

APPELLATE CRIMINAL.

Before Mr. Justice Baguley.

MA NYEIN

v.

MAUNG CHIT HPU.*

1929

May 13.

Criminal Procedure Code (Act V of 1898), s. 439—Acquittal by trial Court—High Court's powers on revision—Acquittal cannot be converted into conviction—Retrial when may be ordered on revision—Government's power to appeal against acquittal.

The High Court, in a revision application has no power to convert a finding of acquittal into one of conviction. The High Court may on revision set aside an order of acquittal and direct a re-trial if there is a case of non-recording of evidence or improper recording of inadmissible evidence. It is open to the Local Government to appeal against an acquittal.

Kishan Singh v. King-Emperor, 50 All. 722 (P.C.)—followed.

Wazir Kunjra v. King-Emperor, 7 Pat. 579—dissented from.

Sanyal for the applicant.

BAGULEY, J.—The respondent, Maung Chit Hpu, has been tried and acquitted by the Special Power Magistrate, Shwebo, of an offence under sections 376-511, Indian Penal Code. The present application has been filed by the complainant, Ma Nyein in revision of this order of acquittal.

I do not see how this application can be entertained. There is no question of evidence having been erroneously omitted or of evidence having been erroneously recorded. The evidence is there and I am asked to hold that on that evidence and no other the respondent ought not to have been acquitted. This seems to me to go very near to saying that he ought to have been convicted, and that is a thing which I hold I have no power to do in a revision application. The point has been dealt with by the Privy Council in a very

* Criminal Revision No. 64B of 1929 at Mandalay of order of Special Power Magistrate of Shwebo in Criminal Trial No. 118 of 1928.

recent case, namely, *Kishan Singh v. King-Emperor* (1). In that case a man was charged with murder (section 302, Indian Penal Code); he was convicted under section 304, and an application for revision was made asking the High Court to find him guilty of murder. In this case the High Court of Allahabad did so, and their Lordships of the Privy Council regarded the case as one which justified them in interfering even though it was a criminal matter, for, they pointed out, section 439 (4), Criminal Procedure Code, forbids the altering of an acquittal into a conviction in a revision proceeding.

Were I to say that this case has got to be retried on the same evidence, I should be definitely saying, "On this evidence the man should not have been acquitted," and there is no difference between saying that and saying that he ought to have been convicted, and few Magistrates would be able to retry the accused on the same evidence with my *dictum* staring them in the face and have sufficient independence of spirit to give the man an unbiased trial. Human nature must be taken to be what it is.

My attention has been called to the case of *Wazir Kunjra v. King-Emperor* (2). In this case a two Judge Bench of the Patna High Court took up in revision the case of a man who had been acquitted, and altered that acquittal into a conviction. They did not mention section 439(4), Criminal Procedure Code, in their judgment and appear to have overlooked it entirely.

I can well understand that cases may occur in which, owing to non-recording of evidence or improper recording of inadmissible evidence, a High Court interfering in revision might set aside an order of acquittal and direct a re-trial, which the magistrate

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(1) (1928) 50 All. 722.

(2) (1928) 7 Pat. 579.

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before whom the case came could deal with in a perfectly impartial manner. In the present case where there is no erroneous recording or shutting out of evidence, should I direct a re-trial, it would be for all practical purposes the same thing as sending the case to a Magistrate with directions to convict and this I do not see my way to do.

The applicant has still got plenty of time to move the Local Government to file an appeal against the acquittal if she thinks fit, and this in my opinion is the proper remedy if she is dissatisfied with the acquittal.

I dismiss this application for revision.

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Oller.

U SEIN PO

v.

U PHYU AND OTHERS.*

1929
 May 14.

Company law—Association of over twenty persons without registration illegal—No suit lies for an account of its dealings and profits—Suit for return of subscriptions lies—Distinction between enforcement of illegal contract and prevention of continuance of illegality—Reduction of members does not make illegal association legal—Suit falls under Sch. I, Art. 120 of Limitation Act (IX of 1908).

An association consisting of more than twenty persons and formed for the purpose of carrying on business must be registered as a company. Otherwise it is an illegal company and its subscribers cannot sue for an account of its dealings and transactions and of its profits. But they have a right to sue for the return of their subscriptions, and if these have been converted into land or other things for the purpose of the company, they can be reconverted into money for payment of the debts and liabilities of the concern and then for repayment of the subscribers. In such cases no illegal contract is sought to be enforced and only the continuance of what is illegal is sought to be prevented.

Butt v. Montcaux, 1 K. & J. 97; *Sheppard v. Oxenford*, 1 K. & J. 489—*referred to.*

* Civil First Appeal No. 84 of 1928 from the judgment of the District Court of Prome in Civil Regular No. 11 of 1926.