IN THE PRIVY COUNCIL No. 89 of 1946

ON APPEAL

FROM THE HIGH COURT OF JUDICATURE AT RANGOON

B E T W E E N

CHITTAMBARAM ... Appellant

- and -

THE KING-EMPEROR ... Respondent

CASE for the APPELLANT

RECORD.

1. This is an appeal from the Judgment of Mr. Justice Dunkley, Acting Chief Justice of the High Court of Rangoon, dated the 26th March 1946, in which he reviewed and confirmed a Judgment given on the 25th February, 1946 by U. Kyaw U, a Special Judge appointed under the Special Judges Act, 1943 (Burma Act No.X of 1943) for Rangoon Town District. The said Special Judge had convicted the Appellant under section 302 of the Indian Penal Code and sentenced him to death. This sentence was confirmed by the High Court. P.13 P.2

2. The Appellant petitioned His Majesty in Council for special leave to appeal both on the merits and on the question of the jurisdiction of the Special Judge, his submission on the latter point was that the Special Judge had no jurisdiction to try him and that the whole of the proceedings in his trial were illegal and void. Special leave to appeal was granted by Order in Council dated the 28th October, 1946, solely on the question of the jurisdiction of the Special Judge. P.16

3. Until the year 1935 Burma was a province of British India, and was administered by the Government of India. Supreme Judicial Authority in Burma was exercised by the High Court of Judicature at Rangoon, a Court of Record to which Letters Patent were issued by Warrant under the King's Sign Manual on the 11th November 1922. The High Court amalgamated the Chief Court of Lower Burma (established in 1900) and the Judicial Commissioner's Court of Upper Burma. The Chief Court was itself an amalgamation of three separate

In the Privy Council
PULUKURI KOTTAYA AND OTHERS
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RECORD OF PROCEEDINGS

and any such Proclamation may contain *such incidental and consequential provisions* as may appear to him to be necessary or desirable to give effect to the objects of the Proclamation, *including provisions for suspending in whole or in part the operation of any provisions of this Act relating to any body or authority in Burma:*

Provided that nothing in this subsection shall authorise the Governor to assume to himself any of the powers vested in or exercisable by the High Court, or to suspend, either in whole or in part, the operation of any provisions of this Act relating to the High Court.

4. On the 10th December, 1942, the Governor of Burma being satisfied that a situation had arisen in which the government of Burma could not be carried out in accordance with the provisions of the 1935 Act issued a Proclamation under subsection (1) of section 139 assuming to himself all powers vested by or under the 1935 Act in the Legislature of Burma and all powers vested in either Chamber of Legislature. As provided by subsection (3) of section 139 the said Proclamation has been extended by annual resolutions of both Houses of Parliament.

5. In 1943 the Governor of Burma in the exercise of the powers of the Legislature which he had assumed to himself by the said Proclamation enacted the Special Judges Act. Subsection (2) of section 1 of this Act provided that it should come into force on such date as the Governor might by notification direct. Subsection (3) of section 1 provided that the Act should extend only to such local areas and should be in force only in such areas for such periods as the Governor might from time to time by notification provide. Subsection (1) of section 3 provided that in any area to which the Act extended the Governor might appoint a Special Judge for the trial of accused persons under the Act. Subsection (1) of section 4 provided that a Special Judge might try all offences punishable under law for the time being in force and might pass any sentence which was authorised by law. Subsection (1) of section 6 provided that there should be no appeal from, and no application for revision of, any sentence or order made by a Special Judge. Subsection (2) of section 6 provided that sentences of death passed by a Special Judge need not be confirmed by the High Court, but that if a Special Judge sentenced a convicted person to death the proceedings should be submitted for review by a Judge of the High Court nominated in this behalf by the Governor and that the decision of that judge should be final.

6. By notification dated the 1st day of May, 1943, the Governor of Burma directed that the Special Judges Act should come into force. By notification dated the 9th day of October, 1945, the Governor directed that the Special Judges Act should extend to the whole of Burma and should be in force therein for a period of one year commencing on the 16th day of October, 1945. On the 27th day of October, 1945, the Governor appointed U Kyaw U Special Judge in Rangoon.

7. The Appellant contends that by appointing a Special Judge to try criminal cases in Rangoon the Governor usurped the original Criminal Jurisdiction of the High Court since the High Court at Rangoon had the

exclusive right and duty of trying persons accused of serious crimes committed in Rangoon. The Appellant refers to section 84 of the 1935 Act which provides that "the jurisdiction of the High Court shall be the same as immediately before the commencement of the 1935 Act. The Respondent admits that immediately before the commencement of the 1935 Act the High Court at Rangoon had jurisdiction to try persons for crimes committed in Rangoon, but does not admit that such jurisdiction amounted to an exclusive right or duty. The Respondent will contend that by appointing a Special Judge in Rangoon under the provisions of the Special Judges Act the Governor did not assume to himself any of the powers vested in or exercisable by the High Court, contrary to the proviso to subsection (1) of section 139 of the 1935 Act.

8. If it is contended that the Governor by enacting the Special Judges Act or by making an appointment under that Act, suspended, contrary to the proviso of subsection (1) of section 139 of the 1935 Act, the operation of a provision of the 1935 Act relating to the High Court, namely the provision in section 84 that the jurisdiction of the High Court should be the same as at the commencement of the Act, the Respondent will contend first that the operation of the said provision in section 84 was not suspended by the Special Judges Act. Owing to the occupation of Burma by the Japanese Armed Forces the operation of this provision was already suspended. Secondly, the Respondent will contend that the Special Judges Act did not alter the original criminal Jurisdiction of the High Court in Rangoon. Under the Special Judges Act temporary Courts were set up but there was nothing in the said Act which prevented the High Court, when re-established at Rangoon, assuming its original criminal jurisdiction in Rangoon. Thirdly the Respondent will contend that if the jurisdiction of the High Court was altered by the Special Judges Act, the Governor having assumed to himself by Proclamation the powers of the Legislature to make laws, had power by such laws to alter the said jurisdiction. The provisions of section 84 of the 1935 Act are expressly stated to be "subject to the provisions of any Acts of the Legislature." The Respondent will contend that the Special Judges Act was an Act of the Legislature. Subsection (4) of section 139 of the 1935 Act provides that any reference in the Act to Acts of the Legislature shall be construed as including a reference to a law made by the Governor in the exercise of the powers of the Legislature which he had assumed to himself by Proclamation. The Respondent will contend that the power of the Governor to pass such Acts of the Legislature is not affected by the proviso to subsection (1) of section 139 of the 1935 Act, as this proviso only refers to subsection (1) and only restricts the power of the Governor to issue proclamations under that subsection.

The Respondent will therefore pray that the appeal be dismissed for the following (among other)

REASONS

(1) Because the Special Judge had jurisdiction to try the Appellant.

(2) Because the Governor of Burma had power to appoint a Special Judge to try persons for crimes committed in the town of Rangoon under the Special Judges Act.

(3) Because the Governor had the power to enact the Special Judges Act.

(4) Because by making such appointment under that Act the Governor did not assume to himself the powers vested in the High Court.

(5) Because the Special Judges Act did not suspend the operation of any provision of the 1935 Act relating to the High Court.

(6) Because the Special Judges Act did not alter the jurisdiction of the High Court.

(7) Because if the Special Judges Act did alter the jurisdiction of the High Court it was an Act of the Legislature and under the provisions of section 84 of the 1935 Act the jurisdiction of the High Court could be altered by an Act of the Legislature.

DAVID MAXWELL FYFE.

D. A. GRANT.

In the Privy Council.

P.C. 89 of 1946.

ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT RANGOON.

BETWEEN

CHITTAMBARAM - - - - *Appellant*

AND

THE KING EMPEROR - - - *Respondent.*

CASE FOR THE RESPONDENT.

THE SOLICITOR,

India Office, S.W.1.

The Solicitors' Law Stationery Society, Ltd., Law & Parliamentary Printers, Abbey House, S.W.1. WHI 3131-4711

In the Privy Council.

P.C. No. of 1946.

ON APPEAL FROM THE HIGH
OF JUDICATURE AT RANGOON

Between

CHITTAMBARAM . . .

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THE KING EMPEROR .

CASE FOR THE RESPONDENT

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India Office.

The Solicitor Law Stationery Society, Ltd.
Kean House, 27

In the Privy Council.

Appeal No. 89 of 1946.

ON APPEAL
FROM THE HIGH COURT OF JUDICATURE AT RANGOON.

BETWEEN

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RECORD OF PROCEEDINGS.

PART I.

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In the Privy Council.

Appeal No. 69 of 1946.

ON APPEAL
FROM THE HIGH COURT OF JUDICATURE AT RANGOON.

BETWEEN

CHITTAMBARAM - - - - - - - - - - *Appellant*

AND

THE KING-EMPEROR - - - - - - - - - *Respondent.*

RECORD OF PROCEEDINGS.

PART I.

10 **PROCEEDINGS.**

Record. Part I.

In the Court of the Special Judge, Rangoon.

No. 1. Charge, dated 13th February 1946.

No. 1.

CHARGE.

(Sections 221, 222, 223 of the Code of Criminal Procedure, 1898)

I, U Kyaw U, Bar-at-Law, sitting as Special Judge in the Rangoon Town District hereby charge you Chittambaram son of Mr. Puneya as follows :—

That you, on or about the 18th December day of 1945 at Rangoon did commit murder by causing the death of Mr. Vellayan Chettiar an
20 offence punishable under and thereby committed an offence punishable under section 302 of the Penal Code and within my cognizance.

And I hereby direct that you be tried by the said Court on the said charge.

(Seal)

Sd. KYAW U,
Special Judge.

Charge read and explained to the accused.
Accused pleaded "NOT GUILTY."

Sd. KYAW U,
Special Judge.

30 Dated 13.2.46.

He stated that he wished to recall witnesses for the prosecution and undertakes to file a list in the afternoon.

Sd. KYAW U,
Special Judge.

Dated 13.2.46.

On being called on for his defence he stated

He cited the following as witnesses :—

Undertakes to file a list in the afternoon.

Sd. KYAW U,
Special Judge.

Dated 13.2.46.

No. 2.

JUDGMENT.

In the Court of the Special Judge, Rangoon.

No. 2. Judgment, dated 25th February 1946.

IN THE COURT OF U KYAW U, BAR-AT-LAW, SITTING AS SPECIAL JUDGE RANGOON TOWN DISTRICT.

Criminal Regular Trial No. 1 of 1946.

MAUNG BA TUN *Vs.* CHITTAMBARAM.

Charged under Section 302 of the Penal Code.

Dated Rangoon, the 25th February '46.

JUDGMENT.

The accused Chittambaram, a boy of about 18 years of age, was sent up for the murder of a wealthy financier named Vellayan Chettiar, an offence punishable under Section 302 of the Penal Code.

The facts of the case are that on the night of the 18th December 1945, Mr. Vellayan Chettiar went out with his agent Peria Keruppan Chettiar and visited a house in Halpin Road as deposed to by Thirumalai (p.w.22), a motor driver. After staying in the house for a while it appears they went to the house of Dr. Srivastava (p.w.18), Health Officer, Rangoon Corporation, where they got to at about 9 or 9.15 p.m. on that evening. After staying there for about half an hour or thereabouts, they left for their flat in Sule Pagoda Road, known as No. 124, Sule Pagoda Road which is commonly called Mamsa Building.

It is apparent from the evidence of Karuppan Chettiar that on arrival at the building, he and his principal climbed the stairs as they lived on the second floor and before they got to the 1st floor, they saw a Tamilian coming down along the same stairs. They apparently passed him between the platform and the landing on the 1st floor. In going up the stairs, the deceased had a torch which he flashed every now and then to see their way. After they had passed the Tamilian and when the Tamilian got to the platform and Mr. Vellayan Chettiar had got to the landing of the 1st floor with Peria Keruppan Chettiar in the middle, the Tamilian flashed his torch at Mr. Vellayan Chettiar and the witness. Mr. Vellayan Chettiar then turned and flashed his torch at the Tamilian and by that light Peria Keruppan Chettiar saw that the Tamilian was a small thin dark man wearing white clothes and a stranger to him. Now as he flashed his toreh, Mr. Vellayan Chettiar asked the Tamilian who he was. In reply the Tamilian flashed his toreh and fired at Mr. Vellayan Chettiar two times, one after another. After that everything became dark and Mr. Peria Keruppan Chettiar could not say whether the first or the second shot hit his principal. However, he climbed to the 1st floor landing where he found the deceased lying there because he touched him with his foot. Peria Keruppan Chettiar then tried to lift the deceased and his hands became covered with blood. He then felt Mr. Vellayan Chettiar's face and found the injury on the head and he called him but received no reply. Peria Keruppan Chettiar ran to his flat and called his servant and Doria Swamy Pillai (p.w.20) and brought a light and found the deceased covered with blood lying unconscious. They lifted him and removed him to his flat. He then sent Doria Swamy Pillai and the cook to go and call a doctor.

No. 2.
JUDGMENT.

F U KYAW U, BAR-AT-LAW, SITTI
UDGE RANGOON TOWN DISTRICT.
inal Regular Trial No. 1 of 1946.
N
Vs.
302 of the Penal Code. CHITTAMBARA
Dated Rangoon, the 25th February

JUDGMENT.

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In the meantime, Dalal (p.w.6) arrived. He is the gentleman who came out from India in the same boat as Mr. Vellayan Chettiar and on arrival here it seems that they were staying in the same flat. Peria Keruppan Chettiar then told Dalal what had happened and Dalal went off to Mogul Street to fetch a doctor and brought Dr. Parikh who advised them to remove Mr. Vellayan Chettiar to the hospital. Dr. Dalal got an ambulance from the Fire Station and removed the deceased to the hospital and at about a little after midnight, the deceased succumbed to his injuries.

In the Court of the Special Judge, Rangoon.

No. 2. Judgment, dated 25th February 1946, *continued.*

Now on that night H.C. Ba Tun (p.w.1), a Police Officer, who appears to be ready with a statement when questioned even if he did not remember an incident or event. Now he deposed that at about 10.10 p.m., he left the Botataung Pogoda Festival in a trishaw with a view to return to his flat in 32nd Street. He deposed that he came along the Strand Road and turned into Sule Pagoda Road and when he got about a bamboo's length from Mamsa Building, he heard two reports of a gun. He then went into a shade of a tree and stopped his trishaw and waited. About five minutes later he saw a man coming down from Mamsa Building hurriedly.

Ram Lal (p.w.14) night durwan of Messrs. Ahuja Co. whose business premises is also in Mamsa Building corroborated H.C. Ba Tun. He too heard the reports of a gun and saw a man coming out from the middle entrance of Mamsa Building. It appears from the evidence of Ram Lal that there are three entrances to this building and in order to go to Mr. Vellayan Chettiar's flat one has to go through the middle entrance.

H.C. Ba Tun looked and noticed that the man was an Indian. He stated that he distinctly saw the man as there was bright moon-light which is deposed to by almost all the Prosecution witnesses. The man then ran towards Sule Pagoda, that is, towards the south and when he got to the water tub used by the public to bathe on the pavement in front of Mamsa Building, that man slipped and fell on the left side. H.C. Ba Tun noticed that the Indian had a torch in his left hand.

Ram Lal although he tried to be hostile to the Prosecution, admitted that the man came in the direction that he was standing, that is, between Mamsa Building and Sule Pagoda and fell near a water tub. Ram Lal then asked the man what had happened but the man gave no reply. He got up and ran, according to Ram Lal, in the direction of Sule Pagoda Road and he saw, most probably, Ba Tun who asked what had happened and chased the man. According to Ram Lal that man ran along Sule Pagoda Road in the direction of Dalhousie Street. Now it is in the direction Ram Lal had lied for he had stated before the Police something else. When he was confronted with the statement made to the Police that the man got up and ran towards Fraser Street along Sule Pagoda Road he denied making that statement. He also stated to the
that later he heard a report of a firearm from Fraser Street side. As he is a hostile witness, I could not use his statement to the Police but it could be used to contradict him. Further I am not prevented from accepting his evidence of the incident that the man slipped and fell which is in corroboration to Ba Tun's statement.

Now Ba Tun deposed that after the man slipped and fell, he got up and ran in the direction of Fraser Street and in the next sentence Ba Tun states that the man walked hurriedly and he asked him in Hindustani

In the Court of the Special Judge, Rangoon.

No. 2. Judgment, dated 25th February 1946, *continued.*

what had happened, he was then about twenty feet away from that man and when he asked him what had happened, the man ran towards Fraser Street and he followed him.

It is apparent from Ba Tun's evidence and also from that of Ram Lal that the intention of the man coming out from Mamsa Building was to run towards Sule Pagoda and make good his escape but when he slipped and fell and on seeing Ram Lal standing in his way, he must have altered his plan and ran towards Fraser Street.

As Ba Tun chased the man and when he got near the old Du Burns Building, that man fired a shot at him but it did not hit Ba Tun. Ba Tun got into his trishaw which was following him from behind and it was after he had been fired at that Ba Tun cried out "Thief! Thief! Catch! Catch!" and when he got to the junction of Fraser Street and Sule Pagoda Road, the man ran towards east along Fraser Street. By that time Ba Tun had got on his trishaw and was chasing the man. The man then turned towards 34th Street and ran towards Dalhousie Street and by that time a large crowd had been pursuing the runaway and after they had run along 34th Street, the man got into a side lane leading to the back drainage space between 34th Street and Barr Street. The man chased then turned and ran into it followed by Golam Rasul and some other persons.

On the other hand H.C. Ba Tun along with a number of people ran along 34th Street towards Corporation Street in order to block the passage of the runaway at the top of the back drainage space and Corporation Street. He was joined by Sapper Rogers (p.w.2), Kyin Pe (p.w.3), Maung Par (p.w.7) Mamood (p.w.8) and others.

Besides the Prosecution also called Ma Phatee and Ma Yan (p.w.4 and 5) to show that the man who ran away was the man who was later arrested and taken to the Police Station. However, as these witnesses must have been strangers to the accused I am not prepared to accept their statements although both the women had turned hostile to the Prosecution. Their evidence has little or no value for the Prosecution except for the fact that the man ran away along Fraser Street soon after a shot was heard and that man ran into 34th Street.

Now when Ba Tun and other pursuers including Rogers got to Corporation Street and the back drainage space between 34th and Barr Streets, it is apparent that Rogers who had joined the pursuers asked where was the man and some one pointed to him the back drainage space. He then flashed his torch and saw a man come running in their direction and that man, according to him had a pistol in one of his hands but on seeing them turned round and ran in the opposite direction and Rogers and the pursuers then pursued the man along the back drainage space. Then Rogers slipped and fell and his light went off for a moment and when he recovered he cried out to the man to halt or otherwise he will fire. That was only a ruse on the part of Rogers as he had no weapon with him. However, the man who admittedly understood English stood with his hand up against the wall of a building and Rogers went up and arrested him.

In the meantime, several persons came and began to talk to the accused in Burmese. Here there is evidence for the Prosecution to show that Ba Tun asked the accused what he had done with his revolver. At first the accused denied that he had a revolver. Rogers then deposed

RECORD

tribunals: the Court of the Recorder of Rangoon, the Judicial Commissioner's Court of Lower Burma and the Court of the Judge of Moulmein. The Recorder of Rangoon and the Judge of Moulmein exercised original criminal jurisdiction within the limits of the Rangoon Town District and the Moulmein Town District respectively: The Court of the Judicial Commissioner had no original jurisdiction: it had however, appellate and revisional jurisdiction in all matters both civil and criminal outside the two districts named. For a few years after the Second Burmese War there were Judges at Akyab and Bassein, whose positions were similar to those of the Recorder of Rangoon and the Judge of Moulmein: but these special jurisdictions were soon abolished and the Towns of Akyab and Bassein passed under the jurisdiction of the Judicial Commissioner of Lower Burma.

Before the Chief Court of Lower Burma was established appeals from either of the three tribunals which it amalgamated were heard in the first place by the Special Court, in which the two Judges not previously concerned sat in appeal from the third.

4. Clause 36 of the said Letters Patent provides that proceedings in Criminal cases before the High Court shall be regulated by the Criminal Procedure (Act V of 1898 of the Indian Legislature). This Code provides for three classes of Magistrates and for Sessions Judges, the latter dealing with the more serious crimes. Before an accused person can be tried by a Sessions Court it was provided that he must be committed to Sessions by a Magistrate of the first or second class after an enquiry on oath in open Court in the presence of the accused and his legal advisers, who have the right not merely of cross-examining the witnesses for the prosecution, but of calling and examining witnesses for the Defence. An accused may not be so committed unless the Committing Magistrate thinks that a sufficient prima facie case is made out against him. In the Sessions Court the trial is to be held before the Sessions Judge generally with the help of assessors, but in certain cases with a Jury. The Sessions Judge is bound to record the opinions of the assessors but is not bound to accept them: the decision rests with him. In Jury Trials the Sessions Judge, if he differs seriously from the Jury can submit the

DRURY LANE, W.C.2.
1947

that the accused denied having a revolver. He then talked to him in English and it was only then that the accused showed Rogers where he had thrown away the revolver and it was in a sink but in the deposition I have generally used the words sewage space.

Rogers told the accused to take out the revolver and the accused put his hands in the sink which is very dirty and brought out his hands again saying that he could not find it. Rogers then told him to look for it again and this time the accused brought out a revolver Ex. 1 which was seized and the accused was taken to the Police Station by Ba Tun, Rogers and others.

There are contradictions in the evidence for the prosecution as to whether the accused had a revolver in his hands. Rogers deposed that he saw a pistol which could be taken for a revolver as he was some distance from the accused. He stated that he saw it in the hands of the accused when he flashed his torch. Ba Tun (p.w.1) who was with him at the time did not see anything in the accused's hand nor Kyin Pe (p.w.3). Neither did Mg Par (p.w.7), Mamood (p.w.8) see anything in the hand of the accused when Rogers flashed his torch.

Now the question for consideration is whether Rogers should be believed on account of the contradiction. I have here to look to the power of observations of persons who had stated that they had not seen the revolver. One is a policeman from Motor Vehicle Department, another Kyin Pe, a Contractor, Maung Par, glass dealer and Mamood is a blacksmith. None of them are trained to watch and observe the actions of an enemy. On the other hand, Rogers is a soldier especially trained to observe anything he could see as a member of His Majesty's Armed Forces and I am inclined, in spite of his lone evidence, to give credit to him that he did see either a pistol or a revolver in the hands of the accused.

Then the next question is how the revolver got into the sink. Rogers had explained that he slipped and fell and for a moment lost his observations on the accused and during that moment it is probable that the accused threw away his revolver. He later pointed out to Rogers the place he threw away his revolver.

Now as regards the finding of the revolver in the sink, H.C. Ba Tun has stated in his report to the Police Ex. A thus: "That the accused threw away his loaded revolver into the sink. Rogers and Kyin Pe put their hands into the sink and searched for it and found the revolver."

In Court he stated thus "he pointed out the place which is a sewage space (sink) which held water going through a pipe from the building. He was asked to bring it out. There were rubbish and dung in it. He put his hands to look for the gun and when I asked him whether he got it, the accused replied in the affirmative. He then caught hold of the accused's hand and drew it out. He brought out a revolver."

When he was confronted with the statement he made to the Police in Ex. A, he stated that it is true that Rogers and Kyin Pe searched for the gun by putting their hands into the sink and they found the revolver. He also stated that they made the search for the revolver in two or three sinks in the back drainage space. However, he could not say who dipped his hands into the first sink and it was while they were searching for the revolver that the accused pointed out to a sink as the place where he had thrown away the revolver, and dipped his hands and brought out the Ex. 1 revolver. He still affirms that his statement that the revolver was

In the Court of the Special Judge, Rangoon.

No. 2. Judgment, dated 25th February 1946, *continued.*

found by Rogers and Kyin Pe was true and then stated that it was the accused who brought out the revolver from the sink and stated that his statement that Rogers and Kyin Pe dipped their hands into the sink and brought out a revolver is not true. He also stated that he did not see the accused throw away his revolver.

Kyin Pe (p.w.3) deposed that after Rogers had arrested the accused, Rogers demanded for the gun. The man arrested denied he had a revolver. Later he searched for it in a sink and brought out the Ex. 1 revolver and H.C. Ba Tun seized it and took the revolver and the accused to the Kyaktada Police Station.

Maung Par (p.w.7) deposed that Ba Tun asked for the revolver and the accused got it from the sink and gave it to Ba Tun. However he stated that the accused denied having a revolver.

Mamood (p.w.8) corroborated Maung Par.

Golam Rasul (p.w.12) also stated that it was the accused that picked up the revolver from the sink and handed it over to his captor, the European, meaning Rogers.

Although Ba Tun made some silly contradictions both in his report to the Police and in Court about the finding of the revolver in the sink, yet the majority of witnesses and his later admission shows that it was the accused that brought out the revolver from the sink and handed it over either to Ba Tun or to Rogers.

The accused was taken to the Kyauktada Police Station where the report Ex. A was made and the revolver which was very dirty as it had been taken out from the sink which at the present time contains all sorts of rubbish and dung, I do not wonder at the accused not wanting to put his hands in the sink when Rogers told him to search for the revolver. The revolver taken out from the sink must have been very dirty and it was only at the Police Station that it was washed and cleaned. Rogers himself opened the revolver and found three spent, two mis-fired and one live cartridges in the revolver.

The Police then went to Mamsa Building and found a crime had been committed. From there they went to the General Hospital and after the death of the deceased Mr. Vellayan Chettiar, Maung Nook (p.w.23) and other Police officers accompanied by Peria Keruppan Chettiar returned to the flat and inspected the scene of crime where they found Ex. 6 spent bullet on the staircase. Directly above it was a hole made by the bullet. It was seized and taken to the Police Station.

The next day at 9 a.m. Dr. Maung Aye (p.w.16) performed the post mortem on Mr. Vellayan Chettiar. He deposed that he found that the skull on the right side of the head was fractured measuring 1″ in diameter. The right side of the brain was damaged and the bullet was found at the base of the skull. There was some amount of intradural hæmorrhage on both sides of the brain. The skull was of normal thickness. Other organs were also found to be normal.

He also found the following external injuries on the deceased.

1. One gun shot wound $\frac{3}{8}$th″ in diameter on the right side of the forehead. This is wound of inlet.
2. One lacerated wound $1\frac{1}{2}$″ $\times\frac{1}{2}$″ bone deep just above the left eyebrow.
3. One abrasion $1\frac{1}{2}$″ $\times$ $\frac{1}{2}$″ near Injury No. 2.

On being further questioned he deposed that the Injury No. 1 was a necessary fatal wound, and death was due to injury to the brain. The

deceased must have been facing the assailant when the shot was fired and as he found the bullet lodged at the base of the skull he gave the direction of the wound as backwards and downwards and opined that the assailant of the deceased was standing on a higher level to that of the deceased when he fired the shot. It is apparent from the evidence of Peria Keruppan Chettiar that the deceased was standing on a higher level to that of the accused but the doctor stated that it is possible that the bullet might have deflected after entrance. He then made over the Ex. 7 bullet found at the base of the skull of the deceased to Maung Nook who seized it and sealed Ex. 1 revolver and the two bullets, packed it and sent it to the Gun Expert at Calcutta through R.A.F. Police.

Sgt. Keeble (p.w.19) was the officer who delivered the parcel to Mr. Sen (p.w.17), the Arm Expert, C.I.D. Bengal and it was Keeble that brought back the parcel from the Gun Expert to Rangoon.

Mr. B. Sen (p.w.17) the Arm Expert deposed he received the sealed parcel from the Commissioner of Police, Rangoon, in connection with a case at Kyauktada Police Station under Section 302 of the Penal Code. He broke open the parcel and it contained one ·38 bore six chambered revolver (Webley & Scott) No. 30899, one spent bullet of ·38 calibre said to have been extracted from the skull of the deceased and a deformed bullet Ex. 6 and he examined them and the result of his examination is as follows :—

The marks of rifling in Ex. 7 bullet were found to be identical with those of a test bullet fired by him from Ex. 1 revolver and he is of opinion that the bullet Ex. 7 was fired from Ex. 1 revolver. As regards Ex. 6, it was highly deformed and unfit for comparison. After examination he sealed the parcel again and gave it to Sgt. Keeble who brought it to Rangoon.

At the time of the comparison he took composite micro photographs of both the test bullet and Ex. 7. Ex. H is the photograph. He has written behind the photograph the exhibit as well as the test as against the two bullets compared. The negative is Ex. J.

He further opined that if a shot is fired from any particular arm, the mark of rifling of that particular arm is not the same as other arms of the same kind and calibre and he showed in the photograph one land mark and grove mark that has been magnified to show the similarity. The rifling mark on the test and on the exhibit bullet is identical and equi-distant in each set.

He also stated that the rifling marks of a revolver, pistol, rifle etc. is not the same as a revolver, pistol or rifle of the same calibre. Each has its own peculiarity.

He also stated that a bullet travels at a high velocity and if the bullet comes across any resistance, it could be deflected to any direction and stated that Ex. 7 bullet met with great resistance and pointed out to the dented end, and stated that if it did not meet with any resistance at all it would have kept its normal shape.

Mr. M. N. Pillai (p.w.21) identified the dead body of Mr. Vellayan Chettiar at the post mortem.

Although the accused could not be identified as the man who fired the two shots at Mr. Vellayan Chettiar either by Keruppan Chettiar, Ba Tun and Ram Lal or the other pursuers, it is apparent that after he left Mamsa Building, he slipped and fell on the left side and the Police

In the Court of the Special Judge, Rangoon.

No. 2. Judgment, dated 25th February 1946, *continued.*

found that he had one abrasion on his right elbow and sent the accused to the hospital on the 20th December 1945.

Dr. Ko Ko Gyi (p.w.9) deposed that the accused had one abrasion on the right forearm. This is an injury he may have received by that fall by knocking against the tub.

Therefore, it is proved beyond doubt that a man had run out from the staircase in which Mr. Vellayan Chettiar was shot and killed and that man after he had slipped and fell near a water tub ran north in the direction of Fraser Street pursued by Ba Tun. Then when he got in front of old Du Burns Building he fired a shot at Ba Tun who was chasing him. But that shot did not hit Ba Tun. Ba Tun got into his trishaw which was following him and pursued the man who turned into 34th Street. Ba Tun had now been joined by other pursuers and the man after going into 34th Street ran into a lane leading to the back drainage space between 34th and Barr Streets. A number of people ran into this lane including Golam Rasul while Ba Tun went to block his passage at the junction of the back drainage space and Corporation Street. A reference to the plan filed in the case clearly indicates that there was no escape for the man who ran into the back drainage space if his passage was blocked at the junction of Corporation Street and the back drainage space on the Corporation Street side.

Ba Tun definitely stated that he did not lose sight of the man from the time he left Mamsa Building up to the time when he ran into the side lane leading to the back drainage space. He followed by Rogers and others blocked the passage of the man from the Corporation Street side. Rogers, Kyin Pe and others whose evidence I have dealt with stated that when Rogers flashed his torch and entered the back drainage space they saw the man running in their direction but when the man saw them he ran in the opposite direction. None of them saw any weapon in the hands of the accused but Rogers and I am prepared to accept his evidence as true, because he is a man trained to make observations of an enemy and such would be his observations of the accused and he would have noticed almost everything his enemy carried and in this particular case the accused. However, Rogers could not say how the revolver got into the sink but there is time when Rogers slipped in the back drainage space and as the light of his torch must have gone out, for the accused to throw away his revolver in the sink and when Rogers called for the surrender by a ruse, the accused surrendered himself.

However, after the arrest the accused was asked for the arm he carried. He at first denied possessing one but later he took it out from inside a sink and gave it up either to Rogers or Ba Tun. He was then taken to the Police Station and the revolver was seized by the Police.

In the meantime, Dr. Maung Aye on the following day found Ex. 7 bullet at the base of the skull of the deceased at the post mortem. The bullet found in Mr. Vellayan Chettiar's skull was sent along with the revolver to the Arms Expert C.I.D. Bengal through R.A.F. Police.

Sgt. Keeble took the parcel to the Arms Expert and brought it back again.

The Expert had stated that the Ex. 7 bullet was fired from Ex. 1 revolver, but it has been urged on behalf of the accused by his learned advocate that I should not believe Ba Tun as he made contradictions one after another in regard to the finding of the revolver and also it is

urged that if the accused had fallen near a water tub on the left side, the abrasion would have been on the left forearm.

As regards the contradictions Ba Tun has made, I have dealt with them and he had later to admit that he was wrong. I see no reason why I should discredit the evidence of Sapper Rogers who is a stranger to the accused and to the complainant. His evidence has a ring of truth in it and he is corroborated by other witnesses except Ba Tun who appears to be a man that think that he has to give some sort of an answer to a question even if he did not remember the particular event or incident.

As against Rogers evidence it is urged that as Rogers has admitted that his torch was not powerful he could not have seen the revolver in the hands of the accused. I think I have sufficiently dealt with the power of observations Rogers is likely to have than other witnesses in the case on account of his training.

I was also pointed out a small discrepancy in the evidence of Maung Par about Rogers that he did not see Rogers slip in the back drainage space and that Golam Rasul on the opposite side of the back drainage space deposed that the accused ran into the arms of Rogers which is not true and then I was pointed out that Ram Lal contradicts Ba Tun in the direction which the assailant took after he left Mamsa Building. All these contradictions are not material to the case and those that are have already been dealt with by me.

Finally it was urged that there is no evidence which could be accepted by the Court to connect the accused with the revolver that was found in the back drainage space. I think there is more than sufficient evidence to connect the accused with the revolver that was found in the sink. Firstly Rogers had seen such an arm in the hands of the accused and according to Rogers it was the accused who pointed out to him the sink where the revolver had been thrown and a revolver had been brought out from it.

Apart from that there is good evidence for the Prosecution to show that besides the accused there were no other persons in the back drainage space. He was alone at some distance from his pursuers and was caught there. Further it has been urged that there is no proof that Ex. 1 revolver was the arm by which the murder was committed. Here we have got the evidence of the Arms Expert and I see no reason to disbelieve him especially when the photograph Ex. H shows what he has stated to be true.

Therefore I think there is a prima facie case against the accused and a charge was framed against him under Section 302 of the Penal Code.

The defence of the accused was that he is a resident of Moulmeingyun and came to visit some relatives at Thategon and was on his way back to Moulmeingyun when he was arrested while he was halting at Rangoon.

On the day of his arrest he stated that he went to Kemmendine to enquire about a boat leaving for Moulmeingyun from a friend and on his return from Kemmendine he called in at Maung Gyi's house in 14th Street in order to enquire into the health of his saya.

After leaving 14th Street, he walked along and met Karuppia (d.w.1) at the junction of Mogal and Fraser Streets. He had his meal with him at a hotel and at about 10.10 p.m. he left the company of Karuppia saying that he was going to East Rangoon to sleep with a friend and on the way after he passed Sule Pagoda Road in Fraser Street he heard gun fire

In the Court of the Special Judge, Rangoon.

No. 2. Judgment, dated 25th February 1946, *continued.*

and saw some people running. He too ran along with them and was arrested in the back drainage space and taken to the Police Station. It was about five minutes after his arrival at the Police Station that a Chittagonian came and brought a revolver to that Station saying that he had found it on the road.

The accused called Karuppia to support him so also Abdulla Latiff (d.w.2) and Abdulla Khan (d.w.3).

Karuppia (d.w.1) in the main supported the accused contention that the accused was with him until 10.10 p.m. He remembered it distinctly because he referred to his watch at the request of the accused. As to whether Karuppia's watch was keeping correct time or whether the time shown by his watch was correct it is not on record.

The report to the Police Ex. A was made at 10.25 p.m. so if it is proved that Karuppia's time was correct there was only 15 minutes after he parted company with the accused that the accused was arrested and taken to the Police Station and the report made against him. Now in order for a person to walk from Mogul Street to Sule Pagoda Road it will take 3 or 4 minutes and then began the chase which is likely to take either 4 or 5 minutes. There is the search for the arm which also would take a few minutes. The accused was then taken to the Police Station which is also likely to take a few more minutes. If all these were added I think that the quickest time for a person leaving Mogul Street after doing all what I have stated to reach Kyauktade P.S. would be about half an hour. Such being the case Karuppia's watch definitely was not keeping correct time in the result that his evidence is of little or no value.

As regards Abdulla Latiff and Abdulla Khan (d.ws.2 and 3) they appear to be fairly influential persons in their community. They were called in by the Defence to show that two or three men left the back drainage space before Ba Tun and party arrived to block the passage from Corporation Street and the back drainage space. They stated that they were returning from a party at about 10 p.m. and when they got to 33rd Street in Fraser Street, they heard the report of a gun and they became frightened and ran away as fast as they could and got to the corner of 34th Street and Corporation Street and while they were there they saw two or three persons leaving the back drainage space and go into Barr Street before the arrival of Ba Tun and party.

However, Abdulla Latiff made a bad contradiction. He stated that there were 5 or 10 pursuers that went ahead of them and admitted that Ba Tun and company were about 5 feet behind them. Therefore, if they saw 2 or 3 persons leaving the back drainage space, Ba Tun and company would have seen them also.

Abdulla Khan (d.w.3) contradict Abdulla Latiff in that none of the pursuers got ahead of them. They appear to be chance witnesses and apparently it is not known how and why they came to give evidence for the defence for they are strangers to the accused on their own admission.

Therefore a strong case for the Prosecution which is made up of both direct and circumstantial evidence that it was the accused that shot the deceased remained unrebutted, in the result that I find the accused guilty of the offence with which he is charged.

The question of sentence is not without difficulty. The accused is still in his teens. He has given his age in Court as 18. I do not think that he could be more than 20 years of age. But it has been ruled by the

High Court that youth by itself is no extenuating circumstance for mitigation of the sentence and I feel that I am bound to follow that ruling.

No motive for the crime is shown by the Prosecution. The accused had also not stated anything. If the accused had committed the crime for an injury to himself or his relatives he has my sympathy. But if he has been led into it for some other motive he has to pay the penalty for his folly.

In the Court of the Special Judge, Rangoon.

No. 2. Judgment, dated 25th February 1946, *continued.*

FINDING AND SENTENCE.

I find the accused Chittambaram, son of Mr. Puneya, guilty of murder, an offence punishable under Section 302 of the Penal Code, and I direct that the said Chittambaram son of Mr. Puneya be hanged by the neck till he is dead.

Sd. KYAW U,
Special Judge
Rangoon Sessions Division.

Note :—The accused is warned that if he wishes to appeal he must do so within seven days.

Sd. KYAW U,
Special Judge,
Rangoon.

No. 3.

GROUNDS OF APPEAL.

In the High Court of Judicature at Rangoon.

No. 3. Grounds of Appeal, dated 28th February 1946.

Presented by
Mr. P. N. Ghosh.
Sd/M.K. 28/2/46.

IN THE HIGH COURT OF JUDICATURE AT RANGOON.
(APPELLATE JURISDICTION.)
(S.J. Act.)
Criminal Review No. 85 of 1946.

CHITTAMBARAM, Prisoner under sentence of death, in Town Lock-up, Rangoon, at present at Insein Central Jail - - - Appellant

Versus

KING-EMPEROR (at the instance of Ba Tun) - - Respondent.

APPEAL AGAINST CONVICTION UNDER SECTION 302 I.P.C. AND SENTENCE OF DEATH THEREUNDER PASSED BY THE SPECIAL JUDGE, RANGOON SESSIONS DIVISION IN CRIMNIAL REGULAR TRIAL No. 1. OF 1946 AND DATED THE 25TH FEBRUARY 1946.

GROUNDS.

1. That the finding of guilt of the Appellant by the learned Special Judge, Rangoon Town District is unsustainable in Law and Facts on record.

In the High Court of Judicature at Rangoon.

No. 3. Grounds of Appeal, dated 28th February 1946, *continued.*

2. That the learned Special Judge erred in giving credence to the evidence of Mr. Rogers—about seeing the revolver in Appellant's hand on the basis of his superior "power of observation"—which is merely a surmise and unsupported by any evidence on the point.

3. That the learned Special Judge erred in discarding the contradictions of the Prosecution Witnesses on all material particulars, characterising them as silly or immaterial, to the detriment of the Defence of the Appellant and resulting in grave miscarriage of Justice.

4. That the Learned Special Judge was not justified in interpreting the Prosecution story, as given in the F.I.R. regarding the manner of discovery of the revolver from the sink and other matters, against the Appellant and in accepting the changed story as given in Court to be correct.

5. That the learned Special Judge should have disbelieved the story given in Court about the happenings in the back drainage space, as being entirely a got-up one.

6. That the learned Judge erred in not considering the serious effect of spoliation of Rogers' and Ba Tun's statement ("note") recorded in pencil by the I.O. in the course of investigation and in not drawing adverse inference therefrom in favour of the Appellant.

7. That the learned Special Judge failed to consider the effect of omission in the F.I.R. about the alleged hiding of Ba Tun under the shade of a tree, slipping of the assailant near a hydrant and the assailant having a torch in his hand.

8. That the learned Special Judge failed to consider that the assailant had a white shirt and a white longyi on, whereas the Appellant's "shirt is of Army green in colour and the Longyi is faded green with black stripes."

9. That the learned Judge erred in Law in not drawing adverse presumptions from withholding the evidence of Mulli Ahamed mentioned in F.I.R.

10. That the learned Special Judge should not have believed the testimony of Rogers and other Prosecution witnesses.

11. That the learned Special Judge's remark that "there is time when Rogers slipped in the back drainage space and as the light of his torch must have gone out, for the accused to throw away his revolver in the sink" militates against the fundamental presumption of innocence and as such is illegal.

12. That the learned Special Judge erroneously discarded the evidence of D.W.1 Karuppayya on the supposed ground of his watch keeping incorrect time.

13. That the learned Special Judge did not take into consideration the good character of the Appellant.

14. That the learned Special Judge erred in admitting the evidence of the alleged Expert, and the photographs—the latter being merely secondary evidence in the absence of the alleged test bullets being exhibited before the Court.

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15. That the learned Special Judge should have accepted the Defence story and evidence, and should have, in any case, given the Appellant benefit of reasonable Doubt.

Wherefore Appellant prays that he may be acquitted, and that pending disposal of this Appeal, the execution of the sentence be stayed.

AND SHALL EVER PRAY.

Sd. P. N. GHOSH,

Advocate for Appellant,
129, 27th Street,
Rangoon.

Dated Rangoon,
the 28th February 1946.

In the High Court of Judicature at Rangoon.

No. 3.
Grounds of Appeal, dated 28th February 1946, *continued.*

No. 4.

JUDGMENT.

No. 4.
Judgment, dated 26th March 1946.

IN THE HIGH COURT OF JUDICATURE AT RANGOON.

Criminal Review No. 85 (S.J. Act) of 1946.

Review of the order of U Kyaw U, Special Judge, of Rangoon, dated the 25th day of February 1946, passed in Criminal Regular Trial No. 1 of 1946.

THE KING
Applicant.

Vs.

CHITTAMBARAM
Respondent.

Against conviction under Section 302, Penal Code.
For Applicant—U Tun Byu, Government Advocate.
For Respondent—Mr. P. N. Ghosh.

JUDGMENT.

Dated the 26th day of March, 1946.

At about 10 o'clock on the night of the 18th December, 1945, Vellayan Chettiar and his agent Peria Karuppan Chettiar returned to their flat at No. 124, Sule Pagoda Road, after making some visits to friends. The flat was on the second floor of the building. As they were walking up the stairs they were met by a young Tamil coming down. This man had obviously been waiting in the darkness of the staircase for their return. He passed them, and then he flashed an electric torch on Vellayan Chettiar and fired two shots at him from a revolver. Vellayan Chettiar was hit and collapsed on the staircase. The only eye witness, the Peria Karuppan Chettiar, is an arrant coward. He did not attempt to chase the murderer, who ran out into the street. He did not even call out for assistance. He walked quietly upstairs to their flat, knocked at the door, obtained the assistance of the servants, and had his dying master removed to the flat. That was all that he attempted to do. Shortly afterwards the police arrived and they had Vellayan Chettyar removed to the hospital, where he died. He was unconscious from the moment when he was shot until he died. The post mortem examination of the body, which was conducted on the next morning, showed one bullet wound on the right side of the forehead. The bullet had passed through the right side of

In the High Court of Judicature at Rangoon.

No. 4. Judgment, dated 26th March 1946, *continued.*

the brain and was found at the base of the skull and was recovered. The injury was necessarily fatal. It is clear that the person who fired this shot fired it with the intention of killing, and the offence committed by that person was a premeditated and deliberate murder. The second shot missed and the bullet was found by a policeman on the staircase; there were marks which showed that it had hit the wall.

On this night just after 10 p.m. Head Constable Ba Tun (1st P.W.) was returning home in a trishaw. When he arrived near the block of flats where Vellayan Chettyar lived, he heard two shots. He then saw an Indian come out of the entrance to the flats. That man slipped and fell. Head Constable Ba Tun challenged him and the man ran along Fraser Street. Ba Tun gave chase in his trishaw. The man turned and fired at him, but the shot missed. The defence is constrained to admit that up to this stage the man whom Head Constable Ba Tun was chasing was the murderer of Vellayan Chettyar. H.C. Ba Tun continued the chase, he was joined by a number of other persons. The man ran along Fraser Street, down 34th Street and into the back drainage space between 34th Street and Barr Street. H.C. Ba Tun says that the man was never out of his sight until he entered the back drainage space. It is contended by the defence that Head Constable Ba Tun is an unreliable witness and stress is laid on discrepancies between his first information report (which he made on arrival at the police station after the respondent had been arrested) and his evidence on oath before the learned Special Judge. It is clear that Head Constable Ba Tun is not an observant person and is prone to make loose statements of fact. But in regard to the details of the chase Ba Tun's evidence is corroborated by the evidence of Ma Phatee (4th P.W.), Maung Par (7th P.W.), Mamood (8th P.W.) and Goolam Rasul (12th P.W.), and there is no doubt that the man who fired at Ba Tun, and who is therefore the murderer, ran into the back drainage space between 34th Street and Barr Street. He was followed by a number of pursuers. Head Constable Ba Tun went round to the other end to stop the outlet of the back drainage space into Corporation Street. He was preceded by Sapper P. J. Rogers and Maung Kyin Pe, who happened to be at the junction of the back drainage space and Corporation Street when they heard the noise of the chase. Sapper Rogers pluckily went after the man who was running towards him. The man turned to run back towards Fraser Street. Although Rogers had no weapon he ordered the man to stop, saying he would fire if he did not do so. The man halted and Rogers arrested him. The man who was arrested was the respondent. In my opinion, the evidence of the chase establishes that the respondent is the man who fired at Head Constable Ba Tun, and, consequently, is the murderer of Vellayan Chettyar. But apart from all this evidence there is sufficient other evidence to prove conclusively that the respondent shot and killed Vellayan Chettyar.

The defence has particularly stressed the absence of any motive in this case. It is not, of course, suggested that motive is an essential ingredient of any crime. Man's motives are hidden in his mind and, no doubt, the present respondent had what he thought was a good motive for killing Vellayan Chettyar, but he has not disclosed that motive and the investigation of the offence has not brought it to light. The fact that there is no motive may be of some importance if there is some room for doubt when the evidence is weighed in the balance. But in a case like

case for the orders of the High Court otherwise their verdict prevails. This was the procedure in Sessions Courts outside Rangoon, in what is commonly called the Mofussil. In every case an appeal lay from the Court of Sessions to the High Court. Capital sentences whether the accused appealed or not, had to be submitted for confirmation to the High Court, where in practice the case was always heard by a Bench of at least two Judges.

5. In Rangoon, where the High Court exercised original ordinary jurisdiction, the procedure at Sessions was slightly different. All criminal cases committed to the Rangoon Sessions were tried by a Jury, directed by one of the Judges. There was no appeal from the unanimous decision of the Jury, whether the Judge agreed with it or not.

6. Such was the law of Burma with regard to Criminal procedure until 1935: and such it is respectfully submitted is still the case in Burma. It could have been altered by competent authority but it has not been so altered.

7. In 1935 Parliament enacted the Government of Burma Act, 1935 (26 Geo. 5 Ch. 3) which established a constitution for Burma, and contained detailed provisions for every branch of the administration. The position and functions of the Rangoon High Court were maintained intact. To the High Court a whole Part of the Act (Part VIII sections 81-90) was devoted. Section 84 provides:

"Subject to the provisions of this Act to the "provisions of any Order in Council made under "this or any other Act and to the provisions of "any Act of Legislature, the jurisdiction of, "and the law administered in the High Court and "the respective powers of the Judges thereof in "relation to the administration of justice in "the Court, including any power to make rules of "Court and to regulate the sittings of the Court "and of members thereof sitting alone or in "division Courts, shall be the same as immediate-"ly before the commencement of this Act"

The Act established a legislature for Burma which took the place of the legislature hitherto established for India. Part XII is headed "Provisions in Event of Failure of Constitutional Machinery" and clause (1) of the first section of that Part (Section 139) is as follows:-

the present one, where the evidence is so clear, absence of motive does not affect the case for the prosecution as it has been set out by the evidence against the respondent.

Rogers, who had a torch, says that when he first shone his torch on the respondent he saw a pistol in the respondent's hand, but while running towards the respondent he (Rogers) stumbled and when he arrested the respondent, the respondent had managed to get rid of the pistol. He asked the respondent where he had thrown it and the respondent showed a sump at the side of the back drainage space. Rogers had the good sense to make the respondent himself search in the sump, and the respondent pulled out from the sump the exhibit revolver. The defence has tried to cast doubts on the veracity of Sapper Rogers, but in my opinion he is an entirely truthful witness. In any case, the essential point in his evidence is not that he, and not someone else, arrested the respondent, or that he, and not someone else, ordered the respondent to search in the sump, but is that the respondent himself pointed out the sump from which the revolver was recovered, and the respondent himself recovered the revolver from that sump. This evidence is supported by a number of witnesses, namely, Head Constable Ba Tun (1st P.W.), Maung Kyin Pe (3rd P.W.), Maung Par (7th P.W.), Mamood (8th P.W.) and Goolam Rasul (12th P.W.). It is therefore quite certain that the respondent himself pointed out the sump into which he had thrown the revolver, and himself searched for and brought out the revolver from the sump.

The respondent and the revolver were taken to Kyauktada Police Station. There the revolver was broken, and it was found to contain three cartridges which had been fired, two which had misfired (showing that during the chase the respondent had tried twice more to fire at his pursuers) and one live cartridge. The revolver and the bullet taken from Vellayan Chettyar's skull were subsequently tested by Inspector B. Sen, Arms Expert of the Bengal Police (17th P.W.), and he has given the opinion that the bullet which killed Vellayan Chettyar was fired from this revolver. The pointing out by the respondent of the place where the revolver was hidden, the recovery by the respondent of the revolver from that place, and the evidence of the expert that the bullet extracted from Vellayan Chettyar's skull was fired from this very revolver, are facts which in themselves, without any other evidence whatever, are sufficient to prove beyond doubt that the respondent killed Vellayan Chettyar.

Three witnesses were called and examined for the defence. They do not give any assistance to the respondent. The first of them, P. R. Karuppia (1st D.W.), says that the respondent left him that night at 10 minutes past 10, by his watch. The learned Special Judge has said that Karuppia's watch may have been wrong, and of course, it may have been. My remark on this witness's evidence is that he is obviously a great friend of the respondent, that his evidence is entirely uncorroborated, and that it was only too easy for him to say 10 minutes past 10 when the real time was 10 minutes past 9. The other two witnesses called for the defence are two casual witnesses, the purpose of whose evidence I have been unable to understand. They say that they were at the corner of the back drainage space and Corporation Street and they saw two or three persons run out of the back drainage space into Barr Street just before the respondent

In the High Court of Judicature at Rangoon.

No. 4. Judgment, dated 26th March 1946, *continued.*

was arrested. As I have said, how their evidence assists the respondent in any way I am quite unable to understand.

In my opinion, the respondent is guilty of the offence of murder, punishable under section 302 of the Penal Code, and this offence has been proved against him beyond any shadow of doubt. The respondent is a young man. He says himself that he is only 18 years of age. A doctor who examined him, Dr. U Ko Ko Gyi (9th P.W.), says that he is 21. Apart from this question of age, which, as this Court has so frequently held, is not in itself an extenuating circumstance, there is no extenuating circumstance in this case. In fact, it is a peculiarly horrible murder. The crime was obviously premeditated. It is quite obvious that the respondent was lying in wait for the return of Vellayan Chettyar, having by some means knowledge that on that evening Vellayan Chettyar had gone out to visit his friends, and the intention to kill Vellayan Chettyar is only too apparent from the determination with which not one but two shots were fired at the deceased. Consequently, the only sentence which could be passed for this crime was the sentence of death. The conviction and sentence of the respondent are confirmed.

Sd. H. F. DUNKLEY,
Acting Chief Justice.

(Seal of the High Court at Rangoon)

No. 5.

ORDER IN COUNCIL granting special leave to Appeal.

In the Privy Council.

No. 5. Order in Council, dated 29th October 1946.

AT THE COURT AT BUCKINGHAM PALACE

The 29th day of October 1946.

Present

THE KING'S MOST EXCELLENT MAJESTY

LORD PRIVY SEAL — Mr. ISAACS
Mr. PALING — Mr. BARNES

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 10th day of October 1946 in the words following viz. :—

" WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Chittambaram in the matter of an Appeal from the High Court of Judicature at Rangoon between the Petitioner Appellant and Your Majesty Respondent setting forth (amongst other matters) that the Petitioner was tried by a Special Judge appointed under the Special Judges Act 1943 (Burma Act No. X of 1943) in Criminal Regular Trial No. 1 of 1946 Rangoon Sessions Division on a charge of murdering Vellayan Chettiar on the 18th December 1945 : that on the 25th February 1946 the Special Judge convicted the Petitioner under Section 302 of the Indian Penal Code and sentenced him to death : that in accordance with the Special Judges Act the proceedings were submitted for review to a Judge of the High Court of Rangoon nominated by the Governor and a Review

Petition was lodged on Petitioner's behalf ; that on the 26th March 1946 the Review Petition was dismissed and the conviction and sentence of death confirmed : that a memorial to the Governor against the death sentence was also rejected : that the whole trial of the Petitioner is bad : that the Special Judge had no jurisdiction to try him: that this Special Judge was not a Judge of the High Court : that he was appointed under the Special Judges Act 1943 : that under Section 4 (1) of that Act " a Special Judge may try any offence punishable under any law for the time being in force and may pass any sentence which is authorised by law ": that under Section 6 (2) of the Act " The provisions of Chapter XXVII of the Code (meaning the Code of Criminal Procedure) shall not apply to sentences of death passed by a Special Judge but if in any proceedings before a Special Judge a person convicted is sentenced to death the proceedings shall be submitted for review by a judge of the High Court nominated in that behalf by the Governor and the decision of that Judge shall be final " : that the Special Judges Act was passed under the Government of Burma Act 1935 which Act was passed when Burma was separated from India and provides (*inter alia*) for the establishment of a new Legislature : that the situation caused by foreign invasion was not contemplated but what was contemplated was the failure of the constitutional machinery and especially the failure of the new Legislature to co-operate with the Executive : that in appointing a Special Judge to try persons for murder the Governor was doing what the proviso to Section 139 (1) of the Government of Burma Act 1935 forbade him to do : that he was usurping the jurisdiction of the High Court and in particular of the Original Criminal Jurisdiction of the High Court : And humbly praying Your Majesty in Council to grant the Petitioner special leave to appeal from the conviction and sentence of death passed upon him by the Special Judge Rangoon Town district dated the 25th February 1946 and confirmed in Criminal Review No. 85 of 1946 by the High Court on the 26th day of March 1946 and that in the meantime execution of the sentence of death may be suspended :

" THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion (1) that leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the Judgment of the High Court of Judicature at Rangoon dated the 26th day of March 1946 not on the merits of the case but solely on the question of the jurisdiction of the Special Judge ; (2) that the certified copy of the record deposited by the Solicitor India Office at the Privy Council Office ought to be deemed to be an authenticated copy under seal of the record proper to be laid before Your Majesty on the hearing of the Appeal ; (3) that the Petitioner ought to lodge within fourteen days after the deposit of the certified record aforesaid a typewritten copy of the record duly prepared in accordance with Rule 23 of the Judicial Committee Rules 1925 at the Registry of the Privy Council for printing at the

In the Privy Council.

No. 5. Order in Council, dated 29th October 1946, *continued.*

expense of the Respondent; (4) that the Petitioner ought to lodge his Printed Case within twenty-one days of the completion of such printing; and (5) that failing compliance with any of the terms of this Your Majesty's Order herein the parties ought to be at liberty to apply to the Registrar of the Privy Council for directions."

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Judges of the High Court of Judicature at Rangoon for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

E. C. E. LEADBITTER.

Record Part II.

Documents.

PART II.

DOCUMENTS.

No. 1.

PROCLAMATION.

No. 1. Proclamation dated 10th December 1942.

WHEREAS the Governor of Burma is satisfied that a situation has arisen in which the government of Burma cannot be carried on in accordance with the provisions of the Government of Burma Act, 1935 (hereinafter referred to as "the Act"):

Now therefore, in the exercise of the powers conferred by section 139 of the Act, the Governor by this Proclamation

(*a*) declares that notwithstanding anything to the contrary in the Act all his functions under the Act shall be exercised by him in his discretion;

(*b*) assumes to himself all powers vested by or under the Act in the Legislature of Burma and all powers vested in either Chamber of the Legislature, but not so as to affect any power exercisable by His Majesty with respect to Bills reserved for the signification of His Majesty's pleasure or the disallowance of Acts:

And he hereby makes the following incidental or consequential provisions which appear to him to be necessary or desirable for giving effect to the objects of this Proclamation, namely:—

(1) the operation of the following provisions of the Act is hereby suspended, namely, sections 5, 6, 12, sub-sections (3), (4) and (5) of section 16, sub-sections (2) and (3) of section 17, sections 18 to 32, inclusive, and 35 to 37, inclusive, sub-section (1) of section 38, sections 39 and 41 to 43, inclusive, sub-sections (1) and (2) of section 59, sections 60 to 63 inclusive, so much of sub-section (2) of section 67 as relates to the laying of reports before

the Legislature, so much of sections 69 to 80, inclusive, and sub-sections (1) and (2) of section 99 as refer to the duties and powers of the Railway Board, sections 119 to 121, inclusive, 153 and sub-section (1) of section 154 ;

(2) in exercising legislative powers under or by virtue of this Proclamation the Governor, acting in his discretion, shall prepare such Bills as he may deem necessary and declare as respects any Bill so prepared either that he assents thereto in His Majesty's name or that he reserves it for the signification of His Majesty's pleasure ; and the reference in sub-section (2) of section 38 of the Act to the day on which a Bill was presented to the Governor shall be construed as a reference to the day on which the Bill was so reserved by him.

This Proclamation is signed and published at Simla on the tenth day of December 1942.

(Sgd.) R. H. DORMAN SMITH,
Governor of Burma.

NOTE : *The resolutions approving the continuance in force of this Proclamation were passed by the House of Lords on 27th May 1943, 18th April 1944, 17th May 1945, and 4th April 1946 and by the House of Commons on 27th May 1943, 18th April 1944, 17th May 1945, and 5th April 1946.*

Documents.

No. 1. Proclamation dated 10th December 1942, *continued.*

No. 2.

PROCLAMATION.

Documents.

No. 2. Proclamation, dated 17th October 1945.

WHEREAS by Proclamation, dated the Tenth day of December 1942, made in exercise of the powers conferred by section 139 of the Government of Burma Act, 1935 (hereinafter referred to as "the Act"), provisions were made for the assumption and exercise of certain powers by or on behalf of the Governor for the reason that a situation had arisen in which the Government of Burma could not be carried on in accordance with the provisions of the Act ;

AND WHEREAS by sub-section (2) of section 1 of the Government of Burma (Temporary Provisions) Act, 1945, the Governor may, subject to the provisions contained in Orders-in-Council made in this behalf, by Proclamation provide for the constitution of councils or other bodies or authorities for the purpose of associating any such council, body or authority with the Governor in the exercise of his functions and for regulating its powers, duties and procedure, and for matters incidental thereto ;

AND WHEREAS by Order-in-Council, dated the Twenty-eighth day of September 1945, His Majesty has authorized the exercise of the powers conferred by sub-section (2) of section 1 of the Government of Burma (Temporary Provisions) Act, 1945, subject to the conditions specified therein ;

Documents.

No. 2. Proclamation, dated 17th October 1945, *continued.*

NOW, THEREFORE, in exercise of the powers conferred as aforesaid, the Governor by this further Proclamation declares that:

(*a*) there shall be constituted an Executive Council, consisting of not more than fifteen members appointed by the Governor, to assist and advise the Governor in the exercise of his duties, powers and functions generally;

(*b*) there shall be constituted a Legislative Council of not more than fifty members consisting of the Executive Councillors appointed under clause (*a*) hereof and other members nominated by and removable by the Governor to advise him in the exercise of powers vested by or under the Act in the Legislature or in either Chamber thereof which the Governor has, by the Proclamation, dated the Tenth day of December 1942, assumed to himself.

The Governor hereby makes the following incidental or consequential provisions which appear to him to be necessary or desirable for giving effect to the objects of this Proclamation, namely :—

1. For the purpose of regulating the duties, powers and functions and the procedure of the Executive Council and the Legislative Council and for matters incidental thereto the Governor may make rules—

(i) prescribing the allocation of Government business amongst the members of the Executive Council, the delegation to the members of the Council of certain of the duties, powers and functions of the Governor, the manner in which the members of the Council shall meet for the transaction of business, the procedure at such meetings, and the business to be transacted at such meetings;

(ii) regulating the practice and procedure and conduct of business in the Legislative Council in relation to the exercise of the powers assumed by the Governor under the Proclamation, dated the Tenth day of December 1942.

2. The operation of sections 12, 119 and 120 of the Act is hereby restored. (The purpose of this is to provide for the appointment of an Advocate-General and to provide for the constitution and specify the functions of a Public Service Commission.)

3. Nothing in this Proclamation shall be construed as requiring the Governor to accept the advice of any council, body or authority constituted under this Proclamation if so to be guided would be inconsistent with the exercise by him of any of his functions in his discretion.

This Proclamation is signed and published at Rangoon on the Seventeenth day of October 1945.

(Sgd.) R. DORMAN SMITH,
Governor of Burma.

Rangoon

The 17th October 1945.

NOTE: *Resolutions approving the continuance in force of this Proclamation were passed by the House of Lords on 4th April* 1946 *and by the House of Commons on 5th April* 1946.

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(Sgd.) R. DORMAN SMITH,
Governor of Burma.

continuance in force of this Proclamation
Lords on 4th April 1946 *and by the House*
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L.S.

At the Court at Buckingham Palace

The 29th day of October, 1946

PRESENT

THE KING'S MOST EXCELLENT MAJESTY

LORD PRIVY SEAL
MR. PALING
MR. ISAACS
MR. BARNES

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 10th day of October, 1946 in the words following viz :—

" WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Chittambaram in the matter of an Appeal from the High Court of Judicature at Rangoon between the Petitioner Appellant and Your Majesty Respondent setting forth (amongst other matters) that the Petitioner was tried by a Special Judge appointed under the Special Judges Act 1943 (Burma Act No. X of 1943) in Criminal Regular Trial No. 1 of 1946 Rangoon Sessions Division on a charge of murdering Vellayan Chettiar on the 18th December 1945: that on the 25th February 1946 the Special Judge convicted the Petitioner under Section 302 of the Indian Penal Code and sentenced him to death: that in accordance with the Special Judges Act the proceedings were submitted for review to a Judge of the High Court of Rangoon nominated by the Governor and a Review Petition was lodged on Petitioner's behalf: that on the 26th March 1946 the Review Petition was dismissed and the conviction and sentence of death confirmed: that a memorial to the Governor against the death sentence was also rejected: that the whole trial of the Petitioner is bad: that the Special Judge had no jurisdiction to try him: that this Special Judge was not a Judge of the High Court: that he was appointed under the Special Judges Act 1943: that under Section 4 (1) of that Act " a Special Judge may try any offence punishable under any law for the time being in force, and may pass any sentence which is authorised by law ": that under Section 6 (2) of the Act " The provisions of Chapter XXVII of the Code (meaning the Code of Criminal Procedure) shall not apply to sentences of death passed by a Special Judge but if in any proceedings before a Special Judge a person convicted is sentenced to death the proceedings shall be submitted for review by a judge of the High Court nominated in that behalf by the Governor and the decision of that Judge shall be final ": that the Special Judges Act was passed under the Government of Burma Act 1935 which Act was passed when Burma was separated from India and provides (*inter alia*) for the establishment of a new Legislature: that the situation caused by foreign invasion was not contemplated but what was contemplated was the failure of the constitutional machinery and especially the failure of the new Legislature to co-operate with the Executive: that in appointing a Special Judge to try persons for murder the Governor was doing what the proviso to Section 139 (1) of the Government of Burma Act 1935 forbade him to do: that he was usurping the jurisdiction of the High Court and in particular of the

Original Criminal Jurisdiction of the High Court: And humbly praying Your Majesty in Council to grant the Petitioner special leave to appeal from the conviction and sentence of death passed upon him by the Special Judge Rangoon Town district dated the 25th February 1946 and confirmed in Criminal Review No. 85 of 1946 by the High Court on the 26th day of March 1946 and that in the meantime execution of the sentence of death may be suspended:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion (1) that leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the Judgment of the High Court of Judicature at Rangoon dated the 26th day of March 1946 not on the merits of the case but solely on the question of the jurisdiction of the Special Judge; (2) that the certified copy of the record deposited by the Solicitor India Office at the Privy Council Office ought to be deemed to be an authenticated copy under seal of the record proper to be laid before Your Majesty on the hearing of the Appeal; (3) that the Petitioner ought to lodge within fourteen days after the deposit of the certified record aforesaid a type-written copy of the record duly prepared in accordance with Rule 23 of the Judicial Committee Rules 1925 at the Registry of the Privy Council for printing at the expense of the Respondent; (4) that the Petitioner ought to lodge his Printed Case within twenty-one days of the completion of such printing; and (5) that failing compliance with any of the terms of this Your Majesty's Order herein the parties ought to be at liberty to apply to the Registrar of the Privy Council for directions."

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Judges of the High Court of Judicature at Rangoon for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

E. C. E. LEADBITTER.

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

(53485) Wt. 8015—7 14 11/46 D.L. G. 338

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E. C. E. LEADBITTER.

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L.S.

At the Court at Buckingham Palace

The 21st day of December, 1946

PRESENT

THE KING'S MOST EXCELLENT MAJESTY

LORD PRESIDENT
EARL OF LISTOWEL
MR. ALEXANDER
SIR ALAN LASCELLES

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 19th day of December, 1946, in the words following, viz.:—

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee the matter of an Appeal from the High Court of Judicature at Rangoon between Chittambaram Appellant and Your Majesty Respondent (Privy Council Appeal No. 89 of 1946) and likewise the humble Petition of the Appellant setting forth: that the Appellant was tried by a Special Judge appointed under the Special Judges Act 1943 (Burma Act No. X of 1943) on a charge of murdering Vellayan Chettiar on the 18th December 1945: that on the 26th February 1946, the Special Judge convicted the Appellant under Section 302 of the Indian Penal Code and sentenced him to death: that the proceedings were submitted for review to a Judge of the High Court of Rangoon (Dunkley Acting Chief Justice) and a Review Petition was submitted on the Appellant's behalf: that on the 26th March 1946 Dunkley Acting Chief Justice dismissed the Petition and confirmed the conviction and sentence of death: that by Order in Council dated the 29th October 1946 the Appellant was granted special leave to appeal to Your Majesty in Council not on the merits of the case but solely on the question of the jurisdiction of the Special Judge: And humbly praying Your Majesty in Council to take this Appeal into consideration and that the Judgment of the High Court dated the 26th March 1946 may be reversed altered or varied and for further or other relief:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the Appeal and humble Petition into consideration and having heard Counsel on behalf of the Parties on both sides Their Lordships do this day agree humbly to report to Your Majesty as their opinion that this Appeal ought to be dismissed and the Judgment of the High Court of Judicature at Rangoon dated the 26th day of March 1946 affirmed."

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Judges of the High Court of Judicature at Rangoon for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

E. C. E. LEADBITTER.

[28]

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

(55129) Wt. 8015—7 14 1/47 D.L. G. 338

RECORD.

"139. (1) If at any time the Governor is satis-
"fied that a situation has arisen in which the
"government of Burma cannot be carried on in
"accordance with the provisions of this Act, he
"may by Proclamation -
" (a) declare that his functions shall, to
" such extent as may be specified in the
" Proclamation, be exercised by him in
" his discretion;
" (b) assume to himself all or any of the
" powers vested in or exercisable by any
" body or authority in Burma;
"and any such Proclamation may contain such
"incidental and consequential provisions as may
"appear to him to be necessary or desirable to
"give effect to the objects of the Proclamation,
"including provisions for suspending in whole or
"in part the operation of any provisions of this
"Act relating to any body or authority in Burma:
" Provided that nothing in this sub-section
"shall authorise the Governor to assume to him-
"self any of the powers vested in or exercisable
"by the High Court, or to suspend, either in
"whole or in part, the operation of any provis-
"ions of this Act relating to the High Court.

When this Act was passed foreign invasion was not contemplated and it is submitted that what was contemplated was friction, or the failure of the newly created legislative assembly to co-operate with the executive. The problems which Parliament had in mind were internal problems not unlike those which are now confronting the authorities in India.

In the cases of emergency for which section 139 provided the Governor was given wide discretionary powers but was not permitted to assume to himself or suspend any of the powers or functions of the High Court. Those powers and functions were not indeed immutable: they could be modified by the local legislature, or of course by the Imperial Parliament, but they could not be modified by the Governor acting under his emergency powers. He could not suspend the operation of any provisions of the Act (e.g. Section 84) relating to the High Court. He was specifically prevented from so doing by Act of Parliament.

DRURY LANE, W.C.2. 1947

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RECORD.

8. On the 10th December 1942 the Governor of Burma issued a Proclamation in which, purporting to be in exercise of the powers conferred by section 139 of the Government of Burma Act, 1935, he assumed to himself all powers vested by or under the Act in the Legislature of Burma and also made incidental or consequential provisions which appeared to him to be necessary or desirable for giving effect to the objects of the Proclamation. None of these incidental or consequential provisions affects Part VIII of the Act; the draftsman may have borne in mind the restrictions on the Governor's powers imposed by the proviso to Section 139 (1). It is not contended that this Proclamation was ultra vires. P.18 P.18 L.38 P.18 L.23

9. In 1943 notwithstanding the restriction on his powers provided by Section 139 (1) aforesaid the Governor of Burma purported to pass an Act (the Special Judges Act 1943 - Burma Act No.X of 1943) by which he suspended the operation of vital provisions of the Act relating to the powers and functions of the High Court. The Special Judges Act began by reciting the Proclamation of 10th December 1942. It created a new Order of Special Judges. Sections 4 to 6 are as follows:-

"4. POWERS OF SPECIAL JUDGES. (1) A special
"Judge may try any offence, punishable under
"any law for the time being in force, and may
"pass any sentence which is authorized by law.
" (2) A Special Judge may take cognizance of
"an offence in any of the modes prescribed by
"sub-section (1) of section 190 of the Code and
"the provisions of section 191 of the Code
"shall not be applicable to proceedings before
"a Special Judge.
"5. PROCEDURE OF SPECIAL JUDGES. A Special
"Judge may take cognizance of offences without
"the accused being committed to him for trial,
"and in trying accused persons shall follow
"the procedure prescribed by the Code for the
"trial of warrant cases by Magistrates;
"provided that a Special Judge shall ordinarily
"record a memorandum only of the substance of
"the evidence of each witness examined, may
"refuse to summon any witness if satisfied that
"the evidence of such witness will not be
"material, and shall not be bound to adjourn a
"trial for any purpose unless such adjournment

RECORD.

"is, in his opinion, necessary in the interests
"of justice.
"6. NO APPEAL FROM CONVICTION BY SPECIAL JUDGE.
"(1) There shall be no appeal by a convicted
"person from any sentence or order passed by a
"Special Judge, and no application in revision
"made by or at the instance of a person accused
"before or convicted by a Special Judge shall
"be entertained by any Court.
" REVIEW OF DEATH SENTENCES. (2) The provis-
"ions of Chapter XXVII of the Code shall not
"apply to sentences of death passed by a Special
"Judge (but if in any proceedings before a
"Special Judge a person convicted is sentenced
"to death the proceedings shall be submitted for
"review by a Judge of the High Court nominated
"in this behalf by the Governor and the decis-
"ion of that Judge shall be final).

It will be seen that if this Act was valid the Special Judge can try any case and pass any sentence authorised by law; that no commitment for trial or enquiry preliminary to commitment, was necessary; that the Judge need record a memorandum only of the evidence: that there is no appeal from his decision and that no Court (which includes the High Court) may entertain an application for revision. Except in Section 6 the High Court is entirely ignored: the exception applies only to death sentences. As to these the provisions of the Code of Criminal Procedure are set aside but it is directed that the proceedings are to be submitted to a single Judge of the High Court, not selected by the High Court itself but "nominated in this behalf by the Governor".

The powers thus given to the Special Judge far exceed those of the regular Sessions Judges. A Sessions Judge cannot fine an accused ten rupees without the possibility of appeal: a Special Judge can without appeal or revision sentence an accused to transportation for life. Nor is there any exception of European British Subjects.

The time-honoured and much prized right of trial by Jury, hitherto enjoyed by the inhabitants of Rangoon is by implication taken away.

10. It was under this Special Judges Act that U Kyaw U, who purported to try Appellant, was appointed.

DRURY LANE, W.C.2.
1947

11. Appellant submits that his appeal should be allowed and that the whole proceedings in his trial, including his conviction and sentence, should be quashed and he so submits for the following (among other)

R E A S O N S

1. Because the Special Judges Act, 1943, was ultra vires of the Governor of Burma in that by that Act he purported to supersede the High Court, and to abrogate or suspend their powers and functions without being empowered so to do by any Act or Order and in contravention of the prohibition contained in the proviso to Section 139 (1) of the Government of Burma Act, 1935.

2. Because by the illegal procedure adopted under that Act the Appellant was de in the first place of the right to have the evidence taken in the first instance at a public enquiry on oath before a competent Magistrate; secondly of a trial by jury presided over by a Judge of the High Court selected by the High Court and thirdly of a right of appeal.

3. Because the trial of the Appellant amounted to a total disregard of correct legal procedure and a denial of justice.

4. (So far as not included under the foregoing reasons) for the reason set out in the Appellant's Petition for Special Leave to appeal to His Majesty in Council.

5. For other good and sufficient reasons.

J.D. CASSWELL.

A. PENNELL.

No. 89 of 1946

IN THE PRIVY COUNCIL

ON APPEAL FROM THE HIGH COURT
OF JUDICATURE AT RANGOON

B E T W E E N

CHITTAMBARAM ... Appellant

- and -

THE KING-EMPEROR ... Respondent

CASE for the APPELLANT

LAMBERT & WHITE,
23, Surrey Street,
Strand, W.C.2.

DRURY LANE, W.C.2.
1947

HE PRIVY COUNCIL

No. 89 of 1946

APPEAL FROM THE HIGH COURT
OF JUDICATURE AT RANGOON

BETWEEN

TAMBARAM

... Appellant

- and -

KING-EMPEROR ... Respondent

CASE for the APPELLANT

In the Privy Council.

P.C. 89 of 1946.

ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT RANGOON.

BETWEEN

CHITTAMBARAM - - - - - - - - *Appellant*

AND

THE KING EMPEROR - - - - - - - *Respondent.*

CASE FOR THE RESPONDENT.

10 1. This is an appeal by Special Leave from an order made on the 26th March, 1946, by Sir Herbert Dunkley Acting Chief Justice of Burma, nominated by the Governor of Burma as a Judge of the High Court to review the proceedings in which the Appellant had been convicted of, and sentenced to death for, murder under section 302 of the Indian Penal Code by U Kyaw U sitting as Special Judge in Rangoon Town. The said order of the Chief Justice confirmed the conviction and sentence.

2. His Majesty's Order in Council dated 29th October, 1946, provided that leave to appeal be granted solely on the question of the jurisdiction of the Special Judge, which jurisdiction is derived from the Special Judges
20 Act 1943 (Burma Act X of 1943) (hereinafter called " the Special Judges Act ").

The Appellant contends that the appointment by the Governor of Burma of a Special Judge to try criminal cases in Rangoon under the Special Judges Act is contrary to the proviso to subsection (1) of section 139 of the Government of Burma Act 1935. (Hereinafter called " the 1935 Act.")

3. Subsection (1) of section 139 of the 1935 Act is as follows :—

139 (1) If at any time the Governor is satisfied that a situation
30 has arisen in which *the government of Burma cannot be carried on in accordance with the provisions of this Act*, he may by Proclamation—

(a) declare that his functions shall, to such extent as may be specified in the Proclamation, be *exercised by him in his discretion ;*

(b) *assume to himself all or any of the powers* vested in or exercisable *by any body or authority* in Burma ;

CASE FOR RESPONDENT

RECORD OF PROCEEDINGS

WHITE,
Street,
W.C.2.