

**(1916) 09 MAD CK 0021**

**In the Madras High Court**

**In Re: Mannar Krishnan Chetty; In Re: Arunachellam Pillai; In Re: Rangiah Chetty and Another**

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**Date of Decision :** 04-09-1916

**Acts Referred:**

**Citation :** 35 Ind. Cas. 816 : (1916) 4 LW 373

**Hon'ble Judges :** Sadasiva Aiyar, J

**Bench :** Single Bench

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## **Judgement**

Sadasiva Aiyar, J.—The convicted 3rd accused is the petitioner in Criminal Revision Case No. 154 of 1916 and the convicted 4th accused

is the petitioner in Criminal Revision Case No. 152 of 1916, their convictions having been affirmed by the Sessions Judge on appeal. The

remaining Case No. 164 of 1916 was taken up by this Court on its own motion for the revision of the order of discharge passed by the Sub-

Divisional Magistrate in favour of the accused Nos. 1 and 2.

2. Having heard full arguments, I might at once state that there is no evidence worth the name against the 2nd accused and as regards the 1st

accused, though there is grave room for suspicion against him that he committed (or abetted the commission of) an offence under the Opium Act I

of 1878, I do not think that the evidence of his guilt is so clear" and sufficient as to justify interference in revision with the Magistrate's order of

discharge. Criminal Revision Case 164 of 1916 is, therefore, dismissed.

3. As regards the 3rd accused's revision petition (No. 154 of 1916), the evidence against him that he was in possession of 9 seers of opium in an

unauthorized place and was trying to sell it unlawfully and that neither he nor his master (the 1st accused) was entitled to be in possession of that

excessive quantity in that place, is clear and convincing. Dr. Swaminadhan

argued that the third accused's possession was the possession of his master (the 1st accused) and hence he (the third accused) could not be convicted under Clause 9 (c) of the Opium Act of illegal possession of opium. The learned Counsel quoted certain cases under the Arms Act, in which it was held that if the master was entitled to be in possession of arms the possession of arms by a servant for the master was not illegal and no offence was committed by the servant. Those decisions have no application to this case for two reasons.

(a) There is no sufficient evidence to show that the 3rd accused's possession of the 9 seers was on behalf of the 1st accused;

(b) The master (the 1st accused) was himself not entitled to be in possession of the opium.

4. I, therefore, dismiss the 3rd accused's Revision Petition No. 154 of 1916.

5. Coming lastly to the fourth accused's Revision Petition No. 152 of 1916, he was convicted by the Sub-Divisional Magistrate under Clause 9(c)

of illegal possession of opium. On appeal, the Sessions Judge altered the finding to the offence of abetting the illegal sale of opium under Clause

9(f) of the Opium Act and Section 114, Indian Penal Code, maintaining the sentence. As regards the facts found by the Sessions Judge to have

been proved in the case, I see no reason to differ. Dr. Swaminadhan argued, however, that the facts necessary to be proved to establish an

offence under Clause (c) of Section 9 are so materially different from the facts to be established for an offence under Clause (f) that an Appellate

Court cannot alter the conviction from one under Clause (c) to one under Clause (f). He relied principally on an incidental passage found in the

judgment in *Golla Hanumappa v. Emperor* 10 Ind. Cas. 372 : 21 M.L.J. 805 : 10 M.L.T. 66 : (1911) 2 M.W.N. 106 : 12 Cri. L.J. 269. That

passage (at page 808) is as follows: --"In cases not falling under Sections 237 and 238 of the Code of Criminal Procedure, no doubt the Appellate

Court cannot convict a person of: an offence with which he was not charged in the first Court." Section 423(b)(2) of the Criminal. Procedure Code

makes however, no reference to sections 237 and 238 and unqualifiedly gives the power to -the Appellate Court to "alter the finding" , on appeal,

and I am not disposed to qualify the powers so given by the Legislature, unless, of course, prejudice was likely to have been caused to the accused

and injustice might have resulted by his not having had the opportunity to meet the .altered charge. In Yakub Ali v. Lethu Thakur 30 C. 288

Prinsep and Mitra, JJ. laid down (if I may say ""o with respect) the true, principle, namely that where ""the accused " hate been prejudiced by the

omission"" to frame the charge on which the Appellate Court wishes to give the altered finding, that is, where if the altered charge had been framed

in the first Court, ""the defence made"" and the evidence adduced for the defence might have been of an entirely different character,"" the Appellate

Court should not use the power vested in it by Section 423 to give such an altered finding. My opinion, following Yakub Ali v. Lethu Thakur 30

C.k 288 is based entirely on the language of Section 423 and I do not think it necessary to rely on Section 537 of the Criminal Procedure Code,

which says that no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on

appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment, or

other proceedings before or during trial or in any enquiry or other proceedings."" I might, however, state that even if the omission to frame an

alternative charge cannot be called an " error in the charge"" (as argued by Dr. Swaminadhan), it seems to come under the very comprehensive

words error or irregularity in any inquiry or other proceedings"" see also Emperor v. Tribhovandas Brijbhukandas 4 Bom. L.R. 271.

6. Further, Section 535 directly contemplates "the omission to frame a charge"" and it provides that if the Court of Appeal or Revision thinks that a

failure of justice has been occasioned by an omission to frame a charge, it shall order that a charge be framed"", etc., showing that if no failure of

justice has taken place, the lower Court's order ought to be confirmed in appeal or revision. Lastly, Section 232 of the Criminal Procedure Code

says that if the High Court, in the exercise of its powers of revision or of its powers under Chapter XXVTI, is of opinion that any person convicted

of an offence was misled in his defence by the absence of a charge or by an error in the charge, it shall direct a new trial,"" again showing that

omission to frame a charge is not a ground for revision unless there has been consequent miscarriage of justice. In the present case, I am satisfied

that the 4th accused was not misled in his defence and there was no miscarriage of justice caused by the non-framing of a charge under Clause 9(f)

of the Opium Act in the 1st Court, as the facts to be proved were disclosed in the examination of the prosecution 1st witness himself who was cross-examined at great length on every point. The 4th accused's petition is also, therefore, dismissed.