APPELLATE CRIMINAL.

Before Mr. Justice Mosely.

1935

Oct. 25.

NGA AUNG THIN AND ANOTHER
v.
KING-EMPEROR.*

Prevention of Crime (Young Offenders) Act (Burma Act III of 1930), ss. 11, 13, 25 (1)—Offence tried by magistrate not invested with powers under Part II of the Act—Magistrate's finding of guilt—Submission of proceedings to a magistrate empowered—Magistrate's order sending accused to Borstal school—Appeal against the order.

Under s. 13 of the Prevention of Crime (Young Offenders) Act in addition to the right of appeal against an order amounting to a sentence under the Code of Criminal Procedure the accused has the right of appeal against any order affecting him except non-final orders as to age, or directing the submission of the case to a magistrate empowered.

A magistrate tried a case of arson against the accused who were 18 years of age. Not being invested with powers under Part II of the Prevention of Crime (Young Offenders) Act he recorded his opinion that the accused were guilty and submitted the proceedings to the District Magistrate under s. 11 of the Act. The District Magistrate, acting under s. 25 (*1*) of the Act ordered the accused to undergo four years' detention in a Borstal school. *Held*, that the order of the District Magistrate was appealable but the appeal lay to the Court of Session.

MOSELY, J.—The two appellants were tried by the 5th Additional Magistrate of Maubin on a charge of arson under section 436, Indian Penal Code. He recorded his opinion that they were guilty. As they were only 18 years of age, and the Magistrate was not invested with powers under Part II of the Prevention of Crime (Young Offenders) Act (III of 1930), he submitted the proceedings to the nearest Magistrate so empowered, the District Magistrate, under section 11 of the Act. The District Magistrate acting under section 25 (*1*) of the Act

* Criminal Appeals Nos. 1437 and 1438 of 1935 from the order of the District Magistrate of Maubin in Criminal Trial No. 10 of 1935.

ordered that the appellants undergo four years' detention in the Borstal School.

The appeals have been presented to this Court. If an appeal lies it lies to the Court of Session. The question for decision is whether an appeal can lie in virtue of the provisions of section 13 of the Act, or whether this Court should take up the proceedings in revision.

Section 11 of the Act directs that where a Court is not empowered under Part II of the Act, and is of opinion that a person tried by it should be dealt with under Part II of the Act, it shall record such opinion, and submit its proceedings and forward the accused to the nearest Magistrate so empowered ; and such Magistrate may continue the proceedings, or commence them anew, or pass any order which he might have passed if the accused had originally been tried by him.

Section 13 of the Act reads :

"In addition to the right of appeal provided in ordinary course by the Code of Criminal Procedure every person affected by an order made under this Part, except on a finding as to age under section 14, or an order under section 11 * * * may appeal to the Court of Session * *."

It would look at first sight as if section 13 of the Act laid down that no appeal lies against any order of detention passed in lieu of sentence under section 25 (*1*). The only order mentioned in section 11 as such is the order to be passed by the Magistrate empowered, which can only be an order under section 25 (*1*). There is no reason why the right of appeal should be abolished merely because the case has been submitted to a Magistrate for orders instead of being tried by him, and in fact under section 11 the Magistrate empowered may retry the proceedings himself. If the Magistrate

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so empowered had taken cognizance of the case originally there would have been a right of appeal. In similar cases where a Magistrate of the second or third class submits proceedings to the District Magistrate or Subdivisional Magistrate under section 349, Code of Criminal Procedure, there is a right of appeal from the orders of the District or Subdivisional Magistrate. It was no doubt not intended by section 13 that the orders of the Magistrate so empowered should not be subject to appeal. But apart from this I consider the language of section 13 itself shows that what is meant by the words "an order under section 11" is the order of the Magistrate who originally tried the case forwarding the accused to the nearest Magistrate empowered. Although section 11 does not formally apply the word "order" to the submission of the proceedings, such an order, not being a final order on the merits of the case, is more or less *ejusdem generis* with the other matter mentioned in section 13 as not being subject to appeal, that is a finding as to age. But perhaps the most important consideration is this, that if it were to be held that an order made under section 11 was not appealable by virtue of the provisions of section 13, that would be contrary to the opening words of section 13 itself, which allow the rights of appeal provided by the Code of Criminal Procedure, and would render that provision meaningless. It is impossible to construe section 13 as saying firstly that the accused shall have all the rights of appeal provided by the Criminal Procedure Code, and then secondly that no appeal shall lie from the decision of a Magistrate empowered under this part merely because the proceedings have been forwarded to him with his opinion by another Magistrate. The section must

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mean that in addition to the rights of appeal against an order amounting to a sentence under the Code of Criminal Procedure the accused shall have the right of appeal against any order affecting him except non-final orders as to age, or directing the submission of the case to a Magistrate empowered.

It appears to me, therefore, that the appellants have a right of appeal, and this appeal lies to the Court of Session. It will be directed, therefore, that these appeals be forwarded to the Court of Session, Myaungmya, for disposal.

APPELLATE CIVIL.

Before Mr. Justice Mya Bu, and Mr. Justice Bagnley.

ASGAR ALI *v.* C.V.R.M. FIRM.*

1935

Nov. 25.

Suit by creditor to establish right to attach and sell property—Avoidance of fraudulent transfer—Representative suit necessary—Civil Procedure Code (Act V of 1908), O. 21, r. 63—Omission to sue in proper form not fatal—Trial Court's function—Objection as to form of suit taken only on appeal—Appellate Court cannot entertain objection nor can remand suit—Inherent jurisdiction—Irregular exercise of jurisdiction—Transferee from debtor—Objection to form of suit when to be taken.

Where a suit is brought by a creditor under Order XXI, r. 63 of the Civil Procedure Code to establish his right to attach and bring to sale certain property, and in order to succeed it is necessary to avoid a transfer of the property on the ground that the transfer has been made with intent to defeat or delay the creditors of the transferor, the suit must be brought as a representative suit.

A.K.A.C.T.V. Chettyar v. *R.M.A.R.S. Firm*, I.L.R. 12 Ran. 666—*approved.*

The omission to file the suit in a representative form is not fatal to the maintenance of the suit, and the trial Court can and should permit the plaintiff to take proper steps to set matters right. But if no objection is taken to the form of the suit in the trial Court, and is only raised for the first time in the appeal, the objection cannot be allowed in the appellate Court, and the appellate Court should not remand the case to the trial Court to remedy the defect.

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* Civil 2nd Appeal No. 198 of 1935 from the judgment of the District Court of Toungoo in Civil Appeal No. 20 of 1935.