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In Re: Sellamuthu Padayachi

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Court : Chennai

Decided On : Aug-05-1953

Reported in : AIR1954Mad313

Judge : Govinda Menon and ;Basheer Ahmed Sayeed, JJ.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections 495, 495(4) and 537

Appeal No. : Criminal Appeal No. 725 of 1952

Appellant : In Re: Sellamuthu Padayachi

Advocate for Pet/Ap. : K. Srinivasamurthi, amicus curiae;Public Prosecutor

Judgement :

Govinda Menon, J.

1. The appellant has been sentenced to transportation for life by the learned Sessions Judge of Tiruchirapalli division for the murder of one Kaliyaperumal by beating him with a bamboo stick at Karadikulam village, Udayarpalayam taluk, on 12-6-1952. We do not wish to express any opinion regarding the credibility of the prosecution evidence in view of the course which we are adopting.

The learned Sessions Judge believed P. Ws. 1 to 4 and 9 who, according to him, deposed consistently and with very good demeanour. The evidence of these witnesses may or may not be trustworthy, but it is unnecessary to express any

opinion about it. The question of importance that has been argued is whether the proceedings before the Sessions Judge were vitiated by an event that happened in the committing court and if that is so, whether the entire committal and trial are thereby rendered null and void.

2. As stated by the learned Sessions Judge, in the committing court, the investigating officer, who was examined as P. W. 16 in the Sessions Court, conducted the prosecution by examining a large number of witnesses. The Sub-Magistrate who was in charge of the preliminary enquiry permitted him to do so. The prosecution witnesses who were examined by the investigating officer as prosecuting counsel in the committing court, were all examined as prosecution witnesses in the Sessions Court as well and the depositions of Karutha Mookan alias Manickam, (P. W. 5 in the Sessions Court), Rajayee (P. W. 6 in the Sessions Court), Gopal Padayachi (P. W. 7 in the Sessions Court) and Rajamanickam (P. W. 8 in the Sessions Court) in the committing court were exhibited as substantive evidence under Section 288. Criminal P. C., and have thereby become part of the proceedings before the Sessions Judge.

The question for consideration is whether the circumstance that the investigating officer examined prosecution witnesses in the committing court has vitiated the entire proceedings both before the committing court as well as before the Sessions Judge.

3. Sub-section (4) of Section 495, Criminal P. C. lays down that an officer of police shall not be permitted to conduct the prosecution if he has taken any part in the investigation into the offence with respect to which the accused is being prosecuted. There has been admittedly a violation of this mandatory provision of the statute. The learned Public Prosecutor contends that this circumstance does not render the proceedings void, taut is only an irregularity which can be cured by the provisions of Chapter 45 of the Criminal P.C.

Section 529 deals with irregularities which do not vitiate proceedings and Section 530 deals with irregularities which vitiate proceedings. Section 532 relates to Irregular commitments, and states when they can be validated. Where any magistrate or other authority purporting to exercise powers duly conferred, but

which were not so conferred, commits an accused person for trial before a court of Session, then the court to which the commitment is made, may, after perusal of the proceedings, accept the commitment if it considers that the accused has not been injured thereby, unless during the inquiry and before the order of commitment, objection was taken on behalf either of the accused or of the prosecution to the jurisdiction of such Magistrate or other authority. But there has been a conflict of cases in this court regarding the validation of proceedings if both the committing court as well as the Sessions Court have no territorial jurisdiction over the place where the offence took place. The divergence of view is seen from -- 'Assistant Sessions Judge, North Arcot v. Ramammal', 36 Mad 387 (A) and -- 'Ganapathi Chetti v. Rex', AIR 1920 Mad 824 (B).

The learned Public Prosecutor places great reliance on Section 537 which is intended to cure defects which have not prejudiced the accused. But Clause (a) of Section 537 does not mention about an error in the committal, for it states that any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under the Code, shall not be a ground for reversing an order passed by a Court of competent jurisdiction unless such error, omission, irregularity or misdirection has occasioned a failure of justice. Can it be said therefore that a violation of a mandatory provision of law during the stage of committal proceedings would render null and void the entire committal, for unless there is a legal committal to the Sessions Court, that tribunal would not be clothed with Jurisdiction to try.

In -- 'Subramanla Aiyar v. King Emperor', 25 Mad 61 (C) and--'Abdul Rahman v. Emperor' , the Privy Council has laid down that a disregard of an express provision of law as to the mode of trial was not a mere Irregularity such as could be remedied by Section 537, Criminal P. C. The phrase 'irregularity' is inappropriate when an illegality is committed by an infraction of a rule of law. Therefore if we are satisfied that the examination of witnesses by the police officer in direct contravention of Sub-section (4) of Section 495, Criminal P. C., is an illegality which would vitiate and render void the entire proceedings before the committing court, then there had been no committal at all to the Sessions Court and as such

the trial before the Sessions Court would also be illegal.

It is important to notice in this connection that Exs. P. 2 to P. 5 were treated as substantive evidence before the Sessions Judge and if the person who was responsible for bringing into existence those depositions by questioning the witnesses was an unauthorised person who should not have done what he did, then those documents would have no legal validity and would be null and void.

4. The nearest approach to a procedure of the kind which we have to consider in this case is contained in a case disposed of by a Somaliland Protectorate Judge sitting as a court of original jurisdiction and considered by their Lordships of the Judicial Committee in -- 'Adan Haji Jama v. The King', AIR 1948 PC 63 (E). There what happened was that at a criminal trial, as no Public Prosecutor was present, the Judge examined the prosecution witnesses himself; summed up the evidence and convicted the accused. Sir John Beaumont In delivering the judgment of the Judicial Committee held that the combination in one person of the duties of the prosecutor and the Judge prevented the trial from being one conducted substantially in the manner required by law and therefore Section 393 of the Ordinance prevalent in Somaliland, which is in the same terms as Section 537, Criminal P. C., cannot be called in aid to support a conviction in a trial held in that manner.

There is no statutory provision that a Judge should not examine a prosecution witness. In fact In the Indian Evidence Act, Section 165 expressly lays down that the Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant. Such a rule is prevalent in England and presumably in the Protectorate and Somaliland as well. Despite that fact their Lordships held that if a Judge were to examine prosecution witnesses in the absence of the prosecutor, the whole proceedings will be rendered null and void.

In our opinion the action of the police officer, in derogation of the provisions of the Criminal Procedure Code, is a direct and flagrant violation of the statute. But the difficulty in this case is still further enhanced by the fact that we are now sitting in appeal against the trial by the Sessions Judge and any illegality in the committal

proceeding would not, it is contended render nugatory the entire committal; and such being the case the learned Public Prosecutor argues that we should not set aside the conviction by the lower Court.

5. In -- 'Emperor v. Tribhovandas', 26 Bom 533 (P), Candy and Pulton JJ. following Clause (4) of Section 495, Criminal P. c. held that a police inspector who had taken part in the investigation into an offence is not qualified to conduct the prosecution of the person charged with the offence. There, the conviction was by a City Magistrate as a result of prosecution conducted by a Police Inspector and since the fines imposed were non-appealable, the matter came up directly in revision to the High Court. There were therefore no intervening or intermediary proceedings in a Sessions Court and so this decision does not afford much assistance in the solution of the problem.

6. A case similar to the present arose before the Calcutta High Court more than 80 years ago in the -- 'Queen v. Ram Chunder Sircar', 13 WR Cri 18 (G), where the learned Judges animadverted strongly about the objectionable practice of permitting police officers to conduct prosecutions in the Sessions Court. Jackson J. remarked that it is not the proper duty of the police to prosecute criminal cases which they have been engaged in enquiring into. But the learned Judges set aside the conviction and sentence imposed by the Sessions Judge in that case not on that ground but on the merits remarking that the charge was one got up by certain villagers. Following the observations of the above authorities we are of opinion that the proceedings before the committing court were vitiated by a direct contravention of a statutory provision.

7. But the learned Public Prosecutor contends that unless the commitment is quashedunder Section 216, Criminal P. C., before the trial inthe Sessions Court begins, this court cannot setaside the decision of the Sessions Judge afterthe full trial is over.

He relies upon the decisions in -- 'the Sessions Judge, Trichinopoly v. Arokia Padayachi', 2 Weir 262 (H) and--'Kasem Molla v. Emperor', : AIR1926 Cal410 (I). In the earlier case a reference was made by the Sessions Judge to the High Court to quash a commitment after the accused was put on trial and he pleaded 'not

guilty' and was tried with the aid of assessors. Benson and Bhashyam Ayyangar JJ. took the view that it was too late to quash the commitment. But this decision does not say that if the original commitment was Invalid in law and was void, it is not open to the High Court, when the matter comes up in appeal, after the proceedings are finally over before the Sessions Judge, in this appellate jurisdiction to set aside those proceedings.

All that it lays down is that Section 215, Criminal P. C., can be invoked only at a stage antecedent to the commencement of the trial before the Sessions Judge. That is evident from the location of the section in the structure of the Code for it is placed in the Chapter relating to preliminary enquiry in Sessions cases and is immediately after the section relating to 'order of commitment.'

8. In -- ' : AIR1926 Cal410 (I) the learned Judges followed an earlier decision of the same court in -- 'Empress v. Sagambur', 12 Cal LR 120 (J) to the effect that if a sessions trial is held, it is doubtful if an irregularity in the commitment would vitiate the proceedings in the Sessions Court. They further held that when a person was put on trial and pleaded guilty to the charge, the commitment could not be quashed as it is too late to object to the commitment after the accused has pleaded guilty to the charge before the Sessions Court.

No doubt in this case the matter came up before the High Court after the accused were convicted and sentenced and in an appeal. The irregularity complained of in that case was the examination of the Special Deputy Magistrate and the Investigating Police officer under Section 219, Criminal P. C., as supplementary witnesses contravening the provisions of Section 208, Criminal P. C., i.e., examining them after the commitment was over. There was nothing illegal in the procedure adopted in the committing court though there was some irregularity in the commitment. This decision also does not help us in solving the problem before us.

9. The question that arose before the Full Bench in -- 'Girishchandra v. Emperor' : AIR1929 Cal756 related to the power of a Judge of the High Court deputed by the Chief Justice to preside over a criminal sessions to quash a commitment under Section 215, Criminal P. C., where it was contended that such quashing can be

done only on the appellate side of the High Court and not by the Judge sitting in sessions in the exercise of the ordinary original criminal jurisdiction. The learned Judges negatived that contention and held that such a quashing can be done.

Though the headnote in -- 'Empress v. Shibo Behara', 6 Cal 584 (L), states that the High Court has power to quash an illegal commitment, at any stage of the case, it is evident from the facts of the case stated in the report that the matter came up before the learned Judges on a reference by the Sessions Judge as a result of an objection put forward by the accused before the Sessions Court after he had pleaded not guilty, on the ground that he had been prejudiced by the refusal to grant a judicial enquiry. Here again there is no question of an appeal.

10. An objection regarding the sustainability of proceedings before the Sessions Court on account of sanction under Section 196-A(2), Criminal P. C., not being obtained came up for consideration before the High Court on a revision, pending the direction by the Sessions Judge that he could pass no sentence of conviction or acquittal in a trial which was initiated without the requisite sanction. The learned Judges of the Patna High Court in -- 'Haricharan v. Emperor' : AIR1933 Pat273 (M) were of opinion that the High Court could not order the Sessions Judge to record judgment in accordance with the ordinary procedure and that the proper procedure was for the prosecution to obtain sanction under Section 196-A (2), Criminal P. C., make a fresh complaint and that the Magistrate should then proceed to hold a fresh enquiry.

11. From this decision as well as from -- '6 Cal 584 (L)' it is seen that the invalidity which goes to the root of the jurisdiction of the court of Session to try can be taken in the Sessions court before the trial is finally over. But in --' : AIR1926 Cal410 (I)', the question was raised after the conviction. But in none of these cases, except in -- '26 Bom 633 (P)' and -- '13 WR Cri 18 (G)' do we find the question of the unsustainability of the prosecution on account of the police officer, who was the investigating person, conducting the prosecution, being considered.

The matter in its present form is bereft of authority. In our judgment if there had been a violation of a statutory provision, then, as observed by the Privy Council in -- '25 Mad 61 (C)', that is not an irregularity, but an illegality and cannot be cured

by Section 537, Criminal P. C. There are certain positive and negative provisions in the statute; e.g. Section 342, Criminal P. C., lays down that the Magistrate or the Judge shall question the accused. It is a directive to the Judge to do a certain act and if for any reason that provision is violated it has been held that the proceedings are illegal.

Where there is an injunction in the Code prohibiting the court from following a certain procedure, or allowing a certain state of things to be done, as is contained in Section 495 (4), Criminal P. C., then the disobedience of that provision will render the entire proceedings completely void. If the Code says that such and such a thing should not be done, and when that is done, we have necessarily to say that the act is illegal and 'ultra vires' and the proceedings null and void.

In the present case the accused has also been prejudiced by the fact that the depositions brought about by the illegal examination of the prosecution witnesses by the investigating officer have been tendered as substantive evidence in the Sessions Court and exhibited though the Sessions Judge does not seem to have placed much weight upon them. In any event it seems to us that the mode of the enquiry before the committing court, in contravention of a mandatory provision like Section 495 (4), Criminal P. C., cannot be justified and must be declared to be null and void.

Such being the case, we have come to the conclusion that there had been no commitment at all and the Sessions Court did not have Jurisdiction to entertain the case. This is not a case of any irregularity in the commitment but of a total absence of legality in the committal. We therefore set aside the conviction and sentence imposed by the learned Sessions Judge and direct that proceedings be taken afresh in the committal court for a proper enquiry.

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