

1940

*Present : Wijeyewardene and Cannon JJ.*THE KING *v.* SENEVIRATNE.

32—D. C. (Crim.) Colombo, 36,683.

*Summons served outside jurisdiction—No endorsement under section 64 of the Criminal Procedure Code—Summons irregular—Charge of false personation for accepting such summons—Penal Code, s. 202.*

A summons served outside the jurisdiction of the Court issuing the summons, without the endorsement required by section 64 of the Criminal Procedure Code, is irregular.

Where the summons served is invalid, a person who falsely personates another for the purpose of accepting the summons does not commit an offence under section 202 of the Penal Code.

**A** PPEAL from a conviction by the District Judge of Colombo.

H. V. Perera, K.C. (with him J. E. M. Obeyesekere), for accused appellant.

E. H. T. Gunasekera, C.C., for the Crown.

*Cur. adv. vult.*

October 23, 1940. WIJEYWARDENE J.—

The accused-appellant was charged under sections 202 and 102 of the Penal Code with having abetted an unknown person to personate falsely one T. P. S. Siriwardene and in such assumed character accept service of summons issued in case No. 46,702 of the Gampaha Magistrate's Court against the said T. P. S. Siriwardene, the defendant in that case. The District Judge convicted him on that charge and sentenced him to pay a fine of Rs. 500 and in default undergo rigorous imprisonment for nine months. The accused-appellant, therefore, has under section 338 of the

<sup>1</sup> (1900) A. C. 366.

Criminal Procedure Code the right to appeal against the judgment of the learned District Judge for any error in law or in fact. Moreover section 36 of the Courts Ordinance enacts in specific terms that the appellate jurisdiction of this Court extends, subject to the provisions of the Criminal Procedure Code, "to the correction of all errors in fact or in law which shall be committed by any District Court".

The facts as presented by the prosecution are as follows:—Siriwardene became acquainted with Madeline, an unmarried sister of the accused, in June, 1934. Within a short period, this acquaintance ripened into friendship and Madeline began to correspond with Siriwardene. There was "a talk of marriage" between them but owing to certain objections raised by his mother, Siriwardene discontinued visiting or writing to Madeline about the end of 1936. Subsequently another lady was proposed in marriage to him, and he married her on March 16, 1938.

On February 14, 1938, one Noihamy made an application under the Maintenance Ordinance, against Siriwardene for the maintenance of her illegitimate child, about a month old and the Gampaha Magistrate's Court directed summons to issue requiring the attendance of Siriwardene on March 5, 1938. The accused contrived to get the summons into his hands and went with an unknown person to the Wellawatta Police Station in the afternoon of March 4. The accused induced the unknown person to personate Siriwardene falsely and accept from the Police Inspector Schokman of the Wellawatta Police Station the summons handed by the accused to the Inspector for service. The Inspector made an endorsement on one of the duplicates of the summons that the summons was served on the defendant in the maintenance case, and this was returned to the Magistrate's Court. On Siriwardene failing to appear in Court on March 5, the Gampaha Magistrate ordered a warrant to issue for the arrest of Siriwardene. Siriwardene had arranged to entertain his friends at an *ante-nuptial* "At Home" on March 13, and that morning he received a message requesting him to go to the Gampaha Railway Station to receive a parcel addressed to him. Siriwardene went to the Railway Station and finding that there was no parcel for him, was returning home when he was arrested under the warrant issued by the Gampaha Magistrate. Siriwardene was released from custody on giving bail and appeared in Court on March 19. The Magistrate finally dismissed Noihamy's application on June 26, 1938. In the meantime Siriwardene presented a petition P 5 on April 29, 1938, to the Inspector-General of Police complaining that he had been wrongfully arrested owing to an incorrect report of service of summons made by the Inspector of Police.

The case for the defence may be summarized as follows:—The applicant Noihamy is a close relation of Herath, a dependent of the family of the accused which apparently occupies some position of influence in the village. Noihamy gave the summons on February 21, 1938, to the village headman of Ambanwita for service on Siriwardene. The headman went to the house of Siriwardene twice and made other efforts to effect the service but failed. He therefore handed back the summons to Noihamy on March 2 with an endorsement to the effect that he searched for Siriwardene but could not find him in the village and that it was reported that Siriwardene was in Colombo. Noihamy asked Herath to assist her

in the matter and Herath took the summons to the accused. Guided by the endorsement on the summons that Siriwardene was reported to be in Colombo, the accused looked for Siriwardene on March 4, at Wellawatta expecting to meet him at his sisters' house there. He met Siriwardene somewhere near the Wellawatta Police Station and took him to the Police Station stating that he had some business with a friend there. On reaching the Police Station the accused got the Inspector of Police to serve the summons on Siriwardene.

The question of fact, therefore, that has to be decided is whether the person on whom the Inspector of Police served summons was not Siriwardene.

For the prosecution Siriwardene has given evidence stating (i.) that he did not accept service of summons on March 4, 1938, at the Wellawatta Police Station, and (ii.) that in fact he was away at Anuradhapura from March 2 to 5. The prosecution has called as witnesses the Police Sergeant Carolis and Inspector Schokman to support the first statement of Siriwardene.

Police Sergeant Carolis stated that the accused whom he knew for 4 or 5 years came with another person to the Police Station on March 4 at about 3 or 3.30 P.M. On the accused stating to him the purpose of his visit, Carolis took the accused and the other person to Police Inspector Schokman who was then at the Station. The Inspector questioned the person who came with the accused whether "the summons was meant for him" and then delivered the summons to him. Carolis has stated, in answer to questions put to him in cross-examination, that he was unable to deny that the person on whom the summons was served at the Wellawatta Police Station was Siriwardene who was shown to him in the course of the trial. He did not deny that, even at the preliminary inquiry before the Magistrate of Colombo, he made the statement "I am unable to state whether Siriwardene who is shown to me is the person on whom the summons was served or not".

Before proceeding to discuss the evidence of Inspector Schokman it is necessary to refer to the activities of an ex-Inspector of Police, one Herbert Pieris.

Siriwardene was asked in cross-examination about Herbert Pieris. The evidence he gave in reply was as follows:—

"I don't know Herbert Pieris, I have heard of him. I don't know if he is a retired Inspector of the C. I. D. I have heard of him as a friend of my brother-in-law. I did not meet Pieris. I have met him. I might have spoken to him. I went to the Wellawatta Police with Herbert Pieris. Herbert Pieris came with my brother-in-law and accompanied him. I merely accompanied my brother-in-law to the Police Station. That was after I was arrested in the Gampaha Station. There was no need for me to go to the Police Station. I stood out, my brother-in-law and Herbert Pieris were standing out and talking to each other. They stood in the verandah and were talking. I don't know why they went to the Police Station. I did not speak to any one in the Police Station. I say they did not speak to any one in the Police Station. My brother-in-law asked a constable where the

Inspector was. He came away as the Inspector was not there. I don't know why my brother-in-law went to meet the Inspector. It is not the fact that I was shown to Inspector Schokman that day. The petition was presented first."

The evidence of both Police Sergeant Carolis and Inspector Schokman show that Herbert Pieris went to the Wellawatta Police Station in connection with the service of summons two or three times about two months after the date of service. It is also found that on at least one of these occasions Siriwardene accompanied Herbert Pieris. Siriwardene however did not choose to give a straightforward reply when he was asked why he went with Herbert Pieris. I do not think the prosecution could justly complain if in these circumstances, the suggestion is made by the defence that Herbert Pieris took Siriwardene to the Police Station in an attempt to make Inspector Schokman—against whom no imputation whatever is made—to be led unconsciously into the belief that Siriwardene was not the man on whom the summons was served.

On receiving the petition P 5 sent by Siriwardene the Inspector-General of Police or one of his subordinate officers called for a report from Inspector Schokman regarding the service of summons. The Inspector had by that time forgotten all about this incident and accordingly sent a report that no such summons was served at the Wellawatta Police Station. It was only on seeing the duplicate of summons later with his endorsement that he was able to satisfy himself that that particular summons was served by him. This circumstance in itself shows that Mr. Schokman's recollection of the incidents connected with the service of summons is vague. In fact, he says that he regarded the service of summons as "a common work-a-day incident" and that he "had no particular reason to remember the incident thereafter till later". That his recollection of this incident is very vague is shown by another fact. He told the Colombo Magistrate at the preliminary inquiry that the summons was served in the morning. He was later willing to correct his statement in view of the evidence given by Carolis that the service was effected in the evening. In this connection he stated before the District Judge—"I was always doubtful of the time this incident took place. I am doubtful because my recollection of the incident was not good". In view of the admittedly hazy recollection of Mr. Schokman, one cannot be too careful in accepting a statement of Mr. Schokman as to the identity of the person on whom the summons was served. It is needless to repeat that there is no imputation whatever against the good faith of Mr. Schokman. The question is whether quite unconsciously he had permitted his recollection of the incident to be coloured by any remark made by Herbert Pieris with regard to whose visit to the Police Station, Siriwardene has shown a marked aversion to make a definite statement.

The prosecution may be relying on the evidence of Mr. Schokman. "He (Siriwardene) was not the person who accompanied the accused. I am definite about it". The value of this evidence however is largely discounted by his later admission—"I always said I could not identify the man on whom the summons was served". It has to be remembered that the "unknown person" who received the summons was dressed in a coat, shirt, and cloth while Siriwardene when he came to the Police

Station three months after the service was dressed in European costume. This may account for the Inspector's inability to identify the unknown person as Siriwardene. It would be strange if the Inspector could after three months say definitely that the unknown person "was not Siriwardene" when Sergeant Carolis who has a better recollection of the incident and was for a longer time with the "unknown man" on March 4, is not prepared to say that the unknown man was not Siriwardene.

In support of his statement that he was not served with summons on March 4, Siriwardene made the second statement that he was away at Anuradhapura on that date.

The evidence of Siriwardene and his witnesses regarding the alleged trip to Anuradhapura is briefly as follows:—On February 28, 1938, Siriwardene came to Colombo to get a loan of Rs. 150 from his brother-in-law, one D. T. Samarawira, a Government clerk, for his wedding expenses. Samarawira is a member of two Provident Associations and would have admittedly no difficulty in obtaining a loan from one of these associations. Samarawira however gave Siriwardene a letter P 3 addressed to one D. G. Wijewardena described as an "ex-proctor's clerk" at Anuradhapura and advised Siriwardene to go to Anuradhapura and obtain the loan from Wijewardena. In P 3 Samarawira asked Wijewardene to pay himself the Rs. 150 by selling certain bags of paddy at Anuradhapura belonging to Samarawira. Siriwardene in his evidence suggests that this trip to Anuradhapura was also induced by a desire to buy there some vegetables and plantains for his wedding on March 16. Taking the letter P 3 Siriwardene went to Anuradhapura on March 2, and met Wijewardena on March 3. Wijewardena had only some Rs. 50 but he thought that he would be able to make up the balance Rs. 100 by recalling a loan of Rs. 100 made by him to another proctor's clerk. Wijewardena therefore asked Siriwardene to see him some time later. Siriwardene then went to the house of one A. S. Samaraweera, a clerk of the Anuradhapura Kachcheri, on March 4 and spent the night there. On March 5 he went in the morning to Wijewardena who then had the money ready. Wijewardena gave him the money and obtained a promissory note P 1 from him, Wijewardena insisting that A. S. Samaraweera and another clerk Rodrigo should be sent for to sign the note as witnesses. Siriwardene returned from Anuradhapura on March 5 without purchasing any vegetables or plantains.

Tested in the light of one's experience of men and things this story about trip to Anuradhapura appears to be highly artificial. Why did D. T. Samaraweera send his brother-in-law all the way to Anuradhapura when he could have easily obtained the money from one of the Provident Associations? Why did Siriwardene think of going to Anuradhapura on March 2 to buy vegetables for a function on March 16? Could D. T. Samaraweera or Siriwardene have reasonably expected that Wijewardena, the ex-proctor's clerk, would be in a position to advance Rs. 150 in a day or two? Could Wijewardena have got in a day or two the loan of Rs. 100 alleged to have been given by him to another proctor's clerk? Why did Wijewardena insist on getting a promissory note from Siriwardene when he had the letter P3? Why did Wijewardena insist on having two "reliable" persons as witnesses to the note? These are

some of the questions which occur to me on reading the evidence in support of this fantastic story. No doubt the prosecution is able to call a witness or produce a document in support of each incident referred to by Siriwardene. This very fact makes me hesitate before rejecting as far-fetched the suggestion of Mr. H. V. Perera that the entire story regarding this trip is a fabrication of the ex-Inspector of Police not only for the purposes of this case but also to avoid Siriwardene being charged with having given false information to a public officer by his petition P 5.

The evidence given by A. S. Samaraweera in reply to certain questions put by the District Judge militates strongly against the truth of this story. Samaraweera stated that he remembered that Siriwardene visited him and slept at his place on a Saturday which he thought was the first Saturday in March, 1938. He said that he was able to give the date as a Saturday as he remembered the office closed early that day and he came home about 1 P.M. and saw Siriwardene at his place. Now the first Saturday in March, 1938, fell on the fifth of that month, and therefore the promissory note must have been made on March 6, and this effects seriously the evidence of Wijewardena who says he took and dated the promissory note on March 5. Moreover, if Siriwardene stayed with Samaraweera on March 5, Samaraweera's evidence does not help to prove that he was not in Colombo on March 4, the day when the summons was served.

There are other circumstances which throw further doubt on the evidence for the prosecution. When Siriwardene was arrested on March 13 he did not make any complaint that no summons was served on him. When he appeared in Court on March 19, he was represented by a proctor who even went to the extent of asking that an identification parade should be held by the Magistrate that day and that Noihamy should be asked to pick out the putative father. But neither he nor his proctor mentioned to the Magistrate the fact that he had been arrested on a false report of service of summons. This fact was referred to for the first time in P 5 and even then no mention was made of the fact that on the material date March 4, Siriwardene was away at Anuradhapura. An inquiry was held by an Assistant Superintendent of Police on this petition on June 15, and even then he did not make the slightest reference to the fact of his being away at Anuradhapura.

The motive suggested by the prosecution is the annoyance caused to the accused by the conduct of Siriwardene in refusing to marry his sister and marrying another lady on March 16, 1938. Now according to Siriwardene himself, "the general public came to know of his intended marriage" after March 5, 1938. But Noihamy made a complaint to the Vidane Arachchy and the Village Headman of Ambanwita in October, 1937, that she was expecting a child and that Siriwardene was the father of the child. The proceedings under the Maintenance Ordinance were commenced in February, 1938. It is therefore difficult to say that the institution of the maintenance proceedings or the making of the complaint to the headman was inspired by the accused. The summons in the maintenance case was taken by Noihamy to the Headman of Ambanwita on February 21, 1938, and he had it with him till March 2, 1938, during which period he tried unsuccessfully to serve the summons on Siriwardene.

If Siriwardene was in the village during this period there should have been no difficulty in delivering the summons to him. If the Headman of Ambanwita was on the other hand acting on the instructions of the accused there should have been no difficulty in the Headman making a false return relating to the service of summons and thereby preparing a way for the issue of a warrant. Would the accused have ignored this easy way of achieving his object and run the risk of getting an "unknown person" to personate Siriwardene at the Wellawatta Police Station specially when Siriwardene was a person known in the Wellawatta-area? There is the further question as to the reason which could have actuated the accused to get Siriwardene arrested. Would it not have been more than sufficient for his purpose if on a due return of the service of summons Siriwardene had to contest the maintenance proceedings? If Siriwardene was in fact in the village from February 19 to March 2, there should have been no difficulty in serving summons on him, and his appearance in Court on March 5 and the continuance of the proceedings would have become known to the relatives of the intended bride of Siriwardene and might have led to the refusal of the bride to marry Siriwardene. If the idea of the accused was merely to subject Siriwardene to a public humiliation why was Siriwardene arrested on March 13 instead of March 16, the date fixed for the wedding? Siriwardene himself admitted in cross-examination that he would not say that the accused had anything to do with his arrest on March 13.

The accused has given evidence. He is a Railway Guard and his evidence shows that he belongs to a respectable family in the village whose members have been headmen in the village. He has stated on oath that the man he took to the Wellawatta Police Station on March 4 was Siriwardene.

It has been submitted for the defence that on learning the institution of the proceedings under the Maintenance Ordinance against him Siriwardene made an effort to avoid the publicity of a trial before his marriage on March 16. He left the village immediately after the summons was issued and went to Colombo as shown by the endorsement made on the summons by the headman of Ambanwita on March 2. In this connection it has to be borne in mind that Siriwardene himself admitted that he was in Colombo on February 28. Though the summons was in fact served on him on March 4, he avoided attending Court on March 5 as he felt that it would seriously prejudice him if the bride's relations came to know about the proceedings. He probably kept out of his village again and returned to the village on March 13, the day fixed for the "At Home" when he was arrested on the road. The petition P 5 was sent a few days ago before the trial either for the purpose of basing on that fact an explanation for his absence on the service of summons as it was feared that his absence might operate against the success of his defence in the maintenance case or because he felt that the accused had treated him unfairly in taking him to the Police Station and getting the summons served. Once the authorities began to take serious notice of the petition he put forward the story of his stay at Anuradhapura which he failed to mention even in June, 1938, when there was an inquiry by an Assistant Superintendent of Police.

This case has caused me a great deal of anxiety as a careful study of the evidence has raised a very strong doubt in my mind as to the correctness of the findings of the learned District Judge. The principle that should govern the Appellate Court in such circumstances as these has been, if I may say so, clearly set out by Mr. Justice Akbar in the *King v. Fernando*<sup>1</sup>, and I cannot do better than reproduce the following passage from his judgment:—

“The evidence when read as a whole raises serious doubts in my mind. It has been held in the case of *Milan Khan v. Segai Bepari*<sup>2</sup> that the duty of the Appellate Court in a criminal case is not similar to that of the Appellate Court in a civil case. In a criminal case if the Judge of the Appellate Court has any doubt that the conviction is the right one, the accused should be discharged. In a civil case the Court must be satisfied before setting aside the order of the lower Court that the order is wrong. Further in a case reported in *17 Weekly Reporter p. 59 (Criminal)* it was held that an Appellate Court was bound precisely as the Court of first instance to test extrinsically as well as intrinsically. Using this test a strong doubt, as I have stated, has been created in my mind that the conviction is not right and the benefit of this doubt must be reckoned in favour of the accused.”

Following the principle above referred to I have no hesitation in refusing to affirm the judgment of the learned District Judge.

There remains however a point of law raised by Mr. H. V. Perera towards the close of his argument. Mr. Perera contended that the evidence for the prosecution, even if accepted, failed to prove that the accused abetted the commission of an offence under section 202 of the Penal Code.

He argued—

- (1) That proceedings under the Maintenance Ordinance were not a “suit or criminal prosecution” within the meaning of section 202.
- (2) That the fact the unknown person suffered summons to be delivered to him could not be regarded as “any other act” done by the unknown person within the meaning of that section.
- (3) That the unknown person had done no “act in a suit or criminal prosecution”.

For the purposes of this appeal it is sufficient to consider the last argument. The summons in question was issued by the Magistrate’s Court at Gampaha and was served in Colombo outside the local limits of the jurisdiction of that Court. Now section 64 of the Criminal Procedure Code enacts that no . . . . summonses shall be served outside the local limits of the jurisdiction of the Court issuing the same unless the same be endorsed by such Court with the words “for service out of the jurisdiction”. That section further provides that no such endorsement shall be made “unless the Court is satisfied that there are grounds for allowing such service”. Now the summons issued by the Gampaha Court has no such endorsement and could not therefore have been served in Colombo. In fact the document that was delivered to the unknown man by Inspector Schokman at Colombo was not a “summons” as it

<sup>1</sup> (1930) 32 N. L. R. 251.

<sup>2</sup> 23 I. L. R. Calcutta.

was not a process of Court that could have been served. Even if that summons was in fact served on Siriwardene, the Magistrate could not have legally issued a warrant of arrest if Siriwardene failed to attend Court in obedience to the summons. The "summons" was nothing more than a mere piece of paper when it was handed to the unknown man. Even conceding that there was "a suit or criminal prosecution" in the Gampaha Magistrate's Court and that in accepting the service of the "summons" the unknown man did an "act", yet he did no act in the suit or prosecution as the "summons" was a mere piece of paper imposing no legal obligation on him.

Mr. Gunasekera who appeared for the Crown very frankly admitted that he was not prepared to contest the soundness of this argument.

I wish to add that we did not hear Mr. Gunasekere on the facts in view of our decision on the question of law.

I think that the appellant is entitled to succeed both on the law and the facts.

I allow the appeal and acquit the accused.

CANNON J.—

The District Judge, who had an opportunity of seeing the witnesses and judging of their demeanour, has in his judgment carefully considered their evidence and the probabilities and improbabilities affecting it. On the balance of the probabilities and on his judgment of the credibility of the witnesses he has accepted the case for the prosecution that the person served with the summons by the Inspector was not Siriwardene. I would confirm the conviction on the facts. I agree, however, that the appeal on the law be allowed.

*Set aside.*