment in the Sessions case, that in the trial of that case and in his judgment therein he disregarded the provisions of section 162 of the Code and in contravention of those provisions used statements which had been made to the Police not only in the investigation of that case but also in the investigation of other cases between the parties, that because those statements were used in contravention of the provisions of section 162 they were not legal evidence at the Sessions trial, and that because they were not legal evidence they were not matters which could be taken into consideration in proceedings under section 476 of the Code.

The learned Government Advocate on the other hand says that there is nothing in section 162 of the Code to prevent a Magistrate or Judge from using, for the purpose of finding whether or not an inquiry should be made into an alleged offence of giving or conspiring to give or abetting the giving of false evidence, statements which were made to the Police in the investigation of the alleged offences

of murder or abetment of murder or in the investigation of any other offences except the offences of giving or conspiring to give or abetting the giving of false evidence. He goes further and asks us to decide that there is nothing in section 162 of the Code which prohibits the use of statements, made to the Police in the investigation of the offence of murder or abetment of murder or in the investigation of any offences other than those of giving or conspiring to give or abetting the giving of false evidence, at the trial for the alleged offences connected with the giving of false evidence, and he asks us to give a decision to that effect.

It is clear that such a decision would be beyond the scope of the questions referred to us, and that all that we can decide in this case is whether the Additional Judge was entitled to consider such statements to the Police as he did consider in his proceedings under section 476.

A question then arises as to what statements made to the Police the Additional Judge did consider in his proceedings under section 476. On this point the learned Judge's order of reference throws no light. The only direct reference in the Additional Judge's order under section 476 to statements made to the Police was in the order with regard to Ma Twe. The statements there mentioned were recorded by the Police in the investigation of the case which was the subject of Criminal Regular Trial No. 100 of 1923, mentioned above, and could not possibly be excluded from consideration by the provisions of section 162 which says merely that statements made to the Police in the course of an investigation shall not be used at an enquiry or trial in respect of any offence which was under investigation at the time when such statements were made. The present

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alleged offences connected with the giving of false evidence were certainly not under investigation at the time when Ma Twe's statements to the Police were made in the course of the investigation into the alleged offence of poisoning, and therefore there is nothing in the terms of section 162 to prevent their use for the purpose of finding whether or not it is expedient in the interests of justice that a complaint should be made under the provisions of section 476.

Appellants' learned Advocate contends that the finding mentioned in section 476 must be based on legally admissible evidence, and goes on to argue that because certain evidence which the Additional Judge admitted during the Sessions trial was inadmissible for the purposes of that trial by reason of the provisions of section 162, that evidence must be inadmissible as a basis for a finding under section 476. There is nothing in the wording of section 476 to support that view. The section says that when a Court is of opinion that it is expedient in the interests of justice that an enquiry should be made into an offence which appears to have been committed in or in relation to a proceeding in that Court, such Court may, after such enquiry if any as it thinks necessary, record a finding to that effect and make a complaint. There is thus no necessity for any enquiry and the Court can come to its finding on any materials which are before it. There is nothing in either section 162 or section 476 which excludes from those materials statements made to the Police in the investigation of alleged offences other than the particular offence which is under consideration in the proceedings under section 476, and even if those statements were inadmissible in the proceedings in or in relation to which that offence was committed it would not follow that they

are inadmissible and cannot be considered in proceedings under section 476.

We therefore answer the reference, so far as it arises in the present appeals, as follows :—

"Section 162 of the Code of Criminal Procedure does not prohibit the use of statements, made by any person to a police-officer in the course of an investigation under Chapter 14 of that Code, in proceedings under section 476 of the Code, in cases where the alleged offence which is under consideration in the proceedings under section 476 was not under investigation at the time when the statements were made."

We note that we do not intend this answer to be read as involving a decision of the question whether statements made to the Police in an investigation under Chapter 14 of the Code in respect of one alleged offence can be used at an inquiry or trial in respect of a different offence which happened to be separately under investigation at the time when the statement was made. All that we desire to say is that the wording of section 162 does not prohibit the use of statements made to the Police in the course of an investigation under Chapter 14 in cases where the offence, which is the subject-matter of the enquiry, was not under investigation at the time when the statement was made, and that therefore in the particular cases with which these appeals deal, the provisions of section 162 of the Code cannot be read as prohibiting the use of statements, made to the Police in the course of the investigation of other offences, in the proceedings under section 476 of the Code in respect of alleged offences which were not under investigation at the time when the statements to the Police were made.