

Chellappan and ors. Vs. State of Kerala

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Court : Kerala

Decided On : Jan-06-1971

Reported in : 1971CriLJ1021

Judge : T.C. Raghavan and; E.K. Moidu, JJ.

Appellant : Chellappan and ors.

Respondent : State of Kerala

Judgement :

T.C. Raghavan, J.

1. In these cases, we are constrained to order a retrial because of an error committed by the Additional Sessions Judge.

2. There were fourteen accused persons before the lower court, of whom nine have been acquitted. The other five accused persons, accused persons 1 to 5, have been convicted, the second accused of murder Under Section 302, accused persons 1, 3 and 5 Under Section 323 and the fourth accused Under Section 325 of the Penal Code. The second accused has been sentenced to the extreme penalty of the law; accused persons 1, 3 and 5 have been sentenced to rigorous imprisonment for 6 months each; and the fourth accused has been sentenced to rigorous imprisonment for 4 years.

3. The trial before the Sessions Judge opened on 3rd August 1970, his schedule for the trial being to examine P. Ws. 1 to 4 on. 3rd August, P. Ws. 5 to 7 and 9 to 11 on the 4th, P. Ws. 8 and 12 to 18 on the 5th and P. Ws. 19 and 20 on the 6th and to hear the defence and the arguments on the 7th. Accused persons 1, 3 and 6 to 14 engaged a counsel; but accused persons 2, 4 and 5 did not engage counsel, and they prayed for an adjournment. The Sessions Judge rejected the prayer and appointed a counsel for them and commenced the trial straightway. It appears that on the 3rd P.W. 1 was examined and three exhibits and a material object were also marked. The reason given by the Sessions Judge for refusing adjournment, as it appears from the B diary, is that, if the adjournment was granted, the Sessions Case would go off to January 1971, which would be more than a year after the date of the incident.

4. this Court had occasion to point out in *Thankappan v. State of Kerala* (Criminal Appeal No. 324 of 1970 (Ker)) that Sessions Judges should not commence the trial immediately on appointing a counsel for the accused without giving the counsel time to prepare the case, to consult the accused, if necessary, etc. this Court also pointed out Rules 21 and 22 of the Travancore-Cochin Criminal Rules of Practice and Rule 9 of the Kerala Legal Aid (to the Poor) Rules, 1958. Rule 21 says that a Court of Session shall appoint a pleader to defend an accused person if the charge against him is such that a capital sentence is possible and it appears that the accused has not engaged a pleader and is not possessed of sufficient means to do so. Rule 22 says that the pleader so appointed shall be furnished with the necessary papers and be allowed sufficient time to prepare the case. Rule 9 of the Legal Aid Rules provides that the Sessions Judge must appoint a counsel of the choice of the accused, etc.

5. Appointing a counsel, especially in a case involving a charge for a serious offence like murder, should not be treated as a farce should not be treated as a formal affair or a matter of course. Justice should not only be done, but should appear to be done too. A counsel appointed just before the opening of the trial without getting any opportunity to look into the papers, study the brief or consult the accused, can do no substantial help in the trial. It was the duty of the Sessions Judge to have seen that the counsel appointed was given reasonable opportunity

to prepare the case. The reason given by the Sessions Judge in the B diary shows a thorough lack of imagination, because the case has been posted for trial from day to day from 3rd August to 7th August. The Sessions Judge could have just put off the commencement of the trial by 24 hours, to the next day, so that the counsel appointed could have got some time to prepare the brief and consult the accused persons, who were already present in court: the adjournment need not necessarily have been to January 1971. If only the Sessions Judge did that, we would have been spared the necessity of ordering a retrial at this stage.

6. As we have already indicated, of the five persons convicted, three were accused persons for whom a counsel was appointed only on that day just before the commencement of the trial. One of those now stands convicted for murder and sentenced to the extreme penalty of the law. If the conviction and sentence are confirmed, in the circumstances mentioned above, it will shock the judicial mind and it will not also appear, at any rate, that justice is done to the accused.

7. Then comes the question of the scope of the retrial: whether we should order retrial of the entire case against all the fourteen accused persons or should confine the retrial to the five accused persons before us and that also to the offences for which they have been convicted and against which they have appealed. We have power Under Section 439 of the Code of Criminal Procedure to issue notice to the nine accused persons acquitted completely and also to the four accused persons acquitted of murder to show cause why their acquittal should not be set aside: we can also order retrial of all of them for murder after notice to them. And unless we issue notice Under Section 439 and exercise our suo motu powers contained therein, we have no power to order retrial in appeals filed by the accused persons for offences of which they have been acquitted: in other words, we can order retrial only for offences of which the accused persons have been convicted. In the circumstances of these cases in view of the fact that the State has not filed any appeal against the acquittal of nine accused persons fully and against the acquittal of four accused persons of murder, we do not think that the interests of justice demand that we should issue notice Under Section 439 of the Code of Criminal Procedure. We feel that it is enough if we order retrial of the five accused persons before us for the offences for which they have been convicted and sentenced.

8. We, therefore, set aside the convictions and sentences passed by the Sessions Judge on the five accused persons before us and direct the Sessions Judge to have a retrial of the case the second accused for murder, accused persons 1, 3 and 5 for an offence Under Section 323 and the fourth accused for an offence Under Section 325 of the Penal Code. We direct that the retrial is taken up with all expedition.

9. Before we close, we wish to add a word about the Public Prosecutor too. The Public Prosecutor is not merely a counsel of the Government: he is an officer of court. And it was his duty too to have guided the Sessions Judge and pointed out to him the relevant rules of the Criminal Rules of Practice. We also add that the Sessions Judge should have looked into such matters sufficiently early and have appointed counsel for the accused persons well in advance before the trial commenced. There is no meaning in his saying that at the commencement of the trial he found that some of the accused persons did not engage counsel.

The records will be sent down forthwith.

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