CRIMINAL REVISION.

Before Sir Mya Bu, Kt., Offg. Chief Justice, and Mr. Justice Mosely.

1939
Aug. 25.

THE KING *v.* U KHEMEIN AND ANOTHER.*

Trial, place of—Magistrate's discretion to fix place of trial—Place of trial an open Court—Access of the public—Criminal Procedure Code, s. 352—Burma Courts Manual, paragraph 20—Trial inside a jail—Procedure—Formal order.

Section 352 of the Criminal Procedure Code gives the magistrate who tries a case a discretion to prescribe the place in which a trial shall be held. Such a place shall be deemed to be an open Court to which the public may have access subject to the order of the trial magistrate in a particular case that the public or a particular person shall not have access thereto.

Administrative instructions have been given by the High Court as to the place of trial and are contained in paragraph 20 of the Burma Courts Manual. A magistrate may ask the proper authority for permission to hold a trial inside a jail, and on obtaining such permission he should pass a formal order directing that the trial is to be held in the jail premises. The formal order enables the accused to apply to the higher authority for redress in case he has a grievance against the order.

Need for amending the administrative directions to suit modern conditions pointed out.

Myint Thein (Government Advocate) for the Crown.

Where a breach of the public peace is threatened it is usual for trials to take place in jail. The legality of such a step has never been questioned. Trials have taken place in hospitals in cases where the accused was too ill to come to Court. The only requirement in s. 352 of the Criminal Procedure Code is that the place of trial must be accessible to the public. Paragraph 20 (3) of the Burma Courts Manual requires amendment in the light of s. 352, because it unduly fetters the discretion of the presiding magistrate.

The Secretary to the Government of Burma, Judicial Department is in charge of prisons and where the trial is to be held in a jail, permission is obtained from him, quite apart from the discretion of the magistrate to hold the trial at the jail. As a matter of

* Criminal Revision Nos. 714A and 715A of 1939 from the order of the District Magistrate of Lower Chindwin at Mônywa in Cr. Misc. Trial No. 6 of 1939.

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practice the necessary permission is granted only after consultation with the High Court, and there was nothing improper on the part of the District Magistrate to have written to the Judicial Secretary. The District Magistrate, as the executive head of the District, should not be precluded from moving the trying magistrate, through the Public Prosecutor, to have the case tried elsewhere. The magistrate would pass formal orders on such applications and they can be made the subject of revision applications by aggrieved persons.

MYA BU, OFFG. C.J. and MOSELY, J.—These proceedings,—one under section 108, Criminal Procedure Code, and the other under section 107, Criminal Procedure Code,—where the trial was held in the Mônywa Jail, have been called for in revision in order to consider the procedure adopted, and in order to lay down the procedure which should be carried out in such cases.

In the present case it would appear that the trying Magistrate, the First Additional Magistrate, Mônywa, made oral representations to the District Magistrate, (for there is nothing in writing on the subject on the record), and the District Magistrate communicated with the Judicial Secretary to Government, under whose control the Jail Department is, and requested that the trial of the two accused in these cases be held inside the Mônywa Jail. The offences were political ones, and it was anticipated that the trial could not safely or peacefully be held in the Magistrate's Court.

Directions as to the venue of criminal trials are laid down in section 352 of the Criminal Procedure Code, the marginal note to which is "Courts to be open." The section reads as follows :

"The place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed an

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open Court, to which the public generally may have access, so far as the same can conveniently contain them ;

Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court."

There is no doubt that this section gives the Magistrate who tries the case a discretion to prescribe the place in which a trial shall be held, and the only limitation to that discretion in this direction is that the place in which the trial is held " shall be deemed to be an open Court to which the public may have access, so far as the same can conveniently contain them."

Administrative instructions have been given by this Court as to the place of trial. In paragraph 20 of the Burma Courts Manual it is laid down that ordinarily criminal trials should be held at the headquarters of the trying Magistrate, though on occasions they may be held at or close to the scene of crime, if that is convenient to the witnesses and the Magistrate happens to be on tour in the vicinity. Sub-paragraph (2) provides that sessions cases should only be tried at the Sessions Judge's headquarters. Sub-paragraph (3) is as follows :

" At headquarters cases are to be enquired into and tried at the Court-house only, subject to any provision of the law for a local enquiry."

The procedure of the learned District Magistrate in the present case appears to have been correct. He did not apply to the Government that the Magistrate should hold the trial at a place other than his Court-house. As has been said, that is a matter purely within the discretion of the Magistrate himself. All that was done here was that the District Magistrate, who is the proper authority, applied to the Government for

permission to hold the trial inside the jail, and that, of course, can only be done with the permission of the authorities who control the Jail Department.

There is, however, one irregularity which should be noted. The Magistrate did not pass a formal order directing that the trial should be held in the jail premises. Such a formal order must invariably be passed, as otherwise, if accused persons consider that they have a grievance in any matter it would be difficult for them, in the absence of any formal order, to have recourse to higher authority for redress. It is as well to point out here that it is ordinarily for the trying Magistrate to take the initiative in these matters if he considers that the trial should not be held in his Court-house. If, however, the District Magistrate, who is responsible for law and order in his district, wishes to take the initiative in such matters himself, his proper course is not to move the Government himself straightaway in the matter, but to instruct the Public Prosecutor to make an application to the Magistrate asking that the trial shall be held elsewhere. It is then for the Magistrate to pass formal orders as to whether he considers it desirable to hold a trial in the Court or outside of it. If the Magistrate then wishes to try the case in a place other than his Court, he will do so after obtaining the permission of the proper authorities who are in control of the premises in which the Magistrate desires to hold the trial.

It would appear that the administrative directions of this Court contained in paragraph 20, sub-paragraph (3), are unnecessarily rigorous and ill-adapted to present conditions, and fetter the discretion of Magistrates. The question of amendment of these directions will be considered in due course. It is owing to the existence of these directions that the Judicial Secretary at present consults this Court when an application is made to him,

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and enquires whether this Court has any objection to a trial being held at headquarters outside the Court-house. This procedure will, no doubt, be rendered unnecessary when the requisite amendments have been made to the Burma Courts Manual.