

[IN REVISION.]

1943

*Present: Hearne J.*DE SARAM *and* SRI SKANDA RAJAH.*M. C. Colombo, 12,685.**Affidavit—Refusal to administer oath—False statements in affidavit—Grounds of belief—Remedy by way of Mandamus.*

A Justice of the Peace, who honestly believes that an affidavit which it is proposed to swear before him is false may decline to administer an oath.

Where it can be shown that he had no reasonable or probable cause for his belief, he may be required to do his duty.

In such a case the remedy is by way of *Mandamus*.

THIS was an application to revise an order made by the Magistrate of Colombo.

F. W. Obeyesekere, for petitioner.

N. Nadarajah, K.C. (with him *H. W. Thambiah* and *I. Misso*), for respondent.

Cur. adv. vult.

November 17, 1943. HEARNE J.—

E. M. P. Saram requested the Magistrate of Gampaha to administer an oath to him in support of an affidavit which he desired to use in connection with an appeal to the Supreme Court. Alleging that "he refused to swear the affidavit" Saram, as the complainant, charged the Magistrate, as the accused, with criminal offences under sections 162 and 289 of the Penal Code. Process was refused and the former has petitioned this Court to revise the order and to direct that process should issue.

In his formal complaint under section 148 C.P.C., which was filed in the Magistrate's Court of Colombo, the complainant alleged that the refusal on the part of the accused occurred between March 21 and 24, 1942, but when he was orally examined he fixed the date as the 21st March. The latter, as will appear, is incorrect. It was probably, to the knowledge of the complainant, untrue. According to a statement made by his Counsel it could only have been the 23rd March.

In his examination the complainant further stated that the accused read through his affidavit and remarked that all the contents were untrue. He altered this later when he said that "the accused stated the first few paragraphs were false".

The complainant had been charged in a criminal case before the accused, as the Magistrate of Gampaha, and the opening paragraphs of the affidavit alleged that he had not been given an opportunity of calling his witnesses, and that he had been forced to stand his trial on a date on which he was only required to hand in his list of witnesses.

When, at a summary trial, an accused pleads not guilty, the Magistrate shall "subject to the provisions of section 289 (5) either postpone the trial to a date to be *then fixed* or proceed forthwith to try the case". As the trial did not proceed forthwith it was the accused's duty to have fixed a date of trial and it is of interest to note that it was not alleged by the complainant that he did not do so. What he said was that, as he had pleaded not guilty on 12th February, he was "under the impression" that the next date, the 26th February, was the date on which he was required to file his list of witnesses. What or who gave him this impression is not disclosed.

It is clear that the accused, rightly or wrongly, took the view that there was no room for any misunderstanding, that the complainant was not speaking the truth when he suggested there was, and he declined to "swear the affidavit". In these circumstances an application may have been made for a *mandamus*. If the writ was issued and an inquiry held, questions of law and of fact would have required to be determined.

But the complainant has charged the accused with a criminal offence or rather two criminal offences under sections 162 and 289 of the Penal Code.

It was argued, in support of the charges, that no Justice of the Peace had any discretion, by reason of the provisions of section 84 of the Courts Ordinance, to refuse "to swear an affidavit" on the ground that the contents of it were false: also that, if he did so, he committed a criminal offence. This is a startling proposition of law.

The Solicitor-General is a Justice of the Peace for the Island, and if he refuses to administer an oath in support of an affidavit which he knows to be false and which, on the face of it, is intended to be used for the purpose of perpetrating a fraud, his refusal would amount to a criminal offence! Similarly if a Magistrate refuses to administer an oath in support of an affidavit which he knows to be false and which, on the face of it, is intended to mislead a Court of law and to cause a possible miscarriage of justice, he is liable to be branded as a criminal under the Penal Code!

The error into which Counsel has fallen is that he has assumed and in effect maintained that any deponent is entitled, as of right, to depose to anything he chooses, irrespective of whether it is true or false. This is, most emphatically, not the law and the fostering of this pernicious view of the law may have most mischievous consequences. The law gives no person the right to depose to what is not true, whether it be for profit, the perversion of justice or any other purpose. If a Justice of the Peace honestly believes that an affidavit which it is proposed to

swear before him is false, he may decline to administer an oath. If it can be shown that he had "no reasonable and probable cause for his belief" he may be required to do his duty. The remedy is by way of *mandamus*.

It is surprising that Counsel did not pause to examine the implications of his argument. "Any person has the right to swear any affidavit, true or false", and a Justice of the Peace who dares to interfere with this right does so at his peril. What a right for Counsel to assert—the right of any citizen to be untruthful and to complain of a crime against the State if he is not allowed to be untruthful, the right to testify on oath to what is false!

The complainant and the accused are of course at issue on the question of whether the affidavit is or is not true. It is difficult to see how the complainant can possibly substantiate his case. There is no presumption of law that when the complainant pleaded not guilty on the 12th February, the accused fixed the date of trial. There is only a presumption that if a judicial act has been performed, it has been regularly performed. But as, according to the complainant, the 26th February was mentioned and as, according to the law, the accused was required to give a date of trial, there appears to be a strong presumption of fact that the accused fixed the 26th February as the date of trial. If this is so, the presumption can hardly be displaced by the complainant's "impressions".

To turn to another matter—the complainant, in his evidence, stated that "the accused had asked him to get the affidavit sworn to before the Additional Magistrate and that there was only one Magistrate (the accused) at Gampaha at the time of this incident". This implied that, to the knowledge of the accused, there was no other Magistrate at Gampaha to whom the complainant could go. I ascertained from the *Ceylon Government Gazette*, and so informed Counsel for the complainant, that on March 23, 1942, Mr. Francis Perera had been appointed Additional Magistrate for the purpose of trying M. C. 11,820. I told him that I would take judicial notice of the appointment. It was after this that Counsel informed me that, according to his instructions, the complainant on the advice of the accused, in fact went from the latter to Mr. Perera and was told that he was not competent to administer an oath to him, as he had been appointed solely for the purpose of trying case 11,820. It follows that the date on which the complainant went to the accused was the 23rd March and not the 21st as he stated in his evidence.

I hope the complainant will not now be advised to charge Mr. Perera when I say that, in my opinion, he took a wrong view of his position in the matter. Section 428 C. P. C. enacts that "Subject to general rules an affidavit may be used in a criminal court if it is sworn . . . before *any* Magistrate". Magistrate means "Magistrate appointed to a Magistrate's Court" and there is nothing in "general rules" so far as I am aware (certainly nothing was brought to my notice) which prevented Mr. Perera, as Additional Magistrate of Gampaha on 23rd March, from complying with the request of the complainant *for the reason he gave*.

It would appear that the complainant mentioned the 21st March in his evidence as he was aware that an Additional Magistrate was not

available on that date, and that when he said there was only one Magistrate at Gampaha "at that time" (the 23rd, not the 21st) he was being deliberately untruthful. There was another Magistrate to whose Chambers or Court he went.

It would also appear that when the accused advised the complainant to go to the Additional Magistrate he indicated quite clearly that he had no intention of acting oppressively. In particular it would appear that he had no intention of shutting out from the Supreme Court an affidavit merely because it contained allegations against him. His position, on the complainant's own showing, was "Go to a Magistrate who knows nothing of the facts to which you propose to depose. I shall have nothing to do with the matter as I am aware that some of the so-called facts are false". Even if the accused was wrong in thinking there were no grounds for misunderstanding on the part of the complainant, it is obvious that he did not act with an improper motive, or with intent to cause injury or in abuse of his office. To suggest that in these circumstances he acted wilfully and criminally is sheer nonsense.

The application is dismissed.

Application dismissed.
