

Ayyappankutty Vs. the State

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Court : Kerala

Decided On : Jan-10-1986

Reported in : 1987CriLJ1593

Judge : S. Padmanabhan, J.

Appellant : Ayyappankutty

Respondent : The State

Judgement :

ORDER

S. Padmanabhan, J.

1. The petitioner is prisoner No.,4952 undergoing imprisonment in the Central Prison, Cannanore. He requests that the police and other State authorities may be restrained from publishing his photographs in public places. According to him, this action is illegal and violative of his fundamental rights. In view of his expectation of immediate release from jail, he feels that the publication of his photographs will adversely affect his future life.

2. On behalf of the State, I had the advantage of hearing able arguments on questions of fact and law from the Director of Public Prosecutions. The Law Society of India represented by advocates M/s. K.A. Abdul Salam, M.P. Krishnan Nair and C.A. Sebastian entered appearance and Mr. Abdul Salam ably assisted

me by presenting the legal and factual aspects which involve public importance.

3. The petitioner is convicted in three cases, namely, C.C. 110/84 on the file of the Judicial First Class Magistrate, Hosdurg, S.C. 23/84 on the file of the Asst. Sessions Judge, manjeri and C.C. 264/84 before the Judicial First Class Magistrate, Talipramaba. In the first case, he was convicted for offences punishable under Sections 457,461 and 380 of the Indian Penal Code and sentenced to rigorous imprisonment for three years, while in the second, he was sentenced to undergo rigorous imprisonment for eight years, for the offence under Section 395 of the Indian Penal Code, and in the third, he was sentenced to undergo rigorous imprisonment for one year each for the offences under Sections 380,457 and 461 of the Indian Penal Code. He is said to be involved in other cases also. Crime No. 134/83 of the K.R. Nagar Police station, Karnataka has been registered against him under Section 395 of the Indian Penal Code in respect of a motor vehicle MYH 8968. He is said to be involved in three other major burglary cases, Crime No. 119/83 of the Sreekantapuram Police Station and two other cases.

4. Photographs of certain persons were circulated among taxi drivers in the context of a large number of crimes against taxi drivers including murder. One Panakkal Chandran is said to be a close associate of the petitioner. A similar petition has been filed by him in M.C. 41/85 of this Court against publishing his photographs. After obtaining an interim order on the basis of which his photos were withdrawn. It was pointed out by the Director of Public Prosecutions that subsequently he fled justice and thereafter two identical crimes involving murders of taxi drivers were reported. In the three southern States of Karnataka, Kerala and Tamil Nadu, according to the Director of Public Prosecutions, similar offences have become very frequent. To refer. to a few, in Crime No. 16/81 Car No. PYP 6959 was stolen from Ernakulam and its driver Babu was murdered. Car KLA 5125 was hired by three youngsters and the driver Kunhappu was murdered. Similarly Car MED 5578 was stolen, and the driver P. Subramoniam was murdered. Again Car KLQ 8939 was stolen, and the body of the driver was found at Poonjar. Car KLM 38 was stolen and the dead body of the driver Balan was found at Parappanangadi. Again Car KLE 5174 was stolen and the driver

Sukumaran was murdered. Likewise Car KLQ 7840 was stolen and driver Muhammed was murdered. The same fate happened to Varghese when the Car KLA 3203 was driven by him. One Thankappan who was the driver of KLV 2949 was murdered after theft of the car. It is said that a large gang of inter-State criminals is involved in such cases and all of them belong to the age group between 23 and 35. It is the further case of the State that stolen cars were being used for committing further offences including idol thefts, bank robbery, timber smuggling etc. The present petitioner, Panakkal Chandran alias Mathew and one Miranda are said to be reasonably suspected as members of this gang. C.C. 110/84 in which the petitioner is convicted is a case of burglary in which a stolen car was used. Panakkal Chandran is also said to be involved in that crime.

5. It is in this background that the police decided to circulate the photographs through the possible group victims at different places with a view to alert them and save their lives. Circulation is said to be through the association of taxi drivers. The counsel on behalf of the Law Society of India put the State to proof of the involvement of the petitioner in the above-said cases as a condition precedent to justifying the alleged preventive action. But it has to be noted that the petitioner is not being tried for any offence. In this proceedings we are only concerned with the question whether the preventive action of the State through the police machinery is justified or not. The fact that there are at least three convictions against the petitioner is evident from the submissions of the Director of Public Prosecutions and the letter received from the Superintendent Central Prison. In this proceeding, we are not deciding the correctness of the disputed questions of fact. As earlier stated by me, the subsistence of three convictions against the petitioner is not disputed. The other cases are only pending investigation. In this proceedings the State cannot be asked to place concrete evidence substantiating the involvement of the petitioner as a condition precedent to justification of the preventive action. For the present purpose, this Court will have to accept the reasonable suspicion entertained against the petitioner regarding his involvement. Arguments will have to be appreciated in this background.

6. What is involved is a conflict between State interest and liberty of the citizen. Liberty of individual is no more than what law gives him and it is also subject to

reasonable restrictions on grounds of public interest, morality, decency etc. as provided in the Constitution. Police Officers are entitled to enforce reasonable restrictions on those rights no less than to which honest law enforcement and preventive measures demand. The delicate and difficult task of the Courts is to balance the conflicting interests. There must be reasonable restrictions in the exercise of executive powers also. In given cases executive powers could extend even to total prohibition of the rights of the individuals. In order to persuade this Court to prevent publication of the photographs, the petitioner will have to show that any of his fundamental rights or any other common law rights have been violated or that there was abuse of power in resorting to the preventive measures. It is the responsibility of every civilised government to establish and ordain a peaceful society free from transgression of law. Powers of the police and the extent of police functioning require a lot of executive decisions. It will be necessary to appreciate the powers of the State and the police to take preventive measures. Apart from the specific statutory provisions, it is the basic duty of the police to prevent crimes. Not only bringing offenders to justice, but also prevention are basic police functions. This position has been put beyond doubt by judicial pronouncements.

In (1936) 1-KB 218 it was observed that

it does not require authority to say that it is the duty of the police to prevent crime.

Similarly in *R. M. Malkani v. State of Maharashtra* : 1973 CriLJ228 the Supreme Court of India categorically stated that 'the police have a duty to prevent commission of crimes'. In the well-known decision in *Govind v. State of M.P.* : 1975 CriLJ1111 it was held that it is basic function of the police to prevent crimes. This principle has been laid down in various judicial pronouncements. The theory of sovereignty of State, whether the Lockian theory or Hobbes or Austin, is that an orderly society is the basic attribute of good government. Without law and order, the liberties of citizens cannot be meaningful. Therefore it is evident that prevention of crimes is basic to the police power of the State. It may not be possible for the legislature to lay down all the circumstances under which such power is to be exercised or to provide absolute guidelines in all possible cases. As

observed by Cressy and Sutherland in Criminology at page 390 'if police brought all suspects to the Courts, the Courts will have no time for their work; police discretion will always be with us'. Those who commit crimes cannot seek shelter under law to prevent effective policing. In (1948) 338 US 25, Wolf v. Colorado, the position has been summed up; 'it gives the individual no more than what the law gives to him; and the police officer no less than to which honest law

7. Now we shall examine the statutory provisions which enable the police to publish photographs of persons who are considered dangerous. Under Section 149 of the Criminal P.C., it is the duty of every police officer to interpose for the purpose of preventing and actually prevent the commission of any cognizable offence. Section 151 of the Code makes it the duty of every police officer knowing of a design to commit any cognizable offence to arrest the person so designing without warrant and without orders from a Magistrate, if commission of the offence cannot otherwise be prevented. These are instances of curtailment of valuable fundamental right in the interest of public order. Similarly Section 29(b) of the Kerala Police Act empowers the police officers to take all reasonable measures for prevention of crimes. It rather makes their duty also. This is intended to protect the society against criminal enterprises coming from various sources. Effective discharge of that duty will have to be enforced in order to safeguard a peaceful society.

Section 3 of the Identification of Prisoners Act authorises measurements and photographs of convicted persons or persons ordered to give security being taken. Section 4 authorises the same even in the case of certain non-convicted persons. Section 5 authorises magistrates to order measurements and photographs being taken even during investigation. Though the Act does not specify the reasons and objects of taking such measurements or photographs of convicts, habitual offenders or suspects, evidently it is not for mere preservation. It must evidently be for being used, for some permissible purposes. There are other provisions of law like the Habitual Offenders Act and the Indian Police Act etc. to which detailed reference is not necessary because even the provisions mentioned by me earlier will be sufficient to justify the exercise of the power challenged in this case. Within the framework of law, well-known methods of crime prevention include data

collection, intelligence, preventive arrest, surveillance and even computerisation.

8. Now we will have to consider whether any of the fundamental rights or other common law rights of the petitioner is likely to be infringed by the publication of photographs in public places and if so whether it will come within the reasonable restriction clause or State interest theory. In this case what the State wants to do is only to give warning to the possible group victims against the dangers that they are likely to suffer at the hands of the petitioner if they are not careful. That only what honest law enforcement demands and what is necessary in the interest of the society. Police reasonably suspects that the petitioner and his gang are habitually engaged in using force and even murdering taxi drivers for committing theft of taxi cars. By publishing the photographs the police wants to alert the taxi drivers that here is a man with whom they will have to be careful. The question is whether such publication affects his rights and if so whether it will outweigh the public interest that is sought to be achieved. It cannot be said that any right of the petitioner has been violated, because there is no right against photography nor the rights under Articles 19, 20 or 21 of the Constitution infringed. The case of the petitioner has no foundation, whatever, in law, to enjoy an immunity of the kind claimed. I was told by the Director of Public Prosecutions about the instance of the photograph of a maniac killer by name Raman Raghavan who was suspected to have murdered about 20 or 21 persons, being published for general information without being frowned. It is well established that even a fundamental right can be subject to restrictions in public interest.

9. The first question that was focussed for consideration was whether the publication Of the photographs will offend Article 20(3) of the Constitution, which says that no person accused of any offence shall be compelled to be a witness against himself. Giving thumb impressions or impressions of foot or palm or fingers or specimen handwritings or showing parts of the body by way of identification are not included in the expression 'to be a witness'. That expression means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in Court or otherwise. Photography or exposure of any God given feature of a man's physiognomy will not be violative of Article 20(3). An element ,of compulsion or communication is required to make it

self-incriminative and thereby testimonial compulsion. 'To be a witness' in its grammatical sense means giving oral testimony in Court. But by decided cases the expression now bear a wider meaning, namely, bearing testimony in Court or out of Court by a person accused of an offence, orally or in writing. Further the person must have stood in the character of an accused person at the time he made the statement. It is not enough that he became an accused at any time after the statement had been made. These positions of law were declared by a Full Court judgment of the Supreme Court in *State of Bombay v. Kathi Kalu* : 1961 CriLJ856 . That decision held that photography, finger printing and taking specimen handwritings are not against law. A man is competent to prove his own crime. The restriction is only that he cannot be compelled to do so. Truth is not endangered where compulsion is for exhibition of body or of any identifying marks on it for the purpose of comparison. *Pakhar Singh v. The State* AIR 1958 Punj 294 : 1958 Cri LJ 1084 is also authority for the position that photography is justified. Therefore there is no point in contending that the publishing of the photographs will infringe the rights conferred under Article 20(3) of the Constitution.

10. The other fundamental rights canvassed before me are those under Articles 19(3) and 21 of the Constitution. Under Article 19(1) the rights include freedom of speech and expression, right to assemble peaceably and without arms, to form associations or unions, to move freely throughout the territory of India, to reside and settle in any part of the territory of India, to practice any profession etc. These are subject to reasonable restrictions in the interests of the sovereignty and integrity of India, security of the State, decency morality etc. Article 21 provides for a prohibition against deprivation of life or personal liberty except according to procedure established by law. In dealing with a fundamental right such as the right to free movement or personal liberty, that only can constitute an infringement which is both direct as well as tangible. Under the cover of such freedoms the Constitution makers would never have intended to protect mere personal sensitiveness. 'It is true that the term 'personal liberty' is used in Article 21 as a compendious, term which include the varieties of rights that go to make up personal liberties of man other than those covered by the several Clauses of Article 19(1). Article 19(1) covers particular species or attributes of that freedom whereas Article 21 takes in and comprises the residue. The Preamble of the

Constitution shows that it is designated to assume the dignity of the individual and therefore all those cherished human values as the means of ensuring his full development and evolution. Those rights may include the right to live with dignity and reputation. Even a convict undergoing imprisonment is not denuded of his fundamental rights except those that cannot be availed of as a result of incarceration. We are not concerned with those aspects in this case. What we are concerned with is only whether the publication of the photographs with the warning will in any way infringe the fundamental rights or other common law rights and whether the reasonable restriction clause or State interest theory will be transgressed.

11. Article 21 contemplates the procedure established by law for deprivation of life or personal liberty. In *R. M. Malkani's case* : 1973 CriLJ228 the question was whether the tapping of a telephone conversation of a citizen will amount to interference with his fundamental rights. The Supreme Court held that the telephone conversation of an innocent citizen will be protected by Courts against wrongful or high-handed interference. But such a protection was held not available to the guilty citizen against the efforts of the police to vindicate the law and prevent corruption of public servants. Courts will not tolerate safeguards for the protection of the citizen to be imperilled by permitting the police to proceed by unlawful or irregular methods. At the same time the reasonable restriction in public interest will be protected also. As held in *Narendra Kumar v. Union of India* AIR 1960 SC 430 it is reasonable to think that the makers of the Constitution considered the word 'restriction' to be sufficiently wide enough to save laws inconsistent with Article 19(1), or even taking away the rights conferred by the said Article, provided the inconsistency or taking away is reasonable in the interests of the different matters mentioned in that clause. The word 'restriction' was held in appropriate cases to include total prohibition also. The contention that a law prohibiting exercise of a fundamental rights is in no case saved was rejected in that case. But Courts are given a warning that when restriction reaches the stage of prohibition, special care has to be taken to see that the test of reasonableness is satisfied on the principle that the greater the restriction the need of strict scrutiny by the Court is more. In applying the test of reasonableness, the Court has to view the question in the facts and circumstances of each case, the nature of the evil that is sought to be

remedied and the ratio of the harm caused to individual citizens by the proposed remedy, to the beneficial effect reasonably expected to result to the general public. It may also be necessary to consider whether the action is more than what is necessary in the interests of the general public. In the decision in *Babulal Parate v. State of Maharashtra* : 1961 CriLJ16 the Supreme Court held that both Clauses (2) and (3) of Article 19 give power to the legislature to make laws placing reasonable restrictions on the rights conferred under Article 19, among other things, in the interest of public order. Public order has to be maintained in advance in order to ensure it. Therefore it is competent to enact a law permitting the appropriate authority to take anticipatory action or place anticipatory restrictions upon particular kinds of acts for the purpose of maintaining public order. Though the right to liberty is valuable it has to be subjected to reasonable restrictions in the larger public interest which should be the paramount consideration. Rights and liberties under Articles 19 and 21 cannot be unrestricted in the interests of a peaceful, orderly and civilized society which is the duty of the Government to establish. Where rights and liberties of individuals come into conflict with each other or affect 'the interest of the society the question of restriction must naturally enter for the purpose of balancing interest. That is why preventive detention is upheld under Article 21. Even the sanctified rights under Articles 19 and 21 are bound to give way when larger public interests are involved.

12. In the leading case of privacy : 1975 CriLJ1111 , three propositions have been set out. In para 10 it was held that prevention of crime is a basic police duty. Para. 22 of that decision said that even the right of privacy will be subject to countervailing considerations of State interest. At para. 33, it was observed that surveillance has to be upheld. .Privacy, unlike in the U.S. is not a fundamental right in India. Under Article 21 the right of privacy could be said to be only a pervasive right. It may be a right emanating from the bundle of rights envisaged by Article 21. Since 1963 it has developed as an evolved doctrine which has to be built up by case law. In the U.S., by amendments of the Constitution, right to privacy obtained constitutional recognition. The first Indian decision in this line is *Kharak Singh v. State of U. P.* : 1963 CriLJ329 . One of the questions that came up for consideration in that decision was whether the freedom guaranteed under Article 19(l)(d) of the Constitution to move freely throughout the territory of India is

infringed by a watch being kept over the movements of a suspect by police. The answer was in the negative. The Supreme Court added that Article 21 providing that no person shall be deprived of his life or personal liberty except according to the procedure established by law has no relevance in the context since the right of privacy is not a guaranteed right under our Constitution. Therefore attempts to ascertain movements of an individual which is merely a manner in which privacy is invaded was held to be not an infringement of a fundamental right guaranteed under Part III.

13. Right to move implies nothing more than right to locomotion. In that context 'freely' would only mean that the freedom to move is without restriction and absolute subject to valid laws. In that decision it was observed that by knocking at the door or by being aroused from sleep the right of free locomotion is not impeded or prejudiced in any manner and the feeling of psychological inhibition against right of movement also cannot be accepted/Freedom guaranteed under Article 19(1)(d) was held to have reference only to something tangible or physical and not to the imponderable effect on the mind of a person which might guide his action in the matter of his movement. The self-same questions were considered in Govind's case AIR 1975 SC 1378 : (1975) 3 SCR 946 : 1975 Cri LJ 1111 where certain provisions of the M. P. Police Regulations made by the Government under the Police Act providing for surveillance of individuals leading lives of crime was challenged as offending Articles 19(1)(d) and 21 of the Constitution. In that decision also it was laid down by the Supreme Court that there is no constitutional right of privacy in India as provided by amendments in the U. S. Constitution. The principles finally laid down in that decision are:

Depending on the character and antecedents of the persons subjected to surveillance as also the objects and the limitation under which surveillance is made, it cannot be said surveillance by domiciliary visits would always be unreasonable restriction upon the right of privacy. Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest. As Regulation 856 has the force of law, it cannot be said that the fundamental right of the petitioner under

Article 21 has been violated by the provisions contained in it; for what is guaranteed under that Article is that no person shall be deprived of his life or personal liberty except by the procedure established by 'law'. We think that the procedure is reasonable having regard to the provisions of Regulation 853(c) and 857. Even if we hold that Article 19(1)(d) guarantees to a citizen a right to privacy in his movement as an emanation from that Article and is itself a fundamental right, the question will arise whether Regulation 856 is a law imposing reasonable restriction in public interest on the freedom of movement falling within Article 19(5); or, even if it be assumed that Article 19(5) does not apply in terms, as the right to privacy of movement cannot be absolute, a law imposing reasonable restriction upon it for compelling interest of State must be upheld as valid.

14. It was argued that there is no specific provision of law within the meaning of Article 13 of the Constitution authorising photographs of suspected criminals being published as a preventive measure. The argument was that there is no law within the meaning of Clauses (2) and (3) of Article 19 making reasonable restrictions and there cannot be any 'procedure established by law' within the meaning of Article 21 so far as this case is concerned. I have already referred to the provisions of the Code of Criminal Procedure and the Kerala Police Act with reference to the duties of the police in preventing commission of crimes. The actions of the police is only in the discharge of such duties. The absence of any law enumerating or specifying particular actions to be taken in given cases for preventing crimes cannot leave the police without the right to take action. It may not be possible for the State always to specify particular measures to be taken for the purpose of preventing crimes. When a particular step is taken purporting to be under the powers conferred by some provisions of law, the validity of that action will have to be tested in relation to its reasonableness on the basis of that law.

Publication of photos, as in this case, is evidently a preventive action which the police could resort to under the provisions of the Criminal P.C. and the Kerala Police Act. Even though a criminal or suspected criminal also may be entitled to live with dignity and reputation such a right cannot be allowed to outweigh the interest of the State. It may be true that publication of the photograph of an individual with a warning that he is a criminal who has to be taken care of will

naturally affect his dignity and reputation, if any, and it may indirectly affect his rights and liberties under Articles 19 and 21. But as held in R. M. Malkani's case : 1973 CriLJ228 the protection is not for the guilty citizen against the efforts of the police to vindicate the law and prevent crimes. Protection will only be in favour of innocent citizens against wrongful or high handed interference by the police. If what the Director of Public Prosecutions said is correct (I have no reason to think that it is not correct), in public interest it is the duty of the police to warn the possible group victims. The actions of the police cannot be said to infringe any of the rights of the petitioner.

As I have earlier stated in Babulal Parate's case : 1961 CriLJ16 anticipatory action to prevent crime is upheld as reasonable. Likewise in Madhu Limaye v. S.D.M., Monghyr : 1971 CriLJ1720 it was held that a person can be arrested and his fundamental rights and liberty deprived of, if there is a reasonable apprehension that he will cause a breach of the peace. In : 1952 CriLJ1147 an order of externment was also upheld as reasonable. Even in Sunil Batra's case : 1978 CriLJ1741 where the humane content of prison law was highlighted and the deep sensitivity of the human being was considered, classifying persons as dangerous criminals and putting iron fetters was justified.

15. The great humanistic trend in modern law has not obliterated the concept of reasonable restrictions that are imposed for the larger social welfare. The Court has to protect the voiceless, the dumb and the mute victims of crime, and criminal law is aimed at a correctional and preventive purpose. Lord Parker C. J., has summed up the larger goal of criminal jurisprudence as the stumping out of criminal enterprise. Prof. E.A. Ross of Harvard has observedv:

Not crimes punished, but, crimes prevented should measure the worth of law. If one rascal out of 20 men can egress at will, the higher forms of control would break down.' The criminal justicing system, is to uphold the rule of law, and if it fails, in the words of Butler, J. of the U. S. Supreme Court; 'If Courts did not protect, the injured parties would be obliged to resort to private vengeance to protect themselves, (Nice v. Minnesota).

16. The Courts cannot innovate to enlarge the concept of liberty, in a benevolent mood, ultimately breaking down the rule of law. Lord Devlin has cautioned the judges 'neither mid-wife nor rain-maker, thou shall be.' It follows that preventive action is basic to police function. Even the largest rights shall yield the public order. The petitioner has no statutory or fundamental right, not to have his photos published. The action will be perfectly reasonable to restrict his rights, if any, in large considerations of crime prevention. As already stated by me, the petitioner has been convicted at least for three offences. The case that his reputation would suffer does not deserve serious notice. For one thing his reputation is that of a convicted criminal and the publication would even be justified by the known defence of justification by truth. Exaggerated devotion of fanciful notions, innovative in character and fanciful in content, cannot be justified, because any right should yield to restrictions imposed in public interest. We have seen instances of even total prohibition being justified and liberty being deprived by preventive detention permissible under Article 22.

17. The phraseology in Article 19(2) is 'in the interest of public order' and not in the interest of law and order. In Madhu Limaye's case : 1971 CriLJ1720 it was held that the expression 'in the interest of public order' is capable of taking within itself not only those acts which disturb the security of the State but also certain acts which disturb public tranquillity or breach of the peace. That expression was held to be very wide. No person can ask to be considered free to do what he likes when there are grounds for thinking that his conduct would be of the kind against which society requires protection. Such action is necessary in aid of an orderly society. Activities subversive of peace and public tranquillity will have to be nipped in the bud.

18. The petitioner, as I have already stated, is a convict in several cases and a suspected criminal in many other cases. He is a man with known criminal tendencies which is likely to affect dangerously a possible group of persons. This possible group victims are being attempted to be given a warning by publication of photos so that they could take care of themselves. That involves no question of depriving his life or personal liberty except according to due process of law and there is no question exceeding reasonable restrictions under Clauses (2) and (3)

of Article 19 also. No question of violation of Article 20(3) is also involved. The petitioner has no right to say that even at the risk of public interest, his rights, if any, will have to be protected. There is nothing wrong in the photograph of the petitioner being published with warning. The petition is therefore rejected and the Cr. M. C. is disposed of accordingly.

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