

Ushman and Another Vs. the State

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Court : Chennai

Decided On : Mar-07-1997

Reported in : 1997CriLJ2457

Judge : M. Karpagavinayagam, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 425 and 436; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 227 and 228; Evidence Act - Sections 105

Appeal No. : Criminal Revn. Case No. 494 of 1992

Appellant : Ushman and Another

Respondent : The State

Advocate for Def. : N.R. Elango, Govt. Adv.

Advocate for Pet/Ap. : C. Vijayakumar, Adv.

Judgement :

ORDER

1. This revision is directed against the order dated 11-10-1991 in Crl. M.P. No. 4788 of 1990 in S.C. No. 127 of 1990 on the file of XVth Assistant Sessions Judge, Madras, dismissing the petition filed by the petitioners/A-1 and A-2, to discharge them under S. 227, Cr.P.C.

2. In 1989, the Inspector of Police, Periamet, filed a charge sheet before the Vth Metropolitan Magistrate, Egmore, Madras, against the petitioners/A-1 and A-2, for the offences u/Ss. 436 and 436 read with 34, I.P.C., respectively, alleging that due to their deliberate negligence in not putting off the main switch in their shops at Moore market buildings on 29-5-1985 around 00.15 hours-midnight, the fire broke out from the above two shops due to the melting of the metal wires, insulation materials etc. kept at the above shops, which got fused and due to which the above two shops, the adjoining shops and the parts of Moore market buildings got completely damaged, causing loss of property estimated at about six crores.

3. After committal to the trial Court, the case was taken on file and renumbered as S.C. No. 127 of 1990. On 20-11-1990, the petitioners/A-1 and A-2 filed a petition under S. 227, Cr.P.C., requesting for discharge, mainly on the ground that there is no material to frame any charge against them.

4. On counter being filed by the Public Prosecutor, and after hearing the counsel for both, the trial Court, dismissed the said petition, holding that there are sufficient materials to proceed against them for the above offences, by order dated 11-10-1991. This order is being challenged in this revision.

5. Mr. C. Vijayakumar, learned counsel for the petitioner, though raised several grounds, mainly contended that in the absence of sufficient grounds to proceed against the petitioners, the trial Court could not frame charge and dismiss the application. Learned counsel further contended that there is no iota of material either against A-1 for the offence under S. 436, I.P.C., or against A-2 for the offence under S. 436 read with 34, I.P.C., and that the reasons given by the trial Court for dismissing the said petition are not sound and justifiable. He also submits that in order to satisfy the requirements of S. 436, Cr.P.C., the prosecution has to establish that the accused had intention to cause mischief by fire which is absent in this case. On the basis of these submissions and through his elaborate and persuasive arguments, learned counsel for the petitioners requests this Court, to discharge the petitioners by allowing the revision.

6. Per contra, Mr. N. R. Elango, learned Government Advocate, representing the Public Prosecutor, while countering the submissions made by learned counsel for

the revision petitioners, contended that there are sufficient materials collected by the investigating agency to frame the appropriate charges as referred above, and the reasonings given by the trial Court, for dismissing the application for discharge are unassailable, and the order of dismissal is liable to be confirmed.

7. I have carefully scrutinized the records of the case, as well as given my anxious consideration to the strenuous submissions made by both the counsel.

8. Before considering the materials available in this case, let me go into the scope of the relevant Section viz. Section 227, Cr.P.C., by which the powers have been conferred to the trial Court to discharge the accused even in Sessions case. S. 227, Cr.P.C., provides as follows :-

'If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.'

A reading of this section would show that there are some contingencies to be complied with before passing order under this section. They are :-

(1) The record of the case and the documents submitted along with the police report have to be considered.

(2) The prosecution as well as the accused have to be heard.

(3) If there is no sufficient ground for proceeding against the accused, on consideration of both the records and the submissions, the trial Court shall discharge the accused.

(4) While discharging the accused, the trial Court shall have to necessarily record the reasonings.

9. Section 228, Cr.P.C., which deals with 'Framing of charge' reads thus :-

'(1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which -

(a)

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.' So, under this Section, the following conditions have to be complied with :- (1) After consideration of the reports, documents and hearing, the Judge has to form an opinion.

(2) In order to arrive at an opinion, he has to find out whether there is any ground to presume that the accused committed an offence triable by the Sessions Court.

(3) After the formation of the opinion about the presumption of the guilt of the accused, the Judge shall frame the charge.

10. Now let me see whether these contingencies and the conditions of Sections 227 and 228 Cr.P.C., have been complied with by the trial Court, while passing orders, taking into consideration of the citations referred to by both the parties.

(a) Learned counsel for the revision petitioners relied on a decision reported in : 1990 CriLJ1869 (Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijja), in which it is held as follows :-

'That in exercising his jurisdiction under section 227 of the Code the Judge which under the present Code is a senior and experience Judge cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.'

This decision while interpreting Section 227 Cr.P.C., indicates that the trial Judge as a Sessions and senior Judge, should not be a mouthpiece of the prosecution

and he has to necessarily consider the total effect of the evidence produced before the Court. At the same time, the Apex Court puts the restriction on the powers of the Sessions Court, in making a roving enquiry and weighing the evidence.

(b) Learned Government Advocate placed reliance upon the decision in the case of State of Maharashtra v. Som Nath Thapa 1996 (1) Sup (Cr.) 410 : 1996 CLJ 2448 wherein the observation of the Supreme Court is as follows :-

'The aforesaid shows that if on the basis of materials on record, a Court could come to the conclusion that commission of the offence is a probable consequence, a case for framing of charge exists. To put it differently, if the Court were to think that the accused might have committed the offence it can frame the charge, though for conviction the conclusion is required to be that the accused has committed the offence. It is apparent that at the stage of framing of charge, probative value of the materials on record cannot be gone into; the materials brought on record by the prosecution has to be accepted as true at that stage.'

(c) Even in the citation referred by counsel for the revision petitioners (Niranjan Singh In re) the Apex Court referred a case of Supdt. and Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja, : 1979 CriLJ1390 , wherein it has been held as hereunder :-

'The standard of test, proof and judgment which is to be applied finally before finding, the accused guilty or otherwise, is not exactly to be applied at the stage of Section 227 or 228 of the Code of Criminal Procedure, 1973. At this stage, even a very strong suspicion founded upon materials before the Magistrate which leads him to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged may justify the framing of charge against the accused in respect of the commission of that offence.'

(d) Yet another decision referred to by the Supreme Court in the above Niranjan Singh's case 1990 C LJ 1869 is State of Bihar v. Ramesh Singh, : 1977 CriLJ1606 . In that decision, the Supreme Court observed thus :-

'Reading Sections 227 and 228 Cr.P.C., together in juxtaposition, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under section 227 or Section 228 of the Code. At that stage the Court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction.

Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused.'

In the light of the legal position as interpreted by the Apex Court in the above decisions, I shall now consider whether there is any ground for presuming that the accused has committed the offence, and liable to be tried.

11. At the outset, let me consider the case as regards the 2nd petitioner/A-2. One Loganathan has been examined in the investigation as witness No. 14. He was the owner of the neighbouring shop of the petitioners. According to him, the shop allotted to the 2nd petitioner/A-2 and the shop of 1st petitioner/A-1 both were managed by the 1st petitioner alone, since even in the year 1980 itself, the 2nd petitioner Kareem left Tamil Nadu, after handing over the possession of his shop in the hands of 1st petitioner, and settled at Kerala. Therefore, both shops were run and managed by the 1st petitioner and the electricity connection was taken to the shop of A-1 from the shop of A-2, though the electricity connection stood in the name of 2nd petitioner. This would make it clear, that on the date of offence, the

2nd petitioner was not running his shop and he can, in no way be held liable for the incident took place in the shops on 29-5-1985 midnight.

12. Learned Government Advocate as well fairly concedes that there is no material whatsoever to connect the 2nd petitioner with the commission of the offence under section 436 read with Section 34 IPC, and as such, the charge against the 2nd petitioner for the offence under Section 436 read with Section 34 IPC, is not sustainable. In the absence of any ground, even for presuming that A-2/2nd petitioner might have committed the offence, the inclusion of the 2nd petitioner as one of the accused viz. A-2, would not be held valid. Therefore, the order of the trial Court dismissing the petition for discharge in so far as the 2nd petitioner is concerned, without complying the conditions required under section 227 Cr.P.C., is not justified and the same is liable to be set aside. Accordingly, the revision in so far as the 2nd petitioner is concerned, has to be allowed and the 2nd petitioner is to be discharged from the above case.

13. As regards the 1st petitioner, on going through the records and the relevant provisions, relating to the offence and the scope of Sections 227 and 228 Cr.P.C., I feel that there is strong suspicion that the 1st petitioner might have committed the offence alleged, as there is ground to presume that the 1st petitioner committed the mischief by fire, though not with intention, but with the knowledge.

14. Section 425, IPC, defines Mischief. As per this Section 'whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage, causes the destruction of any property, commits 'mischief'. Under Explanation 1, the said Section provides, that it is sufficient, if he intends to cause, or knows that he is likely to cause wrongful loss to any property. Explanation 2 of the said Section provides that mischief may be committed by an act affecting property belonging to the person who commits the Act, or to that person and others jointly.'

15. So, it is apparently clear from this Section, that mere knowledge that he is likely to cause wrongful loss to the property belonging to himself and others jointly would attract this section, and therefore, it cannot be contended that the intention of the accused has got to be established.

16. As per the statement of one Shanmugam, one of the witnesses in this case, it is clear that every shop had a switch board, meter and chamber, and every person after closing the shop has to put off the equipment switch and the main switch, or else the metal wires and insulation materials would get melted due to high temperature, which would normally develop during the electric supply.

17. The statement of one Tharaa Bhagadur, Watchman of the Moore market, would show that at about 12.20 midnight on 29-5-1985, he saw that the fire first broke out only from the shop of the accused, and that the door of the shop of the accused was found closed and locked from outside.

18. Item 87 of the Chemical report dated 18-11-1986, issued by Tamil Nadu Forensic Sciences Laboratory, shows that 'a cardboard box packed in a polythene paper and labelled' at part of a burnt metal box with burnt wires collected from the north of the southern side road east of the second main entrance from the park station road end', containing a rusty metal tray with some partially burnt metal wires, insulation material, hardened mass, ash debris, a broken piece of fuse with wires attached to it, a small transformer and a few small wires melted and fused at one end.' The details of the shop mentioned above would indicate that it relates to the shop of A-1, the first petitioner.

19. Of course, as correctly pointed out by learned counsel for the revision petitioners, that there is no direct evidence against the 1st petitioner/A-1, to show that he deliberately failed to put off the main switch, while closing his shop. The statement of one Ramanathan, Assistant Electrical Engineer, M.E.S. sub-station, shown as witness No. 10 is as follows :-

Therefore, in the light of the above materials, as pointed out earlier, though there is no direct evidence, there is strong suspicion for being entertained against the 1st petitioner/A-1, who was admittedly in possession of the shop, from which the fire broke out.

20. In this context, Section 105 of the Evidence Act, would become relevant. Under Section 105 of the Indian Evidence Act, 'when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case

within any of the General Exceptions in the Indian Penal Code, is upon the accused.' Of course, the presumption which would rise under this Section could be rebutted by the accused, by preponderance of probability. Therefore, it cannot be said at this stage, that there cannot be a presumption against the 1st petitioner/A-1, in view of the very grave and strong suspicion that arises against him on the basis of the materials available in this case, as discussed earlier, and as indicated above, the Apex Court has specifically held that when there is a strong suspicion to presume that the accused has committed an offence, it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. Therefore, I am of the view, that the order passed by the Court below, dismissing the application for discharge in so far as the 1st petitioner/A-1 is concerned, does not suffer from any infirmity, and as such, the same has to be confirmed.

21. In the result, the revision is partly allowed. In so far as the 2nd petitioner/A-2 is concerned, the order of Court below is set aside, and the 2nd petitioner is discharged from the above proceedings. In so far as the 1st petitioner/A-1 is concerned, the order of Court below is confirmed, and the revision is dismissed. The trial Court is directed to give preference to this case, since it relates to the incident that took place in 1985, and dispose of the case as expeditiously as possible.

22. Revision partly allowed.