

The Public Prosecutor Vs. Velayangat Devassia

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Court : Chennai

Decided On : Oct-24-1951

Reported in : AIR1952Mad604; (1952)1MLJ12

Judge : Ramaswami, J.

Acts : Madras Prohibition Act, 1937 - Sections 4(1) and 38(3); [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 103

Appeal No. : Criminal Appeal No. 587 of 1950

Appellant : The Public Prosecutor

Respondent : Velayangat Devassia

Advocate for Def. : C.K. Viswanatha Aiyar, Adv.

Advocate for Pet/Ap. : Party in person

Judgement :

Ramaswami, J.

1. This is Criminal Appeal filed against an acquittal by the Joint Magistrate, Tellicherry, in C. A. No. 6 of 1950.

2. The facts are : The accused (respondent before us) lives with his wife in Manathana Amsom. On 26-11-1949 at about 5-30 or 6 p.m. P. W. 1 the Sub-

inspector of Police, Peravur, searched the accused's house in the presence of P.W. 2 and other witnesses and recovered from inside a single room of the house one jar M. O. 1 containing 14 3/4th bottles of arrack and an empty bottle, M. O. 11 which was kept by its side. P.W. 1 took M. Os. 1 and 2 into custody under a search list, Ex. P. 1 in the presence of P.W. 2 and one Joseph Kutty who have attested Ex. P. 1. The accused was also in the house at the time of the search. P. W. 1 registered a case as Crime No. 25 of 1949 of the Peravur station, prepared the first information report and without further enquiry laid the charge-sheet on 6-12-1949.

3. The case for the accused was that on 26th two police constables came to his house and asked him to accompany them to the police station, he started for the police station, that when they reached a place known as Pottanchura the constables took him to the forest nearby and pointed out M.O. 1 which was there and asked him what it was that the accused stated that he did not know; that he was then asked to carry it to the station and he refused, that the police constables tied up his hands and carried M. O. 1 with the help of one Verghese to the Peravur police station.

4. The accused examined two witnesses both of whom belonged to Manathana Amsom and their version has been summarised by the Sub-Magistrate as follows:

'D.W. I swears that about two months ago when he was going to Peravur at about 4 p.m., and was taking tea at Pottanchira two constables went to the shop and enquired about the location of the accused's house. D.W. 1 took the constables to the accused's house. The accused was there in the house. The constables told the accused that P.Ws. want him to go to Peravur station. The accused replied that he will go after sometime. They said that he should go at once and arrested the accused and took him away. The witness followed them. When they had gone about 11/2 furlongs they took a jar from the forest and asked the accused to carry it which he refused. Then they tied the accused's hands and took him and the jar with them. After going another half a furlong they had M.O. 1 carried by a cooly by name Verghese. He further stated that the police did not measure the contents of M.O. 1 nor does he know what it contained. Joseph Kutty was not in the accused's

house. About two months ago when he was sitting in his verandah he saw two policemen and another going to the accused's house and returning with the accused after a quarter of an hour. He did not see any jar with them. P.W. 1 was also not with them.'

5. The learned Sub-Magistrate found that the offence had been made out as charged by the prosecution and disbelieved the defence version and convicted the accused to undergo rigorous imprisonment for four months under Section 4 (1) (a) of the Madras Prohibition Act. The contraband was directed to be destroyed. There was an appeal there from and the Joint Magistrate, Tellicherry, came to the conclusion that the conviction and sentence of the lower Court could not be supported for two reasons namely that there was no enquiry in this case as contemplated by Section 38 (3) and secondly that a search in this case was bad and acquitted the respondent.

6. The learned Public Prosecutor on Instructions from the Government had filed the appeal against the acquittal on the ground that the learned Joint Magistrate erred in holding that there was no compliance with the provisions of Section 33 (3) of the Madras Prohibition Act and secondly in holding that there had not been a valid search within the meaning of Section 103, Criminal P.C.

7. I entirely agree with the contentions of the learned Public Prosecutor that on both points the learned Joint Magistrate completely went wrong.

8. So far as the first point is concerned all that Section 38. (3) states is that such enquiry as the police officer thinks necessary shall be held. In this case there was nothing on which an enquiry could be held and the attention Of the police officer was not also drawn to any matter on which he should enquire. In fact the entire enquiry was completed when the house was searched and contraband articles in the possession of the accused were seized and that all that remained was to register a case and prepare the first information report, and despatch the charge-sheet. This has been done. This is not a case falling within the ambit of the decision referred to by the learned Joint Magistrate in 'In re: KUPPUSAMI NAIDU', 17 M.L.W. 308, where there was necessary to make such an enquiry. Therefore on the mere ground that no enquiry was held when the police officer has a

discretion to hold such an enquiry or not if he thinks on facts that no such enquiry was necessary or even possible, the proceedings cannot be said to be vitiated. The spirit of Section 38 (3) should be understood and applied as otherwise we would be merely reducing these provisions into an absurdity. The lower Court erred in holding that under Section 38 (3) of the Madras Prohibition Act the police officer should hold an enquiry in spite of the fact that he has himself investigated the case and filed the charge-sheet and that under the aforesaid circumstances any omission to hold an enquiry by P. W. 1 was made out and that there had been no valid institution of proceedings in respect of the offence punishable under Section 4 (1) (a) of the Madras Prohibition Act and In applying 'In re: KUPPUSAMI NAIDU', 17 Mad L W 308, which was a case firstly under the different Abkari Act and which decision has no application to the facts of this case.

9. POINT 2: The lower Court was wrong In holding that there was no valid and proper search of the accused's house by the police officer in the case, The grounds of appeal challenging the search before the Joint Magistrate are grounds 2, 3 and 4 and are as follows:

'2. The lower Court ought to have held that there was no valid search of the premises in question either as regards the authority of the person searching or as regards' the fulfilment of conditions precedent to search. The necessary formalities regarding the search have not been complied with either.

3. The search being illegal, the lower Court ought not to have relied on the results of such a search in inferring the guilt of the accused.

4. The lower Court ought to have held that P.W. 2 had not witnessed the search as a fact and was in any view unreliable.'

On the other hand, the evidence in this case shows that none of these criticisms was justified. The word 'locality' has not been defined and in Malabar where houses are situated furlongs from one another there is nothing wrong in a man like P.W. 2 being chosen as the search witness. Then this P.W. 2 has actually witnessed the search and seizure because he was able to see from the verandah all that went on in one room which constitutes the entire house and this is no; a

case of a search witness not seeing what actually happened and blindly attesting the mahazar. The Sub-Magistrate rightly found that all the formalities of a search had been complied with and the Joint Magistrate was not justified in holding that there had been no valid search within the meaning of Section 103, Criminal P.C., and in any event ought to have found that it was not such an irregularity which could vitiate the conviction in the case. The net result is that the acquittal of the Joint Magistrate cannot be supported.

10. But in the circumstances of the case should I set aside this acquittal order in revision and convict the respondent? I do not think it is necessary to do so because the offence itself was in 1949 and the accused has stood the trial and appeal and has spent a portion of his time in Jail and the offence itself was not accompanied by any aggravated circumstances. Therefore this is not a fit case for setting aside the acquittal order and convicting the respondent. With the observations made by me above which would clarify the legal position and prevent further public mischief this criminal appeal is dismissed.

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