

APPELLATE CRIMINAL.

Before Mr. Justice Maung Ba.

U MO GAUNG

v.

U PO SIN.*

1928

July 25.

Presidency Towns Insolvency Act (III of 1909), s. 103—Penal Code (Act XLV of 1860), ss. 421, 424—Criminal proceedings maintainable independently of the Insolvency Act—Death of the complainant—Magistrate's discretion to proceed with trial.

An insolvent concealed the receipt by him of insurance money on his mortgaged property from the mortgagee as well as from the Official Assignee who expressed an opinion in his report that the insolvent was guilty of an offence under section 103 (b) (ii) of the Presidency Towns Insolvency Act. A creditor applied to the Insolvency Court for his prosecution; but the Court declined to do so. The creditor thereupon filed a complaint himself against the insolvent charging him with offences under sections 421 and 424 of the Indian Penal Code. After the complainant's evidence was taken, there were several adjournments and then the complainant died. The trial Magistrate decided to proceed with the trial and declined to discharge the accused under section 259 of the Criminal Procedure Code.

Held, that the Presidency Towns Insolvency Act does not take away a Magistrate's jurisdiction to try an insolvent for an offence under sections 421 and 424 of the Indian Penal Code. There was no reason to interfere with the Magistrate's discretion to proceed with the trial as the offences were not compoundable and the deceased complainant's evidence could be used under section 33 of the Evidence Act.

Emperor v. Bhat, 35 Bom. 63—*referred to*.

MAUNG BA, J.—Applicant U Mo Gaung was a paddy broker. He was adjudicated insolvent by this Court. From the report of the Official Assignee it appears that his house and its site were mortgaged to Messrs. Steel Brothers & Company, Limited. But he never made over the Insurance Policy although the property was insured. The house was destroyed by fire and the agents of the Insurance Company informed the Official Assignee that they had paid the insolvent Rs. 4,925. The insolvent concealed the insurance

* Criminal Revision No. 214B of 1928 against the order of the Second Additional Magistrate of Rangoon in Criminal Trial No. 94 of 1928.

and the receipt of the assured amount not only from Messrs. Steel Brothers but also from the Official Assignee and he never made over the amount to the Official Assignee. Consequently the Official Assignee in his report expressed an opinion that the insolvent was guilty of an act falling under section 103 (b) (ii) of the Presidency Towns Insolvency Act or in other words that he had made away with or concealed part of his property.

U Po Sin, one of the creditors, applied to the Insolvency Court to direct the insolvent's prosecution. The learned Insolvency Judge declined to do so, remarking that such prosecution was not recommended by the Official Assignee and that the case was not of importance. From that order an appeal was filed. The learned Judges of the Appellate Bench observed that it could not be doubted that there were grounds which, *primâ facie*, would justify an enquiry, but they declined to interfere with the exercise of the Insolvency Judge's discretion.

U Po Sin then filed a direct complaint to the District Magistrate charging U Mo Gaung with offences under sections 421 and 424 of the Indian Penal Code. The complaint was in order because nothing contained in the Presidency Towns Insolvency Act takes away a Magistrate's jurisdiction to try the insolvent for an offence under those sections. This view was held by a Bench of the Bombay High Court in *Emperor v. M. H. Bhat* (1). The complaint was transferred to the Second Additional Magistrate, Rangoon, for disposal. During the trial the Magistrate was transferred and the accused person claimed a *de novo* trial. The case was accordingly adjourned for three weeks to summon witnesses. On the adjourned date

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the complainant's advocate asked for an adjournment on the ground that he had a case in the High Court. The case was adjourned. When the case was called on due date the complainant was too ill to attend and the case was adjourned for nearly a month. When the case was called again the complainant was reported to have died. The accused's advocate asked the Magistrate to discharge his client under section 259, Criminal Procedure Code. The Magistrate rejected that application. From the order of rejection this application for revision has been filed.

Section 259 gives a Magistrate discretion to discharge the accused when in the case instituted upon complaint the complainant is absent on any day fixed for the hearing of the case and when the offence is one which may lawfully be compounded or when it is a non-cognizable offence. The offences under sections 421 and 424 are non-cognizable but they are non-compoundable. The complainant has been examined and cross-examined. His evidence can therefore be used under section 33 of the Evidence Act. The learned Magistrate has exercised his discretion and decided to proceed with the trial. I see no sufficient reason to interfere with his exercise of that discretion. I therefore dismiss this application for revision.