

**(1958) 11 KL CK 0017**  
**In the High Court Of Kerala**  
**Case No : Criminal Ref. No. 6 of 1958**  
**In Re: Chathukutty**

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**Date of Decision :** 18-11-1958

**Acts Referred:**

Criminal Procedure Code, 1898 (CrPC) — Section 340

**Citation :** AIR 1959 Ker 119 : (1959) CriLJ 474

**Hon'ble Judges :** T.K. Joseph, J;G. Kumara Pillai, J

**Bench :** Division Bench

**Advocate :** Public Prosecutor, T.L. Viswanath Iyer and V. Gopalakrishna Iyer, for the Appellant;

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## Judgement

G. Kumara Pillai, J.—This is a reference made by the District Magistrate (Judicial), Kozhikode, u/s 438 of the Code of Criminal Procedure. The reference arises out of C. C. No. 1986 of 1957 on the file of the Sub-Magistrate's Court, Kozhikode. That was a case in which the charge against the accused was u/s 224, Indian Penal Code, for escape from lawful custody after he was arrested by the Customs Officials on 4-11-1957. The escape, according to the prosecution, was on 5-11-1957. On 11-11-57 Shri V. Gopalakrishna Iyer, advocate, Kozhikode, acting as counsel for the accused, is said to have produced him before the Assistant Customs Collector Kozhikode. Shri Gopalakrishna Iyer subsequently moved an application for bail on behalf of the accused and also got him enlarged on bail.

In the case also Shri Gopalakrishna Iyer filed a memo of appearance on behalf of the accused, but he was included in the list of prosecution witnesses for proving the fact that he had produced the accused before the Assistant Customs Collector on 11-11-1957. On account of this circumstance the Assistant Public Prosecutor who was conducting the prosecution objected to Shri Gopalakrishna Iyer's appearance in the case for the accused and made an application to the Magistrate for compelling him to retire from the case.

The Magistrate granted this application holding that Shri Gopalakrishna Iyer was a material witness and that it was better for him to withdraw from the case. The

accused, who was thus deprived of the service of his counsel, then moved the District Magistrate, in revision, and after examining the records of the case the District Magistrate has made the present reference recommending to this court that the Magistrate's order should be quashed and Shri Gopalakrishna Iyer should be allowed to appear in the case,

2. The question whether the court has got jurisdiction to forbid an advocate to appear in a particular case and under what circumstance the court should exercise that jurisdiction, if it has such jurisdiction, has been considered by the Emperor Vs. Dadu Rama Surde, . It has been observed in that case:

"On the one hand, an accused person is entitled to select the advocate whom he desires to appear for him, and certainly the prosecution cannot fetter that choice merely by serving a subpoena on the advocate to appear as a witness. On the other hand, the Court is bound to see that the due administration of justice is not in any way embarrassed. Generally, if an advocate is called as a witness by the other side, it can safely be left to the good sense of the advocate to determine whether he can continue to appear as an advocate, or whether by so doing he will embarrass the Court or the client. If a Court comes to the conclusion that a trial will be embarrassed by the appearance of an advocate, who has been called as a witness by the other side, and if notwithstanding the Court's expression of its- opinion, the advocate refuses to withdraw, in my opinion, in such a case the Court has inherent jurisdiction to require the advocate to withdraw. An advocate cannot cross-examine himself, nor can he usefully address the Court as to the credibility of his own testimony, and a court may well feel that justice will not be done if the advocate continues to appear. But in my opinion, the prosecution in such a case must establish to the satisfaction of the court that the trial will be materially embarrassed, if the advocate continues to appear for the defence."

In *Weston v. Peary Mohan Dass* ILR 40 Cal 898 : (AIR 1914 Cal. 3&6) (SB) the Calcutta High Court has said on the very same subject:

"In the Privy Council decision, *Corea v. Peiris* (1909) A. C. 549, a gentleman named Schroder was examined as witness, though counsel in the case. The Judicial Committee did not disapprove of this as contrary to the professional ethics of which Mr. Justice Fletcher speaks, but on the contrary there stated that counsel had been properly examined.

The true rule in such matters is, in my opinion, as follows: Counsel though they may be engaged in the case are in law competent to testify whether the facts in respect of which they gave their evidence occurred before or after their retainer (see Section 118 of the Evidence Act, and *Cobbett v. Hudson* (1853) 1 El and Bl. II). The Court has no authority to exclude such evidence if tendered. It is not in all cases a breach of professional ethics for counsel retained in the case to give his evidence in it. There are cases in which he properly may, and, indeed, should do so. At the same time it is recognised by both the Court and the profession that, as a general practice, it is undesirable, when the matter to which counsel

deposes is other than formal, that they should testify either for or against the party whose case they are conducting. In judging the matter from the point of view of what is desirable as opposed to what is legal, much must depend on the circumstances of each case."

We are in respectful agreement with these observations.

3. Applying the principles enunciated in the above observations to the present case, we have absolutely no doubt that the application made by the Assistant Public Prosecutor for compelling Shri Gopalakrishna Iyer to withdraw from the case was most mischievous and made without good faith. All that Shri Gopalakrishna Iyer was cited to prove was that he had produced the accused before the Assistant Customs Collector on 11-11-1957. That is a matter not disputed by the defence, and to prove the same fact the prosecution had cited the Assistant Customs Collector also.

Shri Gopalakrishna Iyer could have given evidence about this fact and still continued to appear for the case without causing any embarrassment to the accused or to the court or even to himself, The insistence of the Assistant Public Prosecutor that Shri Gopalakrishna Iyer should withdraw from the case must undoubtedly be due to his desire to deprive the accused of the services of a good counsel of his own choice. We, therefore, quash the order of the Sub Magistrate and allow Shri Gopalakrishna Iyer to appear in the case. The reference is accepted, and ordered accordingly.