

the Court in which the trial was held to pronounce the judgment that had been written by his predecessor. He has a discretion in the matter, and if he is in doubt as to the correctness of the judgment that has been written by his predecessor he ought either to act in accordance with the provisions of Order XVIII, rule 15 or to hear the case *de novo*.

For these reasons we answer the question propounded in the affirmative.

MYA BU, J.—I agree.

BAGULEY, J.—I agree.

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## APPELLATE CRIMINAL.

*Before Mr. Justice Dunkley.*

NGA THA E AND ANOTHER

*v.*

KING-EMPEROR.\*

1936  
Jan. 2.

*Prevention of Crime (Young Offenders) Act (Burma Act III of 1930), ss. 13, 25 (1)—Appeal against order for detention in Borstal School—Order for detention not a sentence of imprisonment—Order for any period appealable to Court of Session—Appeal to the High Court—Criminal Procedure Code (Act V of 1898), s. 408 (b).*

It is provided by s. 13 of the Prevention of Crime (Young Offenders) Act that in respect of any order passed by a magistrate under Part II of the Act (which includes an order for detention in a Borstal School) an appeal shall lie to the Court of Session. An order of detention in a Borstal School is not a sentence of imprisonment, and against such an order for any period passed by a magistrate there is a right of appeal to the local Court of Session. The only circumstance in which the appeal against such an order will lie to the High Court is under proviso (b) to s. 408 of the Criminal Procedure Code when a co-accused, who has been tried together with the juvenile affected by the order, has been sentenced to imprisonment for a term exceeding four years.

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\* Criminal Appeal No. 1683 of 1935 from the order of the 2nd Add. Sp. Power Magistrate of Tharrawaddy in Trial No. 81 of 1935.

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NGA THA E  
v.  
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EMPEROR.

*Kyaw Zan* for the appellants.

*A. Eggar* (Government Advocate) for the Crown.

DUNKLEY, J.—Under the provisions of section 25 (1) of the Prevention of Crime (Young Offenders) Act, 1930, the two appellants have been directed to be detained in a Borstal School for a period of five years. This order was passed by the 2nd Additional Special Power Magistrate of Tharrawaddy. They have appealed to this Court, but in my opinion their appeal lies to the Court of Session of the Tharrawaddy District.

Section 25 of the Prevention of Crime (Young Offenders) Act occurs in Part II of the Act, and sub-section (1) of this section says that where a sentence of imprisonment would ordinarily be passed on a person whose age is between 16 and 19 years, the Court may, instead of passing such sentence, direct that such person be sent to a Borstal School. It is clear from the wording of this sub-section that an order of detention in a Borstal School is not a sentence of imprisonment; it is, in fact, something which is substituted for a sentence of imprisonment which would ordinarily be passed. Moreover, it is plain from the scheme of the Act and the rules made thereunder that the period of detention of a young person, ordered under the provisions of the Act, bears no relation to the period of imprisonment to which an adult would ordinarily be sentenced for a similar offence, as in the case of an order under the Act considerations arise which cannot arise in the case of a sentence passed on an adult.

Now, the only provision under which the appeal from a conviction by a Magistrate outside Rangoon, except a conviction of an offence under section 124A

of the Indian Penal Code, can lie to this Court is proviso (b) to section 408 of the Code of Criminal Procedure, which proviso lays down that when in any case a Magistrate specially empowered under section 30 (or an Assistant Sessions Judge) passes a sentence of imprisonment on an accused person for a term exceeding four years, the appeal of that accused and also of any co-accused convicted at the same trial shall lie to the High Court. As I have pointed out, an order of detention in a Borstal School is not a sentence of imprisonment, and the terms of section 408 itself plainly contemplate that, except in the instances mentioned in the provisos to the section, all appeals from a Magistrate of the first class shall lie to the Court of Session.

Section 13 of the Prevention of Crime (Young Offenders) Act reads as follows :

"In addition to the right of appeal provided in ordinary course by the Code of Criminal Procedure, 1898, every person affected by an order made under this Part (*i.e.*, Part II of the Act), except on a finding as to age under 14 or an order under section 11, by any Court subordinate to a Court of Session, may appeal therefrom to the Court of Session, but subject to any time-limit prescribed for the presentation of such appeals."

Consequently, it is provided by this section that in respect of any order passed by a Magistrate under Part II of the Act (which includes an order for detention in a Borstal School) an appeal shall lie to the Court of Session. It is therefore plain that in respect of any order of detention in a Borstal School for any period, passed by a Magistrate, there is a right of appeal to the local Court of Session, and the only circumstance in which the appeal against such an order will lie to this Court is when a

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co-accused, who has been tried together with the juvenile affected by the order, has been sentenced to imprisonment for a term exceeding four years. In such a case the appeal will lie to this Court under the provisions of proviso (b) to section 408 of the Code of Criminal Procedure.

This appeal will therefore be transferred to the Court of Session of the Tharrawaddy District for disposal, and the Sessions Judge is directed to accept the appeal as having been instituted in his Court on the date on which the memorandum of appeal was presented in this Court.

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## APPELLATE CIVIL.

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

A. B. NEOGI

v.

B. B. NEOGI AND OTHERS.\*

1936  
 Jan. 9.

*Will—Probate obtained without issue of citations to persons entitled—Revocation of probate—Genuineness of will disputed—Burden of proof on person propounding the will—Averment of will being a forgery—Onus of proof—Succession Act (XXXIX of 1925), s. 236.*

Where probate of a will has been granted without citing parties to whom notice ought to have been given, and one of such persons applies to the Court to have the probate revoked on that ground the probate will be revoked. The burden of proving the genuineness of the will lies upon the person who propounds the will. The *onus* is not on a person entitled to be cited to prove that the will was a forgery.

*Ramanandi Kuer v. Kalawati Kuer*, 55 I.A. 18—*followed*.

*Bhattacharyya* for the appellant. The propounder of a will must prove that the document in respect of which he is applying for probate is genuine. No.

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\* Civil First Appeal No. 100 of 1935 from the order of this Court on the Original Side in Civil Misc. No. 4 of 1935.