

**State Vs. Mohammad Ismail**

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**Court :** Kerala

**Decided On :** Sep-02-1981

**Reported in :** 1981CriLJ1553

**Judge :** Kumari P. Janaki Amma, J.

**Appellant :** State

**Respondent :** Mohammad Ismail

**Judgement :**

ORDER

**Kumari P. Janaki Amma, J.**

1. This revision case is taken up suo motu in view of certain irregularities noticed at the time of the inspection of the judicial Magistrate's Court. First Class, Neyyattinkara.

2. C. C. No. 279 of 1973 was initiated by the Sub Inspector of Police Neyyattinkara, against one Mytheen Pillai Mohammed Ismail for offences punishable under Sections 457 and 380 of the Indian Penal Code. Several attempts were made to get at the accused. While so, the Assistant Public Prosecutor filed a report stating that the case was pending for many months without any progress on account of the non-availability of the accused, that the efforts to get. at the accused having failed, in order to avoid unnecessary pendency in the court

permission might be given under Section 321 of the Code of Criminal Procedure for withdrawing the prosecution for the time being, without prejudice to the right of the prosecution to proceed against the accused as and when he would be made available to stand the trial. The Court allowed the withdrawal of the case without prejudice to the right of the prosecution to proceed against the accused as and when he would be made available to stand the trial. The Court also discharged the accused under Section 321 Criminal P. C., The propriety of this order was doubted by the Chief Judicial Magistrate and a report was sent to this Court for taking appropriate action in the matter.

3. There is no provision in the Code of Criminal Procedure for permitting withdrawal of a case solely on the ground that the whereabouts of the accused are not known. In respect of summons cases a power is given to the Court to stop the proceedings under Section 258, Criminal P. C. in cases filed otherwise than upon a complaint. In such cases if the stoppage of proceedings is made after the evidence of principal witnesses has been recorded the accused would be acquitted and in any other case the accused would be released, and such release would have the effect of discharge. Even such a provision is absent in respect of warrant cases. No doubt, there is the general power under Section 321 of the Code for withdrawing the prosecution with the consent of the Court and in such cases the withdrawal if it is made before the charge is framed the accused would stand discharged and if after the charge is framed the accused would stand acquitted. There is conflict of opinion as to whether after an order of discharge the State had power to direct prosecution of the accused on the same facts so long as the discharge is not set aside by a competent judicial authority. (See *Khanimullah v. Emperor* AIR 1947 Pesh 19 : 48 Cri LJ 750 and *The King v. K. N. Chachan* 50 Cri LJ 992 : AIR 1949 Pat 449V Section 321 does not contemplate cases of the present kind where the effect of the withdrawal is only provisional and it is open to the State to start fresh prosecution when the accused makes himself available, It is not as if the Code of Criminal Procedure does not provide for action to be taken when the accused could not be found and where he is absconding. Section 64 of Criminal P. C. states that where an accused person cannot be found in spite of exercise of due diligence, summons may be served by leaving one of the duplicates for him with some adult male member of his family residing with him,

and the person with whom the summons is so left shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate. If it is a case where the service cannot be effected in the normal course or under Section 64 the serving officer should affix one of the duplicates of the summons to some conspicuous part of the house or homestead in which the person summoned ordinarily resides, and thereupon, the Court, after making such inquiries as it thinks fit, may declare that the summons has been duly served or order fresh notice in such manner as it considers proper. Reference may also be made to Section 299, which corresponds to Section 512 of the Code of 1898. which provides that if it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try or commit for trial such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions. Any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without an amount of delay. expense or inconvenience which, under the circumstances of the case, would be unreasonable.

4. In this connection, the Criminal Rules of Practice (Travancore Cochin State) prescribes under Rr. 35 and 36 the procedure to be followed when the accused is absconding. It enables the Magistrate with the sanction of the District Magistrate (now the Chief Judicial Magistrate) to remove the case from the register of cases received and to enter it in a separate register of long pending cases maintained in Administrative Form A IX: If at any time the accused person is apprehended or appears as the case may be the case against him can be treated as a new case entered accordingly in the register of cases received and dealt with according to law. Rule 36 provides for cases where some of the accused have absconded It may not be necessary to deal with this rule in the present context. Rule 37 prescribes the procedure to be observed before transfer of a case to the Register of Long Pending Cases. The Magistrate has to follow the procedure prescribed in Sections 87 and 88 of Criminal P. C. 1898 which correspond to Sections 82 and 83 of the new Code. Section 82 deals with proclamation for person absconding

and Section 83 deals with attachment of property of person absconding. Section 82 directs that in all cases in which the Court has reason to believe that any person against whom a warrant has been issued has absconded or that he is concealing himself so that such warrant cannot be executed such Court may publish a written proclamation requiring him to appear at a specific place and at a specified time not less than 30 days from the date of publishing such proclamation. Section 83 says that the Court issuing the proclamation under Section 82 may for reasons to be recorded in writing at any time after the issue of the proclamation order the attachment of any property moveable or immoveable or both belonging to the proclaimed person. There is also a proviso which deals with cases where an attachment could be effected simultaneously with the issue of the proclamation. Before a case is transferred to the Register of long pending cases the Magistrate has to follow the above procedure and wherever practicable comply with the provisions of Section 299 also, It is only after complying with the above provision that the Court is expected to stop issue of process against the accused. The rules also provide for taking up the case once again if and when the accused is arrested or appears before Court, Rules similar to the above are provided in Rules 22 to 26 of the Madras Criminal Rules of Practice. Even after a case is transferred to the Register of Long Pending Cases, the Court should issue process to the accused periodically until he is apprehended.

5. When there are specific provisions laying down the procedure to be followed when the Magistrate finds that an accused cannot be served with summons there is no justification for not following those provisions and granting permission to the Assistant Public Prosecutor to withdraw the case without prejudice to the right to file fresh complaint when the accused becomes available.

The order of the Magistrate granting permission to withdraw is set aside. The Magistrate will take the case to file and dispose of it in accordance with law.