

Radha Vs. Raju

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Court : Kerala

Decided On : Oct-27-2003

Reported in : 2003(3)KLT1046

Judge : R. Basant, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 244, 245, 245(1) and 246

Appeal No. : Crl. R.P. No. 1643 of 2002

Appellant : Radha

Respondent : Raju

Advocate for Def. : K. Shrihari Rao, Adv. and; M.A. Khadir Kunju, Public Prosecutor

Advocate for Pet/Ap. : K. Mathew John and; Baby Thomas, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

R. Basant, J.

1. Whether the order of the learned Magistrate discharging the respondents/accused invoking the power under Section 245 Cr.P.C. is correct? This is the short question arising for consideration in this revision.

2. The complainant's husband is facing indictment in a prosecution under Section 302 I.P.C. The gist of the allegations against him in the said case is that he, along with others, trespassed into the residential building of a neighbour and caused the death of one Sabu. The complainant is the daughter of the uncle of the deceased. She had married out of her caste. The accused are all relatives of the deceased. The first accused is his brother, the second accused his mother, the third accused his brother-in-law and the 4th accused his sister. The incident in which Sabu met with his death occurred on the night of 11.7.1997. That incident was at about 10 p.m., according to the prosecution. The complainant's husband was taken into custody on the same night.

3. More than two months after the said incident, in which Sabu met with his death, the complainant filed a complaint before the Judicial First Class Magistrate Court, Palai. In the complaint she alleged that on that night at about 9 p.m. she was called by the said deceased Sabu to go to his house. The purported purpose was to attempt to settle the disputes between the two neighbours in the presence of the uncle of the complainant. According to the complainant, she obliged and proceeded to the house of Sabu. After reaching there she found that the uncle, who allegedly was available there, was not present there. It dawned on her that the attempt was to pressurise her and to compel her to subscribe her signature to some documents. She refused to oblige. She was wrongfully restrained. She was criminally intimidated. She cried aloud. Hearing her cries, some persons from outside had allegedly entered the house after breaking open the door of the house. In the melee she somehow escaped from that house and rushed to her house. It is her case in the complaint that the accused persons are responsible for perpetrating such crimes on her in the house of the deceased Sabu. Along with the deceased they had indulged in criminal acts, she alleged. The obvious suggestion, though not specifically urged, is that Sabu must also have suffered injuries in that melee.

4. Sworn statement was taken and the learned Magistrate dismissed the complaint under Section 203 Cr.P.C. A revision was filed before the Court of Sessions and the learned Sessions Judge by order dt. 26.7.2001 in Crl. R.P. No. 46 of 1998 set aside the said order of dismissal and directed the learned Magistrate to take cognizance and to proceed further. Accordingly, the learned Magistrate under Section 244 Cr.P.C. - at the pre-charge stage - examined the complainant as PW. 1, her mother as PW.2 and an alleged independent witness as PW.3. In an attempt to explain the long gap of time between 11.7.1997, the date of incident and 18.9.1997, the date of the complaint before the learned Magistrate, the complainant produced Ext. D1, a medical certificate.

5. PWs.1 to 3 were subjected to cross examination by the accused. They took the stand that no incident as alleged had taken place at all and that PW.1, the complainant, is attempting to bail out her husband from the inconvenient situation in which he finds himself in the prosecution for murder initiated against him and others. They contended that the complainant was advancing a totally improbable and artificial version. The parties were at logger heads. There were disputes between them. Admittedly, there was very strong enmity between them. In these circumstances the evidence of PW. 1 that she had gone to the house of the deceased on that night for the purpose of settlement of civil disputes is totally improbable, artificial and unacceptable. Reliance was placed on Ext.D1 to contend that the version of PW.1 that she was called to the house of the deceased for the purpose of settlement of the disputes and that there was an attempt to compel her to subscribe her signature to a document to prejudice her interest in the civil case is inherently improbable, as in both the suits which were filed, she was not a party. The cause titles in Ext.D1 show that in both the suits PW.1 was not a party at all. PW.1's evidence was also sought to be challenged on the ground of it being improbable and on the further ground that she had not made any prompt complaint at all. In these circumstances it was urged that PW.1 was interested only in advancing an artificial version to help her husband in the trial before the Court of Sessions.

6. PW.2 is the mother of PW.1. In the complaint dated 11.7.1997 there is no reference to her name at all. Admittedly, she along with her husband - father of

PW. 1, resides not in the house in which PW. 1 resides, but in an adjacent house. PW.2 was examined by the complainant to support her theory that she had gone away from her house to the house of the deceased for the purported purpose of attempting to settle the disputes. PW.2 had tendered evidence that PW.1 had come back to her house on that night after the incident.

7. So far as PW.3 is concerned, he was examined as an alleged independent, though chance witness, who happened to pass the house of the deceased on that night. The name of PW.3 is not referred to in the complaint at all. Though PW. 1 did not have such a case on oath before the learned Magistrate, PW.3 went on to say that PW.1 who ran out of the house of the deceased had apprised him/PW.3, when he met her outside the house, the gist of what she was subjected to inside the house of the deceased.

8. The learned Magistrate proceeded to consider whether charge is liable to be framed. By the impugned order the learned Magistrate came to the conclusion that no charge is liable to be framed and that the accused is entitled to be discharged.

9. Counsel have been heard. The learned counsel for the petitioner/complainant, Shri. Mathew John contends that the learned Magistrate overstepped his jurisdiction under Section 245 Cr.P.C. The exercise of weighing the evidence in golden scales or even appreciating such evidence to decide whether such evidence is acceptable is not one which a criminal court is expected to perform at the stage of Section 245 Cr.P.C. In an attempt to decide whether the evidence of PWs. 1 to 3 is acceptable, the court obviously went beyond the contours of its jurisdiction under Section 245 Cr.P.C., it is contended.

10. The learned counsel then contends that the evidence under Section 244 Cr.P.C. having already been adduced, the learned Magistrate must have considered the question under Section 245(1) Cr.P.C. The crucial question then is whether a case, which, if unrebutted, would warrant a conviction has been made out and not whether the charge is groundless. The question whether the charge is groundless is to be considered under Section 245(2) Cr.P.C. and not under Section 245(1) Cr.P.C. The learned Magistrate did not specifically advert to the crucial question which he was expected to consider and resolve, it is contended.

On such consideration, the learned Magistrate must have come to the conclusion that a satisfactory case had been made out, which, if unrebutted, would warrant a conviction of the accused and must therefore, have proceeded to frame charges against the accused.

11. The learned counsel for the respondents, Shri. Shrihari Rao, on the contrary, contends that the learned Magistrate committed no error in considering the materials available before him to decide whether the case which, if unrebutted, would warrant a conviction. That is his duty under Section 245(1) Cr.P.C. The counsel further contends that at any stage before framing, the charge under Section 245(2) Cr.P.C., the learned Magistrate is entitled to discharge the accused, if the Magistrate finds the charge to be groundless. Even if it be held that the charges are not groundless, the discharge under Section 245(1) is perfectly justified. Notwithstanding the fact that the learned Magistrate had resorted to Section 245(2) Cr.P.C., the impugned order holding that the respondents/accused do not deserve to be proceeded against further, does not warrant interference, it is contended.

12. My attention has been drawn to the two decisions reported in Jacob Thomas v. ASSL Collector of Customs (1998 (1) KLT 741) and Mani v. Joseph (1999 (3) KLT 49).

13. The quality of consideration, which a criminal court undertakes, of the materials available before it, must certainly vary from circumstance to circumstance and stage to stage. At the initial stage of Section 203/204 Cr.P.C., a criminal court considers the materials available before it for the short purpose of deciding whether 'there is sufficient ground to proceed against the accused.' In a private complaint alleging commission of a warrant offence under Section 245 Cr.P.C., after the enquiry under Section 244 Cr.P.C., a criminal court is expected under Section 245(1) only to consider whether such a case has been made out 'which, if unrebutted, would warrant a conviction.' The quality of consideration of the materials available before the court at a later stage of the proceedings - at the stage of deciding whether the accused deserve to be convicted or acquitted - is totally different and more exhaustive. It is at that stage that the exercise of

weighing the evidence in golden scales will, can and should be resorted to by a court.

14. It is true that courts have loosely employed the expression 'prima facie case' at the stage of Section 203/204 Cr.P.C. and Section 245/246 Cr.P.C. That expression is not used in the Code of Criminal Procedure. But it must be noted that the quality of consideration at the stage of Section 203/204 Cr.P.C. and Section 245/246 Cr.P.C. are definitely different. There is a real and reasonable difference between the quality of consideration of the materials at these two stages. Though loosely referred to as 'prima facie case' by courts in some decisions, one cannot jump to a conclusion that the quality of consideration of the materials at these two stages are identical. They are certainly different.

15. It is crucial to note that it is not the mandate under Section 245(1) Cr.P.C. that if evidence if unrebutted, would warrant a conviction charge has to be framed. The language of Section 245(1) makes it very clear that evidence will have to be adduced and thereafter the court will have to consider whether a case, which, if unrebutted. would warrant a conviction is made out. It is not the mandate of law that the court need only consider whether 'evidence if unrebutted. would warrant a conviction.' What should be considered is whether a case if unrebutted, would warrant a conviction. I must note that there is a distinction between these two circumstances.

16. Considering Section 203/204 Cr.P.C. and Section 245/246 Cr.P.C. it can certainly be found that the nature of consideration is not identical. The purposes to be served are also different. The language employed by the Code is also different. At the stage of Section 203/204 Cr.P.C. the court has a sublime duty to perform. A bonafide complainant must be given a fuller opportunity to substantiate his allegations. The complainant actuated by oblique motive will have to be shown the door. An innocent accused who does not deserve to endure the trauma of a prosecution must be saved of such predicament. The nature of consideration at that stage is much lesser in scope than the consideration under Section 245/246 Cr.P.C. At the stage of Section 245/246 Cr.P.C. the complainant has already been given an opportunity to substantiate his complaint. The accused has been given

an opportunity to challenge the materials placed. At this stage of Section 245/246 Cr.P.C. the question is certainly not whether the evidence if accepted would warrant a conviction. The question is only whether the case established, from the materials placed before the court, if unrebutted, would warrant a conviction. In that view of the matter, the consideration of the stage of Section 245/246 Cr.P.C. is one which is more sublime. It is not as though the court will have to accept any and every material placed before it at the stage of Section 245/246 Cr.P.C. An application of mind to the materials available before the court must certainly be undertaken. The evidence will not be swallowed without consideration of its probative value. Of course, the exercise of weighing the evidence in golden scales will not also be resorted to.

17. I am in agreement with the learned counsel for the petitioner/complainant that the court must have considered the materials available under Section 245 Cr.P.C. This is not certainly a case where Section 245(2) would apply. According to me, the case is certainly one to be considered under Section 245(1) Cr.P.C. When so considered, broad improbabilities in the evidence rendered by PWs.1 to 3 and the inherent infirmity in the case or the complainant must all necessarily be taken into account to decide whether such a case which if unrebutted would warrant a conviction has been established.

18. The inherent improbabilities of PW. 1 proceeding in the night to the house of her neighbour without waiting for the return of her husband - that too to the house of a neighbour, with whom they have bitter strain and animosity in their relationship, must also be taken into consideration. The fact that the evidence of PWs.2 and 3 is inherently improbable and uninspiring must also be taken note of. The fact that the complaint does not at all reveal that the complainant had apprised PWs.2 and 3 of what happened must also be necessarily taken into consideration. The broad circumstance that the complaint is being lodged after the lapse of a period of more than two months without convincing explanation and that too by the complainant, whose husband faces indictment in a prosecution under Section 302 I.P.C. must also be taken into consideration.

19. The available inputs when considered in its totality must certainly lead the court to the conclusion that such a case had not been made out which, if unrebutted, would warrant a conviction. If the evidence of PWs. 1 to 3 were swallowed without applying the discretion available to the court, it can certainly be said that the allegations made in their testimony, if accepted, would amount to a valid indictment. But that certainly is not the consideration. A mechanical ascertainment whether the evidence legally admissible is available is not the only function of the court under Section 245(1) Cr. P.C In these circumstances I am satisfied that the impugned order, reckoned as an order under Section 245(1), does not warrant interference.

20. I am conscious of the fact that the learned Magistrate was labouring under some confusion whether Section 245(1) or Section 245(2) has to be applied. In any view of the matter, I am satisfied that invocation of the revisional powers are necessary to interfere with the impugned order of discharge even when the same is reckoned as one under Section 245(1) Cr.P.C.

21. In the result this petition is dismissed.