

1940

Present : Wijeyewardene J.

JOSEPH v. FERNANDO *et al.*

369—*M. C. Dandagamuwa*, 7,582.

Deaf and dumb accused—Trial for offence—Procedure to be adopted—Criminal Procedure Code, s. 288.

A deaf and dumb person may be tried for an offence.

A Magistrate trying a deaf and dumb accused should make all reasonable efforts to ascertain if there is any reliable person who is able to communicate with the accused by signs and make him understand the nature of the proceedings in order to avail himself of the assistance of such a person.

It is also desirable that there should be some medical evidence as to the state of mind of a deaf and dumb accused so that the Court may consider the propriety of taking action under Chapter 33 of the Criminal Procedure Code.

Aiya v. Peniya (21 N. L. R. 72) not followed.

A PPEAL from a conviction by the Magistrate of Dandagamuwa.

No appearance for accused.

N. Gunesekera, C.C., as amicus curiae.

September 10, 1940. WIJEYWARDENE J.—

There are two accused in this case. The first accused Francis, a lad of 16 years, was charged with the theft of some jewellery and clothes of the value of Rs. 18.85. The second accused, an elder brother of Francis, was charged with retaining some of the stolen articles knowing or having reason to believe that the articles were stolen property.

At the commencement of the trial the Magistrate recorded the fact that the first accused was deaf and dumb and that there was no one "who could make him understand the proceedings".

At the close of the case for the prosecution the second accused made a statement in the course of which he stated, "He (the first accused) handed me the string of amulets (one of the alleged stolen articles). He told me that he picked it up. He can make me understand him by signs".

The Magistrate found the first accused guilty under section 369 of the Penal Code and the second accused guilty under section 394 of the Penal Code. He sentenced the second accused to one week's rigorous imprisonment and forwarded the proceedings to this Court for the consideration of the case against the first accused under section 288 of the Criminal Procedure Code.

I think there has been a misjoinder of accused in this case. The first accused is alleged to have committed theft at Pannala on July 18, 1940, while the charge against the second accused is that he received some of the stolen articles at Dalupotha on July 20, 1940. Section 184 of the Criminal Procedure Code would not justify the joinder of the two accused in respect of two such distinct and separate offences (*vide Fernando v. Fernando*). I quash the conviction of the first accused for this reason. In the event of fresh proceedings being taken against the first accused I think it fair that the trial should take place before another Magistrate. A Magistrate trying a deaf and dumb accused should make all reasonable efforts to ascertain if there is any reliable person who is able to communicate with the accused by signs and make him understand the nature of the proceedings; in order to avail himself of the assistance of such a person. It is also desirable that there should be some medical evidence as to the state of mind of a deaf and dumb accused so that the Court may consider the propriety of taking action under Chapter 33 of the Criminal Procedure Code.

I wish to add that as at present advised I am unable to subscribe to the view expressed in *Aiya v. Peniya*² against the trial and conviction of a deaf and dumb person who cannot be made to understand the proceedings against him. Section 288 of the Criminal Procedure Code contemplates clearly the trial and conviction of such persons. It was held in *The Queen v. Bowka Hari*³ that section 186 of the Indian Code of 1872 corresponding to section 288 of our Code enabled a Court to try a person though he was unable to understand the proceedings.

Quashed.

¹ 17 N. L. R. p. 249.

² 21 N. L. R. p. 72.

³ (1874) 22 Sutherland's Weekly Reporter (Criminal) 35.