

APPELLATE CRIMINAL.

*Before Sir John Wallis, Kt., Chief Justice, and Mr. Justice
Krishnan.*

1921,
March 30
and April 1.

VEMUREDDI BABU REDDI (FIRST ACCUSED IN THE COURT OF THE
SECOND-CLASS MAGISTRATE OF KOVUR), PETITIONER.*

Legal Practitioner—Witness—Whether can appear for accused person.

The rule as to the exclusion of witnesses from Court until they have been examined does not extend to counsel for accused who is cited as a prosecution witness.

There may be circumstances which may make it desirable for counsel not to appear in a case in which he is a witness, but they would not render his appearance illegal.

PETITIONS under sections 435 and 439 of the Criminal Procedure Code and section 107 of the Government of India Act to set aside the order of Mr. RANGASWAMI RAO, Second-class Magistrate, Kovur, in Preliminary Register Case No. 2 of 1921.

Mr. Ward is a practising first grade pleader in Nellore and Vemureddi Babureddi has been his standing client for several years. The latter was impleaded as first accused in Preliminary Register Case No. 2 of 1921 on the file of the Second-class Magistrate of Kovur. He retained Mr. Ward to defend him, and Mr. Ward filed appearance on 19th January 1921 and on that date appeared on his behalf to apply for bail before the Magistrate. He appeared before the Sessions Judge two days later in appeal, as the Magistrate refused bail. He also instructed counsel in the High Court as the bail was refused by the Sessions Judge. At the hearing of the Preliminary Register Case on 21st February 1921 objection was taken to Mr. Ward appearing for Babureddi as his (Mr. Ward's) name appeared among the list of witnesses for the prosecution. The Magistrate ruled that 'Mr. Ward cannot appear as counsel for accused No. 1 as long as he is a prosecution witness.' Against this order Babureddi filed a Criminal Revision Petition and Mr. Ward filed a Civil Miscellaneous Petition.

* Criminal Revision Case No. 224 of 1921.

Dr. Swaminathan, T. E. Ramachandra Ayyar, A. Krishna-swami Ayyar and K. Balasubrahmanya Ayyar for petitioners.

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The Public Prosecutor for the Crown.

The Court passed the following ORDER :—

These are applications put in by Mr. F. T. Ward, a first-grade pleader of Nellore, and by his client the first accused in a murder case, under section 107 of the Government of India Act and section 425, Criminal Procedure Code, to set aside an order of the Second-class Magistrate of Kovur debarring Mr. Ward from appearing as counsel for the first accused at the preliminary inquiry on the ground that his name appears in a supplemental list of witnesses put in by the prosecution as forty-second witness for the prosecution. Such an order is wholly unprecedented and is not supported by any of the cases referred to in the order. The Magistrate states that as a prosecution witness Mr. Ward cannot sit in Court on the accused's behalf until he is called in for examination in due order by the prosecution. The rule as to the exclusion of witnesses from Court until they have been examined is not without exceptions. It does not extend to the parties themselves in civil cases, so long as they conduct themselves properly, or to their solicitors whose assistance is necessary for the proper conduct of the case: Roscoe's *Nisi Prius*, Volume 1, page 159 (18th Edition). The same rule applies in Criminal cases: Roscoe's *Criminal Evidence*, page 114 (13th Edition), and it has never been suggested that the fact that in England the accused is now a competent witness justifies his exclusion from the Court during the trial. There are even stronger reasons for not applying the rule to the counsel of the parties who has to conduct the case; and this is apparently the first case of its application to him which has come before a superior Court. In our opinion the rule does not apply to counsel either in England or in India; and further it would not be easy to reconcile its application to them with the provisions of section 340, Criminal Procedure Code.

The Bar Council has no doubt laid down, for the guidance of the profession, certain rules as to refusing retainers or withdrawing from the case where they are summoned as

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witnesses: see *Weston v. Peary Mohan Dass*(1). But there is nothing in those rules to suggest that circumstances which may make it desirable for a counsel not to appear render his appearance illegal. On the contrary, the rules in question are for the guidance of counsel in the exercise of their legal right to appear or refuse to appear. It might be otherwise, if by appearing in a case a counsel became incompetent to be a witness. It is, however, now well-settled that there is no such incompetency, as held by WOODROFFE, J., in the case just cited, on the authority of *Cobbet v. Hudson*(2), and *Corca v. Peiris*(3), where a counsel in the case gave evidence and no objection was taken to the propriety of his so doing in the particular circumstances of that case.

Further, it cannot be said at the present stage of the case and on the materials before us that there are circumstances which make it desirable that Mr. Ward should retire from the case. It is not suggested that he knows anything about the alleged murder itself. All that is suggested is that he acted for the first accused in certain civil matters which may have afforded a motive for the crime, and even as to these matters, as pointed out by the Public Prosecutor, it may be open to him to plead privilege. The order of the Magistrate must be set aside.

M.H.H.

(1) (1913) I.L.R., 40 Cal., 898.

(2) (1852) 1 E. & B., 11; s.c., 118 E.R., 341. (3) [1909] A.C., 549.