

K. Moidotty Vs. Usman and Another

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Court : Kerala

Decided On : Nov-04-2015

Judge : P.D. Rajan

Appeal No. : Crl.Rev.Pet. No. 872 of 2003

Appellant : K. Moidotty

Respondent : Usman and Another

Judgement :

1. The question under challenge in this case is whether the conducting of 'case and counter case' by the same Asst. Public Prosecutor amounts to an illegality, when both cases arise out of police charge sheet? This revision petition is preferred against the judgment in C.C.No.369/1998 of the Judicial First Class Magistrate, Malappuram by the defacto complainant. The accused was charge sheeted by the Judicial First Class Magistrate for having committed an offence punishable under Section 326 IPC. The charge against the accused is that on 19.7.1998 at about 9.45 p.m, while PW1 was proceeding to his room in the lodge at Parambilangadi, accused voluntarily caused grievous hurt to him by beating with a torch on his left leg and left hand as a result, he sustained serious injuries on his elbow and tibia, thereby committed the offence. Kottakkal Police registered a Crime and after investigation laid charge before Judicial First Class Magistrate, Malappuram. During trial, prosecution examined PW1 to PW11 and marked Exts.P1 to P6. MO1 was admitted in evidence. The incriminating circumstances

brought out in evidence were denied by the accused, while questioning him. He did not adduce any defence evidence and the learned Magistrate Court acquitted him. Being aggrieved by that, he preferred this revision petition.

2. Mr.C.Khalid, the learned counsel appearing for the revision petitioner submitted that there was serious illegality committed by the trial Court while disposing C.C. 369/98 and its counter case C.C.No.368/1999 and the procedure provided for disposing the case and counter case was not followed and he relied the decision reported in *Re Boya Gajji Pedda Venkatanna alias Bodenna and others* (AIR 1954 Madras 15) (1952) 1 MLJ 244]. Both cases were conducted by the same prosecutor, which amounts to an illegality. Hence, the revisional jurisdiction may be invoked to rectify that error.

3. Sri. P. Venugopal, the learned counsel appearing for the 1st respondent opposed the above argument and contended that there is no illegality in conducting case and counter case by the same Prosecutor. It rarely happens that both cases arise out of police charge sheet. The facts and circumstances in this case show that the incident happened at different places at different time, hence both cases were treated as two independent cases.

4. The expression case and counter cases is commonly used with cases instituted by two opposite parties. In certain cases, the accused in one case generally figure as the prosecution witnesses in the other case and vice-versa. In certain occasion both cases arise out of the Police charge, but some times one of these cases may arise out of a police charge-sheet whereas the other may arise out of a private complaint. There may be situation where both the cases arise out of private complaint. It seems to say that in very rare occasion it happens that both the cases arise out of police chargesheets. A case is said to be as counter to another strictly when it presents a version about the same incident different from the one presented in the other case by the opposite party. But if two incidents are different from each other and incident happened at different places and times or that one is the continuation of the other, they are not case and counter case in the strict sense, but they are two independent cases. Even in such a case it is advisable that the trial of both cases should be conducted simultaneously and the judgment

in both cases should be delivered on the same day. Two different versions of the same incident resulting in two criminal cases are described as case and counter case or cross cases . Normally in every criminal case we find a cross version by the defence, sometimes the cross version represents the truth, in most cases they are false and raised just to defeat the speedy trial and for making the trial a complicated one.

5. A Division Bench of the Madras High Court in *R e G oriparthi Krishtamma* 1929 Madras weekly notes 881, (Waller and Cornish, JJ) had occasion to consider 'case and counter case' and they made a suggestion that a case and counter case arising out of the same affair should always, if practicable, be tried by the same court and each party would represent themselves as having been the innocent victims of the aggression of the other. Considering the complication and difficulty, a single Judge of the Madras High Court in *Krishna Pannadi V. Emperor* [AIR 1930 Madras 190] [justice Jackson] emphasised the legislature to provide a mechanism as a statutory provision for trial of both cases by the same court. Learned Judge said thus: There is no clear law as regards the procedure in counter cases, a defect which the legislature ought to remedy. It is a generally recognized rule that such cases should be tried in quick succession by the same Judge, who should not pronounce judgment till the hearing of both cases is finished. Even after several years there is no legislative response to this problem as yet. In this backdrop, Apex Court had the occasion to advert the position in *Sudhir v State* (2001) 2 SCC 688 as follows: We are unable to understand why the legislature is still parrying to incorporate such a salubrious practice as a statutory requirement in the Code. Despite the above clear direction of the Apex court, no progress was made in this regard.

6. It is crystal clear that in Cr.P.C. or in the Evidence Act, there is no provision dealing exclusively with trial of cross cases. In *Nathi Lal and Ors v. State of UP* [1990 Supp. SCC 145] the Supreme Court described the procedure as follows:

We think that the fair procedure to adopt in a matter like the present where there are cross cases, is to direct that the same learned Judge must try both cross cases one after the other. After the recording of evidence in one case is

completed, he must hear the arguments but he must reserve the judgment. Thereafter he must proceed to hear the cross case and after recording all the evidence he must hear the arguments but reserve the judgment in that case. The same learned Judge must thereafter dispose of the matters by two separate judgments. In deciding each of the cases, he can rely only on the evidence recorded in that particular case. The evidence recorded in the cross case cannot be looked into. Nor can the judge be influenced by whatever is argued in the cross case. Each case must be decided on the basis of the evidence which has been placed on record in that particular case without being influenced in any manner by the evidence or arguments urged in the cross case. But both the judgments must be pronounced by the same learned Judge one after the other. In another decision, *State of M.P. V. M ishrilal* [(2003) 9 SSC 426] it is found that both the parties lodged an FIR against each other in respect of the same incident. The Supreme Court explained the procedure as follows:

It would have been just fair and proper to decide both the cases together by the same court in view of the guidelines devised by this Court in *Nathilal's case* (supra). The cross -cases should be tried together by the same court irrespective of the nature of the offence involved. The rational behind this is to avoid the conflicting judgments over the same incident because if cross cses are allowed to be tried by two courts separately there is likelihood of conflicting judgments.

7. This Court in *Augustine v. State* [1982 KLT 351] settled the law with regard to the case and counter case and the meaning and importance of the procedure adopted in a criminal trial and held as follows:

4. Before going into the propriety of the procedure canvassed by the appellants, it is desirable to deal with the connotation of the term "case and counter-case" which is very often used during criminal trials. The term in its general import stands for cases registered on the basis of rival versions of the same incident. Such cases need not always be registered on the basis of police reports. In respect of a particular occurrence, the police on getting information may register a case against a certain individual, say a person by name A. It may so happen that A himself sustained some injuries. A might approach the police and launch a complaint

regarding his version of the occurrence and how he sustained the injuries. The two versions may be conflicting. Still the police may register a case and investigate it along with the main case already registered. After questioning witnesses the investigating officer may find that the version given by A is false. What the officer generally does is to file a charge-sheet in the main case and a refer report in the case registered on the basis of the statement of A. A would naturally feel aggrieved by the conduct of the police. It may also happen that even though A gave a statement the police did not register a case based on his statement. In both the above contingencies A is not left without his remedy. He may present a complaint before Court setting out how, according to him, the occurrence took place and he sustained the injuries and the Magistrate may take the complaint to file and proceed with it. The main case based on the police report and that based on the complaint give conflicting versions of the same incident and are therefore described as "case and counter-case".

8. A close scrutiny of the procedure prescribed by the Apex court and various High Courts in this regard it is clear that both the cases must be tried separately and independently by the same judge and decided on the basis of evidence in each case without being influenced by the materials and evidence in the other case. The procedure laid down is that first the evidence should be recorded in one case and both the parties must be heard but judgment should not be pronounced. Immediately after the trial of one case the other case should be taken up for recording of evidence. Once the hearing is complete in both cases the same should be decided simultaneously by separate judgments. The same public prosecutor should not conduct both case and its counter case and that he has to choose only one of the two cases and conduct the prosecution in it. In Code of Criminal Procedure or in the Evidence Act there is no provision dealing with the trial of case and counter case by different Public Prosecutors when investigation was conducted by one or different investigating officer. Though there is no clear cut guidelines in this regard, for transparency it would be desirable to conduct the trial by two Public Prosecutors or two Assistant Public Prosecutors. If the trial was conducted by the same Prosecutor there is no illegality since no procedure prescribed in this regard. But fairness requires that the same Public Prosecutor should not conduct both case and counter case and the Prosecutor has to choose

one of the two cases and conduct the prosecution in it. A close look at the procedure and the object behind the trial would clearly suggest that the judge should make up his mind regarding guilt or otherwise of the parties on the basis of the entire case and not on the basis of the case of the parties in each individual case.

In order to avoid the chances of conflicting decisions, the whole case has to be taken and not as two independent cases.

9. Learned counsel for the revision petitioner relied on the decision reported in *In Re Boya Gajji Pedda Venkatanna alias Bodenna and others* (AIR 1954 Madras 15) (1952) 1 MLJ 244) wherein it was held thus:-

In a complaint and counter-complaint such as this obviously arising out of the same transaction when the prosecution proceeds on the basis of the complaint, we think it is the duty of the prosecution to exhibit the counter complaint through the police officer who recorded it and also to prove medical certificates of persons wounded on the opposite side also and place before the court a definite case which they ask it to accept. We must deprecate the prosecution in such cases accepting, in toto one complaint and examining only witnesses who support it and give no explanation at all for injuries caused to the other side. The truth in these cases is invariably not in strict conformity with either complaint and it is quite necessary that all the facts are placed before the court to enable it to arrive at the truth and a just decision. If in the present case, Ex.D.10 was in the opinion of the investigating police a false complaint laid for defence purposes and the injuries on D.W.2 self-inflicted, the prosecution should none the less have filed Ex.D.10 and D.W.2's medical certificate asking the court to reject them. The fact that a complaint Ex.D.10 was filed, that it was treated as false or undetectable and that D.W.2 did have injuries on his person are relevant facts which the prosecution itself should have placed before the court in the first instance instead of waiting for the defence to disclose them .

10. The revision petitioner contended that he is the accused in the counter case. Records show that the case and counter case (C.C.369/98 and C.C.368/98) were conducted by the same prosecutor and disposed of in the manner provided for

disposing the case and counter case, in which I find no illegality. The learned Magistrate applied his mind with the final report filed by the investigating officer and considered each point meticulously in both cases. The wound certificate was also considered. The trial Court observed that there are material contradictions in the evidence of PW1 and PW2 and that evidence itself is not sufficient for a conviction. Exts.P2 and P6 show that there was fracture on the left elbow and the injuries on PW1, which could be possible due to a fall. This material contradiction and inconsistencies in the evidence of the occurrence witnesses and the wound certificate were analysed by the Court below. In the absence of any corroborative evidence, the benefit of doubt was given to the accused and I do not find any illegality in the above finding. There is no merit in this revision and it is dismissed accordingly.

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