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THE KING v. MAUNG KAN TUN.

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headman in the execution of his public duties under the Village Act. When a villager pays his *thathameda*-tax to his headman he does not assist the headman in collecting *thathameda*-tax in the sense intended in sections 8 (*1*) (i) and 11 (*d*) of the Act.

The conviction of Maung Kan Tun in the present case is therefore entirely illegal.

As a matter of fact it now appears that Maung Kan Tun should not have been assessed to *thathameda*-tax at all.

The finding and sentence passed upon him are set aside and the fine paid by him shall be refunded to him.

CRIMINAL REVISION.

Before Mr. Justice Mosely.

MA THAUNG *v.* NANDIYA.*

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Oct. 5.

Revisional powers of High Court—Acquittal by appellate Court—Erroneous view of law—Direction by High Court to rehear appeal—"Trial"—Criminal Procedure Code, s. 423.

Where the appellate Court has misdirected itself on a point of law and so has acquitted a person in a criminal case, the High Court can point out the error and direct the appellate Court to rehear the appeal.

Ma Nyein v. *Maung Chit Hpu*, I.L.R. 7 Ran. 538 ; *Queen-Empress* v. *Balwant*, I.L.R. 9 All. 134 ; *Queen-Empress* v. *Basant Lall*, I.L.R. 27 Cal. 320 ; *Queen-Empress* v. *Ganesh*, I.L.R. 13 Bom. 506 ; *Government of Bengal* v. *Gokool Chunder*, 24 C.W.R. Cr. Rul. 41 ; *Rameshwar* v. *Gobind Prasad*, 23 All. L.J. 433 ; *U Min* v. *Maung Taik*, I.L.R. 8 Ran. 663, referred to.

The word "trial" as used in the Criminal Procedure Code includes an appeal for the purposes of several sections of the Code.

M.C. Mozumdar v. *Pundit*, I.L.R. 16 Cal. 121; *Nistarini Debi* v. *Ghose*, I.L.R. 23 Cal. 44, referred to.

Leong with him *Chan Tun Aung* for the applicant.

Kyaw Myint for the respondent.

MOSELY, J.—This is an application in revision against an order of acquittal by the Additional Sessions

* Criminal Revision No. 439B of 1937 from the order of the Additional Sessions Judge of Maubin in Criminal Appeal No. 353 of 1937.

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Judge of Maubin. The accused was convicted by the trial Court on a charge under section 406, Penal Code. The application is on the ground, amongst others, that the order of acquittal in appeal was based on a misconception of law. What is prayed for is that the order of acquittal be set aside and a re-trial ordered. It is not stated whether a re-trial of the case in the trial Court was prayed for or merely a re-trial of the appeal.

The power of the High Court to interfere in revision with an order of acquittal has been the subject of two fairly recent reported rulings of this Court. *Ma Nyein* v. *Maung Chit Hpu* (1), was an application in revision against an order of acquittal by the trial Court. It was remarked that cases might well occur in which, owing to non-recording of evidence or improper recording of inadmissible evidence, a High Court interfering in revision might set aside an order of acquittal and direct a re-trial, which the Magistrate before whom the case came could deal with in a perfectly impartial manner.

U Min v. *Maung Taik and another* (2), was an application for revision of an order of acquittal passed in appeal. The application was one to restore the conviction of the trial Magistrate,—which is of course contrary to section 439 (4), Criminal Procedure Code. It was said there :

"It has been laid down in the case of *Foujdar Thakur* v. *Kasi Chowdhury* (3) that, though the High Court has jurisdiction to interfere on revision with an acquittal, it should ordinarily exercise this jurisdiction sparingly and only where it is urgently demanded in the interest of public justice. This decision was followed in the case of *Nga Po Pyaw* v. *Nga Po Nwe* (4) where the learned Judicial Commissioner of Upper Burma held that the only cases in which applications at the instance of private parties

(1) (1929) I.L.R. 7 Ran. 538.
(2) (1930) I.L.R. 8 Ran. 663.
(3) (1914) I.L.R. 42 Cal. 612.
(4) (1917) 3 U.B.R. 19.

against orders of acquittal could be entertained are those in which there has been a failure of justice through want of jurisdiction or a failure to understand the law applicable to the case."

The question of interference in revision with an order of acquittal passed in appeal as opposed to such an order passed in the original trial was not dealt with there.

The powers of a High Court in revision are the same as those conferred on a Court of appeal by section 423, Criminal Procedure Code, except that a finding of acquittal cannot be converted into one of conviction, [*vide* section 439, sub-sections (*1*) and (*4*), Criminal Procedure Code].

Section 423 (*1*) enacts that the Court may—

> "(*a*) in an appeal from an order of acquittal reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, * * *."

The section does not in so many words allow of the re-hearing of an appeal, but as early as the case of *Queen-Empress* v. *Balwant* (1), it was held that in such a case as the present one the Court of appeal was the proper tribunal for re-trial of the appeal. It was said :

> "* * * it would be idle, as well as unreasonable, to direct a re-trial by the Magistrate, whose proceedings, the order of the appellate Court having been reversed, so far stand good, and who would, presumably, as a matter of course, re-affirm the conviction."

The same conclusion was arrived at in *Queen-Empress* v. *Ganesh Khanderao and Ganesh Daulat* (2), where *The Government of Bengal* v. *Gokool Chunder Chowdhry* (3), was followed. This was also a case

(1) (1886) I.L.R. 9 All. 134, 136. (2) (1889) I.L.R. 13 Bom. 506.
(3) 24 W.R. Cr. Rul. 41.

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where the order of acquittal in appeal had been arrived at on an erroneous view of the law. The concluding words of that ruling are as follows :

"* * * we are of opinion that the words relating to trial in the present Code, in section 423, are used in a sense wide enough to include the trial of appeals as in sections 342, 344, 352 and some sections of Chapter 25."

Other cases, where, in revision, the High Court has directed a re-hearing or re-trial of the appeal on the ground that the accused was acquitted on a misconception of law, are *Queen-Empress* v. *Basant Lall* (1), and *Rameshwar* v. *Gobind Prasad* (2).

It may be noted that the word "trial" is not defined in the Criminal Procedure Code. It has been held to include an appeal for the purposes of other sections also, *e.g.* for the purposes of section 497 in *Madhub Chunder Mozumdar* v. *Novodeep Chunder Pundit* (3), and of section 555 in *Nistarini Debi* v. *A. C. Ghose* (4). Other instances are collected in the note to section 4 (*k*), Criminal Procedure Code, at page 22 of Sohoni's Commentary, 13th edition.

It is clear that, though this Court should not, in revision, direct a re-hearing of an appeal on the ground that the appellate Court had taken a mistaken view of the facts, (for that would be tantamount to a direction to take the view that commended itself to this Court, and in effect to direct that an acquittal be turned into a conviction), yet this Court can, and should in proper cases where the appellate Court has misdirected itself on a point of law, point out the error and direct the re-hearing of the appeal.

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(1) (1900) I.L.R. 27 Cal. 320.
(2) 23 A.L.J. 433.
(3) (1888) I.L.R. 16 Cal. 121.
(4) (1895) I.L.R. 23 Cal. 44.

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[On the merits his Lordship held that the learned Additional Sessions Judge had not committed any error of law whatever and so dismissed the application in revision.]

SPECIAL BENCH.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, and Mr. Justice Dunkley.

IN THE MATTER OF AN ADVOCATE.*

1937

Nov. 10.

Advocates and pleaders—Conviction for offence—Subsequent enquiry for disciplinary action—Conviction to be deemed right—Facts and circumstances of case—Defect of character involving moral turpitude—Conviction for defamation—Function of Bar Council Tribunal—Justification of advocate's action—Dissemination of defamatory matter—Advocate's duty.

Where criminal proceedings are taken against a pleader or an advocate and finally concluded they must be taken to have been rightly decided, and the question to be determined in a subsequent enquiry as to whether the advocate or pleader ought to have disciplinary action taken against him is whether upon a perusal of the facts and circumstances disclosed in the evidence in the criminal proceedings his offence has been one implying a defect of character which unfits him to be a pleader or advocate. Such a defect of character normally involves moral turpitude.

Where an advocate has been convicted of the offence of defamation, it is not open to the tribunal of the Bar Council to justify his action. A responsible citizen when making a charge against a person of which he has not ascertained the truth should be careful not to aggravate the defamatory nature of the matter by lending his support to an implied acceptance of it without careful investigation into its nature.

Campagnac for the advocate: The mere circumstance that an advocate has been found guilty of a criminal offence does not make it imperative for the Court to take disciplinary action against him. The Court will look at all the surrounding circumstances and if it finds that the advocate has been guilty of an offence involving moral turpitude then only will it take disciplinary action against him. *In the matter of an Advocate* (1).

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* Civil Misc. Application No. 60 of 1937.

(1) I.L.R. 12 Ran. 110.