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THE KING *v.* THURIAPPA *et al.*

D. C., Jaffna, 1,916.

Assessors—Their use to the Judge—Calling accused as a witness against his wish—Evidence Ordinance, s. 120, sub-s. 4—Criminal Procedure Code, ss. 295, 296, 302—Riot—Unlawful assembly—Bonâ fide *assertion of legal right.*

The appointment of assessors for the trial of a criminal case is a matter in the discretion of the Judge. Their appointment may, in some cases, be of considerable use to the Judge even where he differs from them in opinion.

While section 120, sub-section 4, of the Evidence Ordinance declares that it is competent to an accused party to call himself as a witness on his own behalf, it gives no right to other people to call him as a witness. A Judge, therefore, cannot under this section force an accused into the witness box, nor is he given power to do so by sections 295, 296, or 302 of the Criminal Procedure Code.

Certain people of Jaffna of the Potter caste, in their attempt to take a procession through the court-yard of a Hindu temple, were repelled by force (which resulted in injury to some of them) by people of the Vellala caste. The Potters asserted a right to take the procession through the court-yard, but it appeared that it was a right that they knew would be disputed by the Vellalas, and it was not clear from the evidence that the Potters had been in the habit of doing, of right, what they attempted to do in this instance, down to a recent period.

Held, that the Potters could not be said to have acted in the *bonâ fide* assertion of a legal right, and that the Vellalas were therefore not guilty of riot or unlawful assembly.

THE facts of this case are as follows. Sixteen men of the Vellala caste were charged with having been members of an unlawful assembly and with having committed riot on or about the 27th October, 1903, at Tunnalai North, in the division of Point Pedro. There were also two other counts, viz., (1) voluntarily causing grievous hurt, and (2) voluntarily causing hurt. The offences were alleged to have been committed during a *kávadi* procession of men belonging to the Potter caste through the court-yard of a Hindu temple, headed by four headmen, who had been specially delegated by the Magistrate, on the petition of the Potters, to go and preserve the peace.

Before the trial the counsel for the accused moved that assessors should be appointed to assist the Judge. This application was, however, refused in the following terms:—

"I refuse the application on the ground that sub-section 2 of section 213 of the Criminal Procedure Code says the District Judge shall not be bound to conform to the opinion of the assessors. This seems to make trial before assessors somewhat of a farce for it introduces an element of uncertainty and seesaw which is demoralizing."

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At the trial three of the accused were unwilling to go into the box; the Judge, however, forced them to do so, notwithstanding the remonstrance on the part of their counsel. All the accused were convicted on the ground that the *causus belli* was given by them: the first six on all four counts.

The first six accused appealed.

The case came on for argument before Moncreiff, A.C.J., on 26th July, 1904.

Van Langenberg.—Under sections 200 and 207 of the Criminal Procedure Code the application to try the case before assessors should have been allowed. In a trial the accused could not be asked to go into the witness box against his will. Under section 295 it is only in an inquiry that power is given to the Police Magistrate to examine the accused. Sub-section 4, section 120, of the Evidence Ordinance makes an accused only competent to give evidence "on his own behalf," but he is not compellable to do so. Nor could sections 295, 296, and 302 of the Criminal Procedure Code have helped the District Judge to assume this power of compulsion. Again, judging the case on its merits, the Potters seem to have been the aggressors.

Rámanáthan, S.-G., contra.

The following cases were cited by counsel:—P. C., Chilaw, 21,612, decided April 22, 1904; D. C., Jaffna, 1,919, June 4, 1904; P. C., Nuwara Eliya, 17,058, July 1, 1904.

Cur. adv. vult.

28th July, 1904. MONCREIFF, A.C.J.—

This case arose out of a collision at Jaffna between a body of Potters and a body of Vellalas. The six appellants belong to the Vellala section, and have been found guilty under four counts, into all of which enters the element of unlawful assembly.

The Potters proposed to carry a *kavadi* procession to the Kandasami temple, which appears to belong to them. They proposed also on the way to pass through the court-yard of the Ammam temple, against the wishes of the Vellalas.

For the appellants it is first urged that the District Judge questioned the utility of assessors. I think the Judge need not have said so much, for although it is possible to exaggerate the value of assessors, their presence may, in some cases, be of considerable use to the Judge, even where he differs from them in opinion. The matter, however, is one for his discretion.

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In the next place, objection was taken that the Judge had put all the accused in the witness box against the consent of some of them. Three of the accused were unwilling to go into the box. The Judge said he would call them all, and he called them all. Some remonstrance was made by the counsel who appeared for the accused, whereupon the Judge said that he relied upon a District Court, Chilaw, criminal case in appeal. We have since obtained the number of that case, 2,506; I have not seen the case, but the Judge has sent an extract from the judgment, which, however, does not appear to me to have any bearing on the subject, and leads me to suspect that he has mistaken the subject of that decision. I think he is wrong in claiming the right he has asserted; neither section 295 nor 296 nor 302 of the Criminal Procedure Code gives him the right. Section 120 of the Evidence Ordinance, sub-section 4, provides that an accused is a competent witness on his own behalf. The words "on his own behalf," I imagine to mean that he may call himself, but that other people cannot do so against his will. The matter has been dealt with by Sir Charles Layard in case No. 21,612 of the Police Court of Chilaw on the 22nd April, 1904; by my brother Sampayo in case No. 17,058 of the Police Court of Nuwara Eliya on the 1st July, 1904; and also touched upon by my brother Wendt in District Court criminal case No. 1,919, Jaffna, on the 8th June, 1904. Reference to these cases will, I think, show that according to the opinion of this Court the Judge was mistaken. I do not think, however, that the irregularity in this case was sufficient to prejudice the accused in their defence.

The Potters, in order to clear the way, had petitioned the Police Magistrate for protection, and the Magistrate issued an order to the Udaiyar to take a number of headmen to see that there was no breach of the peace. The petition, however, was only with reference to a procession with music, and there is no reference in it to the fact that the Potters intended to force their way through the northern court-yard of the Ammam temple. The Udaiyar himself admits this, and, so far as I can judge, did not inform the Magistrate of what was contemplated. The Magistrate's order therefore had no reference to what the Potters actually did, and gave them no sanction for it. The accused were ready to give way if the Udaiyar gave them a writing. The Magistrate had given no such writing, although the District Judge says he had. The Potters went, about seventy persons, to the northern court of the Ammam temple with music and drums, and there were between fifteen and twenty Vellalas there unarmed, with their cloths not tucked up for fighting. Stones began to be thrown, and a scuffle took

place; some persons were injured, and the Udaiyar and the Police Vidane separated the parties. The Judge admits that the Potters went to the temple for the purpose of asserting a right; it was a right which they knew would be disputed; in other words, they went there for the purpose of having their own way, or if necessary attacking the other party.

The one point in the case which the Judge has not sufficiently considered is whether the Potters were acting in the exercise of a legal right. I would grant that if they had been in the habit of doing what they attempted in this instance to do, of right, down to a recent period, the fact that a dispute had been raised on the part of the Vellalas with regard to it is hardly sufficient to deprive them of the exercise of an apparent right. The accounts given, however, upon this point are somewhat conflicting and very meagre. At one time both parties had been in the habit of having processions to the Ammam temple, but the *pusari* says that they fell out some time ago—some of the witnesses put it at three years ago—and the evidence is in favour of that period—that the Potters had never taken part in any procession of that kind since then, and never at any time except by permission of the Vellalas. On the other hand, the Udaiyar, who had no personal knowledge of the facts, and I fear is a partizan, declares that when the dispute began at the temple he questioned the Vellalas who asserted their right; and that then he turned to the *pusári* and elicited from him a statement to the effect that the Potters were accustomed to exercise the right they claimed. That is denied by the *pusári*, and one or two witnesses say one thing and some another. On such evidence it is impossible to hold that these persons were acting in pursuance of a legal right, and as that element is not established the prosecution has, I think, failed to make out the charges.

The Judge remarked that it was the duty of the Vellalas when they were attacked, or rather when the procession entered the northern court, to restrain themselves and to remember that they had their remedy under the Civil and Criminal Law. He does not, however, apply the same observation to the Potters, and I think that he forgot for the moment that the Potters were the persons who went to the spot for the purpose of enforcing what they claimed as a right, without informing the Magistrate of their intention, and well knowing that if the headmen did not interfere there would be a serious breach of the peace.

I think that the conviction of these appellants should be set aside.