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Court : Kerala

Decided On : Mar-22-1982

Reported in : 1982CriLJ1557

Judge : P. Subramonian Poti, Ag C.J., ; P. Janaki Amma and; K. Sukumaran, JJ.

Appellant : Augustine and ors.

Respondent : The State

Judgement :

P. Janaki Amma, J.

1. The nine accused in SC No. 11 of 1980 of the Court of the Additional Sessions Judge, Parur, were tried for the murder of one Michael, for causing injuries to his wife and two sons and other offences. It so happened that accused 1, 6 and 7 also sustained some injuries in the course of the same transaction; The police registered Crime No. 97 of 1979 on the basis of the information given by PW-1, one of the injured sons of Michael, and Crime No. 99 of 1979 on the basis of the statement of the sixth accused. After investigation a charge-sheet was presented in respect of Crime No. 97 of 1979, Crime No. 99 of 1979 was referred as false and a report to that effect was filed. After trial accused 1, 2 and 4 to 7 were convicted for murder, rioting and other cognate offences. Criminal Appeal No. 305 of 1980 was filed before this Court against the conviction and sentence of the above accused. The State filed Criminal Appeal No. 430 of 1980 against the

acquittal of accused 3, 8 and 9.

The appeals came up for hearing before a Division Bench. In the course of arguments a contention was raised to the effect that a serious irregularity has been committed by the investigating agency in having filed a refer report in Crime No. 99 of 1979 and by the Court in accepting the same, that the said case and the present case came under what is known by the expression 'case and counter-case', that for the proper appreciation of the evidence in the present case the evidence in Crime No. 99 of 1979, which is the counter-case, should also have been placed before Court, that the counter-case should also have been committed for trial and the two cases should have been disposed of simultaneously.

In support of the plea of the accused-appellants placed reliance on the decision in Thami v. State of Kerala 1965 Ker LT 697. In that case the appellant, Thami, was tried for the murder of one Madhavan Nair and for causing hurt to PW-1 who according to the prosecution tried to wrest the knife of the accused and for that purpose beat the accused. The accused had his own version of the occurrence and if that version was true he was entitled to right of private defence. Even though a case was registered under Section 324 of the Penal Code on the basis of the statement of the accused, after investigation it was referred as non-cognizable and falling under Section 334 of the Penal Code. The Division Bench of this Court which disposed of the appeal observed that the circumstances made out indicated that the whole thing took place in darkness, that none could have seen the occurrence and that the whole case appeared to have been reconstructed afterwards, because a man died of injuries, Anna Chandy J., speaking on behalf of the Division Bench observed:

If the accused's arrest was illegal and the accused was acting in private defence he could certainly have afforded no provocation to his assailants so as to justify the conversion of the offence under Section 324 into one under Section 334 of the Penal Code. In any case the Circle Inspector need not have usurped the functions of the Court to decide subtle questions of law to the prejudice of the accused who was in custody all along and who was too poor to have gone in for legal assistance. Both the case and the counter-case could well have been sent up to

the Court leaving the Court to take a proper decision.

2. The appellants contended that the investigating agency in the instant case should not have referred Crime No. 99 of 1979 registered on the basis of the statement of the sixth accused, that a charge-sheet should have been filed in Court and the case and the counter-case should have been tried by the same Court. The omission, according to the learned Counsel appearing for the accused, seriously prejudiced their defence and the conviction should be set aside on that sole ground.

3. No doubt there are instances where the police do file separate charge-sheets in respect Of the Same transaction, one in the main case and the other in the counter-case registered on the basis of the statement of the accused in the main case. Whenever such charge-sheets are filed, the practice, it appears, has been to see that the prosecutions in the main case and the counter-case are conducted by two different prosecutors, and the cases are disposed of simultaneously. In the usual course one case would end in acquittal and therefore there has been no occasion for this Court to examine the legal and practical implications' of the practice. When a stand was taken by the appellants that it was incumbent on the prosecuting agency to have filed a charge-sheet in the counter-case also, our learned brothers in the Division Bench did not, not only concur with that view, but felt that the filing of two charge-sheets in respect of the same occurrence is undesirable as it is against accepted norms of procedure and would undermine the very purpose of investigation by the police. The learned Judges after dealing with the case law on the point including Ramakrishnayya v. State : AIR1954 Mad442 , felt that there is an apparent conflict between the decision in Thami v. State of Kerala 1965 Ker LT 697 and the decision in Achuthan v. Bappu 1961 Ker LT 412, which has followed the Madras case. The Division Bench therefore expressed the view that it is desirable that the matter is examined by a Full Bench. That is how the case happened to be before us.

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 coun-ter-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'. In one the prosecuring agency will be the State while in the other it is the private complainant. The decision, Achuthan v. Bappu 1961 Ker LT 412, represents the above type. There can also be case and counter-case where both the prosecuting agencies are private individuals. Thus A may sustain injuries at the hands of B and in the course of the same transaction B may sustain injuries at the hands of A. Both A and B would be having their own versions of the occurrence which would be conflicting with each other. In such cases if A and B prefer complaints against each other, those cases also come under the purview of 'case and counter-case'.

It is now well recognised that cases and counter-cases of the above type should be tried and disposed of by the same Court, trial in one being followed by the other and the judgment in both being pronounced in quick succession. The underlying principle is that since the cases relate to the same occurrence and the witnesses

in one may figure as accused in the other case and they may give conflicting versions, for grasping the real facts and for a proper appreciation of the evidence, it is always desirable that the two cases are tried by the same Court. The case law leading to the above practice has been discussed in detail by Ramaswami J., in Ramakrishnayya v. State : AIR1954 Mad442 . It may not be necessary to go into more details regarding the procedure to be followed in cases where the prosecuting agencies are different in the case and the counter-case as that may not be of much help in resolving the present controversy.

In riot cases where there are factions the police on investigation may find that each of the rival parties overstepped the bounds of law and committed offences of independent nature. In such cases there is nothing wrong in filing separate charge-sheets against each because one would not necessarily be false if the other were true. We are not now concerned with the procedure to be followed in such cases also. In the case and counter-case of the type we are concerned the rival versions put forward may not stand together and it the main case is true, the counter-case would necessarily be false. The question that is posed is whether in such case it is incumbent on the part of the police to see that charge-sheets are filed in both in spite of the fact that as a result of investigation they form the opinion that one of the versions is false.

5. In this connection it has to be borne in mind that there is an essential difference between cases taken cognizance of on the basis of charge-sheets filed by the police after investigation and cases initiated at the instance of, private persons. Section 2(h) of the Criminal P.C. (hereinafter referred to as the Code) defines investigation. The term as defined includes all the proceedings under the Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate on that behalf. Section 4 directs that investigation of offences should be as provided in the Code. Chapter XII of the Code deals with information to the police and their powers to investigate Section 173 provides for a report by the police officer to the Magistrate on completion of the investigation.

Under Section 173(2)(d) the investigating officer should state whether any offence appears to have been committed and if so by whom. The Code thus content' plates that the investigating officer should himself assess the evidence collected by him and form his own opinion, regarding the complicity of particular persons in respect of the offence alleged. Section 169 of the Code empowers the police officer investigating the offence to release the accused when the evidence is deficient while under Section 170, he is to send the accused to the Magistrate when evidence is sufficient, In H.N. Rishbud v. State of Delhi : 1955 CriLJ526 , the Supreme Court had occasion to discuss provisions of the Code dealing with investigation. The following observations are relevant in the present context (Para 5):

Thus, under the Code investigation consists generally of the following steps: (1) Proceeding to the spot, (2) Ascertainment of the facts and circumstances of the case, (3) Discovery and arrest of the suspected offender, (4) Collection of evidence relating to the commission of the offence which may consist of (a) the examination of various persons (including the accused) and the reduction of their statements into writing, if the officer thinks fit, (b) the search of places or seizure of things considered necessary for the investigation and to be produced at the trial, and (5) Formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial and if so taking the necessary steps for the same by the filing of a charge-sheet under Section 173.

The decision proceeded to state-

It is also clear that the final step in the investigation viz., the formation of the opinion as to whether there is a case to place the accused on trial is to be that of the officer in charge of the police station. There is no provision permitting delegation thereof but only a provision entitling superior officers to supervise or participate under Section 551.

In the words of Mack J., in Malla Reddi In re: (1951) 2 Mad LJ 635 : 1954 Cri U 167 the investigating police are primarily the guardians of the liberty of innocent persons, a heavy responsibility devolves on them of seeing that innocent persons are not charged on irresponsible and false implication.

6. On the question whether the Court has power to direct the police to fashion the final report in a particular manner the Supreme Court observed in Abhinandan Jha v. Dinesh Mishra : 1968 CriLJ97 :

Though it may be that a report submitted by the police may have to be dealt with judicially, by a Magistrate, and although the Magistrate may have certain supervisory powers, nevertheless, we are not inclined to agree with the further view that from these considerations alone it can be said that when the police submit a report that no case has been made out for sending up an accused for trial, it is open to the Magistrate to direct the police to file a charge-sheet. But, we may make it clear, that this is not to say that the Magistrate is absolutely powerless, because, as will be Indicated later, it is open to him to take cognizance of an offence and proceed, according to law.

7. The above resume' of authorities makes it clear that if the police after investigation of a case registered on the basis-of the statement given to him by any individual finds that the facts stated therein are false, it is perfectly within his competence to refrain from filing a charge-sheet. This is so irrespective of the fact whether such an opinion is formed by the police in what is generally termed the main case or in the counter-case. Neither the court nor the individual at whose instance the investigation was taken up can challenge that power. As already stated if the individual concerned feels aggrieved is is open to him to prefer a private complaint to see that the same is tried as a counter to the main case.

8. The matter can be viewed from an-.other perspective also. What Section 173(2) of the Code contemplates is a report regarding an offence. When there are rival or conflicting versions of the occurrence and injuries have been caused on both sides the investigating officer can form his own opinion as to which of the parties has committed an offence. Under Section 96 of the Penal Code nothing is an offence which is done in exercise of the right of private defence. It is not incumbent on the officer to file a charge-sheet against a person who caused an injury in exercise of the right of private defence. He may at the same time present a charge-sheet against the rival person. In such cases the remedy of the aggrieved person is to prefer a private complaint and vindicate his position. If such a private complaint is

filed, it will form a counter-case to the charge-sheet filed by the police and may be tried as such.

9. Apart from all that is stated already, there is a still stronger reason for not treating the cases registered by the police on the basis of statements of rival parties as case and counter-case. The cases charge-sheeted by the police are to be prosecuted by the Public Prosecutor. If there are two versions regarding the same incident, one must be necessarily false, and the prosecutor will be forced to plead on behalf of the State that both the inconsistent versions are true. The position is incongruous. It is true that a similar situation will be there. When a case and a counter-case initiated on private complaint are committed to the Sessions and the Public Prosecutor is called upon to prosecute both the cases; but in such cases the Public Prosecutor while prosecuting the counter-case would be putting forward not the State's version of the occurrence but that of the individual who filed the private complaint.

10. The practice of filing charge-sheets by the police based on riyal complaints regarding identical incidents apparently to exhibit a spirit of impartiality has been condemned by Reilly C.J., in the case of Gundi Girivappa (1940) 18 Mys LJ 229:

And how did the police come to put in these two contradictory charges, one of which they must have known in essence false? It has been suggested by the learned Government Advocate that the police officers may have had some idea that they ought to give each side a chance and they ought to be impartial in the matter. That means nothing except that they ought to be impartial between truth and falsehood. If that is the impartiality they exercise) they will destroy their own cases, and incidentally they will destroy their own reputation. The powers of investigation given to the police by the Code of Criminal Procedure are extensive and very responsible. They are given for the purpose of ascertaining the truth, not for dressing up cases with any evidence true or false which happens to be available. If a private person was in the habit of recklessly bringing criminal accusations without caring whether they were false or true, he would be regarded as hopelessly dishonour able, as one with whom no honest man would associate. Do police officers wish to be regarded in that way? This impartiality means nothing

really but that they do not care whether their case is true or false.

The procedure has been the subject to scathing criticism at the hands of Ramaswami J., in Ramakrishnayya v. State : AIR1954 Mad442 , Which has been referred to in Achuthan V. Bappu, 1961 Ker LT 412. Incidentally we may state that the counter-case in Achuthan v. Bappu 1961 Ker LT 412, was one filed by the accused petitioner and not by the police and therefore there is no conflict between that decision and the decision in Thami v. Stata of Kerala 1965 Ker LT 697, wherein the reference is to the omission of the policfi to file a charge-sheet in the counter-case.

11. It is pertinent to note that in Thami v. State of Kerala 1965 Ker LT 697, the appeal was actually disposed of on the evidence on record and not on the ground that there was failure on the part of the police to file a charge-sheet in the case registered on the basis of the statement of the accused. The Court found that it was not safe to act upon the uncorroborated oral testimony of PWs. 1 and 2. There was only a passing observation that 'the Circle Inspector need not have usurped the functions of the Court' and that 'both the case and the counter-case could well have been sent up to the Court leaving the court to take a proper decision'. It is basing on this casual observation that the police at times file charge-sheets in both the case and the counter-case without forming an independent opinion as to which is true and which is false.

12. In the light of the discussion we hold that if in respect of a transaction relating to an offence a case and a counter-case happen to be registered by the police, based on conflicting versions given by rival persons, it is not incumbent on the part of the investigating officer to file separate charge-sheets in both the cases. The investigating officer is expected to file a charge-sheet only in the case where, it appears to him as a result of investigation that an offence has been committed. The observation to the contrary contained in Thami v. State of Kerala 1965 Ker LT 697, is not legally sustainable and will therefore stand overruled.

In view of the above conclusion, the appeals are sent back to the Division Bench for disposal on the merits. Post the case for hearing on 24-3-82.

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