

Gopalakrishnan Vs. State of Kerala

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Court : Kerala

Decided On : Jun-20-2001

Reported in : 2002CriLJ2490; II(2001)DMC492

Judge : Mr. N. Krishnan Nair, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 244, 244(1), 246, 246((4) and (5) and 311; [Indian Penal Code \(IPC\), 1860](#) - Sections 498A

Appeal No. : Crl.M.C. No. 2204 of 2001

Appellant : Gopalakrishnan

Respondent : State of Kerala

Advocate for Def. : Noble Mathew, Public Prosecutor

Advocate for Pet/Ap. : P. Vinod Kumar, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

N. Krishnan Nair, J.

1. This petition is filed under S. 482 of the Code of criminal Procedure by accused Nos. 2 and 3 in C.C. No. 132/2000 on the file of the Judicial First Class Magistrate-

II, Chengannur for setting aside the order of the Magistrate in C.M.P.No. 479/2001 in C.C.No. 132/2000. The case arose on a complaint filed by the 2nd respondent herein against the petitioners and another alleging the commission of the offence punishable under S. 498A of the Indian Penal Code. The learned Magistrate took cognizance of the offence under S. 498A and the complainant and two witnesses are examined as PWs. 1 to 3. But they were not cross-examined by the counsel for the accused. Therefore, the 1st accused moved an application under S. 311 of the CrI.P.C. to recall PWs. 1 to 3 for cross-examination. The learned Magistrate by the impugned order dismissed the petition mainly on the ground that the accused are entitled to cross examine the witnesses under S. 246(5) of the CrI.P.C. after framing the charge.

2. The learned counsel for the petitioners strongly contended that the order of the court below is clearly illegal and cannot be sustained. According to the learned counsel, the accused in a warrant case instituted other wise than on a police report has got an absolute right to cross examine the prosecution witnesses under S. 244 of the Code of Criminal Procedure. On the other hand the learned counsel for the 2nd respondent supported the order and urged that there is no ground for interference.

3. The question for consideration is whether the accused in a warrant case instituted otherwise than on a police report has got an absolute right to cross examine the prosecution witnesses examined under S. 244 of the CrI. P.C. Some of the High Courts are of the view that the accused has an independent right to cross examine the witnesses examined under S. 244 of the CrI.P.C. In my view, S. 244 does not confer on the accused an absolute right to cross-examine the prosecution witnesses. From a reading of sub-s. (1) of S. 244 along with sub-ss. (4) and (5) of S. 246 it is clear that the legislature does not intend to confer on the accused an independent right of cross-examination under S. 244 of the CrI.P.C. S. 244(1) lays down that in a case instituted other wise than on a police report, when the accused appears or is brought before a Magistrate, the Magistrate must proceed to hear the prosecution and take all such evidence as may be produced by the produced by the prosecution. Sub-s.(4) of S. 246 provides that if the accused refuses to plead guilty or does not plead guilty or claims to be tried or if

the accused is not convicted on a plea of guilty, he shall be required at the commencement of the next hearing of the case, or, if the Magistrate for reasons to be recorded in writing, so thinks fit, forthwith, whether he wishes to cross-examine any, and, if so, which, of the witnesses for the prosecution whose evidence has been taken. As per sub-s. (5) of S. 246 if the accused says he does so wish, the witnesses named by him shall be recalled and, after cross-examination and re-examination they shall be discharged. Thus sub-s.(5) of S. 246 gives a statutory right to the accused to cross-examine the witnesses for the prosecution after the charge is framed. Since express provision is made in S. 246 of the Cr.P.C. for cross-examination, the words 'take all such evidence as may be produced' occurring in S. 244(1) cannot be construed as including the right of cross-examination. Therefore, it cannot be said that the word 'evidence' in S. 244(1) imports not only examination in chief but also cross examination and re-examination.

4. The object of S. 244 of the Cr.P.C. is to enable the Magistrate to collect materials to find out whether a case has been made out against the accused. The prosecution witnesses are examined under S. 244 at the inquiry stage. The trial in a warrant case instituted otherwise than on a police report does not start till the evidence is taken under S. 244 of the Cr. P.C. In *Ratilal Bhanji v. State of Maharashtra* (AIR 1979 SC 94) the Supreme Court says, 'The trial in a warrant case starts with the framing of charge; prior to it the proceedings are only an inquiry'. Even if no opportunity is given to the accused to cross-examine the witnesses during the inquiry, no prejudice would be caused to him, since he gets the opportunity to cross-examine the witnesses at the trial stage. In this connection it is also relevant to note that the accused in a case instituted upon a police report gets no opportunity to cross-examine the prosecution witnesses during inquiry. For the reasons stated above, I am of the view that the accused has no absolute right to cross-examine the prosecution witnesses under S. 244 of the Cr.P.C. No doubt S. 244 does not prohibit cross examination before framing charge. Though the accused has no independent right of cross-examination under S. 244 of the Cr. P.C. the Magistrate may in his discretion permit cross examination at the inquiry stage. But it cannot be said that the refusal of a Magistrate to allow an accused to cross examine the witnesses examined under S. 244 of the Cr. P.C. is illegal and

irregular. In this case, I think the lower court was justified in rejecting the application to recall the witnesses for cross examination.

5. It is also relevant to note that the petitioners herein who are accused 2 and 3 in the case have not made any request before the lower court to recall the witnesses. Therefore they cannot be heard to say that the order passed by the Magistrate cannot be sustained. I see no infirmity in the impugned order.

6. This petition is groundless and is dismissed.

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