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In Re : Annavi Muthiriyan

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Court : Chennai

Decided On : Feb-11-1915

Reported in : (1915)28MLJ329

Appellant : In Re : Annavi Muthiriyan

Judgement :

Spencer, J.

1. Apart from the question of the improper admission at the trial of the evidence of Akilanda Soma Naik given before the committing Magistrate without proof that it was impossible to procure by attendance before the Sessions Court with which my learned brother has fully dealt, I think that the accused is likely to have been further prejudiced in this trial by the misreception of hearsay evidence and that, on this account also, the appeal must succeed. The only evidence to connect the accused with this decoity is the statement of two witnesses, viz., Akilanda Soma Naik examined in the committing Magistrate's Court and P.W. 2 examined in the Sessions Court. Both of these persons, on their own admission, are men employed by the Police to do private detection work in Kaller villages on behalf of the Police and in my opinion, the jury should have been cautioned against acting too readily upon such evidence.

2. Both of these witnesses have given a detailed statement as to the inquiries made by them to obtain a clue to the decoity, in the course of which they

employed one Chinnapayal as an agent. The statements of Chinnapayal who has not been examined as a witness in the trial of this accused are not admissible in evidence, but in the depositions of both of these witnesses, statements as to what Chinnapayal said have been recorded as though it was direct evidence. One of the statements made by Chinnapayal as given by P.W. 2 is that four persons named by him had taken part in this dacoity and some others whose names he did not remember; one of those names was that of the accused under trial. What Chinnapayal said was not evidence and should not have been admitted by the Sessions Judge, and it is likely to have prejudiced the Jury in deciding whether the accused was guilty or not. There are other statements in these depositions referring to other offences which were irrelevant for the purposes of this trial. If the Sessions Judge found it necessary to admit such evidence for other purposes he should have cautioned the Jury as to its relevancy against the present accused. For these reasons, I agree that the conviction must be set aside and that the accused should be retried.

Seshagiri Iyer, J.

3. The Jury brought a verdict of ' guilty' against the accused in this case and the Sessions Judge convicted them of the offence of dacoity.

4. It is argued in appeal that there have been misdirections by the Judge and improper admission of evidence which have prejudiced the accused and to the verdict of the Jury. I do not think it has been proved that there has been any positive misdirection to the Jury except it be the failure of the Sessions Judge to draw pointed attention to the fact that they have to rely upon the testimony of an absent witness in the case. He refers in paragraph 7 of his summing up to the fact that the Jury are not dependent on the evidence of Akilanda Soma Naick alone. That cannot be regarded as a direction to disregard the evidence of this absent witness. Other points relating to misdirection were mentioned but they all affect the appreciation of the evidence and do not point to any failure on the part of the Sessions Judge to direct the Jury aright.

5. But on the question of the improper admission of evidence, I am of opinion that the conviction could be set aside. In the course of the examination of the 2nd witness for the prosecution reference was made to the accused having taken part in another dacoity this evidence ought not to have been allowed to go in. The nature of the evidence is such that it would have prejudiced the jury against the accused. But the more serious objection relates to the admission of the evidence of one Akilanda Soma Naick who was examined before the trying Magistrate. The Sessions Judge says, 'This man has not put in an appearance in this Court and it does not appear why he has not come.' Further on he says that ' the Public Prosecutor asked that his deposition in the lower Court might be filed as evidence here, as it seemed that it would be causing unnecessary delay in/the disposal of the case if it had to be adjourned for securing his attendance.' Again he says that the accused's pleader does not object to the evidence given before the Magistrate being admitted under Section 33 of the Evidence Act. Under the Evidence Act the Judge has to satisfy himself that the presence of the witness cannot be obtained without an amount of delay or expense which he considers to be unreasonable. It is not enough to have the statement of the Public Prosecutor to that effect. There must be independent evidence before him before he can exercise the powers given to him under the Evidence Act. Further the Appellate Court may not be prepared to act upon representations which have satisfied the trial Judge. It is therefore incumbent on the lower Court to have on record some legal evidence on which he could act. It was held in Empress of India v. Mulu I.L.R. (1880) A. 646 that it is the duty of the Court acting under Section 33 to have reliable evidence regarding the impracticability of procuring the attendance of a witness. In In Re Rami Reddi I.L.R. (1881) M. 48 this conclusion seems to have found favour with the learned Judges of this High Court. In a recent case in Calcutta in Emperor v. Kangal Mali (1906) 41 C. 601 under similar circumstances the Judges pointed out the danger of allowing statements made in the Court below to be used as evidence without having taken the necessary steps to ensure the attendance of the witness in the Court. The same view was taken in Noshai Mistri and Ham Chunder Haldar v. The Empress 5 C.K 958 and in the Queen v. Lukhun Santhal (1874) 21 W.R. 56. I am therefore of opinion that the procedure of the Sessions Judge in acting upon the statement of the Public Prosecutor was irregular.

6. Does the fact that the accused's pleader consented to the course make any difference in the matter? This question is not altogether free from difficulty. It is true, as pointed out in Imperatrix v. Pitamber Jina I.L.R. (1877) B. 61 that the provisions of the Evidence Act relating to the admissibility of evidence are as applicable to criminal trials as to civil trials. There can be no doubt upon this matter, as Section 1 of the Evidence Act says that ' the Act extends to all judicial proceedings in or before any Court including courtsmartial. ' Therefore Section 167 of the Evidence Act governs trials before the Sessions Court. The question remains whether the provisions of the Act are exhaustive of the rules of evidence and whether we can invoke the aid of the principles of jurisprudence or of English law as supplementing and explaining the rules of evidence given in the Act. The high authority of Edge, C.J. in The Collector of Gorakhpur v. Palakdhari Singh I.L.R. (1889) A. 1 can be cited for the position that English decisions relating to evidence can be relied upon in India. I cannot agree with the learned Public Prosecutor that we are not entitled to refer to English decisions as the Act is selfcontained. Such a practice has the authority of very eminent Judges in India and I am not prepared to depart from it. Section 58 of the Evidence Act lays down that no fact need be proved in any proceeding which the parties thereto or their agents agreed to admit at the hearing. The learned Public Prosecutor argues from this that as the pleader for the accused dispensed with the personal appearance of Akilanda Soma Naick in the Sessions Court, the accused is bound by such an admission. The rules of evidence are subject to the general principles of jurisprudence, that it is the duty of the prosecution to establish the case against the accused, and that they should not rely upon admissions made by him in the course of the trial for convicting him. In Reg v. Bertrand (1867) 4 M.P.C. 460 Rule 391 the Judicial Committee of the Privy Council in a very elaborate judgment point out the inadvisability of basing a conviction upon evidence which but for the consent of the accused counsel should not have been admitted. This decision was followed in the The Queen v. Bholonath Sen 2 C.D 23 where the learned Judges pointed out that no conviction whould be based against the accused upon anything that he said or consented in. the course of the trial. The Queen v. Bishonath Pal (1869) 12 W.R. 3 Jungi Khan v. Hur Chander Rai (1871) 16 W.R. 69 and Queen v. Raghoonath Doss (1875) 23 W.R. 59 are to the same effect. I may cite Rangasami

v. Emperor : (1908)18MLJ330 a decision of the learned Chief Justice in favour of the same position. It may be argued that in most of these cases the consent of the accused or of his counsel was given for an infraction of the rules of procedure contained in the Code of Criminal Procedure. I do not think any difference can be made between the violation of a rule of Procedure and the violation of the rule of evidence. The decision in King-Emperor v. Sakharam Pandurang I.L.R. (1901) B 50 is strongly in favour of the contention of the vakil for the appellant. In Subba v. The Queen Empress I.L.R. (1885) M. 83 the learned Judges of this Court, while holding that the improper admission of evidence was illegal, came to the conclusion the accused was not prejudiced by such evidence being admitted and that therefore it was not necessary to order a trial. The same view has been taken in Purmessur Singh v. Soroop Audhikaree (1870) 13 W Rule 40 (Cr Raling) and in In the matter of the Petition of Jhaubhoo Mahaton 1I.L.R. (1882) C. 739. I understand these judgments to lay down that prima facie the consent of the accused or of his counsel is presumptive evidence of the absence of prejudice. I do not take these rulings to lay down anything more than that. I do not think it was intended to rule that, because an irregular procedure or improper admission of evidence has been consented to by the accused, it precludes the Judges hearing the case from decrising whether, notwithstanding the consent of the accused, his cas has been prejudiced by the irregularity. In the present case the Sessions Judge pointed out distinctly ' that unless you

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