

In Re: Muthaya thevan Alias Ramasami thevan and anr.

In Re: Muthaya thevan Alias Ramasami thevan and anr.

SooperKanoon Citation : sooperkanoon.com/821950

Court : Chennai

Decided On : Sep-15-1926

Reported in : 100Ind.Cas.531

Judge : Wallace and ;Madhavan Nair, JJ.

Appellant : In Re: Muthaya thevan Alias Ramasami thevan and anr.

Judgement :

1. This appeal is by two persons convicted by a Jury by a majority of 4 to 1 of offences of house-breaking by night, robbery with hurt, and against one of them grievous hurt in committing robbery. The learned Vakil for the appellants is satisfied with the major portion of the charge to the Jury, which in fact was evidently a summing up for an acquittal. He, however, put forward three points for the consideration of this Court which will be better understood if a slight consideration of the details of the case is set out.

2. The general prosecution case was that on the night of 7th January, 1926, P.W. No. 1 and his family were attacked by robbers, of whom the appellants were two, who inflicted hurt on them and carried off a large wooden box belonging to P.W. No. 1's wife. In the committing Court it was sought to connect the appellants with the crime by evidence that in the box stolen were certain jewels which had been pledged with P.W. No. 1 and which had been recovered from the appellants, and witnesses to identify the jewels were called and examined. They, however, did not in that Court support the prosecution, but stated that they could not identify the

jewels. When the case came up to the Sessions Court, these witnesses were dispensed with by the Public Prosecutor and not examined, and one other witness, who had been put forward in the committing Court as an eye-witness but had deposed that he had not heard about the robbery, was also dispensed with and not examined. Further, in the Sessions Court the first complaint of P.W. No. 1 made to the Village Munsif through P.W. No. 5, was not filed, and in it we understand that the names of certain, witnesses as eye-witnesses to the robbery are given, of whom one has not been examined at all even in the committing Court, and one, whom we have mentioned above, was examined in the committing Court, but dispensed with in the Sessions Court. The contentions for the appellant are, first, that it is a misdirection by the lower Court in that it did not insist on the prosecution examining all the witnesses who could have given information on the subject of the robbery, secondly, that it is a misdirection in that it did not tell the Jury that a number of witnesses examined in the committing Court for the prosecution had not given their support to the prosecution, and, thirdly, that it is a misdirection not to have told the Jury that the failure of the prosecution to file the original complaint justified them in inferring that that complaint, if filed, would not support the prosecution case.

3. A few general remarks on points Nos. 1 and 2 may be made. An extreme position has no, doubt, been taken up by some Courts that it is the duty of a prosecution to adopt an attitude of non-committal to any version of the case and to examine all witnesses alleged to have known something about the offence; whether or not they will support the prosecution case and whether or not the prosecution regards them as true or false. This position we are not prepared to adopt. For one thing, we regard it as unfair to the accused that the prosecution should be allowed to put forward a nebulous case which can be shaped as the trial goes on. Again, the result would be in our view to place the case wholly in a false light. It would compel the prosecution to put into the witness-box witnesses whom it regards as false and as prepared to mislead the Court as to the real truth, which witnesses it has no chance of cross-examining and, therefore, no chance of discrediting. We say this because it is clear that, if the prosecution attitude is non-committal, the Court could not treat such witnesses as 'hostile' to the prosecution. The evidence of such witnesses, therefore, would stand untested, unshaken, and

the result would be that the prosecution would become a farce, since the true evidence if it survived the test of cross-examination would be negated by the false evidence which would not have been tested at all. If, therefore, witnesses have been examined in the committing Court who have not given what the prosecution regards as true evidence, we do not consider it the duty of the prosecution to examine them in the Sessions Court. It is always open in this country to the Court itself to call and examine any of them and always open to the defence to move the Court to do so, so that there is no fear of a failure of justice because the prosecution does not examine them. If we pursue the contention to its logical conclusion, it will follow that, when an accused has examined defence witnesses in the committing Court, who profess some knowledge of the matter under trial, it is the duty of the prosecution to examine these in the Sessions Court, as witnesses knowing something about the case. The Court would probably allow these to be treated as 'hostile' to the prosecution. We should then have the spectacle of the prosecution examining and cross-examining in order to discredit in advance witnesses whom the defence wishes to examine in its favour, a procedure which this Bench has condemned in strong terms in *In re Biswanath Das* 100 Ind. Cas. 365. The only procedure which is fair to both parties is for the prosecution to put forward a definite case and to refrain from calling witnesses whom it regards as false or unnecessary.

4. This view is supported by the rulings Reported in *Emperor v. Reed* 69 Ind. Cas. 630 : 49 C. 277 : A.I.R. 1922 Cal. 461 : 23 Cri. L.J. 742, and the Full Bench in *Queen-Empress v. Durga* 16 A. 84 : A.W.N. (1894) 7 : 8 Ind. Dec. 55 and in a ruling of this Court reported in *Doraiswami Udayan v. Emperor* 75 Ind. Cas. 987 : (1923) M.W.N. 782 : 1924 45 M.L.J. 846 : 33 M.L.T. 213 : 25 Cri. L.J. 75 : A.I.R. 1924 Mad. 239. We are not prepared to accept the view taken in *Queen-Empress v. Ram Sahai Lall* 10 C. 1070 : 5 Ind. Dec. 715. The ruling in *Ram Ranjan Roy v. Emperor* 27 Ind. Cas. 554 : 42 C. 422 : 19 C.W.N. 28 : 16 Cri. L.J. 170 is not strictly in point. There, there were two admitted eye-witnesses who had not been called and they had not even been examined in the committing Court, so that the Public Prosecutor could not say that they would not give true evidence. That case only lays down that the Public Prosecutor is bound to put before the Court the testimony of 'all the available eye-witnesses'. But the witnesses dispensed with in

the present case are not eye-witnesses, but witnesses who say they know nothing about the robbery. It is obviously not the duty of the Public Prosecutor to put before the Court a lot of witnesses who say they know nothing about the offence. If the complainant says that these were eye-witnesses, that no doubt would re-act on the complainant's evidence, but not on the case as a whole, and this aspect of the case will be dealt with later. There is another ruling in the same Volume of the Calcutta High Court Reports *Amritalal Hazra v. Emperor* 29 Ind. Cas. 513 : 42 C. 957 : 21 Cri.L.J. 331 : 16 CrL. L.J. 497 : 19 C.W.N. 676 which simply repeats that ruling laid down in the earlier case. In the case reported in *Tenaram Mondal v. Emperor* 61 Ind. Cas. 1003 : 25 C.W.N. 142 : 33 Cri.L.J 180 : 22 Cri. L J. 475 the learned Judges held that where witnesses named as eye-witnesses in the original Complaint were not examined it was a misdirection not to tell the Jury that they could presume that the evidence of these witnesses would be unfavourable to the prosecution. With due respect we are not prepared to go so far unless it has been elicited in evidence that these persons were cited as actual and undoubted eye witnesses, and reasons were elicited in the evidence why they had not been called and these reasons were not satisfactory reasons. Unless reasons are elicited, it may be that there are perfectly good reasons for not examining these persons, they may be dead or ill or absent. It would in our view, therefore, be improper to tell the Jury that they were entitled to draw inferences adverse to the prosecution unless in evidence it appears that no satisfactory reasons for not examining them are forthcoming.

5. As to the first contention for the appellants then, we hold that it is not part of the duty of the prosecution to examine witnesses whom it regards as false or unnecessary. It is always open to the defence to elicit in evidence why witnesses alleged to have some knowledge of the offence have not been examined and to comment unfavourably on the reasons advanced if they are not satisfactory. On point one, therefore, we hold there was no misdirection.

6. As to point 2 we cannot say that it is the duty of the Court to inform the Jury that several witnesses in the committing Court examined for the prosecution did not support the prosecution case. These witnesses were not before the Jury so that the Jury could decide for themselves whether their evidence was true or false, and

to ask the Jury to assume that their evidence in the committing Court was true, which is what the contention amounts to, would be very improper. Further, the defence did not choose to elicit this point from any witness and, therefore, it is not in evidence. We conceive it to be no part of the Judge's duty to put to the Jury matters which are not in evidence. It was a simple thing for the defence to have elicited the fact from P.W. No. 1 or any other witness, and, if the defence in the Sessions Court, which was in the hands of a competent Vakil, did not think it advisable to elicit his fact, the Judge would certainly be going out of his way to elicit it unless he himself thought that it was a matter of importance for the Jury to know, and, if he did not think, then he would have elicited it in the evidence. It was, therefore, a matter purely for the Judge's discretion whether he allowed such a matter to be put in evidence or not, and the fundamental principle must be that where a point has not been put in evidence before the Jury it is not the duty of the learned Judge to comment upon it in his charge. We hold there is, therefore, no misdirection on this point.

7. As to the third point we think it is more important. It is the obvious duty of the prosecution to put forward the earliest information in the case, and if it does not do so the defence is entitled to ask the Jury to draw adverse inference. In this case a curious procedure has been adopted. The person who made the earliest complaint P.W. No. 5 was only tendered for cross-examination and the Village Munsif to whom the complaint was made was not examined at all. Certainly here was a matter for adverse comment, but the Judge has merely passed over the matter with a casual remark that the complaint has not been filed. We think this point should have been put to the Jury in much stronger fashion. When the prosecution does not choose to file P.W. No. 1's complaint that omission will react strongly on the credibility of his present story and that should have been pointed out to the Jury. Had the complaint been filed, the Judge should have gone on to say that P.W. No. 1 cited in it as eye-witnesses several persons who have not been examined, and that that was another point for the Jury to consider in deciding on the credibility of P.W. No. 1.

8. The fact that witnesses cited in the charge-sheet as eye-witnesses were not examined is to our minds unimportant, and the defence could not claim that the

Judge must put the charge-sheet to the Jury as if it was evidence. If the defence wanted to comment on statements in the charge-sheet it should have elicited appropriate facts from the investigating officer when he was in the witness-box and thus secured that these facts were put in evidence.

9. Another point of some importance which the Judge has not put to the Jury is that P.W. No. 4 who deposed that he saw the thieves escaping with the box and knew them, did not mention their names to the Sub-Inspector when examined the next day. On this point and the omission to file the complaint, points which vitally affect the trustworthiness of two out of four direct eye-witnesses to the crime, we think there has been a serious omission of important matters which amounts to a misdirection, and that the Jury was, therefore, not properly charged. We must, therefore, allow this appeal.

10. In the circumstances of the cases considering that the learned Judge was evidently summing up for an acquittal we do not think that this is a case for ordering a re-trial. The conviction of appellants and the sentence passed on them are cancelled. The appellants will be set at liberty.