

State of Kerala Vs. Raju

State of Kerala Vs. Raju

SooperKanoon Citation : sooperkanoon.com/724021

Court : Kerala

Decided On : Oct-14-1981

Reported in : 1982CriLJ304

Judge : Kumari P. Janaki Amma, J.

Appellant : State of Kerala

Respondent : Raju

Judgement :

ORDER

Kumari P. Janaki Amma, J.

1. The revision petition is against an order discharging the respondent-accused of offences Under Sections 408, 465 and 420, I. P. C, passed by the Judicial Magistrate, First Class, Tirur.

2. The final report in the case was received in Court on 16-3-1978 and it was in due course registered as C. C. No. 123 of 1978. Along with the final report the Sub-Inspector of Police, who presented the charge-sheet had also filed copies of the statements of fifteen witnesses, recorded Under Section 161(3) of Cr. P. C. and a memorandum of evidence. The accused put in appearance on 6-6-1978. In due course he was released on bail.

3. On 12-12-1978 the Advocate appearing for the accused filed a petition claiming discharge Under Section 239 of Cr. P. C. The sole ground alleged was that there was non-compliance of the directions contained in Section 173(5)(b) of Cr. P. C, inasmuch as the prosecution failed to produce the original statements recorded Under Section 161 of all the persons whom the prosecution proposed to examine as witnesses. The Magistrate upheld the contention and discharged the accused.

4. The order of discharge is not sustainable. Section 239 no doubt contemplates a discharge of the accused before the trial begins; but the section enumerates the conditions required before discharge is ordered. The Magistrate is called upon to consider the police report, the documents sent along with it Under Section 173 and also make such examination, if any, of the accused as the Magistrate thinks necessary. He should also give an opportunity to the accused of being heard. If after following the procedure prescribed the Magistrate considers that the charge against the accused is groundless he should discharge the accused. But in doing so he should also give his reasons thereof. The Court has not followed the above procedure.

5. There is no other provision in the Criminal P. C. under which a Magistrate can discharge an accused in a warrant case instituted on a police report. A provision like Section 258 of Cr. P. C. under which a Magistrate can for reasons to be recorded stop the proceedings in a summons case instituted otherwise than on a complaint is not available in a warrant case.

6. The reasons given by the Magistrate for discharging the accused are also unsustainable. It is no doubt true that the provision regarding the granting of copies of documents contained in the present Cr. P. C. is different from the corresponding provision in the Code of 1898 (the old Code). Under Section 173(4) of the Code of 1898 the duty to furnish copies of statements recorded Under Section 161(3) of the Code of persons whom the prosecution proposed to examine as witnesses was on the officer in charge of the police station. Section 173(5) of the Code now in force (new Code) directs that along with the final report in all cases, to which Section 170 applies, the police officer should forward to the Magistrate all documents or relevant extracts thereof, which the prosecution

proposes to rely on, other than those already sent to the Magistrate during investigation and statements recorded Under Section 161 of all persons whom the prosecution proposes to examine as witnesses. Under Section 207 in cases where proceedings are instituted on police reports it is the Magistrate who is to furnish to the accused free of cost copies of the police report, the first information report recorded Under Section 154 and the statements recorded under Sub-section (3) of Section 161 of all persons whom the prosecution proposes to examine as witnesses, of confessions and statements if any recorded Under Section 164 and of the other documents or relevant extracts thereof forwarded Under Section 173(5). Section 238 casts a duty on the Magistrate, in all warrant cases, to satisfy himself that he has complied with the provision in Section 207. The contention put forward on behalf of the accused before the trial Court was that inasmuch as Section 173(5) mentions statements recorded Under Section 161 it is not sufficient if the police forwarded the copies of the statement of the witnesses as was being done under the Code of 1898 and it is incumbent on the officer who files the final report to send along with it the original statements recorded Under Section 161. Reference has also been made to Sections 64 and 65 of the Evidence Act to make out that the original statements would be necessary in case the accused wants to prove any prior statement of witness, to contradict or discredit him. The point for decision is how far these contentions are acceptable.

7. There is no doubt that the change in the language of Section 173(5) is consequential to the change in Section 207 casting on the Court the duty to furnish copies of the statements to the accused. In effecting the change the legislature must have taken into account the provisions of the Evidence Act regarding secondary evidence. Under Section 63(3) copies made from or compared with the original form secondary evidence. It is to enable the Court to take such copies that a change is made in Section 173(5) that the statements of the witnesses should be forwarded to Court. The Supreme Court had occasion to consider the consequences of the failure to supply copies of the statements as provided in Section 173 (4) of the old Code in *Narayan Rao v. State of Andhra Pradesh* : 1957 CriLJ1320 . The following observations in the judgment of that case throw the necessary light in the matter (Para 10):

Does such an omission necessarily render the entire proceedings and the trial null and void; or is it only an irregularity curable with reference to the provisions of Section 537(a) of the Code? In other words, are the provisions of Section 173(a), read with Section 207-A(3) mandatory or only directory? There is no doubt that those provisions have been introduced by the amending Act of 1955, in order to simplify the procedure in respect of inquiries leading up to a Sessions trial, and at the same time, to safeguard the interests of accused persons by enjoining upon police officers concerned and Magistrates before whom such proceedings are brought, to see that all the documents, necessary to give the accused persons all the information for the proper conduct of their defence, are furnished.

It has rightly been contended on behalf of the appellant that it was the duty of the Magistrate to see that the provisions aforesaid of the Code, have been fully complied with. Magistrates, therefore, have to be circumspect, while conducting such proceedings, to see to it that accused persons are not handicapped in their defence by any omission on the part of police officers concerned, to supply the necessary copies.

But we are not prepared to hold that non-compliance with those provisions has, necessarily, the result of vitiating those proceedings and subsequent trial. The word 'shall' occurring both in Sub-section (4) of Section 173 and Sub-section (3) of Section 207-A, is not mandatory but only directory, because an omission by a police officer, to fully comply with the provisions of Section 173, should not be allowed to have such a far-reaching effect as to render the proceedings including the trial before the Court of Session, wholly ineffective.

The Supreme Court also held if in any particular case it is made out that the omission to supply copies has caused prejudice to the accused the Court may in the interest of justice reopen the proceedings by insisting upon full compliance of the provisions of the Code. The same principle would apply in the case of failure to comply with the directions in Section 173(5) of the new Code. Taking into account the purpose of Section 173(5), if in a case the copies of the relevant records made from the original by mechanical processes are produced in Court for reference and the necessary copies have been supplied to the accused by the officer in charge

of the police station or such copies have been sent to Court for delivering them to the accused, there would be substantial compliance of Section 173(5). No doubt it is open to the Court even in such cases to insist that the original recorded statements should be produced. But Section 173(5) does not confer a right on the accused to insist on production of the originals unless prejudice is made out. The rules regarding admission of secondary evidence contained in Section 65 of the Evidence Act are wide enough to enable the accused to use the copies delivered over to him, for the purpose of contradicting witnesses even if the originals have not been produced as provided in Section 173(5).

8. The petition presented by the accused in the instant case itself shows that he has been supplied with copies of the statements of witnesses. It must be presumed that they are copies taken from the original. There is therefore no scope for complaint that the accused would be prejudiced on account of the failure on the part of the prosecution to produce the original statements recorded during investigation. Even assuming that it is incumbent on the part of the prosecution to produce the statements in original, the proper procedure would have been to call upon the concerned police officer to produce them.

In any case the order discharging the accused is unsustainable. The order is set aside. The case is sent back to the Magistrate for disposal according to law. The revision petition is allowed.

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