Kennady Vs. the State

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SooperKanoon Citation : sooperkanoon.com/788904

Court : Chennai

Decided On : Jul-09-1996

Reported in : 1997CriLJ1465

Judge : N. Arumugham, J.

Acts : Indian Penal Code (IPC), 1860 - Sections 147, 323 and 448; Code of Criminal Procedure (CrPC) , 1973 - Sections 5, 161, 161(3), 173, 173(1), 173(3), 173(8), 190, 190(1) and 482

Appeal No. : Cri. R.C. No. 226 of 1996 and Cri. R.P. No. 226 of 1996 and Cri. M.P. No. 963 of 1996

Appellant : Kennady

Respondent : The State

Advocate for Def. : A.N. Rajan, Govt. Adv. for the Public Prosecutor

Advocate for Pet/Ap. : S. Rajeswaran, Adv.

Judgement :
ORDER

1. By consent of both the parties, the revision as well as the miscellaneous petition were heard and disposed of by delivering this common order on merits.

2. The challenge in this revision is against the order passed by the learned Judicial Magistrate, Devakottai in Criminal Miscellaneous Petition No. 585/96 dated 15-3-1996, which was the very result of a memo filed by the learned Assistant Public Prosecutor Grade II before the trial Court dated 15-3-1996 as stated hereunder :

'In the above case P.W. 1 was examined on 1-3-1996 and today P.W. 2 is examined. Both the witnesses have elicited in the evidence box about the overt act of one Kennady, whose name was not included and added as one of the accused in the charge sheet.

Therefore, it is humbly prayed that your honour may be pleased to pass order for issue of summons to the accused in the following address and thus render justice.'

The above memo seems to have been filed on 15-3-1996. Consequently, on the same day, the following order was passed by the learned Judicial Magistrate :-

'Evidence of P.Ws. 1 and 2, complaint and S. 161(3), Cr.P.C. statement of P.W. 1 perused. Permitted. Issue summons to Kennady A5.'

2. It is this order virtually being canvassed and challenged in this revision for want of its legality and propriety. Four accused by name Antonysami, Charless, Diraviam and Arockasamy stand charged by the Sub. Inspector of Police, Devakottai in Devakottai Taluk Police Station Crime No. 71 of 1995 for the offence under Ss. 147, 448 and 323, I.P.C. on the basis of a final report sent by the Sub-Inspector of Police, Devakottai to the Court of Judicial Magistrate, Devokottai, which was taken on file for the cognizance of the offences referred to therein against them. After having gone through the entire report with every case materials under S. 173, Cr.P.C., the learned Magistrate framed the charge, issued process and upon the appearance of the accused by summoning the witnesses, commenced the trial and that in which P.Ws. 1 and 2 appear to have been examined by the prosecution. It was at this stage, the memo first referred to has been filed by the Assistant Public Prosecutor Grade II before the trial Court and which was allowed with the order referred to subsequently as above.

3. While challenging the legal sanctity and propriety of the impugned order, Mr. Rajeswaran, the learned counsel appearing for the petitioner dwell his attack firstly that the impugned order was a non-speaking one and that secondly the said order was passed not in consonance with the mandatory provisions of sub-clause (8) of S. 173 of the Code of Criminal Procedure and that thirdly while passing the impugned order, the learned Judicial Magistrate has not at all applied his mind the factual aspects of the case, which do not implicates the accused with reference to their specific overt acts by all the witnesses and the materials placed by the Investigating Agency and that lastly, the learned counsel contended that the settled principles of law in a case of similar crime held by the higher Courts have been clearly overlooked in this case and that for all the said reasonings, the impugned order is to be declared as vitiated as it lacks the legality and propriety.

4. While responding to the above contentions, the learned Government Advocate Mr. A. N. Rajan has stated that though the prosecution is entitled to ask the Court to add any more person as an accused along with other accused on the basis of any material and that the Court upon such request, shall satisfy itself that there are enough materials to add such person and that the said procedure is well settled now by the Courts of law. It can be made applicable to the facts of the instant case also and while so doing, he would submit that the learned Judicial Magistrate has not at all looked into the special report sent by the Investigating Agency along with the final report filed already and that the learned Government Advocate has generously pointed out that the special report sent along with the final report has not at all been looked into and taken note off by the learned Judicial Magistrate while passing the impugned order. Therefore, it is under these circumstances, the learned Government Advocate is put in a fix, but however, not able to support or justify the impugned order under this revision.

5. Seemingly almost an identical facts of the case, I have had my preference to say the following in S. Ramapandian v. State, (1996) 2 Crimes 148 :-

'What is expressly and explicitly requited by the statute is that the Investigating Agency shall forward the new materials or the additional evidence of further evidence to the Magistrate in the news of a further report or reports regarding such

evidence, which has been collected subsequently for the appropriate scrutiny and proceedings by the Court of law. On the receipt of such additional materials and further evidence, the Court is bound to look into the said matters and then on the basis of the same is entitled to alter or amend the charges and shall be entitled to proceed further, but only after hearing the accused and the accused took notice of the said facts. If otherwise, the Court proceeds, then the said proceedings adopted by the Court would definitely, in my firm view, would be hit by the principles of natural justice. No man shall be condemned unless he is heard, is the very fundamental meaning of the doctrine of 'audi alteram partem' and it could be ignored if the additional materials or evidence collected by the Investigating Agency which are placed before a Court requiring the Court to alter or amend the charge framed already in a pending case, would definitely come within the teeth of the said doctrine and for the said reason, the procedure so adopted cannot be countenanced. To state more precisely the police are entitled to investigate further if they come across with new set of facts or materials or further evidence while a case against an accused is pending before a Court. But, however, that additional facts and further evidence collected must be placed before the Court for the purpose of future action to be taken appropriately and it is certainly not the duty of the Investigating Agency to alter or amend the charge. But that duty must be cast upon the Court to do so. I had the occasion in one of my previous judgment to deal with the similar aspect and observed that on coming to know to the new adequate materials if the police wants to investigate further for an offence taken cognizance of already without the permission of the Court or giving any opportunity to the accused, then, such investigation cannot be termed as valid in law. What is precluded by the statute for a police is that they must investigate and place all the materials collected before the Court and that could be done only with the permission of the Court, for the very reasoning that the Court is seized of all the facts and materials already and if the Court come across with the new materials and further evidence bearing on the accused and by giving full opportunity to put forth his objections, the Court must proceed further in accordance with the procedural law, if not, the whole proceedings could be termed as not only irregular but also vitiates the whole proceedings for the reason of serious prejudice caused to the accused. Implicating false persons roping in innocents into the criminal

cases has become more possible if such procedures are subscribed. It is therefore, in the light of the said view, the law has been settled as referred to above by the Apex Court.'

6. In State of Bihar v. J. A. C. Saldanna, : 1980 CriLJ98 , the Supreme Court has held the legal ratio in the following words :-

'There is a clear cut and well demarcated sphere of activity in the field of crime detection and crime punishment. Investigation of an offence is the field exclusively reserved for the executive through the police department, the Superintendence over which vests in the State Government. The executive which is charged with a duty to keep vigilance over law and order situation is obliged to prevent crime and if an offence is alleged to have been committed it is its bounden duty to investigate into the offence and bring offender to book. Once it investigates finds an offence having been committed it is its duty to collect evidence for the purpose of proving the offence. Once that is completed and the Investigating Officer submits report to the Court requisting the Court to take cognizance of the offence under S. 190 of the Code its duty comes to an end. On a cognizance of the offence being taken by the Court the police function of investigation comes to an end subject to the provision contained in S. 173(8), there commences the adjudicatory function of the judiciary to determine whether an offence has been committed and if so, whether by the person or persons charged with the crime by the police in its report to the Court and to award adequate punishment according to law for the offence proved to the satisfaction of the Court. There is thus a well defined and well demarcated function in the field of crime detection and its subsequent adjudication between the police and the Magistrate.'

'Section 5 of the Code of Criminal Procedure provides that an offence under the Indian Penal Code shall be investigated, tried or inquired in accordance with the provisions contained in the Cr.P.C. Investigation of offences are two in nature, one is cognizable and the other is non-cognizable. With reference to cognizable offences, when the complaint is received with respect to such commission of the offence, the concerned Police Officer takes up the investigation. In the case of non-cognizable offences, the Police Officer does not investigate without the order

of a competent Magistrate. According to the scheme of the Code, investigation is preliminary to a case being put up for trial for a cognizable offence. Investigation starts, on an information relating to the commission of an offence given to a Police Officer in charge of the Police Station. Investigation generally consists of various steps, namely, enquiry by the officers or ascertainment of facts and circumstances of the case from the complaint, proceeding to the spot by the officer concerned on the allegations of the complaint and discovery and arrest of suspected offender and the collection of evidence for the arrest of the offender relating to the commission of the offence which in turn may consist of examination of various persons including the accused person and the reduction of the statement into writing with reference to seizures in mahazars and formation of opinion as to whether on materials collected by the Police Officer, there is a case to place the concerned person in action against whom complaint is lodged before the Magistrate for trial and filing of the charge-sheet under S. 173, Cr.P.C. In both the cases however, the final report of the police is to be submitted to the Magistrate under sub-sec. (1) of S. 173, Cr.P.C. If the Magistrate, on the other hand, disagrees with the report submitted by the police, then the accused comes into the picture and thereafter, he has a right to be heard and to adduce evidence in support of his innocence. But, in case an order is passed by the Magistrate under S. 173(3), Cr.P.C. in agreement with the police report that there is no case against the person accused, it goes in favour of the person accused. But it is open to the Magistrate to agree with the police report and take cognizance of the offence under S. 190(1)(b) or to take the view that the facts disclosed do not make out an offence and decline to take cognizance.'

7. Thus, the whole philosophy of the crime detection followed by the conducting of investigation, which consists of receipt of the complaint, identifying the accused, collection of the materials, recording of the statements, gathering the attendant circumstances, recoveries to be made, were all to be completed and all such materials thus gathered, have to be forwarded to the Court of law under S. 173(1) which are to be scrutinised by the Magistrate and upon doing so, he may or may not accept and if any particulars require further with all details, power is given to the Court to direct Police Officer to furnish the same before taking cognizance of the offence and that by so doing, the Court takes the cognizance of the offence

pursuant to S. 190 of the Code and all the duties of the police or the Investigating Agency come to an end. On taking the cognizance of the offence under the various penal provisions of the Code, the adjudicatory function of the judiciary to determine whether such an offence alleged to have been committed by the person so charged or not is alleged with what punishment and its adequacy, are all to be commenced and decided by the Court of law depending upon the legal evidence alone with the permitted attending circumstances. Thus, the clear distinction on the demarcating line between investigation and the power of the Court has been well laid and settled by the Apex Court in the above cited case law. Following this legal thesis based upon my observations given earlier, with great constraint I may observe after the full investigation of the police filed the final report and all materials before the Court, which was found accepted by the Court of law by taking cognizance of the same by framing the charges under the relevant provisions of the Indian Penology, then it must be deemed without hesitation that the investigatory functions are already over and the adjudicatory function of the Court of law begins and while the process of the said adjudicatory function is on, if the prosecution wants to intervene by adding any more person as an accused or delete any accused under the guise of sub-clause (8) of S. 173 of the Code of Criminal Procedure, then he must approach the Court of law, which is performing its adjudicatory functionings and certainly not otherwise and if any other mode is opted by the prosecution, it is certainly alien to the very basic fabric of criminal jurisprudence and procedural law. As I have held already, upon such materials placed before the Court, if the evidence by the prosecution pursuant to the wider power given to the Court are mandatory, then only Court of law is expected to allow such petitions and issue summons to add any more persons as accused.

8. For the sake of convenience, it has become necessary for me to advert sub-clause (8) of S. 173, Cr.P.C. alone as stated herein :-

'Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-sec. (2) has been forwarded to the Magistrate and, whereupon such investigation, the officer in charge of the Police Station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form

prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report of reports as they apply in relation to a report forwarded under sub-section (2).'

9. Pertinent at this stage to advert a decision held by the Supreme Court in Ram Lal Narang v. State (Delhi Administration) and Om Prakash Narang v. State (Delhi Administration), : 1979 CriLJ1346 , in the following words :

"Any one acquainted with the day-to-day working of the criminal Courts will be alive to the practical necessity of the police possessing the power to make further in investigation and submit a supplemental report'. It is in the interests of both the prosecution and the defence that the police should have such power. It is easy to visualise a case where fresh material may come to light which would implicate persons not previously accused or absolve persons already accused. When it comes to the notice of the Investigating Agency that a person already accused of an offence has a good alibi, is it not the duty of that agency to investigate the genuineness of the plea of alibi and submit a report to the Magistrate After all the Investigating Agency has greater resources at its command than a private individual. Similarly, where the involvement of persons who are not already accused comes to the notice of the Investigating Agency, the Investigating Agency cannot keep quiet and refuse to investigate the fresh information. It is their duty to investigate and submit a report to the Magistrate upon the involvement of the other persons. In either case, it is for the Magistrate to decide upon his future course of action depending upon the stage at which the case is before him. If he has already taken cognizance of the offence, but has not proceeded with the enquiry or trial, he may direct the issue of process to persons freshly discovered to be involved and deal with all the accused, in a single enquiry or trial. If the case of which he has previously taken cognizance has already proceeded to some extent, be may take fresh cognizance of the offence disclosed against the newly involved accused and proceed with the case as a separate case. What action a Magistrate is to take in accordance with the provisions of the Code of Criminal Procedure in such situations is a matter best left to the discretion of the Magistrate. The criticism, that a further investigation by the police would trench upon the proceedings before the Court is really not of very great substance, since whatever the police may do, the

final discretion in regard to further action is with the Magistrate. That the final word is with the Magistrate is sufficient safe-guard against any excessive use or abuse of the power of the police to make further investigation. We should not, however, be understood to say that the police should ignore the pendency of a proceeding before a Court and investigate every fresh fact that comes to light as if no cognizance had been taken by the Court of any offence. We think that in the interests of the independence of the Magistracy and the judiciary, in the interests of the purity of the administration of criminal justice and in the interests of the committee of the various agencies and institutions entrusted with different stages of such administration, it would ordinarily be desirable that the police should inform the Court and seek formal permission to make further investigation when fresh facts come to light.'

10. It is thus identified the police or the Investigating Agency are vested with the onerous powers to investigate at any stage. There are certain limitations and stages to be provided by the law and the first of which could be done independently before submitting the final report under S. 173, Cr.P.C. and that secondly, further investigation can be done and consequent changes in the final report could be made only in one and the only stage of getting permission from the Court and not others and what has been clearly and expressly envisaged in the provision of S. 173, Cr.P.C. is Court must look into and satisfy itself to proceed further in declining or accepting the request made by the prosecution, during the second spell of the adjudicatory functions. It is not an automatic right for the prosecution to add any more persons as accused or delete any accused from the arraying of the accused to go scot-free by merely filing a memo or a petition. The minimum understanding of the above provision of law would clearly indicate that the wider discretionary powers vested with the Court must be fully utilised and legally exercised before adding any person as an accused or alter or amend the charge framed and tried. If this legal thesis is understood in its proper legal perspective, then neither the prosecution nor the Investigating Agency, in my considered view, will not opt for filing any memo to issue summons, without placing any adequacy of materials or evidence and that it has been done so in the facts of the instant case, which is rather unfortunate.

11. It appears from the case records that the learned Assistant Public Prosecutor Grade II attached to the learned Judicial Magistrate has filed simply a memo without even quoting the provisions of law provided under the Code of Criminal Procedure. The basis to file the memo seems to be on the evidence of P.Ws. 1 and 2 and S. 161(3) statement of P.W. 1. The impugned order passed by the learned Judicial Magistrate is undisputably a non-speaking one, given on no reasoning at all. On this ground alone, the impugned order is liable to be set aside and that secondly the filing of a memo by the Assistant Public Prosecutor Grade II without even quoting the provision of law and without assigning any reason to add a person by name Kennady as 5th accused for the prosecution is rather surprising and scanty. The learned Judicial Magistrate has not approached the matter by applying his mind fully by ascertaining whether there were adequate materials or evidence collected by the Investigating Agency to frame a charge against the third person, by name Kennedy. If he says that he has done it already, then I am rather surprised to see as what has prevented the learned Magistrate to frame a charge against 5th accused along with the other accused when the offences under the relevant provisions of law were taken cognizance of at the initial stage It is not known under what basis and materials of the evidence collected by the Investigating Agency, the memo to add a third person has been filed and accepted by the Court below. It is thus seen the reasoning is totally lacking, basis is lacking and the satisfaction and application of mind by the Court are lacking and virtually a non-speaking order has come into vogue.

12. As I have observed already, none of the accused, who were on the record, was heard about the new materials or upon the memo filed by the Assistant Public Prosecutor Grade II. It is not a mere fancy or the prerogative of the prosecution to file simply a memo and ask the Court to add any third person to be one of the accused in a criminal case, as there was no procedural law mandated by the statute and that what is exactly has been done in this case to the utter disregard of the settled principles of law. Mr. Rajeswaran, learned counsel appearing for the petitioner drew my attention to the S. 161, Cr.P.C. statement recorded by the Investigating Agency from P.Ws. 1 and 2 as well as the First Information Report. Except the mere embellishment, no materials seem to have been newly collected or placed before the Court, warranting to rope in the revision petitioner to be

arrayed as the 5th accused in this case so as to justify the impugned order. It is thus having considered the whole gamut of the case that the very approach adopted by the learned Magistrate is found totally erroneous and cannot at all be sustained for any moment, with the result the impugned order is hereby set aside in toto.

13. In the result, for the foregoing reasonings, findings and observations, the revision succeeds and accordingly, is allowed. Consequently, the impugned order passed by the learned Judicial Magistrate in Crl. M.P. No. 585/96 dated 15-3-1996 is hereby set aside. One more observation is necessary that the impugned order since passed resulted in total failure of justice by roping in a third person into a criminal case, which amounts to the total miscarriage of justice and that giving a quietus for the same amounts to a full adjudication, I have entertained this revision under S. 482 of the Code, if not under the revisional jurisdiction.

14. In view of the disposal of the main revision, no order is necessary in the criminal miscellaneous petition and accordingly, the CMP is dismissed.

15. Revision allowed.