

Deva Setty and ors. Vs. State of Mysore

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Court : Karnataka

Decided On : Mar-20-1958

Reported in : AIR1959Kant170; AIR1959Mys170; 1959CriLJ751; ILR1958KAR192; (1958)36MysLJ625

Judge : M. Sadasivayya, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 539B; [Indian Penal Code \(IPC\), 1860](#) - Sections 143 and 428

Appeal No. : Criminal Revn. Petn. No. 42 of 1958

Appellant : Deva Setty and ors.

Respondent : State of Mysore

Advocate for Def. : B. Venkataswami, Govt. Pleader

Advocate for Pet/Ap. : M. Ramachandra Rao, Adv.

Judgement :

ORDER

1. The petitioners in this Revision Petition were the accused persons in Criminal Case No. 185/57 on the file of the First Class Magistrate, Hunsur and have been convicted by the learned Magistrate for an offence under Section 143 of the I. P. C., and each of the accused has been, sentenced to pay a fine of Rs. 10/- and in

default to undergo simple imprisonment for a period of 10 days. The charge against the accused was that on 28-12-1956 they were the members of an unlawful assembly, the common object of which was by means of criminal force to take possession of a land lying in front of P. W. 1's house. 14 witnesses had been examined for the prosecution and a number of defence witnesses also had been examined.

The charge-sheet which had been placed against the accused was in respect of certain other offences also, but the learned Magistrate charged them for an offence punishable under Section 143, I. P. C., and in regard to some of the accused he had framed a charge for an offence under Section 428, I. P. C., also, but he acquitted them in regard to the offence under Section 428, I. P. C. and convicted all the present petitioners for an offence under Section 143 of the I. P. C.

2. The learned counsel for the petitioners has urged three main contentions as against the conviction of the petitioners. The first contention is that having regard to the charge which had been framed in regard to the offence under Section 143 of the I. P. C., the prosecution should have satisfactorily established that the possession of this land was with P. W. 1 and that it was with the common intention of taking possession of that land from P. W. 1 that the accused persons committed this offence,

The contention of the learned counsel is that the evidence which had been adduced by the prosecution in respect of possession of this land by P. W. 1 is not satisfactory. The second contention which has been urged by the learned counsel for the petitioners is that the accused persons had placed considerable defence evidence in an attempt to show that this land was not in the possession of P. W. 1 and that it belonged to the village panchayat.

It was urged by the learned counsel that the learned Magistrate had not taken this evidence adduced by the accused persons, into consideration at all. The third contention which has been urged on behalf of the petitioners is that after the evidence in the case had been closed, the learned Magistrate proceeded to the spot to make a spot inspection and that in the course of that spot inspection, the learned Magistrate heard the accused, complainant and certain others in regard to

certain matters and that the learned Magistrate further proceeded to satisfy himself in respect of some matters by personal investigation there on the spot; it is also urged by the learned counsel that the learned Magistrate prepared two sketches purporting to show the location of a chappara, the house of P. W. 1 and such other matters and that the learned Magistrate has made liberal use, in the course of his judgment, of the sketches so prepared by him,

The learned counsel has argued that under Section 539-B of the Code of Criminal Procedure, it is competent for a Magistrate to make a spot inspection only for the purpose of properly appreciating the evidence given at the enquiry or trial and that in the present case the learned Magistrate has acted with impropriety in having made this spot inspection not merely for the purpose of appreciating the evidence on record but because the learned Magistrate thought that it would help the decision of the case.

After the hearing of the arguments, I am of the view that there is much force in these contentions which have been urged on behalf of the petitioners and that for the reasons which will be mentioned hereafter the conviction of the accused persons will have to be set aside.

3. Taking up for consideration the first contention which has been urged on behalf of the petitioners, it is seen that there is really no satisfactory evidence to show that the land in front of the house of P. W. 1, where this incident is stated to have taken place, was really in the possession of P. W. 1. The learned High Court Government Pleader pointed out that there was the evidence of P.W.1 & P. W. 9 as regards the possession of this vacant space by P. W. 1. But, in appreciating the evidence it will have to be remembered that P. W. 1 is no other than the complainant himself and that P. W. 9 is the father of P. W. 1. Exhibit D-3 is a certified copy of the sale deed which has been executed in favour of P. W. 9.

It would appear that the claim of P. W. 9 to this vacant land is based on his purchase under the Original of Exhibit D-3. The contention of the learned counsel for the petitioners is that a scrutiny of the schedule in Exhibit D-3 does not disclose the specific mention of any vacant site attached to the house which appears to have been sold under the original of Exhibit D-3. It does appear that it is only a

house, described by measurements, that has been sold under the original of Exhibit D-3.

The learned High Court Government Pleader pointed out that the boundaries on two sides of this house have been shown to be roads and that this vacant land, which is stated to be lying to the south of the house must have been between the house and the road and that therefore title to this vacant land also should have passed under the original of Exhibit D-3. But, that is a matter in regard to which Exhibit D-3 is not very clear.

It cannot be denied that there is no specific mention in Exhibit D-3 of any vacant site having been sold with the house. Under these circumstances, it cannot be said that the evidence adduced by the prosecution as regards the possession of this vacant site by P. W. 1, is very satisfactory. The accused have examined some witnesses to show that this site is not really in the possession of P. W. 1.

The learned Magistrate has not discussed the evidence which has been adduced on the side of the accused in regard to the possession of this land: the does not appear to have taken that evidence into consideration before reaching the final conclusion in the case. It may also be stated that there is no evidence to show that it was with the common object of taking possession of this land that the accused persons entered on this land.

4. The evidence adduced by the prosecution in regard to the incident itself is also far from being satisfactory. P. Ws. 4 to 6 while stating that a number of persons had entered on this land, frankly admit that they are not able to identify them. P. Ws. 3, 7 and 14 state that neither P. W. 1 nor P. W. 9 was assaulted. In view of these discrepancies, there is scope for considerable doubt as to whether the incident took place in the manner alleged by the prosecution.

The case for the accused persons appears to be that they found P. W. 1 trying to dig a well on this land which is claimed by them as belonging to the village panchayat. They attempted to prevent the digging of this well and it is on this account that there has been ill-will between P. W. 1 and the accused persons.

The case of the accused finds some support from the evidence of P. W. 14 who is said to have been engaged as a coolie for the purpose of digging a well and who admits in the course of his evidence that the accused persons asked that the digging of the well be stopped and that it was thereafter that P. W. 1 caused the digging of this well to be stopped. The learned Magistrate has not properly appreciated this aspect of the case.

5. Even apart from the insufficiency of the evidence adduced by the prosecution and the improper appreciation thereof by the learned Magistrate, there is a much more serious objection in regard to the irregularities connected with the spot inspection by the learned Magistrate. It is clearly stated in Section 539-B of the Criminal P. C. that any local inspection may be made for the purpose of properly appreciating the evidence given during the enquiry or trial. The Magistrate should not, in making a local inspection, do anything which would reduce him to the position of a witness.

In the present case, it is seen from the notes of the learned Magistrate pertaining to his local inspection, that he did not stop merely at observing the spot where the occurrence is alleged to have taken place, He seems to have conducted some sort of an investigation at the spot to find out whether a hole in the ground was or was not of recent origin. He also seems to have taken certain measurements. He appears also to have made enquiries of the people there, including the accused and the complainant. That he did all these things can be seen, from his notes pertaining to his local inspection.

He has repeatedly referred in his judgment to a sketch prepared by him. That sketch does not appear to have been put into evidence at all; but the learned Magistrate has not hesitated to make liberal use of that sketch. It does not appear to have been in the mind of the learned Magistrate that the local inspection should have been confined only to the purpose of properly appreciating the evidence on record.

At para 2 of his judgment the learned Magistrate states quite clearly that it was because he thought that it would help the decision of the case if the spot was inspected by him, that he made the spot inspection. The views of the learned

Magistrate and the impressions which resulted from the local inspection have to some extent been imported into his judgment.

In a decision *Kalappa v. Serappa*, reported in AIR 1955 Mys 131, it has been observed that while a Magistrate is entitled to make a local inspection to clear any doubt that has been created in his mind about the situation of the premises or for the purposes of appreciating the evidence, but that the Magistrate has no right to entirely create evidence and to introduce it into the case for the purpose of finding persons accused of the offence guilty.

In a decision of the Supreme Court, reported in *Pritam Singh v. State of Punjab*, (S) : 1956 CriLJ805, it has been observed by the Supreme Court that a Magistrate is not entitled to allow his view or observation to take the place of evidence, because such view or observation of his cannot be tested by cross-examination and the accused would certainly not be in a position to furnish any explanation in regard to the same.

In the present case, the spot inspection by the learned Magistrate has not been confined merely to the purpose of properly appreciating the evidence on record: the learned Magistrate has made liberal use of the sketch which is really in the nature of evidence created by him; and a perusal of the judgment also shows that he has to some extent imported into his judgment his own views resulting from the spot inspection. This is a serious irregularity by which the accused persons have been prejudicially affected.

6. The cumulative effect of all these is that in the present case there is sufficient ground for the court of revision to interfere and to set aside the conviction and sentence as against the petitioners. Therefore, this revision petition is allowed and the conviction and sentence of the petitioners are set aside. The fine amounts, if the same have been recovered from the petitioners, shall be refunded to them.

7. Revision allowed.