

Suresh and Others Vs. State of Kerala

Suresh and Others Vs. State of Kerala

SooperKanoon Citation : sooperkanoon.com/1181834

Court : Kerala

Decided On : Sep-30-2015

Judge : K.T. Sankaran & V. Raja Vijayaraghavan

Appeal No. : Crl.M.A No. 5250 of 2015 in Crl.A No. 465 of 2015, Crl.M.A.No. 551 of 2015 & Crl.MA.No. 5224 of 2015 in Crl.A No. 474 Of 2015

Appellant : Suresh and Others

Respondent : State of Kerala

Judgement :

V. Raja Vijayaraghavan, J.

1. Accused Nos. 6 and 7 in S.C.80 of 2010 on the file of the II Additional Sessions Judge, Thodupuzha, have preferred Crl. A. 465 of 2015 challenging the judgment dated 10.4.2015 passed by the said Court by which they were convicted and sentenced to undergo imprisonment for life and to pay fine of Rs. 25,000/- each for offence punishable u/s 364A r/w S.34 of the IPC and in default of payment of fine, to undergo rigorous imprisonment for one year each. They have also been convicted and sentenced to undergo rigorous imprisonments for six months each for offence u/s 342 r/w S.34 IPC.

2. Accused No. 8 in the aforesaid Sessions Case has preferred Crl.A. 474 of 2015 challenging the conviction and sentence passed against him by the learned

Sessions Judge. The aforesaid appellant has also been convicted and sentenced in the same manner as accused No 6 and 7.

3. (a). Crl.M.A. 5250 of 2015 has been preferred by the appellants in Crl.A. 465 of 2015 u/s 389 (1) of Code of Criminal Procedure, seeking suspension of the execution of sentence imposed against them.

(b). Crl.M.A. 5251 of 2015 has been preferred by the appellants in Crl.A. 465 of 2015 praying that the powers u/s 391 be invoked and to permit them to adduce additional evidence.

(c) Crl.M.A. 5224 of 2015 has been preferred by the appellants in Crl.A.474 of 2015 u/s 389(1) of the Cr.P.C seeking suspension of the execution of sentence imposed by the learned Sessions Judge.

4. Since identical questions are involved, the above applications are considered and disposed of together.

5. The appellants were indicted and tried on the following allegations:-

There was an intense feeling of ill will between PW3 (Pearson) and the 1st accused on account of some monetary transactions and as a result, the 1st accused hatched a conspiracy to abduct the son of PW3 for ransom. In order to accomplish their mission, accused Nos. 1 to 3 forged identity cards and obtained telephone connections. Using these mobile phones, they contacted PW2 (Sham Prasad), an 18 year old student of Engineering, and the son of PW3, and misrepresented that they are the friends of PW3. Thereafter, on 27.08.2008 at 7.30 pm, accused Nos. 5 to 8 came to meet PW2 and thereafter, abducted him in a Wagon R Car. The prosecution allegation is that the accused threatened to kill him and detained him throughout the night and demanded Rs. 30 Lakhs as ransom from PW3. When the news of abduction appeared in the Television, PW2 was let off. It is on these allegations that the police, after investigation, laid charge against accused Nos. 1 to 8 for offence punishable u/s 120-B, 201, 364A, 468, 471, 506(1) r/w S.34 IPC.

6. The prosecution examined as many as 30 witnesses to prove its case, as PWs 1 to 30. Exts.P1 to P44 were also marked through them. The learned Sessions Judge on an analysis of the evidence, found the appellants guilty of the offence u/s 364 A r/w S. 34 of the IPC and also u/s 341 r/w S. 34 of the IPC and convicted them and sentenced them as aforesaid. The accused Nos. 1 to 4 were extended the benefit of doubt. Case against accused No. 5 was split up as he absconded.

7. When the appeals had come up for admission, it was submitted by Sri S. Rajeev, the learned counsel appearing for the appellants in CrI.A.465 of 2015 that grave prejudice has been caused to the appellants as the evidence untested by cross examination of PW2, the victim and PW 3, the person from whom ransom was demanded, was relied on by the learned Sessions Judge to convict the appellants. It was contended by the counsel for the appellant in CrI. Appeal. No. 474 of 2015, that his case fell into a different category from that of the other accused and there were indications in the prosecution evidence itself revealing his innocence in the matter.

8. To ascertain the veracity of the contentions raised by the learned counsel, as per order dated 21.05.2015, we had directed the Registry to obtain a report from the presiding Officer with regard to the above aspect.

9. The report dated 29.5.2015 submitted by the learned Sessions Judge vindicated submissions of the learned counsel appearing for appellants/accused No 6 and 7. But as the lower Court records were not before us and as the report of the Sessions Judge as well as the impugned Judgment did not reveal the intricate details, we felt that suspension of sentence, at that stage, was not warranted. It was ordered that the records be called for, so that the matter could be considered on its merits, and appropriate orders could be passed, to prevent any failure of justice.

10. The records have been placed before us. Fresh applications as aforesaid, seeking suspension of sentence and for issuing directions to take additional evidence have been filed by the appellants as well.

11. Without entering into the merits of the conviction of the appellants, what bothers us most prominently is that PW2 and 3, whose evidence have become substantially the basis of conviction of the appellants, were not subjected to cross examination by the counsel for accused Nos.6 and 7. It is also evident from the records that on 19.04.2014, the counsel appearing for the accused No. 7 had relinquished his vakkalath and subsequently another counsel was engaged by A7 who filed his vakkalath before Court on 17.07.2014. By that time, the majority of the witnesses were examined on the side of the prosecution. Thereafter, on 16.12.2014, the learned counsel appearing for A6 and A7 had filed Crl.M.P.4274 of 2014 seeking for an adjournment for cross examination of Pw2 and 3 due to his own personal reasons and the same was dismissed by the learned Sessions Judge on the same day itself. It is also borne out that no cross was recorded on behalf of A6 and A7. Justification for not providing an opportunity to cross examine the witnesses was that adjournments were granted on several occasions, but opportunity to cross examine was not availed of by the learned counsel appearing for the accused. We have gone through the judgment of the learned Sessions judge and it has been stated in paragraph 16 of the judgment that as PW2 was not cross examined on behalf of A6 and A7, the version of PW2 remains unchallenged.

12. It is trite that the credibility of the witnesses, whether in a civil or criminal case, can be decided only when the testimony is put through the test of fire by cross examination. Cross-examination, properly conducted, is one of the most useful and efficacious means of discovering the truth and failure to provide an opportunity will no doubt result in grave prejudice and failure of justice. The learned counsel is justified in submitting that reliance placed by the learned Sessions Judge on the evidence given by PW2 and 3 to enter a finding of guilt has resulted in failure of justice. The very same untested evidence was put to the accused as incriminating circumstances when questioned u/s 313 (1) (b) of the Code.

13. The Apex Court in Mohd.Hussain @ Julfikar Ali v. State (Govt. of NCT) Delhi, (2012 (2) SCC 584), had occasion to observe as follows:-

While holding the appellant guilty the Trial court has not only relied upon the evidence of the witnesses who have been cross-examined but also relied upon the evidence of witnesses who were not cross-examined. The fate of the criminal trial depends upon the truthfulness or otherwise of the witnesses and, therefore, it is of paramount importance. To arrive at the truth, its veracity should be judged and for that purpose cross-examination is an acid test. It tests the truthfulness of the statement made by a witness on oath in examination-in-chief. Its purpose is to elicit facts and materials to establish that the evidence of witness is fit to be rejected. The appellant in the present case was denied this right only because he himself was not trained in law and not given the assistance of a lawyer to defend him. Poverty also came in his way to engage a counsel of his choice.

14. In the case on hand, we cannot fail to take note that ample opportunity was granted but the same was not availed of by the learned counsel who appeared for accused Nos. 6 and 7. It is also borne out from the records that the counsel who appeared for accused Nos. 1 to 4 and accused No. 8 had cross examined the witnesses and accused Nos.1 to 4 were acquitted granting them the benefit of doubt. The learned Sessions Judge in the said circumstances, ought to have provided the accused, the assistance of a counsel at the expenses of the State as was held in Mohd Hussain @ Julfiker Ali (Supra). It is also borne out from the records that though an application was preferred by the appellants for re-calling the witnesses for the purpose of cross examination, the same was dismissed by the learned Sessions Judge.

15. The mere fact that a mistake was committed by the counsel appearing for defence, should not result in the accused suffering a penalty totally disproportionate to the gravity of the error committed by his lawyer. The consequence of being found guilty for having committed offence u/s 364 A of the IPC is extremely grave as the accused was liable to be sentenced to death or imprisonment for life and was also liable to pay fine.

16. We are of the view that an opportunity has to be granted to the appellants in Crl.A. 465 of 2015 to cross examine PW2 and 3 for which purpose Crl.M.A. 5251 of 2015 has been filed. In exercise of powers u/s 391 of the Code of Criminal

Procedure, we are inclined to allow the said application. If no counsel is appointed by the accused, the learned Sessions Judge shall take steps to provide them the assistance of a counsel at the expense of the State. We are of the view that the 8th accused shall also appear before the trial Court and shall be present when the counsel for accused Nos. 6 and 7 avails of the opportunity to cross examine the witnesses. We do not think that it would be necessary to permit the counsel for the 8th accused any opportunity to cross examination the recalled witnesses, but it shall be at the discretion of the learned Trial Judge.

17. We take note that the appellants were on bail during the trial stage. In view of the above, we are of the considered view that the appellants have made out a case for temporary suspension of sentence in these cases.

18. In the result, the following orders are issued.

19. CrI.M.A.5250 of 2015 in CrI.A.465 of 2015 and CrI.M.A.5224 of 2015 in CrI.A.474 of 2015

These Applications are allowed and the sentence imposed on the petitioners (Accused Nos. 6, 7 and 8 in SC 80/2010 on the file of the II Additional Sessions Judge, Thodupuzha) by the trial Court shall stand suspended for a period of 4 months from the date of this order on the following conditions;-

(a) The petitioners shall be released on bail on executing a bond of Rs. 50,000/ each with two solvent sureties each for the like sum to the satisfaction of the trial Court.

(b) The petitioners shall surrender their passport before the trial Court and if they are not holding one, they shall file an affidavit stating so.

(c) They shall not leave the state of Kerala without obtaining the permission from the Trial Court.

(d) They shall not influence, threaten or intimidate the witnesses who are being recalled for cross examination, and shall not involve themselves in any crime during the period of suspension of sentence.

(e) Violation of any of the above conditions will result in cancellation of the order granting suspension of sentence.

20. CrI.M.A. 5251 of 2015 in CrI.A. 465 of 2015-

The Application is allowed and the following directions are issued.

(a). The appellants in CrI.A.465 of 2015 (Accused Nos. 6 and 7) as well as the appellant in CrI. A. 474 of 2015 (Accused No. 8) shall appear before the II Additional Sessions judge, Thodupuzha, on 19.10.2015.

(b) The learned Sessions judge shall issue summons to recall PW 2- Sham Prasad and PW 3-person and afford opportunity to the counsel for accused No. 6 and 7 to cross examine the said witnesses. If some aspects are to be put to the Investigating officer after cross examinations is completed, the learned Trial judge may summon the said officer as well. The question whether accused No. 8 should be permitted to cross examine the recalled witnesses is left to the discretion of the learned Sessions Judge.

(c) After recording the evidence, if questions need be put to the witnesses u/s 313 (1) (b) of the code of criminal procedure with regard to the incriminating materials, the same shall be done.

(d) The learned trial judge shall then

Certify the evidence to this Court, at any rate, within a period of 3 months from the date of this order.

The applications are allowed as above.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com