

Nataraja Mudaliar Vs. Devasigamani Mudaliar

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Court : Chennai

Decided On : Jul-24-1930

Reported in : AIR1931Mad241

Appellant : Nataraja Mudaliar

Respondent : Devasigamani Mudaliar

Judgement :

ORDER

Sundaram Chetty, J.

1. This is a criminal revision petition tiled by the accused against the conviction and sentence of fine imposed on him for an offence under Sections 379 or 424, I. P.C. The case against the petitioner is that he dishonestly cut and removed two trees which stood at the backyard of the house belonging to the complainant.

2. The main contention of the learned Counsel for the petitioner is, that the failure of the Magistrate to examine the accused under Section 342, Criminal P.C., after all the prosecution witnesses were examined, is an illegality which vitiates the whole trial. There is no doubt as to the facts which have to be taken into consideration in deciding this technical objection. After the examination of P. W's. 1 to 3 a charge was framed on 4th May 1929 and then an additional witness, namely. P. W. 4, was examined on 28th June 1929. After the examination of this additional witness the Court did not question the accused in accordance with

Section 342, Criminal P.C. According to Clause (1) of this section, it is obligatory on the Magistrate to question the accused for the purpose of enabling him to explain any circumstance appearing in the evidence against him after all the witnesses for the prosecution have been examined and before the accused is called on for his defence. This provision has been held in several decisions to be mandatory, and there is no doubt that a strict compliance with this provision should be made after the close of the prosecution evidence and before the accused enters on his defence. That being so, the fact that the accused was questioned under the aforesaid section after the examination of three witnesses for the prosecution cannot be deemed to be a proper compliance with the mandatory provision laid down in the aforesaid section. Reliance has been placed on the petitioner's side on the Full Bench decision of this High Court reported in *Varisai Rowther v. Emperor* A.I.R 1923 Mad. 609. The question has been considered at great length, and the decision of the Full Bench is to the effect that the provision in the latter part of Section 342, Clause 1, Criminal P. C, directing the Court to question the accused generally on the case is mandatory, and failure to comply with the terms of the section is an illegality vitiating the trial and not a mere irregularity which can be cured under Section 537 of the Code. The question whether the non compliance with the strict provision of the aforesaid section has caused any prejudice to the accused or not does not arise, as would appear from the decision of the Full Bench.

3. It is also clearly laid down in this decision that the accused should be examined in the aforesaid manner when the prosecution has finished calling the evidence, though he need not be so examined once again after the cross-examination and re-examination of the prosecution witnesses recalled. There is no doubt that, if a fresh witness is called in and examined, the accused must again be questioned according to Section 342. The learned Subdivisional Magistrate, in dealing with this objection, seems to be of opinion that the written statement filed by the accused on 1st July 1929, after the close of the whole trial may be taken to be a substantial compliance with the provisions of Section 342, Criminal P.C. It seems to me that this view is not in consonance with the express provisions of the Code. As far as I could see, there is no provision in the Code except in Section 256, Clause 2, for the accused to put in any written statement. What Section 3-12

contemplates is the oral examination of the accused by the Magistrate who should put questions generally on the case and elicit answers from the accused. There is nothing in the Full Bench decision referred to above to indicate that the filing of a written statement tantamounts to the examination of the accused as required by Section 312. The omission in the present case of complying with the mandatory provision of Section 342, Clause (1), Criminal P.C., must be taken to vitiate the trial, on the authority of the Full Bench decision of this Court. It is not necessary to refer to the decisions of the other High Courts, some of which seem to be in conflict with the view taken by the Full Bench of this Court. Following the Full Bench decision, I must hold that the trial is vitiated by the illegality referred to above. On this ground, the conviction and sentence have to be set aside.

4. Even on the merits, it seems to me that a clear case of theft under Section 379, I. P.C., has not been made out. It has been admitted by the complainant, P. W. 1, that the house and trees were in Murugesu Mudaliar's possession as tenant till his death and subsequently in his wife's possession. The actual possession on the date of the commission of the alleged offence was with the wife of Murugesu Mudaliar who was occupying it in a tenant's capacity. The complainant having granted a lease of the house and the trees to Murugesu Mudaliar, and the lessee's heir having been in actual possession on the strength of the lease, it cannot be argued with any degree of force that possession of the trees in question was with P. W. 1, on account of his ownership. Lease generally implies a transfer of an interest in immovable property, which is possession. P. W. 1, not having been in actual possession of the trees in question, it is difficult to understand how it can be said that the trees were cut and removed from his possession. Whatever right P. W. 1 may have for damages against the person who cut and removed the trees, it is clear that no offence of theft was committed under the Indian Penal Code. If there was no theft it is still more difficult to understand how there could have been a dishonest concealment or removal of the timber. Even on the merits the conviction seems to be unsustainable.

5. In the result this petition is allowed and the conviction and sentence of the accused are set aside, and the fine, if levied, will be refunded to him.

