1951 *Present :* **Gratiaen J. and Gunasekara J.**

In re KANAGARATNAM *et al.*

S. C. 19-21—D. C. Jaffna, 6,457B

Contempt of Court—Proceedings for sequestration before judgment—Wilfully making false statement—Ingredients—Bias of trial judge—Civil Procedure Code, s. 656.

The mere swearing of an affidavit which contains a statement that is factually incorrect cannot amount to a contempt of court within the meaning of section 656 of the Civil Procedure Code. The provisions of that section empower a court to punish as for a contempt only a person wilfully making a false statement.

A charge of contempt of court ought not to be tried by a judge who has already reached the conclusion that the accused person is guilty.

APPEAL from a judgment of the District Court, Jaffna.

H. V. Perera, K.C., with *T. Somasunderam*, for the appellants.

R. A. Kannangara, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

August 20, 1951. GUNASEKARA J.—

Each of the three appellants was convicted in the District Court of Jaffna on a charge of contempt and they were fined Rs. 1,000, Rs. 500 and Rs. 1,000, respectively. At the close of the argument in appeal we set aside the convictions and sentences and said that we would give our reasons later.

The charges relate to the making of two affidavits by the second and third appellants and the use of them by the first.

The first appellant, who had instituted an action against one Subramaniam for the recovery of a sum of Rs. 5,780·83, obtained from the District Court an order under section 653 of the Civil Procedure Code for sequestration of the latter's property before judgment. The petition for sequestration, which is dated the 21st March, 1950, was supported by affidavits of the same date from the three appellants. The first appellant averred that Subramaniam was making arrangements to alienate his properties fraudulently in order to avoid payment of the first appellant's claim and that the other two appellants had informed him of those arrangements. The second and third appellants in their affidavits declared that they had overheard conversations between Subramaniam and other persons which indicated that he was trying to sell a house and garden belonging to him ; the second appellant deposing to such a conversation that he claimed to have overheard on the 19th March, 1950, when he was opposite Subramaniam's drug store, which is in Jaffna ; and the third appellant to one alleged to have been overheard by him on the 20th March, 1950, when he was inside this store. It has been established that Subramaniam was in Colombo during the whole of the 19th and 20th March, 1950, and could not have been in Jaffna at any time on those two days.

The charges that the appellants were called upon to meet are set out in the summonses that were served on them. The contempt alleged against the first appellant is formulated as follows :—

> " That you filed two affidavits dated 21st day of March, 1950, in Court, to the effect that the defendant Nagalingam Subramaniam of Nallur, Jaffna, was in Jaffna on the 19th and 20th March, 1950, when in fact the said Nagalingam Subramaniam was in Colombo on the said dates, which fact was, to your knowledge false, and obtained an order for sequestration against the property of the said defendant."

The learned Crown Counsel agreed that there was no evidence to prove that the first appellant knew that the statements in question were false and he therefore, quite properly, did not support the conviction of this appellant. He also pointed out that the provisions of section 656 of the Civil Procedure Code, under which the learned Additional District Judge purported to deal with the appellants, empower a Court to punish as for a contempt only a person wilfully making a false statement and not also a person who merely files in Court an affidavit containing a false statement. Curiously enough, the formal order of conviction signed by the learned Judge does not allege that the first appellant knew that the statements were false. It states that the contempt consisted in his having " made false statement by affidavit ", and that he " made false statement by affidavit " by filing the affidavits of the other two appellants and obtaining the order for sequestration. He was convicted, according to this document, of having committed a contempt of Court " in that he on the 21st day of March, 1950, filed two affidavits to the effect that the defendant Nagalingam Subramaniam

of Nallur Jaffna was in Jaffna on the 19th and 20th March, 1950, when in fact the said Nagalingam Subramaniam was in Colombo on the said dates and obtained an order for sequestration against the property of the said defendant and has thereby made false statement by affidavit ".

The contempt alleged against each of the other two appellants is as follows :—

> " that you swore an affidavit on the 21st day of March, 1950, to the effect that you saw the defendant Nagalingam Subramaniam of Nallur, Jaffna, in Jaffna on the 19th and 20th March, 1950, when in fact the said Nagalingam Subramaniam was in Colombo on the said dates."

The charge does not allege against either of them that he knew that the averment in question was false. Obviously the mere swearing of an affidavit which contains a statement that is factually incorrect cannot amount to a contempt of court.

The charges were framed against the appellants on the 5th September, 1950, as a result of an inquiry that was held on the 5th August, 1950, into an application to the Court by Subramaniam to vacate the order of sequestration. Subramaniam's first witness was an advocate, Mr. Tampoe, who deposed to having met him in Colombo on the 18th, 19th and 20th March in connection with a matter in which he had been retained to act for him. At the close of his evidence in chief the first appellant's counsel moved that the order be vacated. In answer to a question from the learned Judge as to whether he withdrew " the averments contained in the affidavit " he said that there might be " an error in regard to the date in the affidavit ". The Judge thereupon held that there was a duty cast upon the court to proceed further with the inquiry to ascertain whether the averments were false, and he called upon Subramaniam's counsel to place before him the rest of the evidence on which he relied to prove their falsity. Mr. Tampoe was then examined further by the Judge and the first appellant's counsel was given an opportunity of cross-examination, which he declined. Subramaniam himself and one Duraisingham were next examined by the former's counsel and by the Judge, and Subramaniam's case was closed. The Judge then delivered an order releasing the property that had been sequestered.

The evidence that had been placed before the learned Judge at this inquiry related only to the question as to whether Subramaniam was in Jaffna on the 19th or the 20th March, 1950, and he held that it had been " conclusively proved that on these two dates the defendant could not have been in Jaffna ". He then went on to say : " I have no doubt in my mind that the averments contained in the affidavit are false and that the persons who had sworn the affidavits and the plaintiff who had depended on these affidavits have been guilty of gross contempt of Court. I have not decided in my own mind as to what action I should take in this matter, but I shall consider and deal with the matter in due course ".

The conclusion that the appellants had been " guilty of gross contempt of court " appears to have been regarded by the learned Judge as a necessary inference from the fact that Subramaniam could not have

been in Jaffna on the 19th or 20th of March, 1950. He appears to have found it possible to reach this conclusion although the second and third appellants had been given no opportunity of explanation. He has not considered the possibility that each of them had given a truthful account of an incident observed by him but had made a mistake in the affidavit as to the date of the incident. There was nothing in the evidence before him to exclude that possibility though Subramaniam himself had been examined as a witness.

Having come to this clear conclusion about the guilt of the appellants, the learned Judge decided a month later to charge them with the offences of which he had already found them guilty, and on the 5th September he made an order directing that the three appellants should be summoned

> " to show cause why they should not be called upon to meet a charge of contempt of Court in swearing affidavits on the 21st March, 1950, to the effect that they saw the defendant N. Subramaniam in Jaffna on the 19th and 20th March when in fact the said Subramaniam was in Colombo."

There was, of course, no evidence that the first appellant swore an affidavit containing such an allegation, though the learned Judge decided that he should be summoned to answer a charge of contempt upon the footing that there was. Nor was there evidence that the second appellant deposed to having seen Subramaniam on the 20th March, or the third appellant to having seen him on the 19th March. This order of the 5th September rather suggests that while the learned Judge had no doubt that each of the appellants was guilty of the offence with which he was about to charge him, he was not equally clear in his mind as to what were the acts that constituted the offence. Moreover, he appears still to have been of the view that the making of a factually incorrect statement in an affidavit was by itself enough to constitute a contempt of Court.

The summonses directed by this order were issued on the same day, requiring each of the appellants to appear on the 11th September, 1950, to answer the charge of contempt framed against him. At the same time the learned Judge also issued warrants for their arrest, purporting to act under section 794 of the Civil Procedure Code which empowers a Court to issue a warrant for the arrest of a person summoned to answer a charge of contempt " if it has reason to believe that the attendance of the accused person at the time appointed in the summons to answer the charge cannot otherwise be secured ". The grounds on which this extraordinary step was taken are stated in the learned Judge's order as follows :—

> " I have reason to think that the 3 accused would not be available before I leave station on transfer. This is a matter which should be dealt with by me. I therefore direct that warrants also do issue against the 3 accused under section 794. The warrants will have bail in Rs. 500 endorsed ."

Assuming that there may be some most unusual case in which it may be proper to deprive a man of his liberty because a Judge is about

to vacate his office, I can see nothing in this case that could justify the issue of these warrants. Nor can I see any justification for the learned Judge's view that this was a matter which should be dealt with by him. A precisely contrary view would have secured for the appellants a hearing by a Judge who was not handicapped by a premature conclusion that they were guilty of the charge. It is one thing to hold that there is ground for calling upon a person to answer a charge of contempt, or of any other offence, and quite another to hold that he is guilty of the offence. It is unfortunate that the learned Judge did not regard himself as disqualified for hearing these charges by reason of the fact that he had already come to the uncompromising conclusion that he had no doubt that the appellants were "guilty of gross contempt of Court".

That the learned Judge was unable to rid himself of this view and approach the trial of the charges with an open mind is indicated by his record of the proceedings held on the 11th September when the appellants appeared before him. The material portions of that record are as follows :—

> "Accused are called upon to admit or deny the charge as required under section 796. Accused severally deny the truth of the charges.
>
> *The accused propose to lead evidence and I am therefore compelled to cite the two witnesses who have already given evidence.*
>
> Cite Mr. Advocate Tampoe and Mr. Duraisingham.....
>
> .....
>
> Office will have to take special steps and communicate with the Fiscal to effect this service forthwith.....
>
> Inquiry on 20.9.
>
> Inquiry is specially fixed as I am expected to leave the station by the end of the month."

Although the learned Judge regarded the disposal of the charges against the appellants to be a matter of such urgency as to justify his subjecting them to the humiliation and inconvenience of arrest in order to ensure their attendance in court on the 11th September, he had not required the attendance on that day of the witnesses on whose evidence the charges were based. Apparently, the guilt of the appellants was so clear to him that the possibility of their not admitting the truth of the charges was outside his contemplation, and it was only the circumstance that they proposed to adduce evidence in support of their denial that "compelled" the learned Judge to summon witnesses to give evidence in support of the charges. The clear conviction in his mind that the appellants were guilty appears to have obscured his view of their right to be acquitted if they did not admit the truth of the charges and no evidence was adduced in support of them, whether the appellants themselves proposed to adduce any evidence or not.

The evidence adduced in support of the charges at the inquiry that was held on the 20th September consisted of that of Messrs. Tampoe and Duraisingham regarding Subramaniam's presence in Colombo on the 19th and 20th March and the evidence of Subramaniam's proctor to the effect that he retained Mr. Tampoe to act for Subramaniam.

That is to say, the only allegations contained in the appellants' affidavits that were contradicted were those regarding the dates of the conversations that the second and third appellants claimed to have overheard. Subramaniam himself did not give evidence and deny that there had been such conversations or that he had been trying to sell his house and garden as alleged by the second and third appellants.

The first appellant, who gave evidence, said that he had acted on information given to him by the other two. The case for the second and third appellants, who also gave evidence, was that the conversations to which they deposed in their affidavits took place not on Sunday the 19th March and Monday the 20th March respectively, but on the previous Sunday and Monday, and that the draftsman of the affidavits had misunderstood what they intended to convey. A business man named Kandiah and a broker, Nagarajah Chetty, gave evidence of requests which they said were made to them by Subramaniam in March, 1950, to find a purchaser for the property referred to in the affidavits, and another broker, Ramapillai, also spoke to a similar request that Subramaniam made to him. The appellants also adduced evidence to show that at the material time Subramaniam was financially embarrassed.

The learned Judge disbelieved the evidence that there was a mistake in the affidavits regarding the dates and based upon his rejection of this evidence a finding that the three appellants had conspired to place before the Court false affidavits to the effect that Subramaniam was in Jaffna on the 19th and 20th March, 1950. He did not hold that the statements about the conversations that the second and third appellants claimed to have overheard were false. It seems to me that he ought to have given his mind to the question whether it had been proved that these statements were false before he decided to reject the appellants' explanation of the dates given in the affidavits, and he ought to have considered the bearing on that question of the evidence relating to Subramaniam's financial position and the requests alleged to have been made by him to Kandiah and the two brokers to find a purchaser for the property. It appears from his judgment that the learned Judge has failed to appreciate the relevancy of this evidence to the question whether it was probable that the second and third appellants overheard such conversations as they say they did overhear. Regarding this evidence the learned Judge says: "Much time and more energy have been spent by counsel for the accused to establish that the defendant Subramaniam was making efforts to dispose of his own property during the whole of March and that he was heavily involved. He has called a number of witnesses and produced a number of documents in this connection. The whole of this evidence can be made a present of to the accused and it may even be conceded that that is so, but my view is that this evidence is neither material to the issue involved in these proceedings, the issue being 'are the specific averments in regard to the 19th and 20th of March false or were they put down by a *bona fide* mistake?'". I understand the word "present" to mean, in the context, a concession that the adverse party is able to make without damage to his own case. The observation that "the whole of this evidence can

be made a present of to the accused " is not merely a misdirection as to the effect and bearing of the evidence but an indication that the learned Judge did not appreciate that there was no adverse party prosecuting the appellants.

In my opinion the learned Judge ought not to have tried these charges himself in view of the conclusion that he had already reached regarding the guilt of the appellants ; and the conviction is bad both for this reason and for the reason that he has misdirected himself as to the effect and bearing of the evidence on the issues before him.

GRATIAEN J.—I agree.

Appeals allowed.