

In Re: A. Vaidyanatha Iyer

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Court : Chennai

Decided On : Aug-17-1953

Reported in : AIR1954Mad350; (1954)IMLJ15

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

Acts : Criminal Law (Amendment) Act, 1952 - Sections 8(1) and 8(3); [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 350

Appeal No. : Criminal Revn. Case No. 810 of 1953 and Criminal Revn. Petn. No. 757 of 1953

Appellant : In Re: A. Vaidyanatha Iyer

Advocate for Def. : R. Santhanam, Adv. for Public Prosecutor

Advocate for Pet/Ap. : N.S. Mani, Adv.

Judgement :

Govinda Menon, J.

1. At the time the Criminal Law Amendment Act, 1952, Act 46 of 1952 came into force on 28-7-1952, certain proceedings were pending against the petitioner herein under Section 161, I. P. C. before a Special Magistrate who had already framed charges against the petitioner and posted the case for further hearing to 12-8-1952. Under Section 10 of Act 46 of 1952 this case stood transferred to the

Special Judge who at that time was the Sessions Judge of Coimbatore who in his turn transferred the case to the Additional Sessions Judge for disposal. Subsequently the Principal Assistant Sessions Judge of Coimbatore (Sri S. Varadarajulu Naidu) having been appointed as a Special Judge, in virtue of the powers conferred under Section 6 of the Act on 18-2-1953, took up the case for hearing and proceeded with the examination of some witnesses when he was promoted and transferred from the station.

When his successor Sri C. Rajabadar Odayar took up the enquiry, an application was made on behalf of the State that in view of some reported decisions of the High Court the enquiry should be recommenced afresh consequent on the change of Judges. Thereupon notice was given to the accused-officer and after hearing his counsel the learned Special Judge passed an order on 20-7-1953 to the effect that the witnesses who had already been examined will be re-examined. Against that order of the learned Special Judge, this Criminal Revision Petition has been filed.

2. In order to appreciate the question of law-raised, it would be advantageous to briefly trace the various provisions of Act 46 of 1952. By Section 3 of that Act a new section is enacted and inserted in the Indian Penal Code as Section 165-A, the result of which introduction is that along with the principal offender, the abettor, who offers a bribe is also made liable. Section 4 of that Act deals with an amendment of Section 164, Criminal P. C. It is unnecessary to refer to the amendments carried out by Section 5. Section 6 confers power on the State Government to appoint Special Judges. Sub-clauses (a) and (b) of Sub-section (1) of Section 8 relate to offences for the trial of which such special Judges can be appointed, among which are offences under Sections 65 and 165-A.

Sub-section (2) of Section 6 lays down that no person shall be qualified for appointment as a Special Judge unless he is, or has been, a Sessions Judge or an Additional Sessions Judge or an Assistant Sessions Judge under the Code of Criminal Procedure, 1898. It is therefore clear that the Special Judge contemplated by the statute must have exercised the powers of a Sessions Judge or an assistant Sessions Judge.

Section 8 is the really important section to be construed in the present case. It runs thus :

'Procedure and powers of special judges (1). A special judge may take cognizance of offences without the accused being committed to him for trial, and in trying the accused persons, shall follow the procedure prescribed by the Code of Criminal Procedure, 1898 (Act 5 of 1898), for the trial of warrant cases by magistrates. (2) A special Judge may, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, an offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole circumstances within his knowledge relating to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof; and any pardon so tendered shall, for the purposes of Sections 339 & 339-A, Criminal P. C., 1898, be deemed to have been tendered under Section 338 of that Code.' (3) Save SB provided in Sub-section (1) or Sub-section (2) the provisions of the Code of Criminal Procedure, 1898, shall so far as they are not inconsistent with this Act, apply to the proceedings before a special Judge; and for the purposes of the said provisions, the court of the special Judge shall be deemed to be a court of session trying cases without a jury or without the aid of assessors and the person conducting a prosecution before a special Judge shall be deemed to be a public prosecutor.

(4) A special judge may pass upon any person convicted by him any sentence authorised by law for the punishment of the offence of which such person is convicted.'

3. Under Section 9 it is laid down that the High Court may exercise, so far as may be applicable, all the powers conferred by Chapters XXXI and XXXII of the Criminal Procedure Code, 1898, on a High Court as if the court of the special Judge were a court of session trying cases without a jury. It is clear from this section that even though ordinarily, from a conviction by an Assistant Sessions Judge an appeal will not lie to the High Court except when the sentence of imprisonment exceeds a term of four years, or where the sentence is transportation for life, still in the case of an Assistant Sessions Judge appointed as

a special Judge appeals would lie to the High Court as if he is a Sessions Judge under Section 410, Criminal P. C. If therefore the procedure for the trial of these cases by the Sessions Judge is that laid down in ordinary sessions cases, then according to certain decisions it will have to be held that a succeeding Judge cannot act on the evidence taken by his predecessor.

4. In -- 'King Emperor v. Sakharan, 26 Bom 50 (A), Candy and Fulton JJ. have laid down that under the Criminal Procedure Code a Sessions Judge is not authorised to try a case partly on evidence not recorded by himself; and he cannot do so although the prisoner has given his consent to such a trial. The learned Judges further held that Section 350, Criminal P. C. applies only to magistrates. In that case the trial had commenced and evidence had been led for the prosecution before an Additional Sessions Judge on three or four days after which he postponed the further trial to a later date. On the adjourned date the case was called on before the Sessions Judge who recorded that the depositions already taken before the Additional Sessions Judge were accepted on both sides. He then continued the trial on further days by recording fresh evidence. On an appeal against the conviction by the Sessions Judge, the High Court held that the Sessions Judge had no jurisdiction to try a case partly on the evidence recorded by himself and partly on the evidence recorded by a previous Judge. The Judges of the Bombay High court referred with approval a decision of the Calcutta High Court in -- 'Queen v. Rughoonath Dass', 23 WR Cri. 59 (B), under Section 328 of Act 10 of 1872, which was the corresponding Criminal Procedure Code in force at that time.

Similarly the Allahabad High Court in -- 'Emperor v. Badri Prasad', 35 All 63 (C), also held that where a Sessions Judge decided a case upon evidence taken, not before him, but before an Assistant Sessions Judge, his judgment was 'ultra vires' and that a fresh trial should be ordered.

Recently two Judges of the Lahore High Court in Pakistan have followed the above decision in-- 'Bashir v. Emperor', AIR 1950 Lah 173 (D). The general principle therefore is that a Judicial officer should not, in a criminal case, convict or acquit on the basis of evidence not fully heard by him and if he acts on part or

whole of the evidence recorded by a predecessor, such a conviction or acquittal would not be legal. The exception to such cases is afforded by Section 350, Criminal P. C. in the case of magistrates; and if that exception is applicable to the facts of the present case, then the order of the Special Judge cannot be supported.

Section 350(1) of the Code confers ample jurisdiction to a succeeding magistrate to act on the evidence recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself; or, if he is so minded, he may re-summon the witnesses and recommence the enquiry or trial. There are two provisos which say that if the case before the Magistrate has reached the stage of trial, then, when the second magistrate-commences his proceedings, the accused may demand that the witnesses, or any one of them, may be resummoned and re-heard. The second proviso says that even if the accused has not taken advantage of a 'de novo' trial, as it is popularly called, still the High Court, -- or the District Magistrate, may, either in appeal or in revision, set aside a conviction passed by a Magistrate on evidence not wholly recorded by the magistrate before whom the conviction was had, if the High Court or the District Magistrate is of opinion that the accused, has been materially prejudiced thereby, and may order a new inquiry or trial.

In short, the effect of Section 350 of the Code is that, be it an enquiry or trial, a succeeding Magistrate has full liberty either to proceed on the evidence wholly or partly recorded by his predecessor, or resummon any witness or witnesses and recommence the inquiry or trial. But when the proceedings have reached the stage of a trial i.e., after the charges have been framed, there is a right conferred upon the accused person, before the new Magistrate enters upon the trial, to request the court to re-summon and re-hear the witnesses or any of them; and in an appeal or revision, the High Court, or the District Magistrate may set aside the conviction by a succeeding magistrate on evidence not wholly recorded by him, even if the accused had not availed himself of the opportunity afforded by the statute to ask for a 'de novo' trial. Nowhere in this section is the prosecution conferred a right to ask for a 'de novo' trial at any stage. The proviso gives such a right only to the accused. In such circumstances, if the procedure before the

Special Judge is that obtaining in trial of warrant cases by magistrates, as provided by Chapter XXI of the Code, then the general provisions regarding enquiries and trials enacted in Chapter XXIV of the Code will also apply.

5. But it is contended that by virtue of Sub-section (3) to Section 8 of Act 46 of 1952 the Court of the Special Judge shall be deemed to be a court of session trying cases without a jury or without the aid of assessors, in which case it is not open to the succeeding special Judge to proceed upon the evidence recorded by his predecessor. Our attention was invited to a judgment of Horwill & Shahabuddin JJ. 'Alli Khan In re', AIR 1947 Mad 248 (E). That case related to the interpretation of Section 367, Criminal P. C. laying down the essential contents of a judgment of a criminal court, wherein it is stated that such a judgment should be written by the presiding officer of the court, or from the dictation of such presiding officer in the language of the court and shall be dated and signed by the presiding officer in open court at the time of pronouncing it; and where it is not written by the presiding officer with his own hand, every page of such judgment shall be signed by him.

Interpreting that section the learned Judges held that the presiding officer referred to in Section 367(1) means the presiding officer at the trial who is assumed in the section to have written and pronounced his judgment while still holding the same office. The facts of the case show that after one Sessions Judge had heard the evidence and reserved judgment, he was transferred from the station and handed over charge to his successor; but before proceeding and taking up office at another sessions division, he wrote the Judgment while he was not the Sessions Judge of any division, handed over the same to his successor -- who pronounced it in court with the endorsement that it was a judgment written by his predecessor. The High Court held that at the time the judgment was written, the officer was not the Sessions Judge of the division where he had recorded and heard the evidence; that he had not become the Sessions Judge of any other division and his writing of a judgment when he was considered to be in course of transit was illegal and its pronouncement by his successor cannot be said to be a valid pronouncement of the judgment.

The principle which the learned Judges intended to lay down, after an exhaustive discussion of the case law, ancient and modern, on that subject is, that in the case of a Sessions Judge any judgment pronounced by him will not be valid until he himself has heard the entire evidence. The learned Judges point out that so far as the Civil Procedure Code is concerned there are exceptions enunciated in Order 18, Rule 15 and Order 20, Rule 2, and that so far as Magistrates are concerned, there is the exception provided under Section 350, Criminal P. C. In all other cases, the general principle that a Judge who pronounces his judgment must have heard the evidence himself is in force.

The other decision cited before us is reported in -- 'Guruswami Thevar, In re' : AIR1951 Mad902 , to which one of us was a party. There it was held that a judgment written by a Sessions Judge who heard the evidence in the case, which, on the handing over charge of his office to another, was pronounced by his successor, is a nullity. It was further held that Section 350(1), Criminal P. C. does not apply to sessions trials. The facts of the case show that the Sessions Judge who recorded the evidence and heard arguments had himself actually written the judgment but handed it over to his successor while handing over charge for the purpose of pronouncing it in court. The High Court held that even that is illegal, following -- 'AIR 1947 Mad 248 (E)'.

6. The cumulative effect of these two decisions is that in the case of Sessions Judges every judgment pronounced by a Judge must be on the evidence wholly recorded before him and the entire trial should have been by him alone. Otherwise, the proceedings would become void. Therefore, as we have already remarked, if the Special Judge is a Sessions Judge, the procedure adopted, viz., of recalling the witnesses, is amply justified. But when Sub-section (3) of Section 8, Act 46 of 1952 enacts that the court of the Special Judge shall be deemed to be a court of Session, It is clear, it is actually and in fact not a court of session, but for the purpose of this statute there is the legal fiction that it should be understood as a court of session. If this is the correct interpretation, then the Special Judge is not, for the purpose of the Criminal Procedure Code, a Sessions Judge. This construction is made more explicit by the enactment of Section 9 of Act 46 of 1952 where it is stated that the provisions of chapters XXXI and XXXII of the Criminal

Procedure Code shall be applicable as if the court of the Special Judge were a court of Session.

If, as a matter of fact, the Special Judge were a Sessions Judge, there is no necessity to have stated that Chapters XXXI and XXXII of the Criminal Procedure Code shall apply to the decisions of such a Judge, for the Criminal procedure Code itself says that from the decisions of Sessions Judges and Assistant Sessions Judges, under certain conditions, an appeal shall lie to the High Court. It is not contended that the Special Judge is only an Assistant Sessions Judge; but what is argued before us is that by virtue of Sub-section (3) to Section 8 of Act 48 of 1952, the Special Judge is in fact and in essence a Sessions Judge, in which case Section 9 of the Act conferring a right of appeal specifically would be a surplusage. In our opinion the mere enactment of Section 9 would show that the legislature did not intend the Special Judge to be a Sessions Judge at all. Moreover, when Sub-section (1) of Section 8 makes it quite clear that a Special Judge 'shall follow' the procedure prescribed by the code of Criminal Procedure, 1898, for the trial of warrant cases by magistrates, that carries with it all the essential concomitants and requirements of a magisterial trial in a warrant case, to enquiries and trials before the Special Judge.

7. Learned counsel for the petitioner relied upon the meaning of the word 'deemed' in Volume II of 'Words and Phrases Judicially defined' in Roland Burrows K. C., where the learned author gives the different interpretations put upon the word 'deemed'- in various countries of the Commonwealth. The gist of the interpretations given for the word 'deemed' shows that it is more commonly used for the purpose of creating a 'statutory fiction'; that is where a person or thing is really not what he or it is, by the use of the word 'deemed' he or it is made something else.

In -- 'R. v. Norfolk County Council', (1891) 60 LJQB 379 (G), Cave J. gave the following meaning to the phrase 'deemed to be':

'Generally speaking, when you talk of a thing being deemed to be something, you do not mean to say that which it is deemed to be. It is rather an admission that it is not what it is to be deemed to be, and that, notwithstanding it is not that particular

thing, nevertheless It is to be deemed to be that thing.'

We are definitely of opinion that when Sub-section (3) of Section 8 of the Act says that 'the court of the special Judge 'shall be deemed' to be a court of Session', it certainly is not in fact a court of session. The court is that of a Special Judge whose procedure in the trial of such cases shall be the procedure prescribed by the Criminal Procedure Code for the trial of warrant cases, in which case Section 350 of the Code is definitely applicable. If that is so, there is no provision by which the public prosecutor can ask the court to recall and ex-examine the witnesses already examined. We therefore set aside the order of the learned Special Judge and direct him to proceed with the enquiry according to law.

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