

Babu Vs. State of Kerala

Babu Vs. State of Kerala

SooperKanoon Citation : sooperkanoon.com/724975

Court : Kerala

Decided On : Jan-04-1984

Reported in : 1984CriLJ499

Judge : K.K. Narendran and; M. Fathima Beevi, JJ.

Appellant : Babu

Respondent : State of Kerala

Judgement :

ORDER

1. A learned Judge of this Court before whom this criminal revision petition came up for hearing referred the same to a Bench to consider the question whether the grant of permission under Section 302 of the Code of Criminal Procedure, 1973 for the conduct of prosecution by any person other than an Inspector of Police is to be confined to cases other than those instituted on Police report and that the Court has no power to consider an application under Section 302 in a case instituted on Police report. Two cases were registered by the Valapad Police with regard to an incident which took place on the side of a river in Engandiyoor on 28-3-1980 in which the petitioner and another on his side sustained serious injuries while two others of the opposite party sustained serious injuries and succumbed to those injuries. On his complaint, Crime No. 73 of 1980 was registered by the Police while Crime No. 71 of 1980 was registered against the petitioner and some others with respect to the injuries sustained by the opposite party. Both cases were investigated

by the Police. In Crime No. 71 of 1980 the petitioners and others were charge-sheeted. The case came up before the Court of Session and the petitioners and two others were convicted under Section 302 and sentenced to undergo imprisonment for life. The petitioner is undergoing imprisonment and the criminal appeal that has been filed against the conviction is pending before this Court. C. C. 277 of 1980 the case which has been charged by the Police after investigation of Crime No. 73 of 1980 is still pending before the Judicial Magistrate of the First Class. Kunnamkulam. The same was not transferred to the Court of Session for trial along with S. C. No. 53 of 1980. the case in which the petitioner and two others were convicted as one accused. and the criminal revision filed before this Court for the same was not pressed as one respondent therein could not be served for a long time. After the disposal of S. C No. 53 of 1980. when C. C. 277 of 1980 was taken up for trial. the petitioner who is none other than the first informant in that case filed a Criminal M. P. No. 880 of 1983 for permission under Section 302 of the Code of Criminal Procedure to engage an advocate to conduct the prosecution. But the Magistrate dismissed the same. It is the above order that has been challenged by the petitioner in this criminal revision.

2. The learned Counsel for the petitioner contended that the petitioner who was the first informant in that case, is very much interested in the prosecution and a conviction in the case will benefit the petitioner and others in the criminal appeal that is pending against the conviction and sentence passed by the Court of Session in the counter-case. The learned Counsel also pointed out that in view of the fact that a conviction in this case will adversely affect the prosecution in the pending criminal appeal the prosecution will only be lethargic in their attitude in conducting the prosecution in this case. According to the learned Counsel. Section 302 of the Code is to be invoked in' cases of this nature and the rejection of the petitioner's application by the learned Magistrate has resulted in the denial of a fair trial to the petitioner. The learned Public Prosecutor contended that permission under Section 302 of the Code can be granted only in very exceptional cases and this is not such a case. According to the learned Public Prosecutor, the petitioner could have invoked Section 301 of the Code for permission of a Pleader of his choice to assist the Public Prosecutor in the conduct of the prosecution.

3. In *Varkey Joseph v. State* 1950 Ker LT 436 a Division Bench of the T-C High Court has held:

In cases charge-sheeted by the Police or other authorised agent of the Government, the complainant is the State and not the private individual at whose instance the case was taken up. In such cases the Public Prosecutor alone is entitled to conduct the prosecution though it is open to him to take instructions from the complainant or his counsel whenever needed.... When there is an officer entitled to conduct the prosecution it is not open to the Magistrate to give permission to some other person to conduct the prosecution. either instead of or along with him without his consent.

In the above decision, reference was made to *Kartikram v Emperor* AIR 1937 Nag 123 : 38 Cri LJ 433 wherein the court has held:

The interests of the Crown and the complainant are not always the same. Private parties often wish to serve their own private ends and criminal proceedings are not primarily designed for that. It would be unfortunate to allow private passions and prejudices to creep into the conduct of a criminal trial when it can be avoided. It would be even more undesirable to leave the matter into two sets of hands with a possible conflict of interest....

In *Yohannan v. Oommen* (1937) 27 Trav LJ 713 the challenge was against the order of the Magistrate declining to entrust the conduct of the prosecution to the private complainant on a Police charge, and the Division Bench of the T-C High Court held:

In cases of this nature the complainant is really the State and not the private individual and the person who is lawfully entitled to conduct the prosecution is the public prosecutor. The private complainant may instruct the public prosecutor but cannot replace him as a matter of right. It is open to the court, however, in appropriate cases to allow a vakil engaged by the private complainant to conduct the prosecution: but this is essentially a matter of discretion with the Magistrate and this Court will not interfere in revision with the exercise of such discretion except under extraordinary circumstances.

In *Subash Chandran v. State of Kerala* 1981 Ker LT (SN) Case No. 125 a learned Judge of this Court held:

Whether permission should be granted or not is a matter left to the discretion of the Court, the discretion being used in a judicial manner. It is true that the petitioner as the son of the deceased and as a person who has a right to make out that there was rashness and negligence on the part of the accused and claim damages from him may be interested in the prosecution. But that fact is not by itself a ground for permitting him to conduct the prosecution in the place of the Assistant Public Prosecutor who is in charge of the case. It is settled law that where a cognisable offence is committed and a prosecution is launched by the State it is for the Public Prosecutor to attend to the prosecution. The object of a criminal prosecution is not to vindicate the grievances of a private person.

4. Under Section 301, a Pleader engaged by a private person can assist the Public Prosecutor or the Assistant Public Prosecutor as the case may be in the conduct of the prosecution while under Section 302 the Magistrate may permit the prosecution itself to be conducted by any person or by a pleader instructed by him. The distinction is when permission under Section 302 is given the Public Prosecutor or the Assistant Public Prosecutor as the case may be disappears from the scene and the pleader engaged by the person who will invariably be the de facto complainant will be in full charge of the prosecution. The question is even if the Magistrate has got the discretion to grant the permission is it to be granted as a matter of course? There is an ocean of difference between assisting the Public Prosecutor under Section 301 and conducting the prosecution on the basis of a permission granted under Section 302. Public Prosecutors are really ministers of justice whose job is none other than assisting the State in the administration of justice. They are not representatives of any party. Their job is to assist the court by placing before the court all relevant aspects of the case. They are not there to see the innocents go to the gallows. They are also not there to see the culprits escape a conviction. But the Pleader engaged by a private person who is a de facto complainant cannot be (expected to be so impartial. Not only that it will be his endeavour to get a conviction even if a conviction may not be possible. So the real assistance that a Public Prosecutor is expected to render will not be there if a

pleader engaged by a private person is allowed to take the role of a public prosecutor by granting permission under Section 302 of the Code. This does not mean that permission cannot at all be granted under Section 302. Under very exceptional circumstances permission can be granted under Section 302. Otherwise, there is no reason why the provision is there in the Code. But that is to be done only in cases where the circumstances are such that a denial of permission under Section 302 will stand in the way of meeting out, justice in the case. A mere apprehension of a party that the Public Prosecutor will not be serious in conducting the prosecution simply because a conviction or an acquittal in the case will affect another case pending will not by itself be enough. At the same time, if the apprehension of the party is going to materialise the court can pending the trial, grant permission under Section 302 even if a request for permission was rejected at the outset.

5. The Sessions case which ended in the conviction of the petitioner and his co-accused was conducted by the Public Prosecutor who appeared before the Court of Session. The prosecution in the counter-case which is now pending before the Magistrate is to be conducted invariably by an Assistant Public Prosecutor who cannot be the same person. There is no reason why this Court should Jump to the conclusion that the Assistant Public Prosecutor will be failing in his duty in assisting the court to meet out Justice. Not only that when once a case is over the prosecutor is thereafter unconcerned about the appeal or revision that will be pending in a higher court.

For the reasons stated above the criminal revision is dismissed.

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