

In Re: Rangaswami Goundan

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SooperKanoon Citation : sooperkanoon.com/794015

Court : Chennai

Decided On : Oct-24-1956

Reported in : AIR1957Mad508; 1957CriLJ866

Judge : Somasundaram and ;Ramaswami Gounder, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 161, 161(3), 173(4), 207A(3), 251A, 510 and 537; Code of Criminal Procedure (CrPC) (Amendment) Act, 1955

Appeal No. : Referred Trial No. 76 of 1956 and Criminal Appeal No. 491 of 1956

Appellant : In Re: Rangaswami Goundan

Advocate for Pet/Ap. : E. Anthony Logo and ;R. Rajagopal Aiyangar, Advs.;Public Prosecutor

Judgement :

2. This is an appeal against the sentence of death passed on the appellant by the learned Sessions Judge of Coimbatore in S. C. No. 24 of 1956 on his file. We do not propose to go into the merits of the case as we are ordering retrial on a question of law that has been raised before us.

3. The point that is taken before us is that the provisions of Section 173 (4), Criminal P. C., have not been complied with. Sub-section (4) of Section 173, Criminal P. C., is in these terms:

"After forwarding a report under this section the officer in charge of the police station shall before the commencement of the enquiry or trial, furnish or cause to be furnished to the accused, free of cost, a copy of the report forwarded under Sub-section (1) and of the first information report recorded under Section 154 and of all other documents or relevant extracts thereof, on which the prosecution proposes to rely including the statements and confessions, if any, recorded under Section 164 and the statements recorded under Sub-section (3) of Section 161 of all the persons whom the prosecution proposes to examine as its witnesses."

4. This section makes it compulsory to furnish to the accused all the documents referred to therein. The complaint of the learned advocate for the appellant is that his client has not been furnished with a copy of the statement of P. W. 5 (the doctor who held the post mortem examination) recorded under Sub-section (3) of Section 161, Criminal P. C. It is conceded by the prosecution that this doctor was examined by the investigating officer and that his statement was recorded in the case diary and that a copy of this statement has not been furnished to the accused.

But it is contended by the learned Public Prosecutor that failure or omission to furnish copy of such statements to the accused does not vitiate the trial. It is at best only an irregularity and in the absence of any prejudice being caused to the accused on account of this failure it is curable under Section 537, Criminal P. C. It is necessary to examine the relevant provisions in the light of the recent amendments introduced by Act XXIV of 1955. Before the amendment a copy of the report under Section 173" shall on application be furnished to the accused before the commencement of the enquiry or trial.

As regards the other documents referred to in Sub-section (4) of Section 173, as amended, they were furnished only on application by the accused. In fact as regards the statements of witnesses recorded under Section 162, Criminal P. C., according to the decisions of this Court and other High Courts, the right of the accused to obtain copies of such statements accrues only when the witness called by the prosecution is put into the witness box.

The accused is entitled to delay cross-examination of the witness till he is able to get copies of the statement made by the witness under Section 162. This inevitably led to delay in the disposal of cases. In practice, therefore, to avoid delay thus caused, these statements were furnished to the accused as soon as the witness got into the witness box. Now after the amendment it has become a statutory obligation on the part of the prosecution to furnish or cause to be furnished to the accused all documents referred to in Sub-section (4) of Section 173 Criminal P. C., before the commencement of the enquiry or trial.

The documents referred to therein are (1) copy of the report forwarded under Sub-section (1); (2), first information report recorded under Section 154; (3) statements and confessions, if any, recorded under Section 164, and (4) all other documents or relevant extracts thereof on which the prosecution proposes to rely including, statements recorded under Sub-section (3) of Section 161, Criminal P. C., of all persons whom the prosecution proposes to examine as its witnesses.

Those statements made under Section 162, with which alone we are now concerned in the present case, which were formerly granted only on application and after the witness got into the witness box and before cross-examination, are now by the new amendment enjoined to be given without any application by the accused. As to the stage at which these documents should be furnished to the accused, it is laid down in Section 173, Clause (4) and in Sub-section (3) of Section 207-A with regard to committal cases and in Section 251-A with regard to warrant cases. In committal cases (the present one is a committal case) Sub-section (3) of Section 207-A lays down that

"at the commencement of the inquiry the Magistrate shall when the accused appears or is brought before him satisfy himself that the documents referred to in Section 173 have been furnished to the accused and if he finds that the accused has not been furnished with such documents or any of them, he shall cause the same to be so furnished."

Section 173 (4) also says that they must be furnished before the commencement of enquiry or trial. The reason for this rule is obvious. It is to enable the accused to have an all round picture of the case against him even at the-commencement of

the enquiry and in order to enable him to cross-examine the witnesses on such defence as he may set up and to avoid delays which occurred formerly. This is mainly intended for expeditious and speedy disposal of cases. Therefore copies of statements recorded under Sub-section 3. of S. 161 of all persons whom the prosecution proposes to examine as its witnesses must be furnished, to the accused before the commencement Of the enquiry itself.

This is a mandatory provision which must be complied with. It is not for the court to refuse it on any ground other than that mentioned in Sub-section (5) of Section 173. For instance, the court cannot say that it has looked into the statements of a particular witness recorded under Sub-section (3) of 3. 161 and that there is no discrepancy between that and the evidence given in court and that therefore, it need not be furnished to the accused and that it does not prejudice the case of the accused.

5. Referring to the breach of the proviso to Section 162, Criminal P. C. (before the amendment) their Lordships of the Privy Council in -- 'Pulukuri Kotayya v. Emperor', ILR 1948 Mad 1: (AIR 1947 PC 67) (A), have observed as follows:

"The light given to an accused person by this section is a very valuable one and often provides important material for cross-examination of the prosecution witnesses. However slender the material for cross-examination may seem to be, it is difficult to gauge its possible effect. Minor Inconsistencies in his several statements may not embarrass a truthful witness, but may cause an untruthful witness to prevaricate and may lead to the ultimate break down of the whole of his evidence."

As regards the security by the court and coming to the conclusion that there is no discrepancy between the statement recorded under Section 162, Criminal P. C., and the evidence given in court it may be stated that it is primarily the concern of the accused and it is for him to point out the discrepancy, if any, and he would not be in a position to point out the discrepancy unless he has a copy of the statement of the witness recorded under Section 162. Further what may not appear to the court at the first reading to be a discrepancy may, when its specific attention is Invited, prove to be a vital discrepancy.

It is entirely within the scope and duties of the counsel for the accused and it is not for the court to find out or not any discrepancy. On the ground that there is no discrepancy the court cannot refuse copies of statements recorded under 8. 162. In the present case a copy of the statement of P. W. 5 recorded under Sub-section 3 of Section 161 should have been granted to the accused before the commencement of the enquiry, at any rate, before the commencement of the trial without any application by the accused. The court should have satisfied itself whether a copy of this statement has been furnished to the accused or not. This has not been done in this case.

6. As regards the report from the Chemical Examiner it is alleged that a copy of this report was not furnished to the accused. But as regards this different considerations will apply. The report of the Chemical Examiner is not usually received by the time the inquiry commences. By its very nature it takes a long time before it reaches the court. Further it cannot be said that the prosecution either relies or does not rely on it as normally it will not be available even to the prosecution at the time of the enquiry and there is, therefore, no obligation cast on the prosecution to furnish a copy of this document to the accused before the commencement of the enquiry.

However, when the report is received by the court either during the course of the enquiry or after committal then it is the duty of the court to furnish to the accused with a copy of the same without any application by him. Now that the report in the instant case was received by the trial court before the commencement of the trial a copy of the same should have been granted to the accused even before the commencement of the trial.

We, therefore, hold that in this case before the commencement of the trial a copy of the statement of P. W. 6 recorded under Sub-section 3 of 8. 161, Criminal P. C. and a copy of the report of the Chemical Examiner should have been furnished to the accused. Another point that is raised before us is based on the evidence in the case. P. W. 13, the Sub-Inspector of Police who investigated into the case stated in cross-examination as follows:

"I recorded the statements of witnesses examined at the inquest in Tamil. Immediately thereafter I translated all the statements into English. Then later the very same night I further questioned the witnesses and recorded their statements in English The Tamil statements of witnesses examined at the inquest were forwarded in original to the magistrate of Pollachi along with the inquest report immediately after the inquest was over."

7. It is conceded that what was granted to the accused was only copies of statements of witnesses translated into English and not copies of statements in Tamil as recorded by the investigating officer. Witnesses made statements in Tamil both at the inquest and also subsequently but the statements recorded at the time of the inquest were recorded in the case diary in the language of the witnesses, that is, in Tamil. Only later on their statements were recorded in English though they spoke in Tamil.

The Code does not prescribe in what language the statements of witnesses must be recorded in the case diary by the investigating officers. It is true that the official language as also the language of the court at present is English. Still the Code does not direct that the statements of witnesses recorded under Section 162 must be recorded only in English. If- that were so even the statements of witnesses examined at the time of the inquest which are undoubtedly statements made in the course of investigation should have been recorded only in English.

But they have not been recorded in English. They have all been recorded only in Tamil. This itself shows that there is no obligation cast on the investigating officer to translate every statement made by a witness in Tamil into English and then record it in his case diary. Part of the statements in this case has been recorded in Tamil. If so what is meant by furnishing to the accused copies of statements recorded under Sub-section (3) of Section 161?

Would it be a sufficient compliance with the provisions of Section 173 (4) if only the English translations of the statements of the witnesses recorded under Sub-section (3) of Section 161 are furnished to the accused? We think not. Section 173 (4) clearly states "shall furnish or cause to be furnished to the accused a copy of the statements recorded under Sub-section (3) of Section 161." The statements

recorded were partly in Tamil and partly in English. No doubt translations of these statements into English were subsequently made by the investigating officer presumably for the purpose of sending them to his superior officers in the department, probably as required by the departmental rules.

There is no dispute that it was only English translations of the statements recorded in Tamil in the case diary that was given to the accused. Learned counsel for the accused contended that the accused is entitled to have copies, of statements of witnesses recorded under Sub-section (3) of Section 161 and not translations of that record. The contention is well founded. According to the learned counsel, failure to grant copies of such statements is a breach of a mandatory provision of the Criminal Procedure Code and is therefore an illegality vitiating the trial itself.

In support of his contention the learned counsel relies upon the decision of the Privy Council referred to already, viz., ILR (1948) Mad 1: (AIR 1947 PC 67) (A). That decision has been followed in another decision of this court reported in *id re*, Chinna Lingappa, (B). The learned Public Prosecutor in reply contends that the English translation must be considered as the statement made by the witness and furnishing copies of the same would be sufficient compliance with the provisions of Section 173, Sub-section (4), Criminal P. C. In support of this contention he relies upon a judgment of ours in *In re. Ramachandran*, Criminal A. Nos. 577 and 638 of 1955: (c).

In the case referred to by the Public Prosecutor the case diary contained statements in English. On the basis of these statements certain contradictions were elicited by the defence. The learned Sessions Judge explained away the discrepancies observing that the statements were made in Tamil and that the English translations of these statements were not a record prepared on the examination of the witnesses. It is in this context that we pointed out that the learned Sessions Judge was not correct in observing so and held,

"that the statements in the case diary though they are English translations of the Tamil statements are statements made during investigation. The statements if recorded in Tamil must be preserved and copies of them must be given when the accused applies for copies of the statements under Section 162. If it is proved that

the statements were taken in Tamil and if they are destroyed, as pointed out by the Privy Council in ILR 1943 Mad 1: (AIR 1947 PC 67) (A), prejudice can be presumed and the accused will have to be acquitted."

8. We have, therefore, made it clear in that judgment that if statements, were recorded in Tamil copies of those statements must be furnished to the accused on his application for them.

9. The next contention of the learned Public Prosecutor was that copies of statements translated into English having been furnished; it is for the accused to apply and obtain copies of statements recorded in Tamil if they are required by him. In support of this contention also he placed reliance in the judgment of ours referred to above. We observed in the above case that the statements if recorded in Tamil must be preserved and copies of them must be given when the accused applies for copies of those statements under Section 162.

That was a case before the present amendment of the Criminal Procedure Code came into force. As stated already the procedure then was that the accused should apply for copies of statements of witnesses after the witnesses are put into the witness box and at the time of their cross-examination but after the present amendment an obligation is cast on the prosecution without any application by the accused to furnish to the accused copies of statements recorded under. Section 162 of the Criminal Procedure Code before the commencement or enquiry or trial.

The magistrate as per the provisions of Sub-section (3) of Section 207-A, Criminal P. C., shall, when the accused appears or is brought before him satisfy himself that the documents referred to in Section 173-have been furnished to the accused and if he finds that the accused has not been furnished: with such documents or any of them, he shall cause the same to be furnished. Sub-section (4) of the same section says that the Magistrate shall then proceed to take evidence of such persons, if any, as may be produced by the prosecution as witnesses.

Thus it is clear that a duty is cast "on the magistrate to see that copies of the document referred to in Section 173 are furnished to the accused before the commencement of the enquiry. He cannot, proceed with the enquiry without

satisfying himself about this. It is conceded that in the present case copies of Tamil statements of witnesses recorded in the case diary of the investigating officer were not furnished to the accused. It must, therefore, be held that the provisions of Section 173 (4), Criminal P. C., and Sub-section (3) of Section 207-A have not been complied with.

The only other question for consideration is whether such a failure vitiates the trial, or whether it is only an irregularity. curable under the provisions of Section 537, Criminal P. C. It is contended by the learned counsel for the appellant that breach of the provisions of Sub-section (4) of Section 173, Criminal P. C. is an illegality and that on account of the non-compliance with the provisions, it must be presumed that prejudice has been caused to the accused.

In support of this contention he relied on the decisions in ILR (1943) Mad 1: (AIR 1947, PC 67) (A), and (B). The learned Public Prosecutor contends that copies of statements translated into English having been furnished, omission to furnish statements as recorded in Tamil is only an irregularity and not an illegality unless it is shown that prejudice has been caused to the accused at the trial and that this irregularity is curable under Section 537, Criminal P. C., and in support of his argument he relied on the decision of the Supreme Court in Willie Slaney v. State of Madhya Pradesh, (S) (D). In the above case their Lordships of the Supreme Court have observed:

"that the Code is a Code of procedure and like all procedural laws is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. The object of the Code is to ensure that an accused person gets a full and fair trial along certain well-established and well understood lines that accord with our notions of natural justice.

If he does, if he is tried, by a competent court, if he is told and clearly understands the nature of the offence for which he is being tried, if the case against him is fully and fairly explained to him and he is afforded a full and fair opportunity of defending himself, then provided there is substantial compliance with the outward forms of the law, mere mistakes in procedure-were inconsequential errors and omissions in the trial are regarded as penal by the Code and the trial is not vitiated

unless the accused can show substantial prejudice. That broadly speaking is the basic principle on which the Code is based."

Under the Code, "as in all procedural laws, certain things are regarded as vital. Disregard of a provision of that nature is fatal to the trial and at once invalidates the conviction. Others are not vital and in that event the conviction must stand unless whatever the irregularity, they can be cured; and the court is satisfied that there was prejudice." In the case before their Lordships of the Supreme Court the accused were charged under Section 302 read with Section 34, I. P. C. The co-accused was acquitted and the contention was that the element of common intention having been dropped out and Section 34, I. P. C., not being called in aid and the accused not having been charged personally, he cannot be convicted under Section 302, I. P. C. Their Lordships held that at best it was only an irregularity and in the absence of any prejudice to the accused, the conviction cannot be set aside.

It is in this connection that their Lordships made the observations referred to above. But their Lordships at the same time have observed that under the Code certain things are regarded as vital. The question is whether an omission to furnish copies of statements recorded in Tamil in the case diary is vital to the trial or not, especially when an English translation of the same has been furnished. There is no guarantee that the English translations of the statements recorded in Tamil are true and correct.

Even the best translations in the world cannot take the place of the original. With the knowledge of English that the investigating officers possess, it cannot be said with certainty that the translations must be true or correct. Errors are bound to creep in the English translations and the spirit and force of particular expressions used by the witness in Tamil may not always be brought out accurately in the English translation. In fact the case in Criminal A. Nos. 577 and 638 of 1955: () (C), will be an instance in point.

In that case the statements translated into English and recorded in the case diary revealed certain discrepancies between them and the evidence given in court. It appears that the statements made in Tamil did not reveal such discrepancies. The

learned Sessions Judge discounted the discrepancies observing that the English translation was not a record prepared on the examination of the prosecution witnesses.

The translation referred to obviously was not a correct one. Translations therefore are subject to errors. If, therefore, statements were recorded in the case diary in the language of the witnesses, then furnishing translations of those statements will not amount to furnishing copies of statements recorded in the case diary. In this case it is conceded that part of the statements was recorded in tamil and copies of the same were not granted to the accused and in that sense not made available to the accused.

As pointed out by their Lordships of the "Privy Council "in cases where statements were made available to the accused, an Inference which is almost irresistible, arises of prejudice to the accused." Copies of statement in Tamil not having been made available to the accused prejudice to the accused must be presumed. In our opinion, the provisions relating to the grant of copies mentioned in Section 173 (4), Criminal P. C., are vital provisions and disregard of such a vital provision, according to their Lordships of the Supreme Court in (S) (D), is fatal to the trial and at once invalidates the conviction. We, therefore, set aside the conviction and sentence of the accused and order re-trial. The accused will be tried by the Additional Sessions Judge of Coimbatore.

10. Before the commencement of the trial the Additional Sessions Judge will see that all documents referred to in Section 173 (4), Criminal P. C., are furnished to the accused sufficiently in advance to enable the accused to prepare his defence.

11. In this connection we would venture to suggest to the State Government that suitable directions may be issued to the officers in charge of investigation of crimes in the State to record statements of witnesses examined by them during the investigation wherever possible in the language of the witnesses themselves and grant copies of such statements to the accused as required under Section 173 (4), Criminal P. C.