

In Re: Mannargan and anr.

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Court : Chennai

Decided On : Feb-26-1925

Reported in : (1925)49MLJ95

Appellant : In Re: Mannargan and anr.

Advocate for Pet/Ap. : Dr. Swaminadhan, Mr. Ethiraj

Judgement :

Devadoss, J.

1. The appellants have been convicted under Sections 457 and 380, Indian Penal Code, and sentenced to imprisonment by the Third Presidency Magistrate, Madras. The case for the prosecution is that a theft of considerable property occurred on the 22nd May, 1923, and that some of the stolen property was traced to be in the possession of the appellants within six days of the commission of the offence. The trial did not commence till the middle of last year owing to the absence of the appellants from Madras. There is a considerable body of evidence on the side of the prosecution. In the view I take of the irregularities in the trial, it is unnecessary to consider this appeal on the merits. There were three cases before the Third Presidency Magistrate in which the 1st appellant was concerned. Dr. Swaminadhan, Bar-at-Law, appeared for the accused in all the three cases. The cross-examination of the witnesses in the two other cases was completed on 26th June, 1924 and all the cases were adjourned to 28th June, 1924, as there was no

time to cross-examine the prosecution witnesses in the third case and on 28th June, 1924 Dr. Swaminadhan filed statements of the accused in the two cases and showed cause against charges being framed in them. After he completed his argument, the Prosecuting Inspector was heard on the side of the prosecution, All the three cases were adjourned to the 3rd of July, 1924. Late at night on the 2nd July, 1924, Dr. Swaminadhan was served with an urgent summons to attend the Court of the Third Presidency Magistrate on the following day to give evidence: in the third case out of which this appeal has arisen. On 3rd July, 1924 the Magistrate discharged the two cases in which the prosecution had been closed and examined Dr. Swaminadhan as a witness for the prosecution in the present case. Dr. Swaminadhan very rightly thought it was not proper for him to appear for the defence inasmuch as he had been examined as a witness for the prosecution and ceased to appear from the 3rd July. The Magistrate framed a charge against the appellants on 4th July, 1924. There was no cross-examination of Dr. Swaminadhan on 3rd July, 1924, as the appellants had no Counsel to represent them that day.

2. It is contended before me by Mr. Ethiraj that the trial has been vitiated by the procedure adopted by the Magistrate in putting the defence Counsel in the box without proper notice to the accused and without allowing the accused an opportunity to engage some other Counsel to conduct the defence on the day on which Dr. Swaminadhan was examined as a witness.

3. The Crown Prosecutor urges that the Police had applied for summons on the 13th of June, 1924, and that Dr. Swaminadhan must have had information that he was going to be examined as a witness and that the accused have not been prejudiced by the procedure adopted by the Magistrate. In order to make clear what really happened on the day when Dr. Swaminadhan was examined as a witness, a letter of Dr. Swaminadhan written to Mr. Ethiraj, Counsel for the appellants, has been produced and that letter contains details as to what happened. As the Magistrate is said to be on leave and as he is not likely to return to duty in a week or two I do not think it necessary to call for a report from him as to what happened. I accept as correct the statement made by Dr. Swaminadhan in his letter to Mr. Ethiraj as they are borne out by the records in the case.

4. The question is whether the trial has been vitiated by the procedure adopted by the Magistrate in this case. Dr. Swaminadhan was not mentioned as a witness in the charge sheet filed in the case. If the prosecution thought that Dr. Swaminadhan's evidence would materially help the case against the accused, one would naturally expect his name to be found in the charge sheet. If the police came to know after the charge sheet was filed that Dr. Swaminadhan could give material evidence against the accused he should have been cited at the earliest opportunity so as to allow the accused reasonable time to engage the services of a competent counsel. P. Ws. 1 to 7 were examined-in-chief on 3rd May, 1924, P. Ws. 8 to 10 on 16th May, 1924, P. Ws. 11 and 12 on 23rd May, 1924, P. Ws. 13 and 14 on 31st May, 1924 and P.W. 15 on 6th June, 1924. There were thus five hearings before 3rd July, 1924. There is nothing to show that on any one of these dates the accused were informed that their counsel was going to be called as a witness on the side of the prosecution. The fact that summons was served upon Dr. Swaminadhan late at night on the 2nd of July throws suspicion on the bona fides of the police in calling Dr. Swaminadhan as a witness for the prosecution, and this is strengthened by the fact that his evidence does not materially help the prosecution. The conduct of the police is highly reprehensible in applying to the Magistrate at a late stage of the case to summon the counsel for the accused as a witness for the) prosecution. In the circumstances of the case I cannot but consider that the police have been guilty of a very mean and dirty trick in serving the summons upon Dr. Swaminadhan the night before the day to which the case against the accused stood adjourned. It is a matter for surprise that a Magistrate of considerable experience like the Third Presidency Magistrate should have so far yielded to the influence of the police as to summon the counsel for the defence as a prosecution witness without giving due notice to the accused so that they might engage a competent counsel. The Crown Prosecutor urges that as the accused cross-examined the prosecution witnesses on 15th August, 1924, they could not have been prejudiced by the action of the Magistrate. This argument overlooks the fact that the services of a counsel are very necessary when witnesses are examined-in-chief to check not only leading questions but to prevent irrelevant evidence being recorded. If the prosecution wants to call the counsel for the defence as a witness on its side sufficient notice ought to be given to the accused

to engage a competent counsel. I consider it to be very reprehensible to call a counsel who is actually defending an accused person as a prosecution witness. Such a course not only affects the proper conduct of the defence but it gives a handle to the prosecution to prevent a counsel who is well acquainted with the facts of the case from conducting the defence. The Crown Prosecutor relies upon *Weston and Ors. v. Peary Mohan Dass* ILR (1912) C 898 and contends that it is not incompetent for a counsel to give evidence in the case in which he is briefed. The question here is not the competency of a counsel engaged in a case to give evidence for one party or the other. The real question is, whether a counsel, who is conducting the defence of the accused and who is well instructed and is well acquainted with the facts of the case could be suddenly called upon to give evidence for the prosecution without safeguarding the interests of the accused by giving ample time to the accused to engage the services of a competent counsel. Even if time be granted to the accused to engage some other counsel, I consider it very reprehensible tactics for the prosecution to call the counsel who is actually conducting the defence as a witness for the prosecution in the middle of the case. The prosecution, if it thinks that the evidence of a particular individual will prove the case against the accused, his name should be mentioned in the charge sheet and if the police get information at a later stage that important evidence is likely to be got from the defence counsel, the police should make an application at the earliest opportunity so that the defence may not be prejudiced. In this case, I have not the slightest hesitation in holding that the method pursued by the police and the action of the Magistrate in putting Dr. Swaminadhan in the witness-box on the day he appeared to conduct the defence of the accused has vitiated the trial, and it is unnecessary to consider whether the accused have been prejudiced or not. It is opposed to all principles of criminal jurisprudence for the prosecution to deprive the accused suddenly of the service of their counsel. The argument that Dr. Swaminadhan could have appeared for the accused after that date is untenable, for, it is against the etiquette of the bar that a counsel should give evidence in the case in which he is engaged as counsel, and no self-respecting counsel would like to conduct a case for the defence after having been called as a witness for the prosecution. I consider the conduct of Dr. Swaminadhan in retiring from the case as the only proper course open to him. I cannot too strongly condemn the action of

the police in calling Dr. Swaminadhan as a prosecution witness after knowing probably that the other cases against the accused were collapsing ; and the action of the Magistrate in allowing himself to be a tool in the hands of the police and in framing a charge on the 4th before the cross-examination of Dr. Swaminadhan was completed, is open to grave censure.

5. There are other irregularities in the trial, such as the admission of inadmissible evidence like Exs. I and II. Taking all the circumstances into consideration, I consider the trial has been vitiated by the procedure adopted by the Magistrate: and there is no other course open but to set aside the conviction of the appellants and to direct that they be tried by the Chief Presidency Magistrate.

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