

CRIMINAL REVISION.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

1935
Feb. 21.

SEIN THA U

v.

MAUNG KYAW KHINE AND ANOTHER.*

Burma Village Act (Burma Act VI of 1907), ss. 10, 28—Complaint against headman—Sanction of Deputy Commissioner for prosecution—No duty of magistrate to procure sanction—Magistrate's right to determine whether sanction necessary—Magistrate's discretion—Non-interference by Deputy Commissioner or District Magistrate.

The meaning and effect of ss. 10 and 28 of the Burma Village Act, 1907, is that no Court can entertain a complaint against a headman in respect of any act or omission punishable under s. 10 unless the prosecution has been instituted with the sanction of the Deputy Commissioner, notwithstanding that the complaint may also disclose offences punishable under some other law.

Maung Po Thit v. Maung Pyu, I.L.R. 8 Ran. 654; *Nga Tun Lin v. King-Emperor*, 4 U.B.R. 101; *Queen-Empress v. Nga Cheik To* (1893-98) P.J. 397; *Shwe Yi v. The Crown*, 1 L.B.R. 336—*referred to*.

It is not the duty of a magistrate to obtain the requisite sanction to prosecute a person against whom a charge has been preferred; but it is both his duty and his exclusive right to determine whether sanction to prosecute the accused is necessary or not. In the exercise of his judicial discretion in the matter neither the Deputy Commissioner nor the District Magistrate can have any legal justification or excuse for attempting himself to influence the decision of the magistrate, or for calling upon the magistrate to explain his conduct.

Vellu Thevar v. King-Emperor, I.L.R. 10 Ran. 180—*referred to*.

A. Eggar (Government Advocate) for the respondents. Section 28 of the Burma Village Act, 1907, is intended to protect village headmen from prosecutions by private persons in respect of acts done in the exercise of their duties under the Act, and sanction of the Deputy Commissioner is necessary for such a prosecution although the offence committed is punishable under the Indian Penal Code. In petty

* Criminal Revision No. 742B of 1934 from the order of the 6th Additional Special Power Magistrate, Akyab, in Cr. Reg. No. 14 of 1934.

cases the Deputy Commissioner deals with the matter departmentally under s. 10, while in more serious cases he would accord sanction to the institution of proceedings in a proper Court.

Queen-Empress v. Nga Cheik To (1) ; *Nga Shwe Ge v. The Crown* (2) ; *Nga Shwe Yi v. The Crown* (3) ; *Nga Tun Lin v. King-Emperor* (4) ; *Maung Po Thit v. Maung Pyu* (5). See also *King-Emperor v. Nga Po Win* (6).

The headman in the present case attempted to interfere with a boat-race that was being held without his permission as required by s. 21 of the Act, and the present complaint is the outcome of it. As the headman was acting within the scope of his powers the magistrate thought fit to "close the case," and his order should be sustained.

PAGE, C.J.—This case illustrates once more the inconvenience of allowing the same person to perform the functions of Deputy Commissioner and District Magistrate [see *Vellu Thevar and another v. King-Emperor* (7)].

The first respondent who was a headman and the second respondent who was his servant were charged before the 6th Additional Magistrate, Akyab, with having committed an offence under section 323, Indian Penal Code.

It appears that certain young men of Rathedaung Village were practising rowing in a racing craft; and it was alleged that, when the headman came on the scene with his servant for the purpose of ascertaining the reason why the racing boat was being used without

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(1) (1893-1900) L.B.P.J. 397.

(2) 9 B.L.R. 62.

(3) 1 L.B.R. 336.

(4) 4 U.B.R. 101

(5) I.L.R. 8 Ran. 654.

(6) I.L.R. 8 Ran. 246.

(7) (1932) I.L.R. 10 Ran. 180.

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the requisite permission having been obtained, a disturbance took place in the course of which the respondents assaulted the complainant.

While the hearing of the case was proceeding the Deputy Commissioner sent the following order to the trying Magistrate :

"3RD H.Q.A. (6TH A.M.),

Please explain why sanction of the Deputy Commissioner was not applied for before prosecuting the headman Maung Kyaw Khine who is now accused in your Criminal Regular Trial No. 14 of 1934, as an enquiry is necessary before sanctioning the prosecution.

I understand the accused has appeared before you as many as 6 times.

Your attention is drawn to section 28 of the Burma Village Act and to paragraph 38 of the Burma Village Manual.

Sd. * * *

for Deputy Commissioner, Akyab."

On the 23rd of July 1934, as appears from the diary of the Magistrate, he "submitted" the following explanation to the Deputy Commissioner :

"SIR,

I beg to explain as follows :—That according to the story of the complainant the headman was not then in the discharge of his duties and so the complaint was not dismissed. Also neither the headman nor his pleader ever contended that the headman was then in the discharge of his duties. The evidence of the prosecution witnesses does not disclose that the headman was then in the discharge of his duties. According to Da Aung (D.W. 2) the headman called him to go and watch the boat race and the headman did not tell him about the summons.

The case was tried at Akyab on administrative ground to avoid strong feeling of factions in Rathedaung town. There are other responsible administrative officers at the headquarters of Rathedaung in his absence Submitted.

Sd. AUNG GYI,

6th A.M.,—23-7-34."

On the 26th July 1934 the explanation of the Magistrate was returned to him with the following comments thereon by the Deputy Commissioner :

" A complaint was made by the headman on the 30th April 1934 against the complainant in this case. (D.O. Progs. 58 of 1934.) It is clear that the headman was acting in accordance with the discharge of his duties. This is borne out by the complaint in this case which shows that the trouble started as a result of unauthorized boat races and summonses to the racers to appear before the headman.

Sd. V. BEADON,
D.C."

On the 26th July the Magistrate recorded in the diary of the case :

" Case received back with the remarks of the Deputy Commissioner. It was held by the Deputy Commissioner that the accused headman was then acting in accordance with the discharge of his duties. Sent for the complainant's pleader U Mra Tun."

On the 15th August 1934, as appears from an entry in the diary by another Magistrate who meanwhile had succeeded the Magistrate who had been trying the case, the case was

"called. U Mra Tun is present. He says he has not obtained sanction from the Deputy Commissioner and says it is not necessary. But the Deputy Commissioner says it is necessary. Case is closed for want of sanction.

Sd. TUN HLA PRU,
VI A.M.S.P."

An application in revision was then filed in the Sessions Court of Akyab, and the learned Sessions Judge ordered that

" the proceedings will therefore be submitted to the High Court with the recommendation that the order of the learned Magistrate dated the 15th of August 1934 be set aside and that the learned Magistrate be directed to pass judgment."

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The case turns upon the construction of section 10 and section 28 of the Burma Village Act, 1907, as amended, which run as follows :

" 10. If a headman or rural policeman neglects to perform any of the public duties imposed upon him by this Act or any rules thereunder, or abuses any of the powers conferred upon him by this Act or any such rule, he shall be liable, by order of the Deputy Commissioner, to pay a fine not exceeding fifty rupees.

28. No complaint against a headman or member of a village committee or rural policeman of any act or omission punishable under this Act shall be entertained by any Court unless the prosecution is instituted by order of, or under authority from, the Deputy Commissioner."

In my opinion the meaning and effect of these sections is that no Court can entertain a complaint against *inter alios* a headman in respect of any act or omission punishable under section 10 unless the prosecution has been instituted with the sanction of the Deputy Commissioner, notwithstanding that the complaint may also disclose offences punishable under some other law [*Q.E. v. Nga Cheik To* (1); *Shwe Yi v. Crown* (2); *Nga Tun Lin v. King-Emperor* (3) and *Maung Po Thit v. Maung Pyu* (4)].

Now, it is not the duty of a Magistrate to obtain the requisite sanction to prosecute a person against whom a charge has been preferred; but it is both his duty and his exclusive right to determine whether sanction to prosecute the accused is necessary or not. In the exercise of his judicial discretion in the matter neither the Deputy Commissioner nor the District Magistrate can have any legal justification or excuse for attempting himself to influence the decision of the Magistrate or for calling upon the Magistrate to explain his conduct.

(1) (1893-1900) P.J. 397.

(2) (1902) 1 L.B.R. 336.

(3) 4 U.B.R. 101.

(4) (1930) 1 L.R. 8 Ram. 654.

It would appear from the records of the Deputy Commissioner's office that Lieut.-Col. Beadon, when communicating with the trying Magistrate in the way of which complaint is made, purported to be acting as Deputy Commissioner and not in the exercise of his revisional powers as District Magistrate. But it matters little, because in neither capacity was he entitled to act as he did (see sections 435 and 438, Criminal Procedure Code). The course taken by the Magistrate who decided the case also was much to be regretted. Although it was his duty, right, and privilege to use his own judgment in deciding whether he could or could not proceed with the case without the sanction of the Deputy Commissioner having been obtained, with a lamentable want of courage and independence he weakly surrendered his will, and passed orders in accordance with the dictates of the Deputy Commissioner.

It is sometimes said that the complete separation of the judiciary and the executive is an Utopian dream, which for financial and administrative reasons cannot be realized. That is a matter of policy about which I say nothing. But if it be so it follows that it is of importance for the due administration of justice that persons performing the dual rôle of Deputy Commissioner and District Magistrate should ever be mindful that their outlook and action in one capacity should not impinge upon their outlook and action in the other. I am fully alive to the difficulties inherent in the position in which such officials find themselves, but I make bold to say that officials who function both as Deputy Commissioners and District Magistrates ought to take meticulous care to differentiate between their exacting, and to some extent incompatible, duties as Deputy Commissioners.

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and as District Magistrates; for it can hardly be expected that an independent and courageous magistracy will be created if Magistrates are compelled to perform their judicial functions in dread of the sting as well of the east as of the north wind, both strangely enough blowing from the same headquarters.

It may or may not be that in the present case the Deputy Commissioner's view of the legal position was correct. It matters not; because it is the Magistrate and not the Deputy Commissioner whose duty it is to try the case in the first instance.

For these reasons, in my opinion, the proper order for this Court to pass is that the order of the Magistrate by which the "case is closed" (a term of no legal import or significance) be set aside, and the proceedings returned to the Magistrate's Court to be determined according to law.

MYA BU, J.—I agree.