

THE PUBLIC
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v.
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before he is delivered by due course of law, he commits the offence of 'escape.' It has been long established that even when the escape is effected by the consent or the neglect of the person that kept the prisoner in custody, the latter is no less guilty, as neither such illegal consent nor neglect absolves the prisoner from the duty of submitting to the judgment of the law (1 Russ, 5th, p. 567; Roscoe, 11th edition, p. 453; and Bishop's Criminal Law, 7th edition, section 1104)."

The fact that the peon who had the custody of the accused went to sleep did not in any way put an end to the custody, or affect the accused's duty to submit to the judgment of the law.

We must, therefore, set aside the acquittal, and direct the Sub-Magistrate to restore the case to his file, and to try it afresh in accordance with law.

APPELLATE CRIMINAL.

Before Mr. Justice Wallis and Mr. Justice Munro.

ARUNACHELLAM

v.

EMPEROR.*

1908.
February 27.

Criminal Procedure Code—Act V of 1898, ss. 337 (2), 339—Accused to whom pardon tendered ought to be examined as a witness and not be put into the dock at once.

An accused person to whom pardon has been tendered and who has accepted such pardon, ought not, when he shows an intention not to give the evidence which he has led the prosecution to expect, to be put back into the dock without being examined as a witness. He should, under such circumstances, be examined as a witness as directed by section 337 (2) of the Criminal Procedure Code, and then dealt with under section 339 of the Code.

Such a person should, if tried, be tried separately and after the trial of the other accused is over.

Queen-Empress v. Ramasami, (I.L.R., 24 Mad., 321), followed.

* Referred Case No. 14 of 1908 (Criminal Revision Case No. 77 of 1908), for the orders of the High Court, under section 438 of the Code of Criminal Procedure, by J. H. Robertson, Esq., District Magistrate of Salem, in his letter, dated 4th February 1908, Referred No. 204 M. B. of 1908.

The facts are sufficiently stated in the letter of reference to the High Court which was as follows:—

I have the honour to submit herewith for the orders of the High Court the records in P.R. 27 of 1907 on the file of the Stationary Sub-Magistrate, Atur.

The accused in the case, who are 9 in number, were charged before the Sub-Magistrate with having, on the night of the 20th November last committed dacoity—an offence punishable under section 395, Indian Penal Code—in the field shed of one Chidambara Padayachi of Thandagoundanpoliem village. In the course of the Police investigation in the case, the ninth accused Arunachalam was arrested on suspicion, and when examined (by the Police) on 25th November 1907, he, it is reported, gave out the full details of the dacoity on the night in question implicating himself and the other accused. A mahazar was accordingly drawn up and several of the stolen properties secured on search with the information furnished by the ninth accused. Such of the accused as were arrested, including the ninth, were produced before the Sub-Magistrate on the 27th instant for remand. Accordingly, the Sub-Magistrate in his proceedings, dated 27th November 1907, remanded them till 3rd December 1907. As the Police represented to the Magistrate that the ninth accused was willing to make a confession, the Magistrate allowed him two days, and on the 29th he took him to the Court, explained to him that he was under no obligation to answer any question at all, warned him that it was not intended to make him an approver and that anything he said would be used against him. It is noted by the Sub-Magistrate (the exact words of the accused not having been recorded) that the accused expressed his willingness to make a true disclosure of the facts knowing the consequences of such disclosure. He accordingly made a long confessional statement and this was recorded by the Magistrate (on the same day, *i.e.*, 29th November 1907).

In the meanwhile, the Police applied to the District Magistrate for sanction to make this accused an approver. As there were reasonable grounds for granting the same, the sanction applied for was accorded by me on 4th December 1907. On 9th December 1907, the Sub-Magistrate tendered the pardon to the accused on condition of his making a full and true disclosure of the whole circumstances within his knowledge relative to the offence in the

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case, and the accused, it is noted by the Sub-Magistrate, accepted the pardon on that condition. When, however, the Magistrate proceeded to examine him on oath as a witness, he began to retract his former statement, and said that he was asked by the Sub-Inspector of Police and others to speak against the present accused and that his former statement was false. (*Note*.—Here again only a note is made by the Magistrate regarding the above facts and the exact words of the accused have not been recorded.) On the next day (*i.e.*, on 10th December 1907), the Sub-Magistrate treated this man as an accused and examined him as such along with the other accused. At this stage, the man made a long confessional statement corroborating his original statement before the Magistrate on 29th November 1907. He further said that the statements made by him on 29th November 1907 and on this occasion (*i.e.*, 10th December 1907) were voluntarily made, that he retracted on 9th December 1907 his former statement (*i.e.*, the one made on 29th November 1907) as the other accused dissuaded him from speaking the truth. On reconsideration he thought it desirable to give out the truth and acted accordingly.

As the Sub-Magistrate considered that a *prima facie* case was made out against the man (ninth accused) according to his own statement made on 10th December 1907, he framed a charge against him on 14th December 1907, along with the other accused for an offence under section 395, Indian Penal Code, and committed him along with the others on 16th December 1907 to the Court of Sessions.

The Sub-Magistrate's procedure seems in my opinion to be illegal for the following reasons:—

(a) The Sub-Magistrate has not recorded the statement made by the accused on 9th December 1907 retracting his former statement.

(b) Even after allowing that irregularity, his subsequent procedure in having at once treated him as an accused and examined as such while the pardon tendered to him was in force (the same not having been revoked either by the Sub-Magistrate or the District Magistrate who sanctioned it), is wrong and is opposed to the ruling in *Queen-Empress v. Ramasami*(1).

(1) I. L. R., 24 Mad., 321.

(c) Further it has been ruled in the same decision that an approver who has forfeited the pardon should not at once be committed to stand his trial with the other accused, and nothing should be done against him until after the trial of the other accused is over and the trial against him should then proceed *de novo*.

(d) Lastly, the Sub-Magistrate's action in having at once treated the approver as an accused, has deprived the remaining accused of the opportunity of cross-examining him as to the truth of his confessional statement on which and other circumstantial evidence the remaining accused have been charged, and committed to the Sessions. This is an irregularity which cannot but prejudice the remaining accused.

A copy of the Sub-Magistrate's explanation in the matter is herewith enclosed. As the original records in the case have already been submitted to the Sessions Judge, copies of them which had been furnished to the Public Prosecutor are herewith submitted.

The case has been adjourned for trial by the Sessions Judge to the 3rd March 1908.

The Public Prosecutor in support of reference.

ORDER.—Section 337(2) of the Criminal Procedure Code provides that every person accepting a pardon under this section shall be examined as a witness in the case. We think that the Stationary Second-class Magistrate of Atur should have put Arunachellam, the ninth accused, into the box and have examined him, and should then have dealt with him under section 339, Criminal Procedure Code, if necessary, according to the ruling in *Queen-Empress v. Kumasami*(1).

The accused ought not, we think, to have been put back into the dock when he showed an intention of not giving the evidence which he had led the prosecution to expect. According to the case of *Queen-Empress v. Ramasami*(1), a prisoner to whom a pardon has been tendered should, if tried at all, be tried separately and after the trial of the other accused is over. One result of putting him back into the dock is that the statement which he has made as an accused person can be taken into consideration against the other accused, and this statement has proved to be in effect the same as that which he was expected to make when a pardon was tendered

(1) I. L. R., 24 Mad., 321.

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him. We think that the commitment of all the accused must be quashed and fresh inquiry held at which the ninth accused should be examined as required by section 337(2) of the Criminal Procedure Code.

APPELLATE CRIMINAL.

Before Mr. Justice Wallis.

GANAPATHI BHATTA

v.

EMPEROR *

1908.
February 21.

Criminal Procedure Code, Act V of 1898, s. 117(4)—Parties in conflict with one another cannot be dealt with in one enquiry—Such joinder illegal.

Two or more persons are not 'associated together in the matter under enquiry' within the meaning of section 117(4) of the Criminal Procedure Code when there is a conflict between them, and they cannot therefore be dealt with in the same enquiry under the provisions of that section.

Such a joinder is not a mere irregularity but an illegality which will vitiate the proceedings.

THE first accused was the maktesser of a certain temple and the second accused an archaka of the temple. The first accused dismissed the second on the ground of misconduct and appointed the third accused in his place. The first and third accused began to collect men to oust the second accused from the temple and the second accused likewise collected men to assert his rights

The Police reported to the Magistrate that there was a likelihood of a breach of the peace. The Deputy Magistrate issued notice to the accused to show cause why they should not be bound over to keep the peace. He joined them all in the same enquiry and after recording evidence, he directed them to execute bonds to keep the peace for a year.

The District Magistrate confirmed the order on revision, holding that the joining of the third accused in a single enquiry was an irregularity by which they were not prejudiced.

* Criminal Revision Case No. 474 of 1907, presented under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the decision of M. R. Ry. R. Rama Rau, General Duty Deputy Collector of South Canara, in Miscellaneous Case No. 14 of 1907.