

CRIMINAL REVISION.

Before Mr. Justice Dunkley.

1940

Jan. 2.

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

Security for keeping the peace—Proceedings under Ch. VIII, Criminal Procedure Code, not prosecutions—Procedure to end proceedings—Withdrawal of the Crown from enquiry not permissible—Instructions from District Magistrate to Public Prosecutor to withdraw prosecution—Improper use of instructions—Magistrate to act judicially and independently—Criminal Procedure Code, ss. 107, 119, 494.

Section 494 of the Criminal Procedure Code has no application to proceedings under Chapter VIII of the Code because such proceedings are not prosecutions.

If, after making his preliminary order under s. 107 of the Criminal Procedure Code, the magistrate is convinced by evidence or in any other legal manner, that the person called upon is no longer likely to do anything which might lead to a breach of the peace, it is open to him to make an order under s. 119 discharging that person. This is the only way in which proceedings under s. 107 can be brought to an end; the Public Prosecutor has no authority to apply for the withdrawal of such proceedings.

Maung Than v. King-Emperor, I.L.R. 2 Ran. 30; *In re Muthia Moopan* I.L.R. 36 Mad. 315, referred to.

A magistrate in consenting to a withdrawal of a prosecution must act judicially and come to his own conclusion whether the withdrawal ought to be permitted. It is improper for the Public Prosecutor to show to the magistrate his instructions from the District Magistrate to apply for the withdrawal of the case.

Abdul Gani v. Abdul Kader, I.L.R. 1 Ran. 756, referred to.

Myint Thein for the Crown. Proceedings under Chapter VIII of the Criminal Procedure Code are instituted when there is an apprehension of a breach of the peace. In the sections throughout the chapter the person called upon is not referred to as an "accused". Sec. 494 enables a Public Prosecutor to withdraw a prosecution but security proceedings are not in the nature of a prosecution. See *In re Muthia Moopan and others* (1). The respondent is not a person accused

* Criminal Revision Nos. 965A to 968A of 1939 from the orders of the Subdivisional Magistrate of Pegu in Criminal Misc. Trials Nos. 25 to 28 of 1939.

(1) I.L.R. 36 Mad. 315.

of an offence. *Maung Than v. King-Emperor* (1). Sec. 494 therefore cannot apply to proceedings under Chap. VIII.

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Such proceedings can terminate in only two ways. If the magistrate finds against the respondent, he will be ordered to execute a bond under sec. 118. Otherwise, the proceedings terminate as provided for by sec. 119. The Magistrate must be satisfied that the apprehension of a breach of the peace, if it existed at all, had ceased to exist. He should then come to a finding that no case is made out for the respondent to execute a bond.

Shafce for the respondents. The proceedings need not be revived in view of the time that has elapsed since the proceedings were dropped.

DUNKLEY, J.—These four cases have been called in revision to examine the propriety of the orders of the Subdivisional Magistrate of Pegu permitting withdrawal by the Public Prosecutor of the cases. The order in each case is in exactly the same terms and is as follows :

“Called. Respondent present on bail defended by U Ba Tun. U Ba Thein, Public Prosecutor, appears and asks the permission of the Court for withdrawal of the case under orders of D.M., Pegu. I have seen D.M.’s order. Withdrawal allowed. Respondent is accordingly discharged.”

The cases were cases in which the Subdivisional Magistrate, acting under the provisions of section 107 of the Criminal Procedure Code, had called upon the respondents to show cause why they should not execute a bond with sureties for keeping the peace. The Magistrate did not state in his order under what section of the Criminal Procedure Code he permitted the

(1) I.L.R. 2 Ran. 30.

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withdrawal of the cases, but presumably he purported to act under section 494. Assuming for the moment that section 494 applied to these cases (which it did not) the orders of the Magistrate were improper orders.

In *Abdul Gani v. Abdul Kader* (1), it was laid down that in withholding or according consent to the withdrawal from a prosecution the Court is acting in a judicial (and not a ministerial) capacity and it ought to give and record its reasons.

I have not seen the orders of the District Magistrate of Pegu which were referred to by the Magistrate, but presumably these orders were instructions to the Public Prosecutor to apply to the Court under section 494 for the withdrawal of the cases, and, if so, they were perfectly proper instructions for the District Magistrate to give to the Public Prosecutor. But the Public Prosecutor acted with grave impropriety in showing his instructions to the trial Magistrate and the Magistrate acted with equal impropriety in looking at them. The fact that the District Magistrate has instructed the Public Prosecutor to apply for withdrawal is no reason for a Magistrate giving his consent to such withdrawal. The Magistrate must not surrender his authority to the District Magistrate, but must act judicially and come to his own independent conclusion as to whether withdrawal ought to be permitted or not upon a consideration of all the relevant circumstances.

Furthermore, section 494 of the Criminal Procedure Code has no application to proceedings under Chapter VIII of that Code because such proceedings are not prosecutions: see *In re Muthia Moopan and six others* (2) and *Maung Than v. King-Emperor* (3). The Public Prosecutor had no authority to apply for the withdrawal of proceedings taken under section 107 of the

(1) (1923) I.L.R. 1 Ran. 756.

(2) (1911) I.L.R. 36 Mad. 315.

(3) (1923) I.L.R. 2 Ran. 30.

Criminal Procedure Code. However, the jurisdiction of the Magistrate under this section is a discretionary jurisdiction, and, under section 119, if it is not proved that it is necessary for keeping the peace that the person in respect of whom the enquiry is made should execute a bond, the Magistrate shall make an entry on the record to that effect and shall discharge the respondent.

Consequently if, after having made his preliminary order under section 107, the Magistrate is convinced by evidence, or other materials of which he is permitted to take judicial notice, that the respondent is no longer likely to do anything which might lead to a breach of the peace, it is open to him to make an order under section 119 discharging the respondent. This is the only way in which proceedings under section 107 can be brought to an end. They cannot be brought to an end by the Crown withdrawing from the enquiry.

The orders of the Magistrate in these cases were made on the 29th May, 1939, and in view of the lapse of time since the orders were made it would not be proper now to reopen the enquiries against the respondents. The records will therefore be returned to the Magistrate with a copy of these remarks.

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