Present : Pereira J.

JOHN *v.* PERERA *et al.*

1913.

613 and 614—P. C. Negombo, 20,090.

Bias—Magistrate also Superintendent of Prison—Trial of prison officer for negligently suffering prisoner to escape—Mere fact of escape is insufficient to give rise to presumption of negligence.

Observations on the inexpediency of the trial of accused, who are subordinate officers of a prison and are charged with negligently suffering a prisoner to escape, by a Magistrate who is also Assistant Superintendent of the Prison, even though such trial is consented to by the accused.

In order to sustain a charge against a jail overseer and a jail guard of negligently suffering a prisoner in their custody to escape, it must be shown that the escape was directly due to some act of negligence on the part of the accused. The mere fact of escape is insufficient to give rise to a presumption of negligence.

THE facts appear from the judgment.

H. A. Jayewardene, for accused, appellants.

Garvin, Acting S.-G., for respondent.

Cur. adv. vult.

September 12, 1913. PEREIRA J.—

In this case the two accused, who are an overseer and a guard, respectively, of the Negombo Jail, have been convicted of having negligently suffered to escape from confinement a person who had been committed to their custody. It would have been well had the Police Magistrate who tried the accused abstained from doing so. He is the Assistant Superintendent of the Prison, and as such, I take it, is the official superior of the accused, interested undoubtedly in seeing that his subordinates are adequately punished if guilty

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John v. Perera

of any dereliction of duty. The first accused does not appear to have consented to being tried summarily, but it appears that the second accused, when asked whether he had any objection to be tried by the Magistrate, stated through his proctor that he had none. Naturally, a person in the position of the second accused would hesitate to give cause for any suspicion of lack of confidence in the impartiality of his superior by refusing to be tried by him, and consent given in the circumstances can hardly be said to be a justification for the trial. I do not, if I may venture to say so, entertain any doubt that the verdict of the Magistrate was a conscientious verdict, but suspicion of bias may naturally lurk in the mind of the accused, and that, as has been pointed out by this Court more than once, is in law to be deprecated.

Now, the evidence in this case establishes no more than that the prisoner in question was entrusted to the custody of the accused to be taken from the Negombo Jail to Kurunegala and brought back, and that on the return journey the prisoner escaped. The Magistrate acquits the accused of dishonesty. The evidence shows that the prisoner had experience of the process of escape from custody. He had often been in jail before; he had once been convicted of escaping from the Negombo Jail; and he had made an attempt at escape from the Welikada Jail. The evidence also shows that the first accused was suffering from a bad foot, and that the second accused had heavy boots on, to which apparently he was unaccustomed, and which impeded his movements. In the circumstances, would the mere fact that the prisoner escaped when in the custody of the accused be sufficient to raise a presumption of negligence against the accused, even if such a presumption may ordinarily be said to arise from the mere facts of custody and escape ? So far as I can see there is not an iota of evidence of an omission on the part of the accused to take any precaution prescribed by prison regulations. It has been laid down that in order to constitute negligently suffering an escape. " the escape must be directly due to some act of negligence " (see *Gour. 1877*). What is the act of negligence here complained of ? To say that because the prisoner escaped the accused are guilty of negligence is to assume the very fact that has to be established by evidence as a fact to which the escape is directly due. It is quite conceivable that a prisoner may so suddenly dart off as to escape vigilance of the highest order and to baffle arrest, especially by persons so handicapped by a bad leg and heavy boots as the accused were. The jailer's evidence implies that the prisoner might, according to rules, have been put in chains. Knowing as he did the past history of the man, why he did not adopt that precaution before he handed the prisoner over to the accused is not explained. I set aside the conviction and acquit the accused.

Set aside.