

In Re: Ayarvali Pokker and ors.

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SooperKanoon Citation : sooperkanoon.com/780348

Court : Chennai

Decided On : Apr-04-1923

Reported in : (1923)45MLJ305

Appellant : In Re: Ayarvali Pokker and ors.

Judgement :

Ayling, J.

1. The four accused in this case have been convicted of offences under Sections 302 and 149 I.P.C. murder committed in the course of rioting, and have been sentenced, three of them to death, and the fourth to transportation for life. The learned Counsel who argued the case for the three accused Nos. 1, 2 and 4, who have been sentenced to death, draws our attention at the inception of the hearing to the fact that the Sessions Judge has illegally declined to summon three defence witnesses cited by the first accused and has issued a commission for their examination purporting to act under the provisions of Section 503 of the Criminal Procedure Code. He argues that this procedure is illegal and that the accused have been materially prejudiced and that for this reason the convictions cannot stand.

2. The trial was held under the provisions of Malabar (Restoration of Order) Ordinance I of 1922, Section 10 which provides that 'in the trial of cases under this Ordinance the Court shall follow the procedure laid down in the Code of Criminal Procedure 1898 for the trial of warrant cases and shall have all the powers

conferred by the said Code on a Magistrate in regard to the issue of processes to compel an appearance and to compel the production of documents and other moveable property.' Turning to the provisions of the Criminal Procedure Code for the trial of warrant cases by Magistrates contained in Chapter XXI of the Code, we find that under Section 257 'If the accused after he has entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness' the Magistrate is bound to issue the process 'unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice.' Such ground has to be recorded by him in writing. This section was binding on the Special Judge who tried the case now under appeal.

3. We have ascertained from the Special Judge that, on accused being asked to name their witnesses, the first accused named three witnesses, Challil Pokker, Challil Mokari and Kunhi Moyi meaning that they should be orally examined in Court; and under the section already quoted it was his duty to issue processes for the attendance of these witnesses unless he chose to refuse the request on the ground that the application was made for the purpose of vexation or delay or for defeating the ends of justice. In the latter case he was bound to record his reasons.

4. The witnesses in question are witnesses whose evidence, if true, would be of the utmost importance in the case. They were cited to prove that one of the murders charged against the, accused, that of Kunhi Kannan Nayar was the work not of accused 1, 2 and 4 as alleged by the prosecution but of another man altogether, one Kunhammad who is said to have since committed suicide. The Special Judge appears to have nowhere in the course of the trial recorded his reasons for refusing to issue processes to these witnesses, but in reply to a reference from this Court, he has reported that he examined them by commission according to his practice during these trials, as 'to obtain witnesses from Coimbatore, Trichinopoly and Bellary and even Andamans seemed to entail unreasonable delay expense and inconvenience.' We are not concerned here with the attendance of witnesses from the Andamans or even from Trichinopoly and Bellary, but only from Coimbatore; and we do not think that the inconvenience and

expense to the State entailed by the conveyance of three convicts from Coimbatore to Calicut could be treated as so serious that an application for the attendance of these witnesses should be deemed to be made for the purpose of vexation or delay or defeating the ends of justice. It seems to us that it was the duty of the Special Judge, in a case of this character involving a capital charge and in view of the importance which the evidence of these witnesses would possess, if believed, to take the usual steps to enforce the attendance of these witnesses.

5. The issue of a commission on the other hand, was in our opinion illegal. Under Section 503 the power to issue a commission is limited to a Presidency Magistrate a District, Magistrate, a Court of Sessions or the High Court, and the Special judge comes under none of these categories. His powers are regulated by Section 10 of Ordinance 1 of 1922 above referred to and as already pointed out are limited to the powers conferred by the same Code on 'a Magistrate.' We cannot accept the suggestion of the learned Public Prosecutor that the powers thus conferred include powers which under the Criminal Procedure Code are confined to a District Magistrate. The omission to clothe a Special Judge with such powers may have been accidental, but we are not concerned with that. Reading Section 10 of the Ordinance with Section 503 of the Code of Criminal Procedure we can only conclude that the issue of the commission by the Special Judge was ultra vires.

6. The next question is what is the effect of the special Judge's illegal action. We have been referred by the Public Prosecutor to Section 16 of Ordinance 1 of 1922 which says that 'no sentence finding or Order shall be invalid by reason of any error, omission or irregularity in any of the proceedings before or during the trial unless such error, omission or irregularity has in fact occasioned a failure of justice.' We do not think that we can decline to interfere with the conviction relying on this ordinance. The accused's right to have his defence witnesses examined by the Judge or the Magistrate who disposes of the case is one which has been secured for him by the Code of Criminal Procedure, and where the action of the Court has deprived him of this right, we think it must be said that a failure of justice is the natural result of the irregularity and this is the way in which the words of Section 537 of the Criminal Procedure Code which are exactly the same as the

words of Section 16 of the Ordinance have been invariably interpreted. We do not think that this is affected by the fact that the accused finding that they could not have their way and that the Court would not summon the witnesses made the best of a bad job by putting interrogatories. We think the illegality is such that the only course we can take is to set aside the conviction.

7. Lastly we are confronted with the question of what further order we should pass. Sections. The Court of the Special Judge of South Malabar has ceased to function from the 25th February 1923, and we cannot therefore, even if we would, order a retrial by that tribunal. It has been suggested by the Public. Prosecutor that Section 4 of Act I of 1923 would empower us to direct a retrial by the Court of the Sessions Judge of South Malabar but the section in question is somewhat obscure and we entertain grave doubts as to whether in itself it would authorise such action. On the other hand under Section 11 of Ordinance 1 of 1922 which gives us jurisdiction to hear the present appeal, we possess all the powers conferred on an appellate Court under Section 423 of the Criminal Procedure Code and this includes the power in reversing a conviction to direct a committal for trial. In the exercise of this power, we accordingly set aside the convictions and the sentences passed on the appellants and direct their committal to the Sessions Court of South Malabar on the charge framed against them by the Special Judge in this case. At the same time we order that the case against them on this charge shall be transferred for disposal to the Sessions Court of Coimbatore.