**Arunkumar Vs. State of Kerala**

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**SooperKanoon Citation** : sooperkanoon.com/724115

**Court** : Kerala

**Decided On :** Jan-16-2004

**Reported in** : 2004(2)KLT1039

**Judge** : K.A. Abdul Gafoor and; J.M. James, JJ.

**Acts** : Code of Criminal Procedure (CrPC) , 1973 - Sections 239, 245 and 482

**Appeal No.** : Crl. M.C. Nos. 9018, 10960 of 2002 and 4064 and 4212 of 2003

**Appellant** : Arunkumar

**Respondent** : State of Kerala

**Advocate for Def.** : T.K. Kunhabdulla, Public Prosecutor

**Advocate for Pet/Ap.** : P. Shaijan Joseph and; V.M. Sajan, Advs.

**Judgement** :
ORDER

**K.A. Abdul Gafoor, J.**

1. A learned Judge of this Court has referred these petitions for consideration by a Division Bench. The question referred is as follows:

If, in a criminal case, there are more than one accused and if only a few of them faces trial, the other being absconding, and in case the trial ends in acquittal of the

accused, can the absconding accused invoke the jurisdiction under Section 482 Cr.P.C. to quash the charges against them.

2. At the outset, we will make it clear that no straight jacket formula can be applied in such a situation. It will depend upon the relevance of the witnesses examined; the overt act complained of; what the witnesses, who had not been examined during the trial of the acquitted accused, would have to say going by the case records, if examined during the trial of the absconding accused; and several other relevant factors. Therefore, each of the cases will have to be examined based on its own facts and circumstances.

3. There may be a case where, during the trial of the accused, who appeared before the Court, the Court may find that the incident alleged by the prosecution may not have happened in the manner as stated by the prosecution, or there had been vitiating factors with reference to the First Information Report as regards its embellishment or inordinate delay, etc. In such circumstances, perhaps, those aspects can be made applicable to all the accused, irrespective of whether they faced trial or not. But, at the same time, when collective overt act is spoken to by a few of the witnesses and the witnesses examined could not identify the accused, and therefore, they were declared hostile, it cannot be contended that they or other witnesses, who were not examined, but can be examined when absconding accused faces trial, would not identify the absconding accused. Therefore, in such a situation, merely because of a few of the witnesses were declared to have turned hostile to the prosecution on the ground that they could not identify the tried accused, it cannot be stated that the evidence of those witnesses shall be applied to the case of the remaining accused persons as well, to quash the charges against them.

4. There may be another situation of each of the several witnesses speaking about separate independent overt acts of each of the accused persons. In such circumstances, when a few of the accused faced trial, while the others absconded, the Public Prosecutor cannot examine those witnesses, who may speak about the overt acts committed by the absconding accused. When the absconding accused is brought to trial, it will be possible for the prosecutor to examine such witnesses

to bring the guilt home on them. In such circumstances, merely because the witnesses examined, who were to speak about the incriminating circumstances against the accused, who faced trial, had become hostile, the absconding accused cannot contend that the evidence of those witnesses shall be applied to their case as well to quash the charges against them. Circumstances and eventualities, to be examined, are manifold.

5. On reading the decision reported in Joy v. State of Kerala (2002 (3) KLT 425) it can easily be seen that the conclusion arrived at there was based on the peculiar fact frame of that case and the principle contained therein is not of universal application. Equally so is the dictum contained in the decision reported in Shafi v. State of Kerala (2003 (2) KLT 920). There also, the fact situation demanded a different conclusion. Thus, it is clear that the learned Judges in the respective cases were examining the fact situation of that case. Therefore, it is upto the Judge who hears the petition under Section 482 Cr.P.C., to examine the fact situation of each case, with reference to the overt acts attributed and such other relevant factors and to come to a conclusion whether the discretion vested in this Court under Section 482 Cr.P.C. has to be exercised or not. It is also possible to consider whether the accused, who had not faced trial, can seek the remedy available under Section 239 Cr.P.C. for an order of discharge.

6. It is contended that such a remedy cannot be available, because the Court which should consider the question of discharge under Section 239 Cr.P.C. will be obliged to consider the records produced by the police under Section 173 Cr.P.C. alone and the evidence and Judgment, which formed part of the records subsequent to the framing of charge against the accused, who faced trial, cannot be looked into. We are unable to subscribe to that view, because, while considering discharge under Section 239 Cr.P.C., apart from considering the police report and the documents sent to the Court under Section 173 Cr.P.C., the Court can make such examination, if any, of the accused as it thinks necessary, and has to give the prosecution and the accused an opportunity of being heard. Therefore, if such an examination is made, the accused can speak about the subsequent events, including the deposition of the witnesses and the judgment in respect of the accused persons, who faced trial. A hearing by a Court means

hearing the oral arguments/submissions made by the incumbent to persuade the Court to grant him the relief sought for. During the hearing, naturally, he can refer to certain basic and relevant documents. Appreciation of oral argument, in such circumstances, shall include consideration of the documents referred to for its consideration. Necessarily, in such a situation, as the accused will refer to the deposition of witnesses who had been examined and the findings of the Court when the other accused faced trial, any Court hearing such arguments will, necessarily, have to consider the points so urged, as well as the supporting documents. Thus, consideration by the Court does not confine to the documents sent with the police report under Section 173 Cr.P.C. alone.

7. In cases taken cognizance otherwise than on the basis of police report, the Court can also examine the possibility of the accused approaching the trial Court itself under Section 245 Cr.P.C. as well.

8. In the light of the above, we will not be justified in giving a straight jacket formula to deal with cases like the ones on hand. We again make it clear that the question has to be considered depending upon the fact situation of each case, including the overt act alleged against the accused concerned; witnesses who have been dropped; what the witnesses already examined had stated; whether the witnesses already examined have identified the accused, etc.

9. On the basis of the aforesaid principles, we will now examine each of the cases on hand separately.

Crl.M.C.No. 9018/2002

There were two accused in the case. The second accused alone faced trial. Accused No. 1 was absconding. He has now come up with this petition to quash the charges against him. There were eight witnesses cited by the police according to Counsel; but only two were examined. CW.1, the injured in the case, was no more at the time of trial. The allegation, as is discernible from the Judgment, Annexure A, is that 'accused trespassed to his bedroom and A1 caught his neck and kicked on his belly'. This is the major overt act alleged in the case and that is alleged against the petitioner himself.

As is revealed from Annexure A judgment, PWs.1 and 2 are the two independent witnesses to speak about the overt act of the accused, who faced trial. Merely because they turned hostile, as, according to them, they had not seen the incident, it cannot be taken that when the other witnesses are examined, if the petitioner faces trial, they will have nothing incriminating against him to speak about. Therefore, this is a case where the inherent jurisdiction of this Court cannot be invoked to quash the charges against the petitioner. However, we make it clear that the right of the petitioner to seek discharge under Section 239 Cr.P.C. is not taken away by reason of this order. If the petitioner appears before the Court below and files an application for bail, the Magistrate shall consider the same and pass appropriate orders, in accordance with law, expeditiously.

Crl.M.C.9919/2003

There were altogether 25 accused in this case. All, except the 12th accused, the petitioner herein, faced trial and all of them were acquitted as per Annexure G judgment. That judgment discloses that PW.1, the de facto complainant, had deposed that 'he did not know who were the miscreants'. This included not only the accused, who faced trial, but also the absconding accused, the petitioner herein, as well. In such circumstances, even though he can plead for a discharge under Section 239 Cr.P.C., taking into account the pendency of this case and its reference to Division Bench, we feel that nothing more fruitful will come out if the petitioner is also made to stand trial. Taking into account that situation, we feel that there is no reason to continue the trial of the petitioner/accused separately. Hence, the charge against him in C.C. 1182/2000 on the file of the Judicial First Class Magistrate Court-I, Kozhikode, will stand quashed.

Crl.M.C.10960/2002

There were altogether six accused. Five of them faced trial. The 2nd accused absconded. He has come up with this petition to quash the case against him, on the ground that the other accused persons have been acquitted as per Annexure A2 judgment.

Annexure A1 is the charge-sheet in this case. It discloses that when CWs.1 and 4 tried to stop accused Nos. 1 and 3 throwing away the granite boulders from the lorry, accused Nos. 2 to 6 fisted and beat CWs.1, 4 and 6. Thus, overt act against the petitioner, the 2nd accused, has been spoken to by CWs. 1, 4 and 6. Admittedly, CW.6 has never been examined in this case. We do not know what he will speak when examined, in case the petitioner faces trial. Therefore, the fact situation of this case does not warrant quashing of the charge against the petitioner. If the petitioner appears before the Court below and files an application for bail, the Magistrate shall consider the same and pass appropriate orders, in accordance with law, expeditiously.

Crl.M.C.4064/2003

In this case also, there were six accused. Three of them faced trial. Accused Nos. 2, 4, and 5 did not face trial, as they were absconding. This petition is only by the 4th accused. Annexure A1 judgment shows that PW. 1, the injured and informant, has turned hostile to the prosecution, as he deposed, as is discernible from the said Judgment, that he is having no idea about the persons who committed the crime. This applies not only to the accused, who faced trial, but all the accused including the petitioner herein, viz., the 4th accused. Consequently, though the petitioner could have sought for discharge under Section 239 Cr.P.C., in view of the pendency of this case and its reference to the Division Bench, and considering the arguments advanced by Counsel for the petitioner, we are of the view that the charge against the petitioner can be quashed, as no purpose will be served if the petitioner faces trial in the light of the deposition already on record from the injured informant. We, accordingly, quashes the charges against the petitioner herein, accused in C.C. No. 540/2001 on the file of the Judicial First Class Magistrate Court-II, Hosdurg.

Crl.M.C.No. 4212 of 2003

There were six accused in the case when it reached the Court below. Three faced trial. This petition is by the 5th accused. The case was with reference to the pelting of stones on a bus belonging to the Kerala State Road Transport Corporation. The driver, conductor and a passenger of the bus were examined. All of them deposed

that they did not know who pelted the stones. Naturally, this should apply not only to the accused, who faced trial, but all the accused in the case, including the petitioner herein. Nothing fruitful will come out, if the petitioner is made to face trial. Even though the petitioner could have sought for discharge under Section 239 Cr.P.C., taking into consideration the pendency of this case and its reference to the Division Bench, and also in view of the arguments advanced before us, we are of the view that the case against the petitioner shall be quashed. Accordingly, the charges against the petitioner herein, accused in C.C. 1743 of 2000 on the file of the Judicial First Class Magistrate Court-I, Aluva, will stand quashed.