

APPELLATE CRIMINAL.

Before Mr. Justice Mosely.

KING-EMPEROR

v.

MAUNG MYAT E. *

1931

April 1.

Criminal Procedure Code (Act V of 1898), s. 438.—Reference by District Magistrate to High Court—Power limited to proceedings of an inferior Court.

The District Magistrate is not empowered himself to make a reference to the High Court under section 438 of the Criminal Procedure Code for the enhancement of a sentence passed by the Sessions Judge. His powers are limited to proceedings before an inferior Court.

Queen-Empress. v. Nga Kya Bu, P.J.L.B. 311; The Crown v. Wasawi, I.L.R., 5 Lah. 11—referred to.

MOSELY, J.—This is an application presented by the Public Prosecutor, Mandalay, under the direct instructions of the District Magistrate, Mōnywa, for the enhancement of a sentence passed by the Sessions Judge Sagaing, in appeal.

The trying magistrate passed a sentence of four years' rigorous imprisonment in a case under section 235, Indian Penal Code, which was reduced on appeal by the Sessions Judge to two years' rigorous imprisonment. It is now requested that the sentence be enhanced to that originally imposed by the trying magistrate.

The District Magistrate was not empowered himself to make a reference to this Court under section 438, Criminal Procedure Code, as the powers conferred on him by that section are limited to proceedings before an *inferior* Court and do not apply to proceedings before a superior Court, *vide Queen-Empress v. Nga Kya Bu* (1).

* Criminal Revision No. 44B of 1931 at Mandalay.

(1) P.J.L.B. 311.

I do not think the procedure adopted in the present case a proper one. The Public Prosecutor admits that he has no option but is bound to present the application, and if the District Magistrate can move this Court through the Public Prosecutor that amounts in practice to the same thing as making a reference on his own motion. As was remarked in *The Crown v. Wasawi* (1) if the District Magistrate were allowed to act in this way it would be open to him to report a case when a sentence passed by himself as a trial magistrate had been reduced on appeal by the Sessions Judge ; an obviously ludicrous position.

It was pointed out in *Kya Bu's* case that it was the District Magistrate's duty to take the necessary steps to get the Government Advocate to move this Court to call for the case in revision.

The "necessary steps" or the proper procedure in references for enhancement of sentences passed by a Sessions Judge in Upper Burma, as in appeals against an order of acquittal, is for the District Magistrate as Deputy Commissioner to obtain the orders of the Local Government before instructing the Public Prosecutor, Mandalay, as Government Advocate, to make the application.

Those orders should be obtained in the present case if action is to be taken. I refuse to entertain the reference. Let the papers be returned.

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(1) (1924) I.L.R. 5 Lah. 11.