

C.B.i. Vs. Babu

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Court : Kerala

Decided On : Sep-20-2004

Reported in : 2005CriLJ29; 2004(3)KLT624

Judge : K.A. Abdul Gafoor, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 24

Appeal No. : Crl. M.A. No. 5911 of 2000 in Crl. M.C. ... of 2000

Appellant : C.B.i.

Respondent : Babu

Advocate for Def. : S. Vijayakumar, Adv.

Advocate for Pet/Ap. : K.C. Satheesan, Adv.

Judgement :

ORDER

K.A. Abdul Gafoor, J.

1. This is a petition to condone the delay of 187 days in filing the appeal. While opposing the delay petition the competence of counsel, who presented the Memorandum of Appeal, to prefer the appeal against the acquittal is also seriously questioned. Therefore, that aspect has to be considered.

2. It is contended by Sri. S. Vijayakumar that the counsel who presented the Memorandum of Appeal under Section 378(2) of the Code of Criminal Procedure did not have the competence to do, as he had not been appointed as Public Prosecutor in terms of Section 24 of the Code nor has he been directed by the Public Prosecutor to prefer such an appeal. A person shall be appointed as Public Prosecutor as per Section 24 of the Code. In terms of the definition of the word 'public prosecutor' as contained in Section 2(u) of the Code, the Public Prosecutor will include any other person acting under directions of a public prosecutor. So either the public prosecutor himself or any one else upon his direction alone can file an appeal under Section 378(2) of the Code of Criminal Procedure. The Memorandum of Appeal discloses that it has been filed by the special counsel for C.B.I. So the appeal itself is incompetent. In support of his contention the decisions in *State of Kerala v. Krishnan* (1981 KLT 839) and *Rajendran v. Ayyappan* (1985 KLT 307) are relied on. It is also submitted that the standing counsel for C.B.I. is not working under the Public Prosecutor appointed in terms of Section 24 Cr. P.C. He also has never been appointed as a Public Prosecutor. The present contention raised in the reply affidavit that he had filed the appeal upon direction from the Public Prosecutor cannot be per se believed unless there is a written instruction in that regard, as an instruction from one office to another in the normal functioning of the Government Office will go only in written form and not as an oral direction. No written direction is produced in this case. There is no evidence to show that Advocate General had instructed the Public Prosecutor to file an appeal. Much less there is no direction from the Public Prosecutor to the counsel for the C.B.I. to prefer an appeal. So this appeal is totally incompetent. Consequently there arises no question of condonation of delay. It is further submitted that even going by the averment of the deponent of the affidavit in support of the application for condonation of delay, no sufficient cause has been shown. Each days delay is not explained. When did the C.B.I. get the certified copy and when the Government of India was addressed to obtain appropriate sanction for filing the appeal etc. are not disclosed in the affidavit So no sufficient cause has been shown to condone the delay.

3. It is submitted by the counsel for the C.B.I. that immediately after the acquittal of the accused the Central Government was addressed to examine the scope of

appeal and to file an appeal. The Central Government, as is revealed by Annexure-1 produced along with the reply affidavit, examined the case record and scope for appeal and requested Government of Kerala to direct the Public Prosecutor to file the appeal, as the appeal had to be filed by the Public Prosecutor in terms of Section 378(2) of the Code. Appropriate direction shall be given by the State Government to the Public Prosecutor to file an appeal. Processing the same the Government of Kerala issued Annexure-A2 letter to the Advocate General to instruct the Public Prosecutor to prefer an appeal. It is submitted that the Public Prosecutor directed C.B.I. counsel to prefer the appeal and it was in accordance with the said direction this appeal had been filed.

4. It has to be mentioned at the threshold that all these debates had arisen only because of lapse on the part of the counsel who prepared and preferred the appeal memorandum. If a sentence that this appeal memorandum has been preferred upon direction from the public prosecutor had been incorporated, necessarily much valuable time of the counsel and the Court would not have been wasted like this at the cost of the public. A casual omission costs a lot.

5. It is evident from Annexure-1 letter dated 21.6.2000 that Central Government and the C.B.I. were conscious that appeal could be filed only through public prosecutor. They had bona fide requested the State Government to take necessary steps in that regard as the Public Prosecutor has been appointed by the State Government in terms of Section 24 of the Code. The Government of Kerala also sat on that letter to hatch it for about more than three months to write Annexure-2. Even in Annexure-2 the Government of Kerala ought to have directly addressed the prosecutor, as this Court has more than one occasion reminded that in case of an appeal against acquittal the Government has to direct the public prosecutor (see 1981 KLT and 1985 KLT) to file appeal. What had happened after Annexure-A2 is not born out by any records, except the averments in the reply affidavit.

6. There is force in the contention of the counsel for the accused that there should have been a written direction. But when Government of Kerala addressed a letter like Annexure-A2 to the Advocate General holding a constitutional and responsible

position to instruct the Public Prosecutor to prefer an appeal, necessarily without any further clarification being obtained from Advocate General it shall have to be taken by this Court that the Advocate General should have promptly acted on Annexure-A2 giving necessary direction to the Public Persecutor. This Court shall not enquire much more than presuming the same, taking into account the direction of the Government and the position of the Advocate General. When the Advocate General had instructed the Public Prosecutor to file an appeal, the Public Prosecutor himself ought to have filed an appeal or would have given written instruction to the standing counsel of the C.B.I. enabling him to present the appeal.

7. It is a fact that the Public Prosecutor appointed under Section 24 of the Code and the Standing Counsel for C.B.I. are the counsel appearing before this Court. When a standing counsel for the C.B.I. submits before the Court that the Public Prosecutor had in a matter like this, instructed him orally to present this appeal, that need not be doubted. Of course this statement would have been made by the present counsel after verifying with his predecessor in office, who really preferred this appeal memorandum. In such circumstances it is not proper for this Court to doubt the veracity of this submission. Even in such case of oral direction from the Public Prosecutor, it is incumbent on the counsel preferring the appeal memorandum upon such direction, to recite about such direction in the memorandum of appeal. Public interest shall not suffer on account of such omission.

8. The decisions relied on by the counsel for the accused in Rajendran's case (1985 KLT 307) as well as in Krishnan's case (1981 KLT 839) were rendered in different circumstances, where the appeals have been filed or argued by the Advocate General without the juncture of the Public Prosecutor appointed under Section 24 of the Code. It was in such situation that this Court made it clear that 'as per Section 378(1) of the Code if the State has to file an appeal before the High Court against an order of acquittal the State has to direct the Public Prosecutor to present the same' and that 'a lawyer on being appointed by the Advocate General will not automatically become a Public Prosecutor within the meaning of Section 2(u) of the Criminal Procedure Code.' In this case, in the fact frame noted above, there are directions from the Government of India to Government of Kerala to

instruct the Public Prosecutor to file an appeal which resulted in Annexure-A2 letter from Government of Kerala to the Advocate General of Kerala to direct the Public Prosecutor to prefer an appeal and, as submitted before the Court, an oral direction by the Public Prosecutor to the then counsel for the C.B.I. to prefer the appeal memorandum. In such circumstances, I am of the view that there is sufficient compliance of Section 378(2) of the Code.

9. Of course there is further contention that the appeal ought to have been by the State of Kerala or Union of India as the case may be. The party who filed the complaint before the Court below was the Inspector of Police, C.B.I. Necessarily, a mistaken description of the appellant cannot have much importance as he again himself is styled as represented by the C.B.I. Prosecutor, as the appellant in this case. Therefore, appeal is competently filed.

10. Coming to the factual aspect regarding the condonation of delay it is revealed that the appeal has been filed on 15.12.2000. Annexure-A1 letter of the Government of India is dated 21.6.2000. It refers to the last date of filing of appeal as 10.7.2000. Government of Kerala wrote Annexure-A2 letter to the Advocate General only on 16.9.2000. The delay until 16.9.2000 is thus evident and explained as per Annexures-A1 and A2, though filed along with the reply affidavit and not with the affidavit originally filed in support of the application to condone the delay. Thereafter, the matter had to be processed in the office of the Advocate General and the appeal memorandum had to be preferred.

Any how, taking into account the over all circumstances, I am of the view that the delay has to be condoned. Accordingly delay is condoned.

CrI. M.C. be numbered.

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