In Re: Krishnan

In Re: Krishnan

SooperKanoon Citation : sooperkanoon.com/800365

Court : Chennai

Decided On : Jan-21-1970

Reported in : 1970CriLJ1539

Judge : K.N. Mudaliyar, J.

Appellant : In Re: Krishnan

Judgement :

ORDER

K.N. Mudaliyar, J.

1. The Petitioner herein gave evidence in the committal Court that he had witnessed with his own eyes the murder of One Guruswami Kudumban by the accused Muthiah Kudumban. In the 'Sessions Court however, the petitioner resiled from that statement and maintained that he did not witness the occurrence at all. In view of this very material contradiction, the learned Sessions Judge of Ramanathapuram concluded that the petitioner bad perjured; and therefore he ordered the prosecution of the petitioner. This step, so the prosecution claims, was taken for the eradication of the evils of perjury and in the interests of justice. The learned Sessions Judge also observed that there was no need to give the petitioner any opportunity of being heard in that regard. The petitioner then faced a criminal trial for an offence under Section 193, Penal Code and was convicted.

2. Mr. K. R. Natarajan appearing for the petitioner argued that before the complaint was laid against the petitioner by the learned Sessions Judge, Bamanathapuram, there ought to have been a notice given to the petitioner within the meaning of Section 479A (1), Criminal P. 0..

3. Before the argument is considered, I should like to set down the finding of the learned Sessions Judge, Madurai, on appeal against the petitioner's conviction for perjury to the effect that it is clear that the notice is mandatory and obligatory and that the witness should be given an opportunity of being heard as to what he has to say in regard to the contemplated complaint. In fact, the learned Public Prosecutor did not dispute the correctness of the proposition of law in the Court below. But the learned Sessions Judge {Madurai) holds that the conviction cannot be Bet aside on the ground of failure to give notice, for, in the opinion of the learned Sessions Judge, the explanation given by the petitioner before the learned Sessions Judge, Ramanathapuram (in the murder trial) was that the Police coerced him to give false evidence and accordingly he gave the statement that he saw the occurrence, in the course of the trial, the petitioner maintained that it was only because of coercion by the Police he gave a false statement in the committal court. On the basis of this explanation, the learned Sessions Judge, Madurai, found that no prejudice has been caused to the petitioner because he did not raise any defence other than what he had stated in his plea or explanation before the Sessions Court.

4. It may be borne in mind that there was a complete trial of the petitioner ending in his conviction. The learned Sessions Judge felt that had the petitioner come by way of an appeal or a petition against the

proceedings initiated against him on the ground that he had not been given an opportunity of being heard, one may be justified to draw inference of, or presume, prejudice. But, inasmuch as the entire proceedings have ended in the conviction of the petitioner, there is no 'prejudice' shown by the petitioner. It is true that he did not raise any objection even before the trial Magistrate; and, therefore, in the appeal, the learned Sessions Judge held that the petitioner cannot be heard to urge such a plea, and more so, in view of the fact that he had no explanation other than what he had already offered before the Sessions Court, Ramanathapuram. The learned Sessions Judge (Maiurai) ultimately found that though no notice, as required by law, has been given, the conviction of the petitioner, on that ground, cannot be questioned. The learned Sessions Judge confirmed the conviction against the petitioner made by the trial Court.

Section 479.A, Criminal P. C. says ;

(1) Notwithstanding anything contained in sections 476 to 479 inclusive, when any Civil, Revenue or Criminal Court is of opinion that any person appearing before it as a witness has intentionally given false evidence in any stage of the judicial proceeding or has intentionally fabricated false evidence for the purpose of being used in any stage of the judicial proceeding, and that, for the eradication of the evils of perjury and fabrication of false evidence and in the interests of justice, it is expedient that such witness should be prosecuted for the offence which appears to have been committed by him, the Court shall, at the time of the delivery of the judgment or final order disposing of such proceeding, record a finding to that effect stating its reasons therefor and may, if it so thinks fit, after giving the witness an opportunity of being heard, make a complaint thereof in writing Signed by the presiding officer of the Court setting forth the evidence which, in the opinion of the Court, is false or fabricated and forward the same to the Magistrate of the first class having jurisdiction, and may, if the accused is present before the Court, take sufficient, security for his appearance before such Magistrate and may bind over any person to appear and give evidence before such Magistrate:.

(2) Such Magistrate shall thereupon proceed according to law and as if upon complaint made under Section 200.

(3) No appeal shall lie from any finding recorded and complaint made under Sub-section (1).

(4) Where, in any case, a complaint has been made under Sub-section (1) and an appeal has been preferred against the decision arrived at in the judicial proceeding out of which the matter has arisen, the hearing of the ease before, the Magistrate to whom the complaint was forwarded or to whom the case may have been transferred shall be adjourned until such appeal is decided; and the appellate Court, after giving the person against whom the complaint has been made an opportunity of being heard, may, if it so thinks fit, make an order directing the withdrawal of the com. plaint; and a copy of such order shall be sent to the Magistrate before whom the hearing of the case is pending.

(5) In any case, where an appeal has been preferred from any decision of a Civil, Revenue or Criminal Court but no complaint has been made under Sub-section (1), the power Conferred on such Civil, Revenue or Criminal Court under the said sub-section may be exercised by the Appellate Court makes such com-plaint, the provisions of Sub-section (1) shall apply accordingly but no such order shall be made, without giving the person affected thereby an opportunity of being heard.

The question that falls for determination is, whether a breach of Section 479.A (1), Criminal P. C., would warrant presumed prejudice without further onus on the part of the petitioner to show prejudice either to his trial or conviction ?

5. The clause in Section 479-A (1) 'and may, if it so thinks fit, after giving the witness an opportunity of being heard, make a complaint thereof in writing . . .' would render the only construction in harmony with the rest of the sub-clauses of the sub-section, as follows : The clause 'and may, if it so thinks fit' governs only the making of a complaint after giving the witness an opportunity of being heard. In other words, 'after giving the witness an opportunity of being heard' is not governed by the clause 'if it so thinks fit.' It is open to the

presiding Officer of the Court to hear the witness and then make or not to make any complaint thereof in writing, according to the explanation of the witness. In the event of his thinking fit not to make a complaint after hearing the witness in his defence, it should be very clear that the witness would go unhampered by any trial, let alone a conviction. In my view, this is a very valuable right which cannot be denied to the witness who is going to be arraigned as an accused in criminal proceedings.

6. In view of the above reasoning, I have no hesitation in holding that there is, in this case, a clear breach of the mandatory provision contained in Section 479-A (1), Criminal P. C., which has really resulted in the denial of a very valuable right, to the petitioner. When there is a clear breach of the provision in the section, which is mandatory in its operation, I consider that this is a fit case where one can draw the inference of 'presumed prejudice.' The fact that the petitioner gave the explanation in the trial similar to the one given by him in the Sessions Court and also the fact that the criminal proceedings against him ended in a conviction and that the petitioner made a grievance of his conviction only at a later stage, are all of no material importance, for, I consider that the complaint on which the entire criminal proceedings were launched was bad in law, and wholly without jurisdiction. The complaint itself being vitiated by an illegality, it is as good as the complaint being non eat, as it were. In my view, the presiding Officer of the Court had no jurisdiction to file a complaint against the petitioner without giving him the opportunity of being heard.

7. Their Lordships of the Supreme Court have, while considering the effect of non-compliance with the provisions of Section 360, Criminal P. C. observed in Narayana Rao v. State of Andhra Pradesh : 1957CriLJ1320 as follows:

Courts in India, before such matters were taken to their Lordships of the Judicial Committee of the Privy Council, had taken conflicting views on the scope of Section 537 of the Code in curing such omissions as aforesaid. In the case of Abdul Rahman v. King-Emperor their Lordships of the Judicial Committee had to consider the effect of non-compliance with the provisions of Section 360 of the Code. After considering the relevant provisions of the Code, their Lordships came to the conclusion that it was a mere irregularity which could be cured by the provisions of Section 537. In the ease of Pulukuri Kotayya v. King-Emperor 74 Ind App 65 : AIR 1947 PC 67 the Judicial Committee had to consider the effect of breach of the statutory provisions of Section 162 of the Code, The following observations of their Lordships, at pages 75, 76, are a complete answer to the arguments advanced on behalf of the appellant before us, and we respectfully adopt them:When a trial is conducted in a manner different from that prescribed by the Code (as in N. A. Subramania Iyer's case (1901) 28 Ind App 257, the trial is bad, and no question of curing an irregularity arises; but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct, the irregularity can be cured under Section 537, and none the less so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code. The distinction drawn in many of the cases in India between an illegality and an irregularity is one of degree rather than of kind. This view finds support in the decision of their Lordships, Board in where failure to comply with Section 360 of the Code of Criminal Procedure was held to be cured by Sections 535 and 537. The present case falls under Section 537, and their Lordships hold the trial valid notwithstanding the breach of Section 162.

8. Therefore, the question for consideration is, whether this breach of Section 479A (1), Criminal P. C. is an 'illegality' or an 'irregularity' I have already indicated that the deal breach of Section 479A (1) is an illegality.

9. Another ruling reported in Ghhadamilal Jain v. State of U.P. : 1960CriLJ145 is cited from the Bar. In that decision, their Lordship held that if the accused is denied the opportunity of leading evidence which he has a right to do under Section 208, the denial of such right is sufficient to cause prejudice to the accused and Section 537 would have no application to such a case and that the possibility that the accused may not have produced defence if asked by the Magistrate whether they would do so, is of no consequence. Following the same reasoning in the present case : if the petitioner is denied the opportunity of being heard, to which he has a right under Section 479A (1), the denial of such right is sufficient to cause prejudice to him and Section

637 would have no applicability to such a case. The possibility that the petitioner may not have given any other explanation than the one he had given either in the trial proceedings or in the Sessions Court, is really of no consequence.

10. Another decision of the Supreme Court reported in Dr. Pal Chaudhry v. State of Assam : 1960CriLJ174 throws a flood of light on the correct and proper interpretation and construction of this Sub-section (s. 479-A (1), Criminal P. C.). In paragraph 9 of the judgment, their Lordships of the Supreme Court have observed as follows:

The appellant's contention is that the terms of this section were not complied with. We think that this contention is justified. The present case is governed by Sub-section (5) of Section 479-A for here the complaint was not made by the trial Court but by the Appellate Court Therefore the terms of both Sub-section (1) and (5) have to be complied with. The combined effect of these subjections is to require the Court intending to make a complaint, to record a finding that in its opinion a person appearing as a witness has intentionally given false evidence and that for the eradication of the evils of perjury and in the interests of justice, it is expedient, that such witness should be prosecuted for the offence and to give the witness proposed to be proceeded against, an opportunity of being heard as to whether a com-plaint should be made or not.

It follows from this paragraph that the petitioner proposed to be proceeded against, should have been given an opportunity of being heard as to whether a complaint should be made or not.

11. The plain meaning would be, in my view, that the Presiding Officer of the Court cannot really make or lodge a complaint with-out giving the witness affected thereby an opportunity of being heard; the intendment in the section is expressly seen from the fact that after giving that hearing to the petitioner it would be open to the Court to decide not to make a complaint. Otherwise, there would be no sense in directing that a hearing should be given. The Court may, after giving that hearing, decide not to make a complaint either for the reason that the Court is satisfied that no false evidence was given by the witness concerned or that such evidence was not intentionally false, or lastly, that it is not expedient in the interests of justice or to eradicate the evils of perjury, to make the com. plaint. In my view, the clear breach of the terms of the section would result in 'pre-judice' to the petitioner.

12 Sadaaivam, J. expresses a similar interpretation or construction in the following language in In re Virndan, (1) 1968 Cri L J 37 (2) (Mad).

The clause 'may, if it so thinks fit' governs the clause ''make a complaint thereof in writing.' But if a Court wants to lay a complaint, it could do so only after giving the witness an opportunity of being heard. In fact, Section 479-A, Criminal P.C. as proposed by the Select Committee was passed in Parliament with an amendment providing that a witness, against whom the Court records a finding of perjury, shall be given an opportunity of being heard.

On this reasoning of the learned Judge, which is quite apposite to the facts of the present case, I have no hesitation in holding that the complaint is totally invalid and vitiated by an illegality. The learned Judge observes : ''It is unnecessary for me in this case to give a definite finding whether the conviction could not be set aside on account of such defect, as in the present case, in preferring the com. plaint'. Without giving a definite finding, Sadasivam J., did not interfere because the petitioner before him had undergone the sentence of imprisonment.

13. Jagadisan, J., on a comparison of Sub-sections (4) and (5) with Section 479-A (i) has observed in Rukmani Bai v. Govindaswamy (2) 1963 Cri L J 355 (Mad), as follows:

It is possible to argue from this provision that notice to the person complained against is not contemplated or provided for under Sub-section (1) as otherwise there was no necessity for the Legislature to specifically state in Sub-section (6) that no order shall be made without giving the person affected an opportunity of being

heard. In Sub-section (1) in its own terms mandatorily provides for the issue of notice to the person affected by the complaint, it would have been enough for the Legislature to say that the appellate Court may make the complaint in accordance with the provisions of Sub-section (1). This is perhaps an indication that in the opinion of the Legislature, there is no necessity to issue notice to the person affected, if the complaint is directed to be filed by the very Court which conducted the proceedings and in the course of which it was found that a particular person was guilty of giving false evidence or fabricating documents but that, if the complaint is to be filed at the instance of some other court even if it be the appellate Court, notice is necessary'. The learned Judge further observes:In my opinion on a strict construction of Sub-section 479-A (1) notice to the person affected, namely, the witness charged with having given false evidence or fabricated false document is not necessary. But all the same notice should be issued as there is no reason why the well-known and well accepted principle of 'audi alteram partem' should not apply.

14. In my view, the construction placed by Jagadisan, J., is open to doubt in view of the authoritative interpretation of the Supreme Court in : 1960CriLJ174 . I quite see that the observations of the Supreme Court were brought to the notice of the learned Judge deciding Rukmani Bai v. Govindaswany (2) 1963 Cri L J 355 (Mad).

15. Another decision has been cited from the Bar, reported in Abdul Shakoor v. State of Rajasthan , Bhargava, J. holds that the provision under Section 479-A (1) of giving an opportunity to the witness of being heard is mandatory and cannot be dispensed with. The learned Judge further observes that the insertion of the clause of giving an opportunity of being heard, in Sub-section (5) is only to emphasise its need and has been made by way of abundant caution. The learned Judge further observes that there is no reason why this provision based on principles of natural justice should not be regarded as mandatory under Sub-section (1) when it is so regarded under Sub-sections. (4) and (5) and that on its language it is the correct interpretation and does not lead to any repugnancy between the provisions of Sub-section (1) and Sub-section (5) and that, on the other hand, it is more in consonance with reason and justice.

16. It is worthwhile to set down the following instructive obsecrations made by Beaumont C. J., in Emperor v. Ningappa Bamappfti ILR (1942) Bom 28 : AIR 1941 Bom 408 although in the present case, there is the evidence of the petitioner before the committal court as contra-distinguished from the statement recorded under Section 164, Criminal P. C. But the reasoning applies with equal force to the facts of the present case. The learned Judge says:

No doubt, a man making a statement on oath before a Magistrate under Section 164, Criminal P. C. should speak the truth but if ha does not, the least be can do is to tell the truth when subsequently he goes into the witness box. To prosecute a man who has resiled from a false statement made under Section 164 is to encourage him in the belief that it pays to tell a lie and stick to it. It is fax better that a man should escape punishment for having made a false statement under Section 164 than that he should be induced to believe that it is to his interest, however false the statement may have been to adhere to it, and thereby save himself from prosecution. The danger of such a course leading to the conviction of innocent persons is too great to be risked.

17. It is true that the proceedings taken against the petitioner ended in his conviction. It would have been far better for the petitioner to have moved the Court at least by way of revision at the earliest opportunity in regard to his grievance. His tardiness or remissness in not moving the Court will not render a clear breach of a mandatory provision of law, an 'irregularity', whereas, in fact, it is an 'illegality'.

18. I set aside the conviction on the ground of 'presumed prejudice' resulting from a clear breach of the section. The petitioner is acquitted.