Privy Council Appeal No. 1 *of* 1943

K. R. Easwaramurthi Goundan – – – – – *Appellant*

v.

The King-Emperor – – – – – – – *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD FEBRUARY, 1944

Present at the Hearing:

LORD MACMILLAN
LORD WRIGHT
SIR GEORGE RANKIN

[*Delivered by* LORD WRIGHT]

The appellant, a wealthy landowner, merchant and banker with large interests in Tiruppur, where he resided, and other places in the Province of Madras, was charged along with ten other persons under section 216 of the India Penal Code with the offence of " harbouring " two persons who were suspected of having committed a murder on or about the 8th March, 1940. The murdered man was Muthu Goundan, of Othuvillaipudur The police formed the opinion that the murder was committed by four persons, all of them Valayans, a low tribe among the depressed and criminal classes of Madras, aided and abetted by one R. V. I. Goundan, the father-in-law of the appellant. Two of these four Valayans are the persons whom the accused was said to have " harboured ". These men, along with R. V. I. Goundan, being subsequently tried for the murder or abetment, were acquitted. Of the eleven men later charged with " harbouring ", ten including the appellant were convicted by the Sub-Divisional Magistrate who tried the case, the appellant being sentenced to six months' rigorous imprisonment and a fine of Rs.1,000, with a further three months' rigorous imprisonment in default of paying the fine. On appeal, the Sessions Judge set aside all the convictions and sentences. On a further appeal by the prosecution from the orders of acquittal, Horwill J., who heard the appeal in the High Court of Madras, confirmed all the acquittals except that of the appellant; as to him, the Judge restored the conviction and sentence passed by the Sub-Divisional Magistrate. Special leave to appeal was granted to the appellant by His Majesty in Council. In the result, as will appear later, their Lordships arrived at the opinion, on the conclusion of the arguments, that the appeal should be allowed on the ground that there was no evidence admissible in law to prove the essential foundation of the case for the prosecution, namely, that any order had ever been made for the arrest of the two men said to have been " harboured ". In view of the decisive character of this objection to the conviction, it will be enough here to summarise as shortly as possible the material facts and to outline the course which the proceedings below took. First, however, the terms of section 216 must be set out. That section is in the following terms:

> " *Section* 216.— . . . whenever a public servant, in the exercise of the lawful powers of such public servant, orders a certain person to be apprehended for an offence, whoever, knowing of such . . . order for apprehension, harbours or conceals that person with the intention of preventing him from being apprehended, shall be punished in the

manner following, that is to say, if the offence for which the person . . . is ordered to be apprehended is punishable with death, he shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; . . ."

The section requires, if the offence is to be established, first that there has been an order for the apprehension of a certain person as being guilty of an offence, secondly knowledge by the accused party of the order, thirdly the harbouring or concealing by the accused of the person with the intention of preventing him from being apprehended. The character of a warrant of arrest is defined in section 75 of the Code of Criminal Procedure, 1898, as follows:—

" *Section* 75.—(1) Every warrant of arrest issued by a Court under this Code shall be in writing, signed by the presiding officer, or in the case of a Bench of magistrates, by any member of such Bench; and shall bear the seal of the Court.

" (2) Every such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed."

The form prescribed for such a warrant is set out in Schedule V of the Code.

" *Schedule V. Form II.—Warrant of Arrest.*

" (See Section 75.)

" To (*name and designation of the person or persons who is or are to execute the warrant*) whereas of stands charged with the offence of (*state the offence*), you are hereby directed to arrest the said and to produce him before me. Herein fail not.

" Dated this day of 19 .

" (Seal.) "

A warrant or order of this character is a public document, and the conditions necessary to prove it are prescribed in sections 62, 64 and 65 of the Evidence Act, which are in the following terms:—

" 62. Primary evidence means the document itself produced for the inspection of the Court.

" 64. Documents must be proved by primary evidence except in the cases hereinafter mentioned.

" 65. Secondary evidence may be given of the existence, condition or contents of a document in the following cases:—

" (*a*) when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or, of any person legally bound to produce it,

and when, after the notice mentioned in section 66, such person does not produce it;

" (*b*) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

" (*c*) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

" (*d*) when the original is of such a nature as not to be easily moveable;

" (*e*) when the original is a public document within the meaning of section 74;

" (*f*) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in British India, to be given in evidence;

" (*g*) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

" In cases (*a*), (*c*) and (*d*), any secondary evidence of the contents of the document is admissible.

" In case (*b*), the written admission is admissible.

" In case (*e*) or (*f*), a certified copy of the document, but no other kind of secondary evidence, is admissible.

" In case (*g*), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents."

The ten persons charged together with the appellant were (1) the pattagar or proprietor of an estate at Palayakottai, in the grounds of which the two suspected Valayans were eventually arrested, and eight other persons who were servants of the pattagar, the appellant and another person said to have assisted the appellant. The appellant was arrested on the 29th September, 1940, the pattagar and the others arrested with him having been arrested on the 23rd August, 1940. The charge against the appellant was in due course framed by the Sub-Divisional First Class Magistrate of Coimbatore. It was dated the 18th January, 1941, and was in the following terms:—

" That on or about the 13th day of July, 1940, Soratta Valayar, son of Vettai Valayar, and Kooravalayar, son of Alaga Valayar, were ordered to be apprehended for an offence under Section 302, by the Sub-Magistrate, Udumalpet, a public servant in the exercise of his lawful powers as such public servant, and that you knowing of the said order for apprehension on or about the 22nd day of August, 1940, at Palayakottai harboured the said Soratta Valayar and Kooravalayar with the intention of preventing them from being apprehended and thereby committed an offence punishable under Section 216 of the I.P.C., and within my cognizance."

The charge referred to an order, though without giving any precise date for it. It specified the place and date of the offence and alleged that the accused knew of the alleged order before the date of the alleged offence, which was said to have been committed on or about the 22nd August, 1940. It is clear that it was necessary for the prosecution to establish that before that date the order existed and was known to the appellant, and that the acts amounting to harbourage were done by the appellant with that knowledge. The prosecution sought to prove both that the warrant of arrest had been issued and that the appellant knew of its issue by means of two proclamations, one in respect of each of the two suspected Valayans. These were except for the name of the particular suspect in identical terms. It will be enough to quote one of them.

" In the Court of the Sub-Magistrate, Udumalpet
" R. C. XI. of 1940 *Calendar Case*.

" Whereas complaint has been made before me that Soratta Valayan, son of Sellappan alias Vettai Velayan, Nallur, Palladam Taluq, has committed (or is suspected to have committed) the offence of murder, punishable under Section 302 of the Indian Penal Code, and the warrant of arrest issued was returned with the endorsement that the said Soratta Valayan could not be found and whereas it has been shown to my satisfaction that the said Soratta Valayan has absconded (or is concealing himself to avoid the execution of the said warrant);

" Proclamation is hereby made that the said Soratta Valayan is required to appear at Udumalpet Camp before this Court, to answer the said complaint on the 18th August, 1940, at 10 a.m.

" Dated this 5th day of July, 1940.

" (Signed) JOHN A. SAMUEL,
" Sub-Magistrate."

There was no evidence at all in this case to show that the proclamations or either of them came to the knowledge of the appellant, or that he had ever visited Nallur, or that it was reasonable to assume that he had done so, or (apart from the evidence of his alleged association with the two Valayans) that he had ever associated with the type of person usually to be found in a Valayan village.

It is obvious that there could not be proof that the appellant knew of the orders or warrants of arrest, unless or until the issue of the warrants had been proved. The proclamation was made under section 87 of the Code of Criminal Procedure, but there is in their Lordships' opinion, as will be explained later, nothing in that section which makes the proclamations legal evidence of the issue of the warrant or order of arrest, nor is there anything either in section 87 or in the facts of the case which makes

it possible to impute to the appellant notice of the proclamations or their terms. This makes it unnecessary to comment on the curious fact that the date of the warrants of arrest given in the proclamations (the 5th July, 1940) differs from the date given in the charge (on or about the 13th July, 1940). It will not be surprising that the same vagueness as to dates recurs in the evidence called to establish the " harbouring." There was some discussion as to what were the dates of the various occurrences spoken to by the evidence, but there is in their Lordships' opinion no evidence to show that there ever were the orders or warrants proof of which was essential to the prosecution's case, so that it will not be necessary to make any meticulous examination of the evidence. It is sufficiently clear in their Lordships' opinion that the Sessions Judge was right in his conclusion on this aspect of the case, which was in effect that even on the prosecution's evidence the appellant brought the Valayans to the pattagar's compound nearly four months before the proclamations were issued and was not said to have associated with them at that place later than six weeks before the proclamations. The Sessions Judge in his judgment pointed out that although the necessary warrants or orders had not been filed, he nevertheless felt justified in inferring from the terms of the proclamations that they had been issued. On this point their Lordships are unable to agree with the Sessions Judge for reasons to be stated later. But they do agree with his conclusion that, even assuming, as he did, that the warrants had in fact been issued, it had not been proved that the appellant knew of them. He went on to emphasise the difference between the positive word " knowing " used in section 216 and the words " has reason to believe " as used in section 212 of the Code as an alternative to " knows." He also referred to the definition of " has reason to believe " in section 26 of the Code as meaning " having sufficient cause to believe." In their Lordships' opinion the Sessions Judge was right in holding that the word " knowing " meant something more than and different from the words " had reason (or sufficient cause) to believe." The latter words might be satisfied even though no warrant had in fact been issued. " Knowing " however implies a fact which can be known. It does not necessarily import actual evidence of the senses, but it does import knowledge of something actual by means of authentic or authoritative information. The Sessions Judge also held that the proclamations could not be deemed to establish that the appellant " knew " of the issue of the warrants. He accordingly held that the appellant should be acquitted.

Horwill J. on appeal reversed that decision. It is not necessary to examine his analysis of the evidence of fact. It is enough to say that their Lordships prefer in general that of the Sessions Judge. But he, erroneously, as their Lordships think, treated the objection that the issue of the warrants had not been proved as a " technical " objection, and he rejected or disregarded the distinction between " knowing " and " having reason to believe." He read section 216 as if it contained the latter words. These two errors are, in their Lordships' opinion, sufficient to vitiate his judgment and the resulting conviction and sentence.

But their Lordships think that the appeal should be allowed on the single ground that there is no evidence that the warrants or orders were ever issued. Sections 62, 64 and 65 of the Evidence Act define the only evidence which the law permits in order to prove a warrant of arrest, and that is under section 62 of the Act production of the original order, or, under the conditions specified in section 65, of a certified copy. A warrant of arrest is a public document which affects the personal liberty of the subject. The statute as quoted above prescribes its form. It has to bear the appropriate signature and seal. Any laxity of proof might have serious consequences. It might for instance lead to error as to the identity of the person to be apprehended. Secondary evidence other than a certified copy would not necessarily or even obviously show that the statutory form had been complied with. But it is unnecessary to emphasise this point. The objection taken on the appellant's part is not technical

but substantial. Mr. Roberts, the able Counsel for the Indian Government, did not in the end contest its validity. Indeed, he said that the Indian Government would not countenance any relaxation of the stringency in regard to warrants of arrest of sections 62 and 65.

It is sufficient to refer briefly to an argument based on subsection 3 of section 87, the words of which are as follow:

> " (3) A statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day shall be conclusive evidence that the requirements of this section have been complied with, and that the proclamation was published on such day."

Their Lordships cannot read these words as overriding the requirements of the Evidence Act or as making the proclamation evidence that the warrants had been issued. The method of proving the warrants is not a requirement of the section which is merely dealing with the proclamation itself and the mode of publishing it and the like. Nor does section 87 expressly or by implication make the proclamation equivalent to notice to the public of its contents, even to the inhabitants of the town or village where it is published.

Some reference was made to the rule relating to concurrent findings of fact in the Court below. If that rule applied at all, it would involve concurrent findings in all the Courts below, whereas here there are such findings in only two out of three. But in a criminal appeal brought by special leave of His Majesty in Council, their Lordships are not concerned with formal rules, but only with the question whether there has been a miscarriage of justice, as in their opinion for the reasons given there has been in this case.

In their judgment the appeal should be allowed and the conviction set aside.

They will humbly so advise His Majesty.

(32823) Wt. 8226—23 170 3/44 D.L. G. 339

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THE KING-EMPEROR

[DELIVERED BY LORD WRIGHT]

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