

APPELLATE CRIMINAL.

Before Mr. Justice Ba U, and Mr. Justice Spargo.

1939

Feb. 9.

MAUNG BA KU

v.

THE DEPUTY COMMISSIONER, BHAMO.*

Kachin Hill Tribes Regulation (I of 1925), ss. 1 (3), 8, 9—Applicability to Hill tribes only—Criminal Procedure applicable to persons not members of hill tribe—Burma (Frontier Districts) Criminal Justice Regulation (I of 1925)—S. 3 ; Cl. 11 of sch —High Court's jurisdiction to transfer criminal cases from Kachin Hill Tracts.

The Kachin Hill Tribes Regulation (I of 1895) applies only to persons who are members of a hill tribe and not to persons who, though they happen to be residing in the Kachin Hill Tracts, are not members of a hill tribe. The law regulating criminal procedure applicable to persons residing in the Kachin Hill Tracts who are not members of a hill tribe is the Burma (Frontier Districts) Criminal Justice Regulation (I of 1925).

The third proviso to Cl. 11 of the schedule to this Regulation does not oust the jurisdiction of the High Court to transfer cases in the frontier districts under s. 526 of the Criminal Procedure Code. It operates to confer upon the High Court a power to reverse or vary an order made by a court of concurrent jurisdiction.

An application by an accused who is not a member of a hill tribe for transfer of a criminal case from the Court of the Sessions Judge of the Kachin Hill Tracts to some other Court of competent jurisdiction in Bhamo or outside Bhamo lies to the High Court.

K. C. Sanyal for the applicant.

Tun Byu (Government Advocate) for the Crown.

Being of opinion that the question arising in this case should be decided by a Bench, an order to that effect was made in the following terms by—

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Dec. 13.

MACKNEY, J.—This is an application to transfer from the Court of the Sessions Judge of the Kachin Hill Tracts, Bhamo, the case in which the applicant is accused of criminal misappropriation and breach of trust, to some Court outside the District of Bhamo or to some other Court of competent jurisdiction other than that of the Sessions Judge of the Kachin Hill Tracts.

* Criminal Misc. Application No. 71 of 1938 arising from Kachin Cr. Regular Trial No. 3 of 1938.

The applicant was the head clerk of the Assistant Superintendent of Sinlunkaba in the District of Bhamo, and the offence which he is alleged to have committed is said to have been committed in Sinlunkaba which is situated in a district which has been declared, under the Kachin Hill Tribes Regulation I of 1895 as amended by later Regulations, to be a hill tract to which the Regulation applies.

Section 8 of the Regulation constitutes the hill tracts in any district a sessions division of which the Deputy Commissioner of the district shall be the Sessions Judge.

Section 9 provides that : " For the purposes of the Code of Criminal Procedure, the Commissioner of the Division shall be the High Court."

Section I, clause (3), of the Regulation reads as follows :

" It shall extend to such hill tracts, being hill tracts within the area specified in the Second Schedule to the Government of Burma Act, 1935 (the Kachin Hill Tracts of Bhamo District being so specified), and shall apply to such hill tribes as the Governor may, from time to time, by notification in the Gazette direct."

In Criminal Appeal No. 176 of 1938, which dealt with a case in which two persons not members of a hill tribe had been convicted by the Headquarters Magistrate of Bhamo for an offence committed within the Tangte Hill Tracts in the Bhamo District, I held that the Regulation, so far as regards persons declared to be members of hill tribes residing in the notified hill tracts, specified what was the law which was applicable to them, but that it also established certain superior Courts having jurisdiction in the said hill tracts; and that these Courts had jurisdiction over persons who were not members of a hill tribe, provided that the offence took place within the hill tract in which the Court had jurisdiction. Consequently, an appeal from a Magistrate exercising jurisdiction in such a hill tract and passing a sentence exceeding four years' imprisonment would lie to the Commissioner of the Sagaing Division as the High Court under section 9 of the Regulation.

In consequence of this order, the Deputy Commissioner, as Judge of the Court of Session, has taken cognizance of the offence alleged to have been committed by the applicant without the accused being committed to him by a Magistrate.

The first question to be considered is whether an application for transfer of such a case as this should be made to this Court

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or to the Commissioner of the Sagaing Division as the High Court appointed under section 9 of the Kachin Hill Tribes Regulation.

On a fresh perusal of the Kachin Hill Tribes Regulation, I must confess that I am now in some doubt as to whether my previous ruling that the Courts established under this Regulation have jurisdiction over persons who are not members of a hill tribe was correct. The preamble to the Act reads as follows :

“Whereas it is expedient to declare the law applicable to the hill tribes in the Kachin Hill Tracts of Upper Burma it is hereby enacted as follows ;”

and then follows the Regulation itself.

Section I, clause (3), part of which I have already cited, further reads : “and section 11 shall also apply to all persons who may be parties to a suit or other proceeding of a civil nature in which any of the parties is a member of a hill tribe to which this Regulation applies, and sections 15, 20 A, 21 and 31 A shall apply to all persons within a hill tract.” From this phraseology it might be inferred that the sections of the Regulation do not apply to persons who are not members of a hill tribe unless they are specifically declared to apply. In that case sections 8 and 9, which constitute the Courts of Session and the High Court for the hill tracts, might be held to declare the Courts which have jurisdiction merely over members of a hill tribe to deal with offences committed under the laws to which members of hill tribes are subject under the Regulation. It is somewhat unusual to constitute territorial Courts whose jurisdiction is limited in such a manner as this, but I now think it is possible, in view of the wording of the preamble to the Regulation, that this was the intention and that the Regulation does not propose to interfere with the Courts which have jurisdiction over persons, other than members of a hill tribe, who may commit offences in hill tracts. I am of opinion that the matter should be further considered by a Bench of this Court, under the direction of my Lord the Chief Justice.

It has been argued that, as the Deputy Commissioner has taken cognizance of the case as a Court under the Kachin Hill Tribes Regulation, the application should in any case be made to the Commissioner of the Sagaing Division as the High Court. In actual fact the complaint was made to the Deputy Commissioner as District Magistrate, but he has chosen to consider that he should act as a Court of Session under the Regulation rather than

as District Magistrate under the ordinary procedure of the Code of Criminal Procedure applicable to persons who are not members of a hill tribe. In that case he might be regarded as a District Magistrate exercising jurisdiction in an illegal manner and as such might be regarded as subordinate to this Court.

Section 11 of Regulation No. I of 1925, the Burma (Frontier Districts) Criminal Justice Regulation, which makes certain modifications in the Code of Criminal Procedure as applicable in the District of Bhamo, provides that :

“ A Court of Session ” (which, in this case, is the Commissioner of the Sagaing Division), “ may exercise as regards all Criminal Courts subordinate to its authority all the powers with respect to the transfer of criminal cases and appeals conferred upon the High Court by section 526 : ”

and the third proviso to the said section reads :

“ Provided further, that the High Court may, on the application of the accused or of the Public Prosecutor, reverse or vary any order made by a Court of Session under section 526, or substitute any other order in lieu thereof.”

It might appear therefore that, if Regulation No. I of 1925 applies and not the Kachin Hill Tribes Regulation, the present application should have been made to the Court of Session, that is to say, the Commissioner of the Sagaing Division. The learned counsel for the applicant, however, correctly points out that he has asked for the case to be transferred to a Court outside the Bhamo District, and that this would involve the transfer of the case to a Court which is not subordinate to the Commissioner of the Sagaing Division as a Court of Session unless it were to be transferred to a Court in another frontier district—a course likely to cause great inconvenience to all concerned. For that reason it would seem that the application was properly made to this Court, assuming that the Kachin Hill Tribes Regulation does not apply.

Section 11 of Regulation No. I of 1925 does not, it seems to me, abrogate the provisions of section 526 of the Code of Criminal Procedure entirely but merely gives the Court of Session similar jurisdiction in these matters to that which the High Court has.

As regards the merits of the application, it must be admitted that ordinarily it is not desirable for the Deputy Commissioner of a district to try for a criminal offence a clerk of his own establishment, especially when, as appears in the present case, the

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Deputy Commissioner himself had something to do with the initiation of the prosecution. Actually I understand that the Deputy Commissioner who has taken cognizance of the matter has been succeeded by another officer, so that these arguments would lose some of their force. This question, however, may be dealt with by the Bench before which I now propose that the present application should be placed, in view of the necessity for the reconsideration of the order passed in Criminal Appeal No. 176 of 1938.

SPARGO, J.—The question that arises for decision in this case is whether the Kachin Hill Tribes Regulation (Regulation No. I of 1895) applies to persons who are residing in the Kachin Hill Tracts but who are not members of a hill tribe.

The applicant, one Maung Ba Ku, is accused of committing criminal misappropriation and breach of trust, the offence being said to have been committed in Sinlunkaba. He has made an application to transfer the case from the Court of the Sessions Judge of the Kachin Hill Tracts, Bhamo, to some other Court outside the District of Bhamo, or to some other Court of competent jurisdiction other than that of the Sessions Judge of the Kachin Hill Tracts.

The question has arisen whether an application for transfer of such a case as this should be made to this Court or to the Commissioner of the Division as the High Court appointed under section 9 of the Regulation.

In Criminal Appeal No. 176 of 1938, Mackney J. held that :

“ So far as the jurisdiction of the Courts is concerned sections 8 and 9 of the Regulation apply, and in deciding which Courts have jurisdiction it is immaterial whether the person concerned was a member of a hill tribe or not. What is relevant is the locality in which the offence took place.”

Doubts have arisen whether this decision was correct.

I am, with the greatest respect, of opinion that the Regulation applies only to persons who are members of a hill tribe and not to persons who, though they happen to be residing in the Kachin Hill Tracts, are not members of a hill tribe.

Reference to the preamble which reads :

“ Whereas it is expedient to declare the law applicable to the hill tribes in the Kachin Hill Tracts of Upper Burma ; * * * ” shows what the intention of the Regulation was. It was clearly to declare the law applicable to hill tribes. Section I (3) enacts that :

“ It (the Regulation) shall extend to such hill tracts and shall apply to such hill tribes as the Governor * * * * * may, from time to time, direct.”

It is clear, therefore, that the Regulation purports to declare the law applicable to members of hill tribes in the Kachin Hill Tracts. Certain sections of the Regulation are made applicable in special circumstances to other persons by section I (3), but the general scope of the Regulation is as I have stated above. Sections 8 and 9, therefore, only apply when the accused is a member of a hill tribe.

The question then arises : What law regulating Criminal Procedure is applicable to persons residing in the Kachin Hill Tracts who are not members of a hill tribe ? The answer to this clearly is that the Burma (Frontier Districts) Regulation I of 1925 applies. By section 3 of this Regulation it is enacted that the Criminal Procedure Code shall be in force in the territories to which the Regulation applies, with such modifications as are set forth in the Schedule. The relevant modification is numbered XI in the Schedule and reads as follows :

XI. A Court of Session may,—

- (1) if it is absolutely debarred by section 487 from trying any case committed to it, or by section 556 from hearing

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any appeal pending before it, direct that such case or appeal be transferred for trial or hearing to any other Criminal Court of equal jurisdiction.

- (2) exercise as regards all Criminal Courts subordinate to its authority all the powers with respect to the transfer of Criminal cases and appeals conferred upon the High Court by section 526 :

Provided that an application for the exercise of the power conferred by section 526, if founded upon a report of the Judge or Magistrate before whom the case or appeal is pending, need not be supported by affidavit or affirmation :

Provided further, that the Court shall, before directing the transfer of a case or of an appeal under section 526, issue a notice to the accused requiring him to show cause, on a certain day to be fixed in the notice, why the said case or appeal should not be transferred to some Court therein named or to such other Court of competent jurisdiction as might be determined :

Provided, further, that the High Court may, on the application of the accused or of the Public Prosecutor, reverse or vary any order made by a Court of Session under section 526, or substitute any other order in lieu thereof.

It was suggested that the third proviso to this modification had the effect of ousting the jurisdiction that the High Court would otherwise have had to transfer cases in the frontier districts. It was suggested that the power granted to the High Court by this proviso to reverse or vary any order made by a Court of Session under section 526, replaced the ordinary power possessed by the High Court to transfer cases under section 526 of the Code of Criminal Procedure.

I find it very difficult to believe that this is the effect intended by the proviso in question. If that effect were intended it would have been very easy to make that clear. And there is a reasonable interpretation of the proviso namely that it confers upon the High Court in those parts a power which is unusual in the Code, a power to reverse or vary an order made by a

Court of concurrent jurisdiction. Or it may be that the effect is to remove doubts on the question whether the High Court has power in the frontier districts to reverse or vary an order made by a Court of Session under section 526 of the Code. But that it takes away the power from the High Court to transfer cases under section 526 of the Code I do not believe.

I therefore believe that this Court has jurisdiction to deal with this application for transfer.

It was suggested that since the Deputy Commissioner Bhamo had taken cognizance of the case as Sessions Judge Kachin Hill Tracts the application for transfer should be dealt with on the footing that the Kachin Hill Tribes Regulation applied. In that case the application for transfer would have to be made to the Commissioner of the Division as the High Court appointed under section 9 of the Regulation. In my opinion this cannot be permitted because by the decision of this case it has now been decided that the Kachin Hill Tribes Regulation does not apply and once that has been decided this Court at once has jurisdiction to order a transfer.

As to the merits of the application, the officer who took cognizance of the offence has now been transferred and I see no reason to suppose that a fair and impartial trial cannot be had if the case is tried by his successor, or that it is expedient for the ends of justice that the case should be transferred as desired. I would therefore dismiss the application.

BA U, J.—I agree.

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