

Lazar Fernando Vs. Amirtham Fernando

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Court : Chennai

Decided On : Feb-22-1929

Reported in : AIR1929Mad604; (1929)57MLJ214

Appellant : Lazar Fernando

Respondent : Amirtham Fernando

Judgement :

ORDER

Odgers, J.

1. In this case the complainant, a brother of the accused, has laid his complaint in the Court of the Sub-Magistrate of Tuticorin under Section 55 of the Abkari Act and Section 9(c) and (d) of the Opium Act. The story is very shortly, that the accused was seen by the complainant and others going down towards the shore, where it is said he had a boat ready to ship ganja and opium on board a vessel that was lying at the port of Tuticorin. The complainant and his party are said to have arrested the accused. The former informed the Sub-Inspector who arrived with two constables at about 1 o'clock in the morning and to whom the accused, who is said to have had a sack with him, was handed over by the complainant and his party. Objection was taken that the provisions of both the Abkari and the Opium Acts prohibit prosecution by private individuals and that, therefore, the complainant had no locus standi to institute these proceedings as the police refused to interfere and

referred the case as false, apparently believing that the accused was beaten by the prosecution witnesses and the bundle of exciseable goods was foisted upon him while drunk, the prosecution witnesses as well as the accused being, in the opinion of the police, notorious smugglers.

2. Now the question is whether there is any right of private complaint under these two Acts. As regards the Abkari Act, Madras Act I of 1886, there is a long series of Sections in Chap. VIII headed 'Powers and Duties of Officers, etc.' For instance, certain Abkari and Police officers may search and arrest (Section 31), or enter and inspect premises (Section 32), and the Collector or Magistrate may on information issue a warrant to search (Section 30), any officer of the Abkari, Salt, Police, Land Revenue or Customs Departments or any other person duly empowered may arrest (Section 34). By all these Sections there is provided a special procedure, e.g., a preliminary enquiry before an Abkari Inspector who may summon witnesses

3. (Section 40 following). The Abkari Inspector may forward a person in custody to a Magistrate and his report is to be treated as a complaint (Section 50). Throughout the Act there is no mention of any private person having power to arrest. In fact, several Sections provide that the person who is to take action should be not below a certain rank. Here there was of course no complaint by an Abkari Officer under Section 50. We have the authority of a Bench of this Court in Kuppuswami Naidu, In re (1922) 44 M.L.J. 231 to the effect that, on an abkari offence, if a charge sheet is put in under the ordinary police procedure, the proceedings are not properly instituted, because they are not in accordance with the procedure to which I have referred contained in the Abkari Act. The learned Judges held that the accused person has the right to a special procedure regulating the course of the investigation and that, he having been denied this special procedure, he was placed under a considerable disability. They also held that the matter is governed by the provisions of the Abkari Act read with Section 5(2) of the Criminal Procedure Code, adding that there is a much more formal enquiry laid down under the Act than is laid down under the Criminal Procedure Code. The case in Lakshmi Narasayya v. Narasimhachari : (1913)25MLJ577 may also be referred to. That was an insolvency offence specially provided for by the Presidency Towns Insolvency Act. It was there held that, as the offence is created

by that Act and the Insolvency Court was constituted into a special tribunal to try that offence with a special procedure, the ordinary Criminal Procedure Code was not applicable. I think, therefore, there is no doubt that under the Abkari Act the proceedings must be initiated and conducted under the elaborate rules contained in the chapter and Sections of the Act to which I have referred. It is obvious that that was not done in the present case.

4. Now the further question arises with regard to the Opium Act, because, it is said, that in this sack of which the accused was in possession, when he was seen by the Police, were 1 1/2 lbs. of opium besides a very considerable quantity of ganja. The latter will clearly fall under the Abkari Act, but we have to deal with the opium and the complaint laid under that Act. Now the Opium Act is an Imperial Act and was passed as long ago as 1878 and Mr. Jayarama Aiyar, the learned Advocate for the accused and the learned Public Prosecutor say that their researches have not enabled them to find any authority on this Act. So, it is unfortunately for me a question of first impression as to whether a similar or somewhat similar procedure is contemplated by the Opium Act as is laid down in the Abkari Act. The Act is very much shorter than the Abkari Act and there is much less detail in it. To begin with, there is a prohibition against the possession of opium. That is all we are concerned with in this case (Section 4). Then the Local Government may make certain rules with regard to this possession, etc. Then Section 9(c) provides a penalty on conviction before a Magistrate for possessing opium; Section 11 provides for the confiscation of opium in certain cases; Section 14 gives the power to enter, arrest and seize. Now that power is given to any officer of any of the departments of Excise, Police, Customs, Salt, Opium or Revenue, superior in rank to a peon or constable, who may in right of his office be authorised by the Local Government in this behalf. He may enter into a building where he has reason to believe opium is manufactured, kept or concealed, seize the opium, detain, search or arrest any person whom he has reason to believe to be guilty of any offence relating to such opium. Section 15:

Any officer of any of the said departments may seize in any open place or detain or search any person whom he has reason to believe to be guilty of any offence and, if such person has opium in his possession, arrest him.

5. Section 18 provides for punishment for vexatious entry or search or seizure or arrest. Then Section 19:

The Collector of the District, Deputy Commissioner or other officer authorised by the Local Government in this behalf, either personally or in right of his office, or a Magistrate, may issue a warrant for the arrest of any person whom he has reason to believe to have committed an offence relating to opium, or for the search, etc.

6. Section 20:

Every person arrested and things seized under Section 14 or Section 15 shall be forwarded without delay to the officer in charge of the nearest police station ; and every person arrested and thing seized under Section 19 shall be forwarded without delay to the officer by whom the warrant was issued.

7. Then follows a sub-paragraph:

Every officer to whom any person or thing is forwarded under this section shall, with all convenient despatch, take such measures as may be necessary for the disposal according to law of such person or thing.

8. I take it that that means that the person arrested and the thing seized are to be forwarded to the officer in charge of the nearest police station or to the officer who has issued the warrant and he has to take steps according to law to bring the person to punishment and to deal with the things seized, under Section 11. There is no mention throughout the Act of any right of private arrest or complaint. Although the Act, as I have said, does not contain these elaborate provisions of the Abkari Act, there is very little doubt in my mind, that for an offence against the Opium Act, the procedure which is indicated in that Act is to be strictly followed; that is to say, that the officers of the departments mentioned together with the Collector of the District, Deputy Commissioner or other officer authorised by Government have alone the power to initiate proceedings. The utmost that a private person can do is to set one of these authorised persons in motion by information. That, it will be noticed, was attempted to be done in the present case by the information to the police, but the police have referred the complaint as false.

In any event, there would seem to be no warrant for the previous private arrest by the complainant and his party of the accused. I see no reason, therefore, to hold that there is any essential difference between the procedure under these Acts.

9. Now, the second point urged before me was, that the Second-class Magistrate of Tuticorin was not authorised to try this offence as under the Opium Act 'Magistrate' means outside the Presidency Towns a Magistrate of the first class, or (when specially empowered by the Local Government to try cases under this Act) a Magistrate of the second class. It was held in a case in *Mahomad Kasim v. King-Emperor* : (1913)25MLJ577 by Spencer and Seshagiri Aiyar, JJ., that the notification in the Gazette of the 12th October, 1880, was an insufficient compliance with Section 3 of the Opium Act, and that, where a class of officials is invested with powers, such officials are only generally and not specially empowered. Government apparently were advised to issue a fresh notification, which they did in June, 1915, where they specially empower the Second-class Magistrate of Tuticorin in the District of Tinnevely. That was held by Mr. Justice Ayling and myself to be a sufficient compliance with the notification, and that that was a special empowering of the person holding that office, which would satisfy the requirements laid down by the learned Judges in *Mahomad Kasim v. King-Emperor* (1915) 2 L.W. 233. That point therefore goes.

10. Having regard to my decision on the Abkari and Opium Acts, the proceedings in C.C. No. 322 of 1928 on the file of the Sub-Magistrate of Tuticorin must be quashed on the ground that he has no jurisdiction under the circumstances to entertain the complaint made to him by the complaint. The accused will be set at liberty.