

## CRIMINAL REVISION.

*Before Mr. Justice Mosely.*MAUNG E MAUNG *v.* THE KING.\*

1939

Sep. 27.

*Sentence passed by trial Court—Appellate Court's power to alter sentence—No power to come to findings beyond competency of trial Court—No power to pass sentence beyond jurisdiction of trial Court—Revisonal powers—Criminal Procedure Code, ss. 32, 106 (3), 423 (b) (3), 439 (3).*

Section 423 (b) (3) of the Code of Criminal Procedure allows the appellate Court, with or without altering the finding, to alter the nature of the sentence, but subject to the provisions of s. 106 (3) not so as to enhance the same. But the appellate Court has no power either to come to a finding which was not within the competency of the trial Court, or to pass a sentence which was beyond the jurisdiction given to the trial Court by s. 32 of the Code.†

The same principle applies as is laid down regarding sentence in cases of revision [s. 439 (3) of the Code].

*Sita Ram v. Emperor*, 12 Cr. L.J. 444, followed.

*In re Ramasawmy*, 2 Weir, 487; *Jatu Sing v. Mahadir Sing*, I.L.R. 27 Cal. 660; *King-Emperor v. Po Yin*, 3 L.B.R. 232; *Mutiah v. Emperor*, I.L.R. 29 Mad. 190; *Queen-Empress v. Pershad*, I.L.R. 7 All. 414, referred to.

*E Maung* for the applicant.

*Paget* for the Complainant Company.

MOSELY, J.—The applicant in revision, Maung E Maung, a paddy broker, was convicted by a First Class magistrate on two charges under section 420 of the Penal Code in respect of two sums of Rs. 6,000 and Rs. 1,500, and was sentenced to two years' rigorous imprisonment on the first charge and to one year's rigorous imprisonment on the second charge, the sentences to run concurrently.

On appeal the learned Sessions Judge held that the obtaining of the two sums was part of the same transaction, and that a single charge might have been framed. The sentence was altered to a single one

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\* Criminal Revision No. 330B of 1939 from the order of the Sessions Judge of Bassein in Criminal Appeal No. 116 of 1939.

1939  
 MAUNG E  
 MAUNG  
 v.  
 THE KING.  
 MOSELY, J.

of six months' rigorous imprisonment and a fine of Rs. 3,000 or in default three months' rigorous imprisonment.

It was remarked that the sentence passed did not amount to an enhancement as the aggregate sentence of imprisonment, (including that in default of payment of fine), imposed by the appellate Court was less than the period of the original sentence. *Bhakthavastalu Naidu v. The King-Emperor* (1) was cited in this connection. (Other authorities may be seen quoted in Note 73, page 907, Sohoni's Criminal Procedure Code, 13th edition.)

This application in revision was admitted because the sentence as altered by the appellate Court was one which the trying magistrate, who was a magistrate of the first class only without special powers, was incompetent to pass.

Section 423 (b) (3) of the Criminal Procedure Code allows the appellate Court, with or without altering the finding, to alter the nature of the sentence, but subject to the provisions of section 106 (3) not so as to enhance the same. But the appellate Court has no power either to come to a finding which was not within the competency of the trial Court, or to pass a sentence which was beyond the jurisdiction given to the trial Court by section 32 of the Criminal Procedure Code.

I have heard the learned advocate for the applicant on the merits of the case also. As to this I think there is nothing to be said. The learned Sessions Judge discussed the facts at great length and with much precision, and I cannot but agree with his conclusions.

[His Lordship set out the facts and found that the case against the accused was proved.]

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(1) (1906) I.L.R. 30 Mad. 103.

As regards the sentence passed by the appellate Court its powers are limited by the restriction which I have mentioned above. Section 423 of the Criminal Procedure Code does not, like section 2 of the Supreme Court of Judicature (Procedure) Act, 1894, (57 & 58 Victoria, Chapter 16), or like Order 41, rule 33 of the Code of Civil Procedure, invest an appellate Court with authority "to make any order which ought to have been given or made" by the Court below. On the other hand it is evident that the appellate Court cannot make any order which could not have been made by the trial Court. The same principle as regards sentence has been expressly laid down in cases of revision, *vide* section 439 (3) of the Criminal Procedure Code.

As was said in *Mutiah v. Emperor* (1) the power given to an appellate Court under section 423 of the Criminal Procedure Code is not an unlimited power, but is to be taken as giving the appellate Court power to do only that which the lower Court could and should have done.

The Court of Appeal is not competent to alter the finding of a magistrate so as to convict an accused person of an offence which the Court whose order is under appeal was not competent to try,—*Queen-Empress v. Pershad* (2). *King-Emperor v. Po Yin* (3) and *Jatu Sing v. Mahadir Sing* (4) are analogous cases, though there it was held that the appellate Court was incompetent to convict the appellant on a charge of which he had not been charged in the trial Court, because the trying magistrate would have been equally incompetent to do so.

As regards sentence, it was remarked as too elementary for discussion in *In re Ramasawmy and one* (5)

1939  
 MAUNG E  
 MAUNG  
 v.  
 THE KING,  
 MOSELY, J.

(1) (1905) I.L.R. 29 Mad. 190.

(3) 3 L.B.R. 232.

(2) (1885) I.L.R. 7 All. 414, 420.

(4) (1900) I.L.R. 27 Cal. 660.

(5) 2 Weir, 487.

1939  
 MAUNG E  
 MAUNG  
 v.  
 THE KING.  
 MOSELY, J.

that the appellate Court cannot pass on appeal a sentence which the original magistrate was not competent by law to pass.

The same question is exhaustively dealt with in *Sita Ram v. Emperor* (1). It was said there :

“ There is no restricting proviso to be found in section 423 such as we read in section 439, sub-section (3). Nevertheless, it is a rule underlying the whole fabric of appellate jurisdiction that the power of an appellate Court is measured by the power of the Court from whose judgment or order the appeal before it has been made. It is a fundamental principle that every Court of appeal exists for the purpose, where necessary, of doing, or causing to be done, that which each Court subordinate to its appellate jurisdiction should have done. The jurisdiction in appeal is therefore necessarily limited in each to the same extent as the jurisdiction from which that particular case comes.”

With these remarks I would respectfully concur.

The sentence passed in appeal will be altered to one under section 420 of the Penal Code of six months' rigorous imprisonment and a fine of Rs. 1,000, or three months' rigorous imprisonment in default. The fine, if paid, to be given to the complainant as compensation.