CRIMINAL REVISION.

Before Mr. Justice Ba U.

1940
June 20.

MAUNG THET *v.* MAUNG CHIT KYWE.*

Criminal proceedings, initiation of—Cognizance of offence by magistrate upon his own knowledge or non-official information—Right of accused to demand transfer of case—Proceedings already initiated—Detention of person attending Court—Magistrate's jurisdiction to try the case—No right to demand transfer—Criminal Procedure Code, ss. 190, 191, 351.

S. 190 of the Criminal Procedure Code appears in a Chapter dealing with conditions requisite for initiation of proceedings, whereas s. 351 appears in a Chapter dealing with matters arising out of proceedings already initiated. After a magistrate has taken cognizance of an offence in one of the three methods mentioned in s. 190, he gets the seizin of the whole case and his jurisdiction to bring everybody concerned in the commission of the offence to justice is in no way restricted. When a magistrate detains a person under s. 351 and tries him, s. 191 of the Code is not a bar to his jurisdiction.

Nga Chan Tha v. *King-Emperor*, 11 L.B.R. 398 ; *Nga Paing* v. *Queen-Empress*, (1897-01) 1 U.B.R. (Cr.) 56, referred to.

At the trial of a person sent up by the police on a charge of theft the magistrate, after the examination of some prosecution witnesses, detained the applicant who was present in Court and made him co-accused. *Held*, that the magistrate had jurisdiction to try the case. He exercised his powers under s. 351 of the Criminal Procedure Code and did not take cognizance of the offence under s. 190 (*c*) and therefore was not bound to transfer the case under s. 191 of the Code.

K. C. Sanyal for the applicant.

U Ni (Government Advocate) for the Crown.

BA U, J.—This is an application for transfer of Criminal Regular Trial No. 78 of 1939 from the Court of the Township Magistrate, Madaya, to some other Court in Mandalay for trial. It arises in this way.

On the report made by one Maung Chit Kywe of the loss of his boat the police arrested one Ma Ya and sent her up for trial on a charge of theft under

* Criminal Misc. Application No. 1 of 1940 arising out of Cr. Reg. Trial No. 78 of 1939 of the Court of the Township Magistrate, Madaya.

section 379 of the Penal Code. The applicant and one Maung Bo were two of the witnesses for the prosecution but they were not examined though they were present in Court. After the examination of some other prosecution witnesses, the applicant and Maung Bo were detained and made co-accused ; whereupon the applicant applied for adjournment of the case on the ground that he wanted to move the District Magistrate of Mandalay for transfer. The adjournment was granted and the applicant moved the District Magistrate for transfer but his application was dismissed. He, therefore, comes up to this Court on the following grounds :

(i) That the Magistrate has no jurisdiction to try the case against the applicant and Maung Bo as he took cognizance of the offence against them under section 190 (*c*) of the Code of Criminal Procedure ;

(ii) That the Magistrate and the informant Chit Kywe are friends and that Chit Kywe has been seen going to the Magistrate's chamber during the hearing of the case.

So far as the second ground is concerned, there is, in my opinion, not only no substance in it but it appears to be a false allegation. When the applicant applied to the District Magistrate for transfer, he did so not on this ground but on the ground of want of jurisdiction on the part of the Magistrate. The applicant can therefore succeed only if he can show that the Magistrate took cognizance of the offence against him and Maung Bo under section 190 (*c*) of the Code of Criminal Procedure. If the Magistrate took cognizance of the offence under section 190 (*c*), he would, of course, have no jurisdiction to try the case in view of what section 191, Code of Criminal Procedure, says. The Magistrate in his order by which he made the applicant and Maung Bo co-accused said

1940

MAUNG THET v. MAUNG CHIT KYWE.

BA U, J.

that he did it in exercise of the power conferred by section 351 of the Code of Criminal Procedure. The whole question that, therefore, arises is whether in circumstances such as these section 190 (*c*) or section 351 of the Code applies. This question was considered by a Full Bench of the late Chief Court of Lower Burma in *Nga Chan Tha* v. *King-Emperor* (1) and Sir Sydney Robinson answered it, after quoting section 190, as follows :

" It is to be noted that the section provides that cognizance may be taken of *any offence* and that no reference is made to the offender. Indeed, the identity of the offender is in no way involved, for a complaint may be presented with a view to action being taken against some person or persons unknown. When, therefore, proceedings are initiated on a complaint, or on a police report, the Magistrate can legally take cognizance of the offence and the requirements of section 190 of the Code are complete.

In the present case, the trial was commenced and action was taken against Chan Tha. The addition of a new accused does not, in my opinion, necessitate fresh proceedings in initiation. The evidence, it is true, must be recorded *de novo*, but that is merely in order that the witnesses, whose evidence has already been recorded, may be used against the new accused. The Magistrate having taken cognizance of the offence it is right and proper that he should bring to justice all those persons, whether originally mentioned or not, who the evidence shows were guilty of that offence. It has been held that in such cases, the Magistrate should be regarded as taking cognizance under the same clause of section 190 as he did against the original accused ; and i it were necessary to apply section 190 at all, I would hold that that is the correct view to take for the reasons that I have given above. But, in my opinion, section 351 applies to such cases, and is intended to apply to them. The offence being one and the same, and the Magistrate, having cognizance of that offence, acting under section 190 (*b*), has full seizin of the offence. He takes action on the evidence given for the prosecution to establish the offence, and there is apparently no need, therefore, to refer back to section 190 at all. However this may be, if there is such necessity, there is

(1) 11 L.B.R. 398, 405, 406.

ample authority to support the view that in this case the Magistrate was acting under section 190 (*b*). I am unable to agree that there is no indication in the language of section 351 to support the view that section 190 applies to the initiation of proceedings and that section 351 applies to proceedings that have already been initiated. The section distinctly refers to cases in which a trial has already been begun, and the section, as now drafted, refers to enquiries and also trials. With the exception of one case, there is no reported case that I can find that takes a different view."

The same view was held by Herbert Thirkell White J.C. (as he then was) in *Nga Paing* v. *Queen-Empress* (1). I respectfully agree with these views.

Looking at the positions which sections 190 and 351 respectively occupy in the Code, the intention of the Legislature becomes quite apparent. Section 190 appears in a Chapter dealing with conditions requisite for initiation of proceedings, whereas section 351 appears in a Chapter dealing with matters arising out of proceedings already initiated. After a Magistrate has taken cognizance of an offence in one of the three methods mentioned in section 190, he gets the seizin of the whole case and his jurisdiction to bring everybody concerned in the commission of the offence to justice is in no way restricted. Section 351, therefore, provides that—

" (1) Any person attending a Criminal Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of inquiry into or trial of any offence of which such Court can take cognizance and which, from the evidence, may appear to have been committed, and may be proceeded against as though he had been arrested or summoned.

(2) When the detention takes place in the course of an inquiry under Chapter XVIII or after a trial has been begun, the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard."

(1) (1897-1901) 1 U.B.R. (Cr.) 56.

1940

MAUNG THET v. MAUNG CHIT KYWE.

BA U, J.

When a Magistrate detains a person under section 351 and tries him, section 191 is not a bar to his jurisdiction. That is exactly what the Magistrate did in this case, and the application must for these reasons be dismissed. It is accordingly dismissed.