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Debendra (1); *Balamlal* v. *Arunachala* (2) and *Kanhaya Lal* v. *Sardar Singh* (3).

This appeal therefore must be allowed, and the decree of the trial Court restored with costs throughout.

CRIMINAL REVISION.

Before Mr. Justice Mosely.

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Sep. 2.

TUN YA *v.* THE KING.*

Sanction to prosecute—Offence by Sub-inspector of Police—Appointment by designated officer—Power of punishment vested by Act in the appointing authority—Police Department Notification No. 44 of 1937—Rules delegating power of punishment—Rules ultra vires—*Police Act, s. 7—Criminal Procedure Code, s. 197* (1).

Where a Sub-inspector of Police who has been appointed to his office by the Deputy Inspector-General of Police in exercise of the powers conferred by s. 7 of the Police Act (1861), was prosecuted prior to 1st April 1937 for the offence of extortion whilst purporting to act in the discharge of his official duty, no previous sanction of the Government for his prosecution was required under s. 197 (1) of the Criminal Procedure Code.

The Police Act confers the powers of appointment (which connote punishment) on certain designated officers, and Government cannot by any rules framed by it *delegate* disciplinary powers to be exercised on its behalf to those officers. The rules purported to be made in exercise of the powers conferred by s. 7 of the Police Act for the appointment and punishment of police officers of and below the rank of Inspector of Police, and contained in Police Department Notification No. 44 of 1937 do not leave the power of punishment to the authority by whom the appointment is made, but purport to *delegate* to certain specified authorities the power of punishment including dismissal. Such rules are to that extent *ultra vires*.

Emperor v. *Jalal-ud-din*, I.L.R. 48 All. 264; *King-Emperor* v. *Bo Maung*, I.L.R. 13 Ran. 540; *Kyaw Htin* v. *Ah Yoo*, I.L.R. 12 Ran. 530; *Pichai Pillai* v. *Mudaly*, I.L.R. 58 Mad. 787; *In re Sheik Abdul Khader*, 17 Cr. L.J. 168, discussed.

Emperor v. *Bhimaji*, I.L.R. 42 Bom. 172, referred to.

Campagnac for the applicant. S. 148 of the Government of Burma Act provides that all laws in Burma in force prior to separation are to continue, and

(1) (1897) I.L.R. 24 Cal. 668. (2) (1894) I.L.R 18 Mad. 255.
(3) (1907) I.L.R. 29 All. 284.

* Criminal Revision No. 376B of 1937 from the order of the 1st Additional Special Power Magistrate of Myitkyina in Cr. Regular Trial No. 3 of 1937.

by s. 128 of that statute all previous provisions made under the Government of India Act continue to operate until superseded by fresh provisions. See also s. 100.

Under s. 96B of the Government of India Act, 1919, Rules have been made (Local Government Circulars, Vol. II) which classify the police force as a provincial force, and by the Delegation Rules of 1926 the power to dismiss a police officer of the rank of a sub-inspector of police has been " delegated " to the District Superintendent of Police. Consequently the principle underlying the decision in *Kyaw Htin* v. *Ah Yoo* (1) is applicable, and sanction to prosecute is a condition precedent to the commencement of any criminal proceedings against the applicant for any offence committed in the discharge of his duty. The decision in *Kyaw Htin*'s case was approved in *King-Emperor* v. *Bo Maung* (2).

Certain rules have been made under s. 7 of the Police Act (1861), *vide* Notification No. 44, dated 15th March 1937 in Part I of the *Burma Gazette*. But by reason of the Government of India Act and the rules made under s. 96B, the Police Act ought to be regarded as superseded in so far as appointments and dismissals are concerned. Even if these rules are referred to, the power of punishment is *delegated* to the District Superintendent of Police and consequently *Kyaw Htin*'s case is still applicable.

A. Eggar (Advocate-General) for the Crown. This is an application in revision from the Frontier Districts, and under s. 12 of the Frontier Districts Criminal Justice Regulation, no sentence is to be modified unless the irregularity in procedure has occasioned a failure of justice.

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(1) I.L.R. 12 Ran. 530. (2) I.L.R. 13 Ran. 540.

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S. 197 of the Criminal Procedure Code refers to the actual authority by whom the public servant concerned is removable, and the question whether he exercises delegated authority or otherwise is immaterial. This view, however, did not commend itself to the Full Bench in *Bo Maung*'s case, though in a subsequent Madras decision the Allahabad case of *King-Emperor* v. *Jalal-ud-din* (1) was followed in preference to their own earlier rulings. *Pichai Pillai* v. *Balasundara Mudaly* (2).

S. 7 of the Police Act is still in force and it cannot be argued that the Act is repealed by implication. Under that section the appointing authority (and the dismissing authority also) is not the Governor, but a subordinate authority, and this is sufficient for the disposal of this case. The Police rules of 1937 went wrong in using the word " delegation ". A rule cannot be inconsistent with the Act itself, and where the Act confers powers on a specified authority they cannot be delegated.

The 1924 Classification Rules were superseded by a new set of Rules in 1930. And s. 100 of the Government of Burma Act refers to enactments relating to police forces, and not to the Government of India Act or the rules thereunder.

Campagnac in reply. The 1930 Rules did not affect the position in this case, because Rule 7 of the new Rules saved the operation of the old Rules.

MOSELY, J.—This is an application in revision against a sentence of eight months' rigorous imprisonment and a fine of Rs. 250 or, in default, two months' rigorous imprisonment, passed on the applicant Maung Tun Ya, a Sub-inspector of Police, who was convicted under

(1) I.L.R. 48 All. 264. (2) I.L.R. 58 Mad. 787.

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section 384, Penal Code, of extorting a sum of Rs. 200 from the *ywagaung* of a village in Myitkyina district. The case was instituted in February, 1937, on a complaint by the Assistant Superintendent of Police. The appeal was dismissed by the learned Sessions Judge.

I see no reason for interfering in revision with either the conviction or the sentence on the facts. It has not been contended that the acts complained of were not committed by the officer while acting, or purporting to act, in the discharge of his official duty. The only ground on which this application has been heard was that the Magistrate acted without jurisdiction in taking cognizance of the case without the previous sanction of the Local Government as required by section 197 (*1*), Criminal Procedure Code. The relevant portion of this section is as follows:

"* * * when any public servant who is not removable from his office save by or with the sanction of a Local Government † or some higher authority, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the Local Government. † "

It appears from his Service Roll that the applicant was appointed Sub-inspector of Police on probation by the Deputy Inspector-General of Police, and was confirmed, again, by the Deputy Inspector-General of Police. The latest rules for the appointment and punishment of police officers of and below the rank of Inspector of Police are contained in Police Department Notification No. 44 of the 15th March, 1937 (*Burma Gazette*, Part I, March 20, 1937). These rules purported to be made in exercise of the powers conferred by section 7 of the

† Now "the Governor" under the Adaptation of Laws Order, but the law applicable in this case was the law as it stood before 1st April 1937—*Ed.*

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general Police Act, 1861. As regards Sub-inspectors of Police, the authority by whom they are to be appointed is, in the case of Sub-inspectors directly recruited, the Principal of the Provincial Police Training School, and in the case of Sub-inspectors promoted from the ranks, the District Superintendent of Police with the previous approval of the Deputy Inspector-General of Police of the Range concerned. Section 4 of the general Police Act, 1861, refers to the offices of Inspector-General of Police and Deputy and Assistant Inspectors-General, and District and Assistant District Superintendents of Police. Section 7 of the Act says that the *appointment* of all police officers other than those mentioned in section 4 of this Act shall, under such rules as the Local Government shall from time to time sanction, *rest with* the Inspector-General, Deputy Inspectors-General, Assistant Inspectors-General and District Superintendent of Police, who may, under such rules as aforesaid, at any time dismiss, etc., any police officer. The rules originally framed under this Act are contained in Judicial Department Notification No. 249, Part I, *Burma Gazette*, June 17, 1893. Paragraph 12 provides that promotions to and in the rank of Head Constable (now called Sub-inspector of Police) shall be made by the Inspector-General on the recommendation of the District Superintendent of Police and the Deputy Commissioner.

Ordinarily, under section 16 of the General Clauses Act * (X of 1897), the power to appoint any person to fill an office carries with it the power to dismiss. Section 16 of that Act, as amended by Act XVIII of 1928, reads as follows :

"Where by any Act of the Governor-General in Council or Regulation a power to make any appointment is conferred, then,

* From 1st April 1937, this Act ceased to operate in Burma. The corresponding section of the Burma General Clauses Act is also s. 16—*Ed.*

unless a different intention appears, the authority having for the time being power to make the appointment shall also have power to suspend or dismiss any person appointed whether by himself or any other authority in exercise of that power."

However, Notification 44 of 1937 did not leave the power of punishment to the authority by whom the appointment was made, nor direct that that power was to be exercised by superior authority, or how it was to be exercised, but purported to *delegate* to certain specified authorities the power of punishment including dismissal, and provided for the authority to whom an appeal against those punishments might be made. In the case of Sub-inspectors of Police, (in all sections of the force except the Flying Squads), the authority to whom the power of punishment has been delegated is shown as the District Superintendent of Police concerned, (the appellate authority being the Deputy Inspector-General of Police of the Range concerned).

The argument for the applicant is, in brief, that, as the authority to dismiss has only been delegated by the Local Government to District Superintendents of Police, and not transferred outright to them, a Sub-inspector of Police is not removable from his office save by or with the sanction of the Local Government, and, therefore, sanction to his prosecution is requisite under section 197 (*1*), Criminal Procedure Code.

The reply to this rests mainly on section 100 of the Government of Burma Act of 1935, which is as follows :

"Notwithstanding anything in the foregoing provisions of this part (Part IX) of this Act, the conditions of service of the subordinate ranks of the Police forces shall be such as may be determined by or under the Acts relating to those forces respectively."

The "foregoing provisions" are sections 97 and 98, which refer to the tenure of office, recruitment and conditions of service of civil servants in Burma.

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The argument for the applicant is as follows : Section 148 of the Government of Burma Act provides that the existing law is to continue in force, and section 128 of the Act provides for the continuance of provisions made under the Government of India Act until other provision is made under the appropriate provisions of this Act.

By section 96B (2) of the Government of India Act of 1919 the Secretary of State delegated the power of making rules for regulating the conditions of service and discipline of the civil services in India to the Governor-General in Council or to Local Governments. Rules made by the Government of India under section 96B (2) were published in the *Gazette of India*, Part I, page 552, 1924, and classified the Burma Police Service as a provincial service. It was provided in paragraph 13 that the Local Government may dismiss any officer in the provincial service ; and in paragraph 15 that the Local Governments may delegate to any subordinate authority, subject to such conditions, if any, as it may prescribe, any of the powers conferred by rule XIII, in regard to officers of the subordinate services.

On the 27th April, 1926, the Secretary of State, under rules passed on that date, prescribed [rule 4 (1)] that the rules regulating the conditions of service of provincial and subordinate services be delegated to Local Governments of Governors' provinces. On the 19th June, 1930, the Secretary of State made certain rules under the powers conferred by sub-section (2) of section 96-B of the Government of India Act ; but rule 4 of the delegation rules of 1926 still remained in force [*King-Emperor* v. *Maung Bo Maung* (1)].

Disciplinary rules for the subordinate services, made in accordance with the Delegation Rules of 1926 by the Local Government, were published in General Depart-

(1) (1935) I.L.R. 13 Ran. 540, 546, 547.

ment Notification No. 5 of the 11th February, 1926 (page 19, Local Government Circulars, volume II), and provided that the Local Government had delegated the power of punishment, including dismissal, of Sub-inspectors of Police to District Superintendents of Police, (the appellate authority being the Deputy Inspector-General). As regards the power of punishment, this, of course, amounts to exactly the same thing as the last notification of 1937, except that the Local Government in the notification made under the Delegation Rules of 1926 delegated the power of punishment under the rules framed under the Government of India Act, while in the notification of 1937 they purported to delegate these powers in virtue of their powers under section 7 of the General Police Act under the authority of section 100 of the Government of Burma Act, 1935.

The learned advocate for the applicant wishes to construe section 100 of the Government of Burma Act as if it meant that the Act relating to the Police Forces was the Government of India Act. That argument, I conceive, is impossible. The Acts relating to the Police Forces referred to in section 100 of the Government of Burma Act are the general Police Act and the local Police Acts, such as the Bombay District Police Act, the Calcutta Police Act, the Rangoon Police Act (Burma Act IV of 1899), etc.

As to the meaning and consequences of "delegation", the learned Advocate for the applicant relies on *Kyaw Htin* v. *Ah Yoo* (1), a decision of my own, the principle of which was approved by a Full Bench in *King-Emperor* v. *Maung Bo Maung* (2).

In *Kyaw Htin*'s case (1) a sub-inspector of excise was prosecuted for a criminal offence, and it was held

(1) (1934) I.L.R. 12 Ran. 530. (2) (1935) I.L.R. 13 Ran. 540.

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that the power to appoint sub-inspectors of excise was delegated by the Local Government under the rules framed under the Government of India Act by a notification of the Excise Department. The case of *In re Sheik Abdul Khader Saheb* (1) was followed. In that case Mr. Justice Coutts Trotter held that the delegation by the Local Government of its power to appoint an officer only meant that the Local Government performs that act itself through the medium of a particular officer as the channel through which it is done, and he says :

> " It is an ordinary case of *qui facit per alium facit per se*. It is no doubt done in accordance with that delegation, but nevertheless it remains the act of the Local Government."

It was there held that the sanction of the Local Government was necessary under section 197 (*1*), Criminal Procedure Code, for the prosecution of the officer. These observations of Coutts Trotter J. were agreed in by the Full Bench in *Bo Maung*'s case (2) which was a case where an Assistant Accountant of a treasury was prosecuted for embezzlement, but it was decided there that under the rules framed under the Government of India Act the Local Government had not authorized the Deputy Commissioner to act for them in appointing assistant accountants, that is to say, had not delegated the power of appointment to the Deputy Commissioner, but had transferred out-and-out to him the power to appoint assistant accountants within his district, and, by implication, the power to remove or dismiss them from their appointment.

The basis of the decision in *Kyaw Htin*'s case (3) was approved ; but the *ratio decidendi* did not apparently commend itself to one of the Judges (see page 552 *ibid*),

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(1) 17 Cr. L.J. 168. (2) (1935) I.L.R. 13 Ran. 540.
(3) (1934) I.L.R. 12 Ran. 530.

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who remarked that the decision in *Kyaw Htin*'s case should have been based solely on the special provisions of the Excise Act without reference to the rules under the Government of India Act. No reasons were given, and, with respect, that matter was not before the Bench. The Government of India Act is an Act of the British Parliament, and when it authorized the Secretary of State to frame rules or delegate the power to frame rules to the Government of India or to Local Governments, the rules so framed must be held to have over-ridden former legislation on the same subject, such as the Burma Excise Act passed by the local Legislature. The notification referred to in *Kyaw Htin*'s case purported to be made under section 6 of the Excise Act, which itself gave the same power, that is to say allowing the Local Government to delegate to Commissioners the power of appointment of Sub-inspectors of Excise; but, though that notification purported to be issued under the Excise Act, it was, I conceive, really issued or should have been issued under the authority conferred by the Government of India Act. The question was academical, as in each case the powers delegated were identical and to the same officer.

It may be interesting to note that *Sheik Abdul Khader Saheb*'s case (1) was followed by Bardswell J. in *K.H.V.S. Narayana* v. *Emperor* (2). That case was not available when *Kyaw Htin*'s case (3) was decided. *Sheik Abdul Khader Saheb*'s case (1) was also considered but dissented from in *Emperor* v. *Jalal-ud-din* (4), another instance where an excise officer was prosecuted, and that decision too, I may remark, went on the provisions of rule 13 as published in the *Gazette of India*, 1924, though it was said that the Excise Act gave a similar power of dismissal

(1) 17 Cr. L.J. 168.
(2) (1934) M.W.N. 371.
(3) (1934) I.L.R. 12 Ran. 530.
(4) (1925) I.L.R. 48 All. 264.

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and a similar power of delegation. *Jalal-ud-din*'s case was followed in *Pichai Pillai and others* v. *Balasundara Mudaly and others* (1), a judgment not available when *Bo Maung*'s case was heard. In both these cases it was held that there was no distinction between an act of delegation and an act of empowerment, and that section 197 (*1*), Criminal Procedure Code, was not intended to include, and did not include, public servants whom some lower authority had by law or rule or order been empowered to remove. In *Jalal-ud-din*'s case it was put as follows :

> " The authority which actually removes the public servant from office is not the authority of the Local Government, but the authority to whom the power is delegated."

I am bound, however, by the Full Bench decision of this Court, which is to the effect that where the power has been delegated the sanction of the Local Government is necessary.

For the Crown it is submitted that section 12 of the Frontier Districts Criminal Justice Regulation, 1925 (Burma Code, page 224A) enacts (paragraph 12) that no sentence shall be reversed or altered on appeal or revision on account of any irregularity of procedure unless the irregularity has occasioned a failure of justice. It is, however, apparent on the face of it that sanction is a condition indispensible to the taking of cognizance by a Magistrate, who would otherwise be incompetent to try the case ; and if any authority is necessary on the point, *Emperor* v. *Bhimaji Venkaji Nadgir* (2) may be referred to.

The difficulty in the present case is that Notification No. 44 of the 15th March, 1937, directs that sub-

(1) (1935) I.L.R. 58 Mad. 787. (2) (1917) I.L.R. 42 Bom. 172.

inspectors of Police be appointed by certain officers,—it is immaterial whom for this purpose—; while the officers in whom the power rests to punish have not been nominated, nor has that authority even been conferred on them, but delegated, and I may remark in the case of a Sub-inspector of Police directly recruited, delegated to an officer other than the one by whom he was appointed.

It is argued for the Crown that, though the authority to punish has been delegated, yet that delegation was pure surplusage, and that it existed already under the Police Act in the officer by whom the appointment was made.

I agree with what was said in *Jalal-ud-din* and *Pichai Pillai*'s cases that it was not the intention of the Legislature when enacting section 197, sub-section (*1*), Criminal Procedure Code, that the sanction of the Local Government should be requisite to the prosecution of subordinate officers, but the effect of delegation of the powers of punishment must be to make that sanction a preliminary requisite to prosecution.

The question however in the present case is whether the delegation of these powers under the general Police Act under the notification of 1937 was *ultra vires* of the Local Government.

I am of the opinion that it was *ultra vires*. The general Police Act confers the powers of appointment (which connote punishment), on certain designated officers, and the Local Government cannot by any rules framed by it *delegate* disciplinary powers to those officers. It is conceivable that the Local Government might order such officers to exercise their disciplinary powers subject to its control or approval, but that has not been done, and I consider it to be a different thing from delegating such powers to be exercised on the Local Government's behalf.

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I must hold that the powers of punishment rest in the officers appointed in such behalf by section 7 of the general Police Act. It follows that the delegation of these powers to them was *ultra vires* of the Local Government, which was not the authority empowered to punish, such authority being the officers designated.

It ensues then that sanction of the Local Government to prosecute a subordinate police officer is not required, and this application in revision will be dismissed.

CRIMINAL REVISION.

Before Mr. Justice Mosely.

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Oct. 7.

RAI MOHAL PANDAY *v.* MAUNG PO SEIN.*

Crown servants—Acts done in execution of duty—Protection for acts done in good faith—Committal to Sessions—Magistrate's duty—Findings as to nature of act and good faith—Criminal Procedure Code, s. 197—Government of Burma Act, s. 124.

S. 124 of the Government of Burma Act affords a general indemnity to all servants of the Crown for acts committed in the execution of their duty as such before the 1st April 1937. The protection given by this section is in addition to the existing protection given by section 197 of the Criminal Procedure Code.

A magistrate must take all the available evidence and come to a finding whether the acts complained of were done or not done by a servant of the Crown in the execution of his duty and in good faith or not before he decides whether to commit the accused to Sessions.

A. Eggar (Advocate-General) for the Crown.

Soorma for the complainant.

MOSELY, J.—This application in revision was made by the Advocate-General against an order of the Fourth Additional Magistrate, Rangoon, passed in a committal proceeding.

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* Criminal Revision No. 515B of 1937 from the order of the 4th Additional Magistrate of Rangoon in Criminal Regular Trial No. 184 of 1937.