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for value in good faith without knowledge of the terms of the tenancy agreement is not bound by its terms, but is bound if he purchases with such knowledge. With the greatest respect, I am doubtful whether a purchaser for good consideration is bound by the agreement between the tenant and his landlord in any event, but that point does not arise in the present case, and the correctness of the decision in *Maung Po Lwin*'s case (1) must be left for future consideration when the point arises. The position of an attaching judgment-creditor is entirely different ; he is always bound by the terms of the agreement between his judgment-debtor and the latter's landlord, whether he has knowledge thereof or not. I therefore agree that this appeal must be allowed, with costs throughout.

CRIMINAL REVISION.

Before Mr. Justice Baguley.

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Nov. 15

MAUNG BA AND OTHERS *v.* THE KING.*

Assault—Conviction for assaulting public servant—Appellate Court's finding—Person assaulted not a public servant—Alteration of conviction—Penal Code, ss. 352, 353.

Where an accused has been convicted under s. 353 of the Penal Code for assaulting a person whom the magistrate thought to be a public servant and the appellate Court finds that he was not a public servant there is no bar to the conviction being altered to one under s. 352.

In the matter of Akbar Momin, 6 C.W.N. 202, considered.

K. C. Sanyal for the applicant.

BAGULEY, J.—I have taken the facts as given by the lower Courts. I see no reason for interference with these findings of fact in revision.

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(1) (1929) I.L.R. 7 Ran. 100.

* Criminal Revision No. 517B of 1937 from the order of the Sessions Judge of Sagaing in Criminal Appeal No. 177 of 1937.

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Aung Dun, a villager of Kinmun village, got drunk. He had an iron fork in one hand and a *dah* in the other, and he was going about the village shouting abuse, cutting fence posts, and in general making a thorough nuisance of himself. He abused the headman and performed certain indecent acts in front of his house ; so the headman, as he was entitled to, called a posse of villagers, disarmed Aung Dun, arrested him and proceeded to take him to his house with a view to sending him and his weapons to the police station. He was perfectly entitled to do this.

Before they got to his house they had to pass the compound of the house of Maung Ba. Maung Ba and his son and daughter, Thein Pe and Ma Thein Tin, came out, asked what it was all about and proceeded to try and snatch the *dah* out of the hands of Po Set, the villager who was carrying it. A struggle ensued and in the end Po Set let them have the *dah* and they took it away. About half an hour later, before the party had started to the police station with Aung Dun, Ma Thein Tin came to the headman's house and threw the *dah* into his compound saying, " Here is the *dah*."

Arising out of this the police sent up the three accused with a charge sheet showing that they had committed an offence under section 353, Penal Code. The Magistrate heard the prosecution witnesses and framed a charge against the three accused charging them with having used criminal force

" to Maung Ngwe Gaing, a public servant and his party while they were bringing the accused Maung Aung Dun and exhibit *dah* with intent etc."

He found them all guilty and sentenced the men to three months' rigorous imprisonment each and Ma Thein Tin to pay a fine of Rs. 51.

They all appealed and the learned Sessions Judge altered the convictions to convictions under section 352 and reduced the sentences to a fine of Rs. 45 in the case of Maung Ba and Rs. 40 in the case of each of his children. The main point on which he reduced the sentence was that although the headman was a public servant, Po Set, from whose possession the *dah* was forcibly seized, was not a public servant. Against this order passed by the learned Sessions Judge the present application for revision has been filed.

The main ground argued was that when the Sessions Judge found the applicants not guilty under section 353 he had no jurisdiction to alter the conviction to one under section 352. This argument was based upon an extract from Gour's "Penal Law of India" (Fourth Edition, page 1746), and the case of *Akbar Momin* (1). I have studied *Akbar Momin*'s case, and I must say that I cannot understand it, that is, not if the words used have their correct meanings. It seems to me that in the statement of the facts of the case the editor is using the word "charge" in its police sense and not in its Criminal Procedure Code sense. There is a passage,

> "On the complaint of Ahmed four persons were sent up for trial * * * who were charged under sections 353 and 352."

Apparently, this does not mean "against whom charges were framed under sections 353 and 352." In any event, it is not clear from this judgment whether a charge was framed against the accused under section 353 for assaulting a police officer, in which case, of course, the accused could not be convicted under any section at all for an assault on somebody else; or whether a separate charge was

(1) 6 C.W.N. 202.

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framed against him for assaulting the witness. If this reported case really bears out the interpretation put upon it in Gour's work, namely, that when there is a report of assaulting a public servant which comes properly before a Magistrate and after he has taken cognizance of the case he finds that in the transaction which was reported to him an assault was committed on some other person not mentioned in the original complaint, he is debarred from dealing with that assault, I respectfully dissent from it. When a fracas is the basis of a police charge sheet, and in the course of that fracas, when the Magisterial inquiry is complete, the fact emerges that some ordinary villager has been assaulted, I see no reason why the Magistrate shall not convict the person guilty of that assault for that assault.

In the present case the original charge was not satisfactory. The charge was of using criminal force to Maung Ngwe Gaing, a public servant, and his party, but the accused were perfectly aware of what they were charged with, namely, using criminal force to Maung Po Set, one of the headman's posse of villagers. The evidence was all with regard to the struggle for the *dah* which he was holding, and after they have been convicted under section 353 for assaulting Po Set whom the Magistrate thought to be a public servant, when the appellate Court finds that he was assaulted, but that he was not a public servant, there is no bar under the Criminal Procedure Code to the conviction being altered to one under section 352. That is a simple and logical deduction which must be made from section 238 (*1*) of the Criminal Procedure Code. In my opinion, these convictions are quite correct.

As the case, however, is before me I think that one alteration might be made in favour of the accused Ma Thein Tin. She cooled down quickly and brought the *dah* back to the headman. I think this gesture

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might be counted in her favour. I would therefore halve her fine. My order is, therefore, that the sentence passed against Ma Thein Tin will be that she will be fined Rs. 20, or in default ten days' rigorous imprisonment. Any excess fine which she may have paid will be refunded to her. The convictions of all the three accused will stand and the sentences passed on Maung Ba and Maung Thein Pe will be left unaltered.

CRIMINAL REVISION.

Before Mr. Justice Baguley.

1937

Nov. 15.

MAUNG PO TU AND ANOTHER
v.
THE KING.*

Inquiry—Case sent up for trial by Police—Appearance of parties before magistrate—Withdrawal of prosecution before hearing—Discharge of accused—Magistrate's order for disposal of jewellery seized—Application to the Sessions Court—Jurisdiction of Sessions Court to deal with application—Commencement and conclusion of inquiry—Criminal Procedure Code, ss. 190 (1) (b), 517, 520.

Where an accused, and the jewellery in respect of which he is accused of theft, are sent up by the police to the magistrate and the magistrate takes cognizance under s. 190 (*b*) of the Criminal Procedure Code, there is an "inquiry" before the Court, though no witnesses are examined. Action under clause (*b*) of s. 190 is one of the conditions requisite for the initiation of proceedings by the magistrate. If the prosecution is withdrawn after appearance of parties and fixing of dates for hearing merely, the withdrawal operates as a discharge of the accused, the inquiry is concluded and the proceedings terminate finally.

The magistrate therefore has jurisdiction to make an order under s. 517 of the Criminal Procedure Code for the disposal of the jewellery, and the Sessions Judge has power under s. 520 of the Code to modify, alter or annul such order.

B. C. De v. *Sama*, 35 C.W.N. 188; *In the matter of Kuppammal*, I.L.R. 29 Mad. 375; *U Ba Hlaing* v. *Sodani*, I.L.R. 14 Ran. 633, distinguished.

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* Criminal Revision No. 509B of 1937 from the order of the Sessions Judge of Prome in Criminal Appeal No. 201P of 1937.