

Chellappan Vs. State of Kerala

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Court : Kerala

Decided On : Jul-26-1994

Reported in : 1994(2)ALT(Cri)497; 1995CriLJ150

Judge : K. Sreedharan and; T.K. Chandra Shekhara Das, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 362, 376, 380, 392, 427, 451, 457, 461, 465 and 482

Appeal No. : Cri. MC No. 566/1993

Appellant : Chellappan

Respondent : State of Kerala

Advocate for Def. : Director General of Prosecution,; M. Rattra Singh, Sr. Adv. and;

Advocate for Pet/Ap. : V. Krishna Kumar, Adv. (State Brief)

Disposition : Petition dismissed

Judgement :

K. Sreedharan, J.

1. These matters have come up before us on reference made by two learned Single Judges of this Court. One of the reference orders states that a deadlock

has been created by two varying decisions rendered by two learned Single Judges on the same subject matter. Consequently, these matters have been referred for solving the said deadlock.

2. Short facts necessary for the disposal of these matters are as follows. - Petitioners in CrI. MC 1144/1989, and CrI. MC 566/1993 were co-accused in a large number of cases. In majority of those cases, they were charged with offences punishable under Section 457, 380 or 392 read with Section 34, of the Penal Code. In one case, namely SC 32/198,6 on the file of the Assistant Sessions Judge, Irinjalakuda, the offences charged against them were under Section 376(g), 380, 392, 451, and 465 read with Section 34 of the Penal Code. Learned Sessions Judge convicted them in that case and sentenced them to undergo rigorous imprisonment for ten years. That conviction and sentence were upheld by this Court.

3. In CC 150/1986, on the file of the Judicial First Class Magistrate's Court, Kodungallur, petitioners above mentioned were charged with offences punishable under Sections 457, 461 and 392, read with Section 34, of the Penal Code, Learned Magistrate convicted them and sentenced to undergo rigorous imprisonment for three years under Section 457, IPC and rigorous imprisonment for three years and to pay a fine of Rs. 5000/-, in default to undergo rigorous imprisonment for six months, under Section 392, of the Penal Code. Learned Magistrate while passing the sentence, directed the periods of the sentence imposed in the case to run consecutively and to be concurrent with the sentence imposed on them in CC 217/1986 on his file. In appeal therefrom, the Sessions Judge directed the sentences to run concurrently. Accused, above mentioned petitioners, approached this Court by filing CrI. RP Nos. 134/1988 and 233/1988 Challenging the conviction and sentence. This Court registered CrI. RC 102/1988 and issued notice to the petitioners to show cause why the sentence should not be enhanced. Revision petitions filed by the accused and the Criminal Revision Case registered by this Court came up before a learned Single Judge of this Court. While disposing of the matters, the learned Judge observed :--

I make it clear that the sentence imposed on the accused in the different cases shall run consecutively'.

That decision is reported as Sukurnaran Nair v. State of Karala 1988(2) KLT 1018. Thereafter, without making any reference to the above decision, one of the accused, namely Suku alias Sukumaran, moved Crl. MC 1144/1989 praying that the sentences of imprisonment awarded in , the several cases against him may be directed to run concurrently. The learned Single Judge before whom Crl. MC 1144/1989 came up, took the view :

I do not think that it is either just or proper to let the petitioner undergo imprisonment for the entire period for which he had been sentenced in the several cases. In my view, it is in the fitness of things and in accordance with justice that this Court should order concurrence as prayed for by him'.

Accordingly, the learned Judge directed that the sentence awarded against the petitioner in all cases will run concurrently with the sentence awarded in SC32/1986 on the file of the Assistant Sessions Judge, Irinjalakuda.

4. A convict prisoner lodged in the Thiruvananthapuram Central Jail moved this Court by filing Crl. MC 179/1989 complaining about the inhuman conditions prevailing in the prison. This Court, while dealing with that case, appointed an Advocate Commissioner to report regarding the conditions of convicts detained in the various prisons. The Commissioner in his report referred to Suku alias Sukumaran as follows :--

One prisoner by name Mr. C.R. Sukumaran (C.4277) attracted our attention on the basis of the complaints from the staff and other prisoners. The complaint is that even though he is a convict in 23 cases for theft, robbery, rape, etc. with a total term of punishment of 67 years, this Honourable Court without being apprised of the true facts converted his jail terms into one concurrent punishment for 6 years, in Crl. MC 1144 of 1989. The staff supplied the details on a sheet of paper, which is enclosed in the sealed cover as Appendix-. The prison authorities told us that almost in all these cases and several others, this prisoner committed theft and rape together. In one case, a very beautiful and young, and the only daughter of a

Doctor was raped before her parents after they were tied up. Only that Doctor complained about rape, and the prisoner got the conviction. On enquiry it is understood that the girl, now in her late 20s is still unmarried and is attached to a nunnery. The order of concurrence has caused the heartburn of discrimination to the other prisoners and even the staff. The prisoner is healthy and hefty and poses himself a hazard to the society. One of the worst things about him is that this prisoner has a group around Kim committing forceful sodomy and other acts of cruelty, after brutally assaulting young new prisoners. A few days previous to our visit one young c prisoner was not prepared to go on release because he feared that he would be killed by this dreaded Sukumaran and his friends. It seems urgent that this Honourable Court reconsider the decision in Crl. MC No. 1144/1989'.

Thereupon the prosecution moved Crl. MP 785/1993 in Crl. MC 179/1989 and Crl. MP 802/ 1993 in Crl. MC 1144/1989 for declaring that the order dated 16-3-1990 passed on Crl. M.C. 1144/ 1989 is non est.

5. Convict No. 4278, -- Chellapan, who was the Co-accused along with Suku alias Sukumaran, moved Crl. MC 566/1993 for getting similar benefit as the one given to Sukumaran as per the order dated 16-3-1990 in Crl. MC 1144/1989.

6. The questions that arise for consideration are :

1. Whether the order dated 16-3-90 passed in Crl. MC 1144/1989 is valid in view of the decision in 1988(2) KLT 1018.

2. Whether the order dated 16-3-1990 passed by a learned Single Judge of this Court in Crl. MC 1144/1989 is liable to be declared as non est.

7. Petitioners before us, namely Suku alias Sukumaran -- Convict No. 4277, and Chellappan -- Convict No. 4278, were accused in CC 150/ 1986 on the file of the Judicial First Class Magistrate's Court, Kodungallur. They were convicted and sentenced to imprisonment for offences under Sections 457, 461 and 392, read with- Section 34, IPC. Learned Magistrate directed that the sentences imposed in the case should run consecutively. It was also directed that the said sentences will

run concurrently with the sentences passed by him in another case, namely CC 217/1986. On appeal, the learned Sessions Judge directed the sentences to run concurrently. Accused came up in revision questioning the conviction and sentence. This Court also registered CrI. RC 102/1988 and issued notice calling upon them to show cause why the sentence should not be enhanced. After hearing the petitioners, this Court directed that the sentences imposed on the accused in different cases should run consecutively. This direction was issued after hearing the accused on the notice calling upon them to show cause why the sentence should not be enhanced. This means that this Court directed the various sentences imposed on the accused to run consecutively after applying its mind to all relevant facts and circumstances. The direction so issued by this Court is binding on the petitioners, the accused before this Court, namely Suku alias Sukumaran and Chellappan. What is the effect of that binding decision ?

8. Where an issue has been decided by a competent court on a former occasion, such a finding constitutes an estoppel or res judicata against the parties to that proceedings. It will operate as a bar to reception of evidence to disturb that finding in a subsequent trial or proceedings. This principle is known as 'rule of estoppel'. The principle of 'issue estoppel' was stated by Dixon, J. in King v. Wilkes 77 CLR 511, as :--

There is issue estoppel if it appears by record of itself or as explained by proper evidence that the same point was determined in favour of a prisoner in a previous trial which is brought in issue on a second criminal trial of the same prisoner'.

In order to invoke the rule of 'issue estoppel', the parties in the two proceedings must not only be the same, but also the fact in issue must be identical, i. e. the issue that was decided earlier must be identical with that which is sought to be reargued. According to Their Lordships of the Supreme Court in Ravinder Singh v. State of Haryana AIR 1975 SC 856 : 1975 Cri. LJ 765

'issue-estoppel' does not prevent the trial of an offence as does *autre fois acquit* but only precludes evidence being led to prove a fact in issue as regards which evidence has already been led and specific finding recorded at an earlier criminal trial before a court of competent jurisdiction'.

9. In the decision in 1988(2) KLT 1018 the question as to whether sentences awarded to Suku alias Sukumaran in the various cases in which he was convicted should run concurrently or consecutively was in issue. That issue was decided by this Court against Sukumaran by directing those periods to run consecutively. That was so ordered after hearing him in reply to the notice to show cause why the sentences awarded to him in CC 150/1986 on the file of the Judicial First Class Magistrate's Court, Kodungallur should not be enhanced. That decision, directing the sentences to run consecutively, is binding on Sukumaran and his co-accused Chellappan, who were parties to that decision. Can that decision be altered or reviewed by this Court ?

10. Section 362, of the Code of Criminal Procedure, hereinafter referred to as 'the Code', mandates that no Court should alter or review the judgment after it has signed it except to correct a clerical or arithmetical error otherwise than as provided in the Code itself. This prohibition contained in Section 362, is virtually absolute. After the judgment is signed, even the High Court in exercise of its inherent power under Section 482 of the Code is not having any authority or jurisdiction to alter or review the same, (vide *Simrikhia v. Dolley Mukherjee* AIR 1990 SC 1605 : 1990 Cri. LJ 1599 and *Moti Lal v. State of MP* AIR 1994 SC 1544).

11. According to learned counsel representing Suku alias Sukumaran, the maxim '*res judicata pro veritate accipitur*' is no less applicable to criminal than to civil proceedings as held by the Supreme Court in *Pritam Singh v. State of Punjab* AIR 1956 SC 415 : 1956 Cri. LJ 805. The bar of *res judicata*, according to counsel, can be waived by the prosecution. When Crl. MC 1144/1989 came before a learned Single Judge, prosecution did not place before the learned Judge the decision in 1988(2) KLT 1018 and sought to have that petition dismissed. Therefore, the prosecution must be deemed to have waived its right based on the principles of *res judicata* and so, the order dated 16-3-1990 passed on Crl.MC 1144/1989 is legal. This argument, though quite attractive, cannot be sustained. By the decision in 1988(2) KLT 1018 this Court directed the various sentences to run consecutively. The prayer in Crl. MC 1144/1989 was to alter that decision and to direct the periods of sentences to run concurrently. That is prohibited by the

provision contained in Section 362, of the Code. The act which was specifically prohibited by the Code could not have been done by the order dated 16-3-1990 in CrI. MC 1144/1989. Viewed in this light, even if the principles of res judicata applies to criminal cases that right which is available to one of the parties cannot be waived and thereby defeat the provisions of Section 362 of the Code. What this Court did was that which was prohibited by the Code. What will be the consequence of the order so passed in ignorance of the earlier decision which was binding on the petitioner? In A.R. Antulay v. R.S. Nayak (1988) 2 SCC 602. 1988 Cri. LJ 1661 Their Lordships observed :--

'Per incuriam' are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such case some part of the decision or some step in the reasoning on which it is based, is found, on that account, to be demonstrably wrong. If a decision has been given 'per incuriam' the court can ignore it'.

The decision in 1988(2) KLT 1018 is binding on the petitioners, namely Suku alias Sukumaran and Chellappan, petitioners in CrI. MC 1144/ 1989 and CrI. MC 566/1993. In ignorance of that binding decision if any subsequent order is passed, that decision is one given 'per incuriam'. The Court can ignore the same. Viewed in that light, order dated 16-3-1990 passed on CrI. MC 1144/ 1989 has to be treated as non est.

12. Learned counsel representing Suku alias Sukumaran argued that the decision in 1988(2) KLT 1018 should be understood in the light of the provision contained in Section 427, of the Code. Clause (1) of that Section without the provisos, which alone is relevant for our purpose, is as follows :--

When a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or imprisonment for life, such imprisonment or imprisonment for life shall commence at the expiration of the imprisonment to which he has been previously sentenced, unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence'. In view of this provision, it is contended that the learned Judge who decided 1988 (2) KLT 1018 was concerned with the consecutiveness or concurrence of the

sentence imposed on his client in CC 150/1986 on the file of the Judicial First Class Magistrate's Court, Kodungallur. The learned Judge could not have directed all the sentences passed against him to run consecutively. It is true that if the learned Judge was to exercise jurisdiction under Section 427 only, this argument could have had some force. But, according to us, the learned Judge was not exercising the jurisdiction under Section 427. Accused were, as stated earlier, served with notice to show cause why the sentences should not be enhanced. On that notice, after hearing the petitioners, the Court directed the various sentences to run consecutively. That could have been only by invoking the provisions contained in Section 482, of the Code. In exercise of that inherent power, the Court ordered the various sentences to run consecutively. That order is not to be altered or reviewed in a subsequent proceeding.

13. Learned counsel representing Suku alias Sukumaran advanced an argument that the order passed by a learned Single Judge in Crl. MC 1144/1989 on 16-3-90 is not to be altered by us in this proceeding. This argument would have had some force if that was the first valid order passed in relation to Suku alias Sukumaran. If it was so, any attempt on our part to modify or alter the same will be hit by Section 362, of the Code. But, the position in this case is entirely different. Since we have held that order dated 16-3-1990 passed on Crl. MC 1144/1989 was one given 'per incuriam', that order is not in existence in the eye of law. So, we are not interfering with an earlier valid order as is contended, but is only stating that the said order being non est, has only to be ignored. So, there is no bar in allowing Crl. MP 802/1993 in Crl. MC 1144/1989. Crl. MP 785/ 1993 filed in Crl. MC 179/1989 is ill-conceived. No alteration or modification of the order in Crl. MC 179/1989 is called for. So. Crl. MP 785/1993 is dismissed.

14. Petitioner in Crl. MC 566/1993 is bound by the decision in 1988(2) KLT 1018. So, his prayer to have the various sentences passed against him to run concurrently cannot be allowed. The petition is dismissed.

Petitions are disposed of as stated above, holding that the order dated 16-3-90 on Crl. MC 1144/89 is non est, since it was given 'per incuriam'.

Before parting with the case, we express our appreciation and thanks to Mr. M. Ratna Singh, Director General of Prosecution, Senior Advocate Mr. T.R. Raman Pillai, who appeared as amicus curiae and M/s. Thottathil B. Radhakrishnan and V. Krishna Kumar on State Brief in placing all possible views on the issues raised in these proceedings.

We want to impress upon the Inspector General of Prisons and the other officers in charge of prisons to take urgent effective steps to prevent atrocities being committed by hardened criminals who are detained in prison towards their co-prisoners. From the report submitted by Sri S. James Vincent, Advocate Commissioner, referred to earlier in this order, it appears that all is not well inside the prison. Officers are directed to take remedial measures to avert the recurrence of such incidents in future.

Copies of this order will be sent to the Inspector General of Prisons and Superintendents of Prisons.

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