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Court : Kerala

Decided On : Feb-15-1957

Reported in : AIR1957Ker78; 1957CriLJ755

Judge : Koshi, C.J. and; Varadaraja Iyengar, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 471 and 474; [Constitution of India](#) - Article 20(3); [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 215 and 438

Appeal No. : Criminal Appeal No. 16 of 1956 (K)

Appellant : Krishnan Kesavan

Respondent : State of Kerala

Advocate for Pet/Ap. : K.N. Narayanan Nair, Public Prosecutor

Disposition : Appeal allowed

Judgement :

Koshi, C.J.

1. Krishnan Kesavan, the appellant, who was the accused in Sessions Case No. 55 of 1956 on the file of the Sessions Court of Trivandrum has been convicted by the learned Sessions Judge of that Court under Section 474, I.P.C., for having been in possession of a 'valuable security', to wit, a lease deed, knowing the same to be forged and intending that the same shall fraudulently or dishonestly be used

as genuine and sentenced to undergo rigorous Imprisonment for a period of 1 year. The lease deed in question is Ext. P-3 and the case arose out of a complaint filed by P.W. 1 before the Taluk Second Class Magistrate of Chirayinkil on November 9, 1953.

The complainant, who is an Advocate, alleged in his petition of complaint that on March 20, 1953 he had permitted the accused to live in a building situate in the northern portion of Parambil Purayidom in Attingal Pakuthy for a period of 3 months and that when he demanded surrender of the same, the accused set up title to the building and paramba as a lessee setting up a case that on 16-5-1117 the complainant had executed a lease deed in his favour. Exhibit P-2, dated November 3, 1953 is the reply notice sent by the accused in answer to the 'quit notice' issued by the complainant through a lawyer.

The institution of the complaint followed soon afterwards on 9-11-1953 and the complaint set out that the accused was guilty of the offences punishable under Section 467, I.P.C. (forgery of valuable security), Section 471, I.P.C., read with Section 511, I.P.C. ('attempt to use a forced document as genuine) and Section 474, I.P.C. (having possession of a forged document knowing it to be forged and intending to use it as genuine). After the complaint was entertained, at the instance of the complainant, the Court issued a search warrant for the recovery of the alleged forged document.

The Police however returned the warrant without executing it. Afterwards, on November 30, 1953 the complainant moved the learned Second Class Magistrate to issue a notice to the accused to produce the document in Court and the Court accordingly called upon the accused to produce the same. Complying with that notice, the lease deed (Ext. P-3) was produced by the accused before the Court on February 9, 1954. The case was afterwards transferred to the file of the Attingal First Class Magistrate, who after the usual preliminary enquiry, committed the accused for trial before the Trivandrum Sessions Court for commission of offences punishable under Section 465 (forgery), Section 467 and Section 474, I.P.C.

At the trial the learned Sessions Judge found that there was no evidence that the accused had committed forgery, but held that the offences under Section 474 was

brought home to him. Accordingly, while acquitting the accused of the charges under Sections 465 and 467, I.P.C., convicted and sentenced Him as stated above under Section 474, I.P.C. The appeal is against the said conviction and sentence,

2. Parambil Purayidom in Attingal Pakuthy, comprised in Sy. Plot 300, was 2 acres arid '26 cents in extent, it belonged to the, tarwad of the complainant and in O.S. 145 of 1120 on the file of the Trivandrum District Court, the complainant obtained a decree for partition of the same under which 85 cents in the northern portion was allotted to his share.. A prayer made in the plaint in the suit was that the share P.W. 1 had in the property should be given to his daughter Leelarathi Amma. who was plaintiff 2 in the case and the decree granted that prayer. Pursuant thereto the executing Court delivered the said 85 cents to her. This delivery was on March 7, 1953, vide delivery receipt.Ext, P-1. As plaintiff 2 was a minor it was her mother, plaintiff 3 in the suit, who passed the receipt to the Amin who effected the delivery.

The complainant's case is that after the delivery he remained in possession of the property, for and on behalf of his minor daughter and according to the complainant, at the instance of the complainant's son. P.W. 2, an Advocate practising at Attingal he permitted the accused to occupy the building temporarily for a period of 3 months. This arrangement is alleged to have been made on March 20, 1953. The complaint would have it that when surrender of the building was sought after the expiry of the period, the accused denied the arrangement and as per Ext. p-2 set up a case that he was not aware of the decree in O. S. 145 of 1120 the delivery in execution thereof and that he was in possession of the property as per the lease deed granted by the complainant on 15-5-1117.

3. To make out the case that Ext, P-3 was a forgery the prosecution depended upon the evidence of P.W. 1, the complainant, P.W. 2, the complainant's son and P.W. 3, the clerk of P.W. 2 These are the only witnesses examined in the case and all of them stated that the signature in Ext. P-3 purporting to be that of P.W. 1, was not really his signature. P.W. 1 definitely stated that he had not granted any lease in favour of the accused or put his signature to Ext, P-3. P. Ws. 2 and 3 supported that evidence by stating that the signature in Ext. P-3 was not that of P.W.1.

However, P.Ws 2 and 3 admitted that Ext. P-3 was in the handwriting of P.W. 3 and that P.W. 3 wrote it with the permission of P.W. 2. P.W. 3 went further and said that the contents of it was dictated to him by P.W. 2.. According to P.W. 3 it was written on the day it purports to have been written, that is, 15-5-1117 and after the writing was finished, he handed it over to P.W. 2 who in his turn handed it over to the accused.

P.W. 1 had not signed the document before it was so handed over. P.W. 2 did not admit that he dictated the contents of the document to P. W. 3 though he would agree that he permitted the latter to write it. He also denied having handed over Ext. P-3 to the accused. These differences in the versions of these two material witnesses apart, we find it difficult to believe that P.W. 2 or P.W. 3 would have on their own handed over, even though unsigned, a document purporting to have been granted by P.W. 1 and acknowledging receipt of Fs. 350/- and stipulating a rent of Fs. 300/- a year for a property belonging to P.W. 1 and which property, as stated earlier, and as mentioned in the document, was of an extent of 2. acres and 26 cents.

The stamp paper on which the lease deed is engrossed was vended in the name of P.W 1 and whether the denial of P.W. 1 that he had not signed the lease deed be true or not, as stated earlier, we cannot accept the version that P.W. 2 or P.W. 3 handed it over to the accused in the form in which they would have the Court believe, it was handed over, namely without any signature. Even if the denial of the signature by P.W. 1 be true, we cannot help thinking that whoever put the signature it must have been there when it was handed over to the accused. P. W. 1 while stating that signature was not his, also said that a great effort would appear to have been made to make that approximate to his signature.-

4. Other suspicious circumstances which occur to us about the truth of the prosecution case are that the version set up in the complaint that the permission granted to the accused to occupy the building was on March 20, 1953 and that it was for a period of 3 months are not adhered to in the evidence at the trial. Both P.W. 1 and P.W. 2 would say that it was 4 or 5 months after the delivery as per Ext. P-1 that the house was left at the disposal of the accused for his occupation.

Ext. P-1 shows that the delivery was on March 7, 1953. Again at the trial the version was that the period of occupation agreed upon was only one month.

Furthermore, we hesitate to accept that P.W. 1 or P.W. 2 would have allowed the accused to occupy the building without anything being taken from him in writing. Originally one Chinnan, the accused's maternal uncle was in possession of the property under a lease from the tarwad of P.W. 1. In 1117 when Ext. P-3 was written by P.W. 3 that lease arrangement was in force and one Kesavan, Chinnan's niece's husband, was in possession. No heir or representative of Chinnan or Kesavan was made a party to O.S. 145 of 1120 We are Inclined to think that if P.W. 1 had not signed Ext. P-3. it must have been brought into existence with some sinister purpose with the knowledge and connivance of P.W. 2 and P.W. 3.

5. In all the circumstances of the case we find it difficult to agree with the lower Court that the accused had possession of Ext. P-3 knowing, the, same to be forged document. We feel constrained to observe that the conclusion drawn by the learned Sessions Judge that the accused had possession of Ext. P-3 knowing it to be a forged document does not necessarily follow from the finding that the document was a forged one. . P.W. 2 or P.W. 3 might have been responsible for it and the accused might have believed both or either that P.W. 1 had lent his signature to it. Much depends on the circumstances under which the document passed hands and the object with which P.Ws. 2 and 3 took pan in bringing it into existence.

As we have found both P.Ws. 2 and 3, if not P.W. 1 as well, not very reliable regarding those matters, suffice it to say for the present that the prosecution has not succeeded in establishing that the accused was having possession of the document, Ext. P-3, knowing it to be forged. The appeal has therefore to be allowed, the conviction and the sentence set aside and the accused acquitted.

6. Before parting with the case however we, feel bound to point out that the learned Taluk Second Class Magistrate committed a grave violation of the right guaranteed by Article 20(3) of the Constitution in issuing notice to the accused to produce in Court the document impugned as forgery. Article 20(3) reads:

'No person accused of any offence shall be & compelled to be a witness against himself.'

We have noticed that on the failure of the police to execute the search warrant for the recovery of the impugned lease deed, the complainant moved the Court for a notice to be issued to the accused for its production and that it was pursuant to the notice so issued that the accused produced before the Court Ext. P-3.

In *M.P. Sharma v. Satish Chandra*, District Magistrate, Delhi, 1954 SCR 1077: AIR 1954 SC 300 (A), it has been held that a compelled production of incriminating documents by an accused person will amount to testimonial compulsion within the meaning of Article 20(3) of the Constitution while a search and seizure of such documents under the provisions of Sections 94 and 96 of the Code of Criminal procedure will not offend the said constitutional inhibition. At pp. 1087 to 1088 (of SCR): (at p. 304 of AIR) Mr. Justice Jaganadhas who rendered the Judgment of the Supreme Court in that case stated:

'.....the only substantial argument before us on this part of the case was that compelled production of incriminating documents from the possession of an accused is compelling an accused to be a witness against himself.....'

'Broadly stated the guarantee in Article 20(3) is against testimonial compulsion'. It is suggested that this is confined to the oral evidence of a person standing his trial for an offence when called to the witness-stand. We can see no reason to confine the content of the constitutional guarantee to this barely literal import. So to limit it would be to rob the guarantee of its substantial purpose and to miss the substance for the sound as stated in certain American decisions. The phrase used in Article 20(3) is 'to be a witness'. A person can 'be a witness' not merely by giving oral evidence but also by producing documents or making intelligible gestures as in the case of a dumb witness (see Section 119 of the Evidence Act) or the like.

'To be a witness' is nothing more than 'to furnish evidence', and such evidence can be furnished through the lips or by production of a thing or of a document or in other modes. So far as production of documents is concerned, no doubt Section 139 of the Evidence Act says that a person producing a document on summons is

not a witness. But that section is meant to regulate the right of cross-examination. It is not a guide to the connotation of the word 'witness', which must be understood in its natural sense, i.e., as referring to a person who furnishes evidence.

Indeed, every positive volitional act which furnishes evidence is testimony, and testimonial compulsion connotes coercion which procures the positive volitional evidentiary acts of the persons as opposed to the negative attitude of silence of submission on his part. Nor is there any reason to think that the protection in respect of the evidence so procured is confined to what transpires at the trial in the Court room. The phrase used in Article 20(3) is 'to be a witness' and not to 'appear as a witness'. It follows that the protection afforded to an accused in so far as it is related to the phrase 'to be a witness' is not merely in respect of testimonial compulsion in the Court room but may well extend to compelled testimony previously obtained from him. It is available therefore to a person against whom a formal accusation relating to the commission of an offence has been levelled which in the normal course may result in prosecution.....'

Again at p. 1096 (of SCR): (at p. 306 of AIR), the learned Judge observed:'

'.....A notice to produce is addressed to the party concerned and his production in compliance therewith constitutes a testimonial act by him within the meaning of Article 20(3) as above explained.'

This Court and the Courts subordinate thereto are bound by this decision and it is unfortunate that the decision escaped the attention of the Public Prosecutor before the lower Court as also of the learned Sessions Judge. The accused was undefended throughout and even before us the Public Prosecutor did not invite our attention to this aspect. No doubt, the Supreme Court decision was rendered (on March 15, 1954) after this case started and after the document was produced by the accused pursuant to the notice from the Court which had taken cognizance of the case.

The trial before the Sessions Court commenced only on October 22, 1956 and by that time almost every High Court in India had occasion to refer to the pronouncement of the Supreme Court in *M.P. Sharma v. Satish Chandra*, District

Magistrate, Delhi, (A). The Madras decisions in *In re, Sorualingam*. AIR 1955 Mad 685 (B) *Swarnlingam v. Asst. Inspector of Labour*, (S) AIR 1955 Mad 716 (C) and *Swarnalingam v. Asst Labour Inspector, Karaikudi*, AIR 1956 Mad 165 (D) may in this context be usefully cited. A more recent decision -where the Supreme Court decision and other decisions following it are reviewed is that reported in *Md. Hussain v. Provident Fund Inspector*, AIR 1957 Madh-B 68 (E). In view of the authoritative pronouncement of the Supreme Court the Public Prosecutor or the learned Sessions Judge would have been well advised to take steps to get the committal quashed.

7. That in our opinion would have been the proper course when the matter reached the Sessions-Court and the conduct of the case passed from the hands of the complainant and his legal advisers to that of the Public Prosecutor, especially when the law would appear to be well settled that the test to be applied in considering whether an item of evidence is admissible is whether it is relevant to the matter in issue and not whether it has been properly obtained: *Pyti Jacob v. State*, ILR 1952 Trav-C 937: (AIR 1953 Trav-C 466) (F) and *Kuruma v. The Queen*, (1955) AC 197 (G). The latter is a decision which Lord Goddard, Lord Chief Justice of England gave on behalf of the Judicial Committee in an appeal from East Africa and there the Judicial Committee turned down the argument that the Court was bound to ignore evidence illegally obtained even though that evidence happened to be admitted at the trial. The former is a decision to the same effect rendered by one of us on behalf of a Division Bench of the Travancore-Cochin High Court.

8. In the view we take regarding the merits of the case in hand the Question whether the evidence illegally obtained should be Ignored by the Court even though it has been allowed to be admitted does not arise for consideration. We are not aware of any case where the point has been considered in the light of the constitutional guarantee contained in Article 20(3) and we do not now feel called upon to express any opinion on that aspect of the matter. A very instructive article on the point decided in the two cases cited above is to be found at pp. 339 to 349 of (1955) Criminal Law Review.

9. To come back to the appeal, as indicated already, we allow it, set aside the accused's conviction and sentence and acquit him.

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