

**Ramlath Vs. Nasar and ors.**

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**SooperKanoon Citation :** [sooperkanoon.com/729965](http://sooperkanoon.com/729965)

**Court :** Kerala

**Decided On :** Jul-07-2009

**Reported in :** 2010CriLJ80; 2009(3)KLJ214

**Judge :** Thomas P. Joseph, J.

**Acts :** Evidence Act - Sections 132; Coroners Act - Sections 19; Indian Penal Code (IPC) - Sections 34, 489B, 489C, 498B and 498C; Code of Criminal Procedure (CrPC) - Sections 240, 319 and 342

**Appeal No. :** Crl. Rev. Pet. No. 1060 of 2009

**Appellant :** Ramlath

**Respondent :** Nasar and ors.

**Advocate for Def. :** P.R. Jayakrishnan, P.P.

**Advocate for Pet/Ap. :** P. Vijaya Bhanu and; P.M. Rafiq, Advs.

**Disposition :** Petition allowed

**Judgement :**

ORDER

**Thomas P. Joseph, J.**

1. The order passed by learned Sessions judge impleading petitioner who is a prosecution witness as additional accused is under challenge in this revision.

2. Short facts of the case necessary for a decision of this revision are: The Deputy Superintendent of Police, CBCTD (CFS) Unit, Ernakulam charge sheeted two accused for offences punishable under Sections 498B and 498C read with Section 34 of the Indian Penal Code (for short, 'the IPC'). According to the prosecution, petitioner (cited by prosecution as charge witness No. 4 and examined in the court of learned Sessions Judge as P.W.

3) took a few of the counterfeit currency notes involved in the case to a Co-operative Bank on 1.2.2002 for repayment of a loan she had availed and gave those currency notes to the Bank authorities, P.W.1, Cashier of that Bank felt suspicious about the genuineness of the currency notes and informed the matter to his superior officer (accused No. 2). Accused No. 2 is said to have entrusted those currency notes to P.W.2 who checked its genuineness. It was revealed that the currency notes are counterfeit. On 11.2.2002 P.W. 2 asked petitioner whether she had similar notes with her. She stated that she has with her 14 more similar notes. On 27.2.2002 police was informed about the incident and they registered a case.' According to the prosecution accused No. 1 had given counterfeit currency notes to P.W. 5 by way of a loan. P.W. 5 owed money to P.W. 4, husband of petitioner who is engaged in manure business. When P.W. 4 demanded repayment of the amount, P.W. 5 is said to have given the notes to P.W.

4. P.W. 4 entrusted a few of those notes to his wife, the petitioner for repayment of loan in the Bank. It thus that petitioner gave the counterfeit currency notes to the Cashier of the Bank on 11.2.2002. Based on the final report, charge was framed against accused Nos. 1 and 2 for offences punishable under Sections 489B and 489C of the IPC. On their pleading not guilty prosecution examined its witnesses. Petitioner was examined as P.W. 3 on 8.9.2007. Resiling from her previous statement to the Investigation Officer she denied that she had given the (counterfeit) currency notes to the Cashier. After examination of petitioner, learned Public Prosecutor filed CM.P. No. 2681 of 2007 to implead petitioner as additional accused. Learned Sessions Judge closed that petition directing the prosecution to

examine C.Ws. 5 and

6. After examination of C.Ws. 5 and 6 as P.Ws.4 and 5, learned Public Prosecutor requested that petitioner may be impleaded as additional accused. After hearing learned Public Prosecutor and counsel for accused learned Sessions Judge vide the impugned order dated 3.1.2009 allowed the request and impleaded petitioner as accused No.

3. That order is under challenge in this revision. Learned Counsel for petitioner contends that evidence given by petitioner as P.W.3 could not be made use of for impleadment in view of the protection available to her under the proviso to Section 132 of the Indian Evidence Act (for short, 'the Act'). It is also contended by learned Counsel that there is no material on record to show even prima facie that petitioner possessed or used counterfeits currency notes knowing the same to be counterfeit. Learned Public Prosecutor contended that on the evidence on record petitioner could be impleaded as additional accused.

3. Section 319 of the Code of Criminal Procedure (for short, 'the Code') enables the court to implead a person as an accused in the case and try him along with the accused already on record. It is not disputed that it is after examination of P.Ws. 1 to 5 including petitioner that order of impleadment was passed by learned Sessions Judge. Two questions arose for a decision in this case; (1) whether, in ordering impleadment evidence of petitioner as P.W. 3 could be taken into account and, (2) whether from the evidence on record it appeared that petitioner has committed offences punishable under Sections 489B and 489C of the IPC?

4. Section 132 of the Act reads as under:

132. Witness not excused from answering on ground that answer will criminate.- A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind.

Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.

(emphasis supplied)

As per that, provision a witness shall not be excused from answering a question on the ground that such answer will criminate or may tend directly or indirectly to criminate such witness or that it will expose or tend directly or indirectly to expose such witness to a penalty or forfeiture of any kind. Proviso to the Section engrafts a protection for the witness that any answer he is 'compelled to give' shall not subject him to any arrest or prosecution or be proved against him in any criminal proceeding other than a prosecution for giving false evidence.

5. One of the earliest decisions under the English law dealing with the privilege of a witness not to answer questions which have a tendency to criminate him is *Fisner v. Ronalds* 1852 138 ER 1104. That was a money suit where the defendant cited and-examined a witness. Counsel for defendant put certain questions to the witness. Counsel for plaintiff requested the Judge to caution the witness that his answer to those questions might tend to subject him to a criminal charge. The Judge told the witness that he was not bound to answer the question inasmuch as his answer might have a tendency to involve him in the danger of being indicted in a prosecution. Witness declined to answer the question. The case went in favour of the plaintiff. Defendant challenged the verdict in appeal. It was contended that the Judge was wrong in telling the witness that he might decline to answer the question on the ground that it might have a tendency to criminate him. Repelling the contention it was held that a witness is not bound to answer a question, where his answer may have a tendency to render him amenable to a criminal charge and that it is no ground of complaint that the Judge cautions the witness, without waiting for him to claim his privilege - it is for the witness, and not for the judge, to determine whether or not the answer to the question may tend to criminate him. Jervis, C.J. held,

The tendency of the question was plain and the learned Judge saw that the witness really believed that his answer to it might tend to criminate him. In Phillip's

on Evidence, 10th Ed. Vo. 11, Paragraph 487, it is said that a witness is privileged from answering not only what will criminate him directly, but also whatever has any tendency to criminate him' and the reason given for this decisively disposes of this case, - 'because, otherwise, question might be put after question, and, though no single question may be asked which directly criminate, yet enough might be got from him by successive questions, whereon to found against him a criminal charge'. We must, therefore, allow the witness to judge for himself, or he would be made to criminate himself entirely. There is, no doubt, at times great difficulty in applying the rule; but it is impossible to help that.

6. Section 132 of the Act is a reproduction of the English law as to privilege of a witness from being compelled to answer questions which was taken away by Section 32 of Act 2 of 1855. The effect of Section 19 of Coroners' Act (4 of 1871) and Section 342 of the Criminal Procedure Code (old) came for consideration in *Emperor v. Kazi Dawood Kazi* : AIR 1926 Bombay 144. It was held,

In my opinion it is repugnant to all principles of criminal law as administered in this Country to compel a person to give evidence in the very matter in which he is accused., or is liable to be accused, and then to base charge on such evidence and at the trial of the accused to use such evidence given on oath as a statement tending to prove guilty of the accused.'

(emphasis supplied)

7. Then came the decision in *Elavarathi Peddatha Reddi v. Iyyala Varada Reddi* AIR 1929 Mad 236. Effect of the word 'compulsion' occurring in the proviso to Section 132 of the Act came up for consideration. Question considered was whether protection is available to the witness only in respect of answers given on 'compulsion' and whether summoning of the person amounted to such 'compulsion'. Devadoss, J, speaking for the Bench said,

In order to avail oneself of the protection given, he must bring himself within the proviso; in other words, he should be compelled to answer the question. The contention of Mr. Ethiraj is that the mere fact that witness is asked to get into the witness box and is sworn to tell the truth and nothing but the truth is tantamount to

compulsion under Section 132, Evidence Act. Section 132 is clear in its terms. It says that no witness shall be excused from answering any question on the ground that the answer might expose him to civil or criminal proceeding or may tend to his prejudice. The proviso protects him from arrest or prosecution or proof of the statement in criminal proceeding against him except as to perjury. The compulsion contemplated in S.132 is something more than being put into the box and being sworn to give evidence; the compulsion may be expressed or implied. It is not necessary that the compulsion must be in any set form of words or that the asking for protection should be in a particular form. If the witness is made to understand that he must answer all questions without expression, it would amount to compulsion. In all cases it is the question of fact whether there was or was not compulsion....

8. Later decisions did not agree with the view that protection under the proviso to Section 132 of the Act is available only when witness objected to the question. Tudball, J. held in *Emperor v. Chatur Singh* AIR 1931 All 36 that, although a voluntary statement made by a witness might stand on a different footing, an answer given by a witness in a criminal case on oath to a question put to him either by the court or by counsel on either side especially when the question was on a point which was relevant to the case was within the protection afforded by Section 132 of the Act whether or not the witness had objected to the question asked to him. Learned Judge expressed his view in the following words,

It would be too much to ask of an ordinary layman that he should know all the terms of Section 132. Evidence Act and that he should be prepared to protest against every question put to him in order to protect himself under that Section. I think if a common sense meaning be given to the word 'compelled' in Section 132, it is clear that in the present case these five persons were compelled to answer. They were under the direct compulsion of the law and of the court, and in my opinion they were protected by that Section.

9. A Division Bench of this Court in *Gangadharan v. S.I. of Police* 1989 (2) KLT 448 dissented from the decision of the Madras High Court in *Elavarathi Peddatha I Reddi's* case and affirmed the decision of a learned Single Judge of this Court in

Kunhappan v. State of Kerala 1987 (2) KLT 222. Division Bench held that protection under the proviso to Section 132 of the Act is available to a witness whose presence is required by the court either by issuance of a summons or by other means and answer given by such witness cannot be characterised as voluntary statement and without compulsion. It is immaterial whether he has objected to the question. So much so, petitioner who was summoned as a witness for the prosecution was bound under law to answer the questions put to her. Hence for application of proviso to Section 132 of the Act it is immaterial whether petitioner had objected to the questions put to her. Evidence given by petitioner as P.W. 3 cannot be used for the purpose of prosecuting her. It is a different matter whether she is liable to be proceeded against for perjury on the evidence given by her if such a situation arose.

10. Next question is whether impleadment of petitioner as an additional accused could be ordered on the materials on record. The law on the point says that to order impleadment it must 'appear' from the evidence on record that the person sought to be impleaded has committed an offence. Dealing with the issue the Supreme Court held in Ram Singh v. Ram Niwas 2009 (2) KLT SN 72 (C. No. 73) SC),

During the trial it has to appear from the evidence that a person not being an accused has committed any offence for which such person could be tried together with the accused who are also being tried. This Court has laid emphasis on the words, it appears from the evidence, 'any person, and has committed any offence'. It was further held that the power under 5.319 has to be essentially exercised only on the basis of the evidence brought on record of the case. The discretionary jurisdiction could, therefore, be exercised only after the legal evidence comes on record and from that evidence it appears that the concerned person has committed an offence. High Court has committed a serious error in proceeding on the premise that mere existence of a prima facie case would be sufficient to exercise the Court's jurisdiction under Section 319 of the Code. We have noticed hereinbefore the importance of the word 'appears'. What is, therefore, necessary for the Court is to arrive at a satisfaction that the evidence adduced on behalf of the prosecution, if unrebutted, would lead to conviction of the persons to be added

as accused in the case.

11. In *Brindaban Das v. State of W.B* (2009) 2 SCC (CrL.) 79 it was held that impleading must be imperative to meet the ends of justice and that substantive evidence, which if rebutted would warrant his conviction is required. For the purpose of framing charge under Section 240 of the Code it is sufficient that there is sufficient ground to proceed against the accused. But when it comes to the question of impleadment under Section 319 of the Code it must 'appear' from the evidence that the person sought to be proceeded against has committed an Offence. The degree of evidence required under Section 319 of the Code is such that in every possibility there is the chance of the person sought to be impleaded being convicted of the offence on the evidence on record. Now, I shall advert to the evidence on record in this case.

12. Learned Sessions judge has observed from the evidence of P.Ws. 1 and 2 that the counterfeit currency notes were brought to the Bank by petitioner on 11.2.2002. Case of prosecution throughout, and it remains so even now, is that the counterfeit currency notes were given to P.W. 5 by accused No. 1 and P.W. 5 for the purpose of discharging his debt, gave some of those currency notes to P.W. 4. P.W. 4 handed over a few of those currency notes to the petitioner (P.W. 3) for repayment of the loan with the Bank. It is accordingly that petitioner brought those currency notes to the Bank and handed over the same to P.W. 1. There is no case for the prosecution and much less, evidence that petitioner was aware that those currency notes are counterfeit. There is no case for prosecution or evidence that knowing the same to be counterfeit notes petitioner used the same as genuine. If that were the case of prosecution, necessarily petitioner should have been added as an accused along with accused Nos. 1 and 2 at the stage of submission of final report. It is relevant to note that P.W. 5 who handed over the currency notes to P.W. 4 and P.W. 4 who gave a few of those notes to the petitioner remain as prosecution witness even now. If P.W. 4 had no knowledge that the currency notes are counterfeit, there was no possibility of petitioner knowing that. Case of prosecution even now is that without knowing the currency notes in question to be counterfeit petitioner took the same from P.W. 4, her husband and handed over the same to P.W. 1 in repayment of the loan. Section 489B of the IPC penalises

use of forged or counterfeit or bank note as genuine, Under Section 489C possession of forged or counterfeit or bank notes knowing or having reason to believe the same as forged or counterfeit notes and intending to use the same as genuine or that it may be used as genuine is punishable. In either case one of the essential requirements to constitute the offence is that the person in possession of or using the counterfeit currency notes must know or should have reason to think that the same are counterfeit notes. 'Possession' referred to in Section 489C of the IPC should have the element of consciousness.

13. This Court in *Karunakaran Nair v. State of Kerala* 2000 (2) KLT 898 held that mere possession of forged notes is not sufficient to constitute an offence under Section 489C of the IPC and that it is necessary to show that the person in such possession knew that such notes are forged and he intended to use it as genuine, knowing the same to be counterfeit or forged notes. In *Umashankar v. State of Chattisgarh* 2001 (3) KLT 681 (SC) the Supreme Court has reiterated the essential requirements of the offences under Sections 489B and 489C of the IPC and said,

7. But these provisions are not meant to punish unwary possessors or users.

8. A perusal of the provisions, shows that mens rea of offences under Sections 489B and 489C is, 'knowing or having reason to believe the currency notes or bank notes are forged or counterfeit'. Without the aforementioned mens rea selling, buying or receiving from another person or otherwise trafficking in or using as genuine forged or counterfeit currency notes or bank notes, is not enough to constitute offence under Section 489B of IPC. So also possessing or even intending to use any forged or counterfeit currency notes or bank notes is not sufficient to make out a case under Section 489C in the absence of mens rea.

That essential requirement is lacking so far as petitioner is concerned. Evidence that petitioner carried a few of the counterfeit currency notes without knowing the same to be so and tried to discharge the liability to the Bank by handing over those currency notes to P.W. I is not sufficient to arrive at the satisfaction that it appears that petitioner has committed offences punishable under Sections 489B and 489C of the IPC. That being the situation, order of impieadment cannot be sustained and it is liable to be set aside. I do so.

The Revision Petition is allowed. The order under challenge is set aside.

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