

Thirumali Kumar Vs. State

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Court : Kerala

Decided On : Feb-03-2010

Reported in : 2010(1)KLT579

Judge : K.T. Sankaran, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 44, 70, 72, 73, 74, 77, 78, 78(1), 79, 82, 82(1), 82(4), 83, 87, 174A, 190 and 439; ;[Indian Penal Code \(IPC\), 1860](#) - Sections 34, 302, 304, 364, 367, 380, 382, 392, 393, 394, 395, 396, 397, 398, 399, 400, 402, 436, 449, 454, 460, 461; ;[Code of Criminal Procedure \(CrPC\) \(Amendment\), 2005](#); ;Indian Penal Code (Amendment) Act, 2005; ;[Code of Criminal Procedure \(CrPC\) , 1898](#) - Section 83(1)

Appeal No. : B.A. Nos. 7819, 7837 and 7818 of 2009

Appellant : Thirumali Kumar

Respondent : State

Advocate for Def. : M.S. Breez and; V. Tekchand, Public Prosecutors

Advocate for Pet/Ap. : S. Nirmal Kumar, Adv.

Judgement :

ORDER

K.T. Sankaran, J.

1. The petitioner, Thirumali Kumar, who is an accused in C.C. Nos. 2168 of 2004 and in C.P. No. 24 of 2009, on the file of the Court of the Judicial Magistrate of the First Class I, Ernakulam, seeks bail under Section 439 of the Code of Criminal Procedure, respectively in B.A. Nos. 7819 of 2009, 7837 of 2009 and 7818 of 2009.

2. The crimes were registered in the year 2004. The offences alleged against the petitioner (first accused) in C.C. No. 2168 of 2004 are under Sections 454 and 380 read with Section 34 of the Indian Penal Code. The allegation is that the accused persons committed theft of gold ornaments from the house of the de facto complainant on 12.12.1996. In C.C. No. 2169 of 2004, the petitioner is the second accused. The offences alleged against the accused therein are under Sections 454, 461 and 380 read with Section 34 of the Indian Penal Code. The prosecution case is that the accused persons committed theft of gold ornaments and other articles from the house of the de facto complainant on 28.6.1998.

3. C.P. No. 24 of 2009 relates to Crime No. 154 of 2004. The petitioner is accused No. 4 therein. The offence alleged against the accused is under Section 402 of the Indian Penal Code. It is alleged that on 30.7.2004, the accused persons were found making preparations for committing dacoity.

4. In all the aforesaid cases, the petitioner was released on bail at the crime stage. After completing investigation, final reports were filed before the court having jurisdiction. The petitioner failed to appear before court. Warrant was issued for the arrest of the petitioner on several occasions. Steps were, taken under Sections 82 and 83 of the Code of Criminal Procedure against the petitioner. C.P. No. 24 of 2009 was removed to the long pending register. For more than five years, the petitioner was absconding. Warrants were repeatedly issued by the learned Magistrate for the arrest of the petitioner. The police used to file reports stating that the petitioner was not found and therefore, he could not be arrested. On 30.9.2009, the learned Magistrate passed an order in C.C. No. 2169 of 2004, which reads thus:

I take notice that in the Malayala Manorama daily dated today, there is an article which shows that the 2nd accused in this case, Thirumalai Kumar, is now residing

in a Village at Tamil Nadu, which is known by the name 'Thiruttu Gramam'. The photo of that accused is also printed in the newspaper. It is also reported that he is the village head of that village, Hence issue now against A2 through the City Police Commissioner, Ernakulam. The City Police Commissioner is directed to arrest the 2nd accused and produce him before the Court before 30.10.09. If necessary, he shall seek assistance of the Tamil Nadu Police for execution of the warrant.

Adjourned to 30.10.09.

More or less similar orders were passed in the other two cases as well.

5. The petitioner was arrested and he was produced before the learned Magistrate. He moved for bail. The learned Magistrate dismissed the Bail Applications by the orders dated 18.11.2009 and 21.11.2009. The petitioner moved the Sessions Court for bail in all the three cases. The learned Sessions Judge dismissed the applications by the order dated 17.12.2009. The learned Magistrate as well as the learned Sessions Judge held that if the petitioner is released on bail, there is every likelihood of his absconding. The learned Sessions Judge, however, directed the learned Magistrate to ensure speedy trial of the cases within six months and to complete the committal proceedings in C.P. No. 24 of 2009 at the earliest.

6. However, the learned Sessions Judge criticized the learned Magistrate (Sri. Ijas A., Judicial Magistrate of the First Class, Ernakulam) for issuing direction to the police on the basis of the press reports. The learned Sessions Judge held thus:

There is no dispute that the petitioner, who is hailing from Tamilnadu, is an absconding accused for the past more than five years in all these grave crimes. Of course, as pointed out by the learned Counsel for the petitioner, the conduct on the part of the learned Magistrate in issuing directions to the Police on the basis of press reports cannot be encouraged or appreciated. It cannot also be said that the learned Magistrate was justified in collecting or being persuaded by such extra judicial information, for the short reason that the Court cannot assume the role of the prosecuting agency.

7. The petitioner is involved in grave crimes. After he was released on bail, he made himself scarce. For more than five years, his presence could not be secured before Court in spite of issuance of non-bailable warrants. Proceedings under Sections 82 and 83 of the Code of Criminal Procedure were taken. The Police used to file reports stating that the accused could not be arrested in spite of the best efforts. Only when the learned Magistrate passed the order in which reference was made of the newspaper report that the petitioner was available in a particular village in Tamil Nadu, the police could secure the arrest of the petitioner. If the petitioner is released on bail, certainly there is every possibility of his absconding and making himself scarce. The trial of the cases would not be over, if bail is granted to the petitioner. Therefore, I am not inclined to grant bail to the petitioner till the trial and disposal of the cases.

8. However, it is necessary to decide whether the learned Magistrate committed an error in issuing the direction to the police to arrest the petitioner, on the basis of the information gathered from the newspaper report. I do not think that the learned Sessions Judge was justified in making observations against the learned Magistrate. The learned Magistrate had acted very effectively and promptly. The order passed by the learned Magistrate led to the arrest of the petitioner. If such criticism as made by the learned Sessions Judge is made, the morale of the subordinate officers would be considerably affected, which certainly would not be beneficial to the functioning of the judiciary.

9. It is to be noted that in C.P. No. 24 of 2009, the case was committed to the Sessions Court on 23.11.2009, which was made possible only because the petitioner was arrested and produced before Court.

10. To decide the question whether the learned Magistrate was justified in relying on the newspaper report, it is necessary to advert to some relevant provisions in the Code of Criminal Procedure. Chap. V of the Code of Criminal Procedure contains the provisions for arrest of persons. Section 44 empowers a Magistrate, whether Executive or Judicial, to arrest or order an offender to be arrested, when any offence is committed in the presence of the Magistrate. Chap. VI of the Code of Criminal Procedure deals with the process to compel appearance. Section 70

provides that every warrant of arrest issued by a Court under the Code of Criminal Procedure shall be in writing, signed by the presiding officer of such Court and shall bear the seal of the Court. Every such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed. Section 72 provides that a warrant of arrest shall ordinarily be directed to one or more police officers; but the Court issuing such a warrant may, if its immediate execution is necessary and no police officer is immediately available, direct it to any other persons or persons, and such person or persons shall execute the same. Section 73 provides that the Chief Judicial Magistrate or a Magistrate of the first class may direct a warrant to any person within his local jurisdiction for the arrest of any escaped convict, proclaimed offender or any person who is accused of a non-bailable offence and is evading arrest. Section 74 states that a warrant directed to any police officer may also be executed by any other police officer whose name is endorsed upon the warrant by the officer to whom it is directed or endorsed. Section 77 provides that a warrant of arrest may be executed at any place in India. When a warrant is to be executed outside the local jurisdiction of the Court issuing it, such Court may, instead of directing the warrant to a police officer within its jurisdiction, forward it by post or otherwise to the authorities mentioned in Section 78 of the Code of Criminal Procedure. Section 79 provides the procedure for execution of the warrant directed to a police officer for execution outside the local jurisdiction of the Court, issuing the same.

11. It is apposite to quote the relevant portions of Sections 82 and 83 of the Code of Criminal Procedure.

82. Proclamation for person absconding.--(1) If any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear at a specific place and at a specified time not less than thirty days from the date of publishing such proclamation.

(2) The proclamation shall be published as follows:

(i) (a) it shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides;

(b) it shall be affixed to some conspicuous part of the house or homestead in which such person ordinarily resides or to some conspicuous place of such town or village;

(c) a copy thereof shall be affixed to some conspicuous part of the Court-house;

(ii) the Court may also, if it thinks fit, direct a copy of the proclamation to be published in a daily newspaper circulating in the place in which such person ordinarily resides..

(4) Where a proclamation published under, Sub-section (1) is in respect of a person accused of an offence punishable under Section 302, 304, 364, 367, 382, 392, 393, 394, 395, 396, 397, 398, 399, 400, 402, 436, 449, 459 or 460 of the Indian Penal Code (45 of 1860), and such person fails to appear at the specified place and time required by the proclamation, the Court may, after making such inquiry as it thinks fit, pronounce him a proclaimed offender and make a declaration to that effect.

83. Attachment of property of person absconding.-- (1) The Court issuing a proclamation under Section 82 may, for reasons to be recorded in writing, at any time after the issue of the proclamation, order the attachment of any property, movable or immovable, or both, belonging to the proclaimed person.

12. Section 87 of the Code of Criminal Procedure reads as follows:

87. Issue of warrant in lieu of, or in addition to, summons.--A Court may, in any case in which it is empowered by this Code to issue a summons for the appearance of any person, issue, after recording its reasons in writing, a warrant for his arrest:

(a) if, either before the issue of such summons, or after the issue of the same but before the time fixed for his appearance, the Court sees reason to believe that he has absconded or will not obey the summons; or

(b) if at such time he fails to appear and the summons is proved to have been duly served in time to admit of his appearing in accordance therewith and no reasonable excuse is offered for such failure.

13. As per Section 190 of the Code of Criminal Procedure, a Judicial Magistrate may take cognizance of any offence in any of the three contingencies mentioned therein, namely, (a) upon receiving a complaint of facts which constitute such offence; (b) upon a police report of such facts; (c) upon information received from any other person other than a police officer or upon his own knowledge that such offence has been committed. The power given under Section 190 of the Code of Criminal Procedure is very wide. Upon information received from any person or upon his own knowledge, the Magistrate may act under Section 190 of the Code of Criminal Procedure.

14. Sub-section (4) of Section 82 of the Code of Criminal Procedure was inserted by Act 25 of 2005. Section 174A was inserted in the Indian Penal Code by Act 25 of 2005. Section 174A of the Indian Penal Code reads as follows:

174A. Non-appearance in response to a proclamation under Section 82 of Act 2 of 1974.--Whoever fails to appear at the specified place and the specified time as required by a proclamation published under Sub-section (1) of Section 82 of the Code of Criminal Procedure, 1973 shall be punished with imprisonment for a term which may extend to three years or with fine or with both, and where a declaration has been made under Sub-section (4) of that section pronouncing him as a proclaimed offender, he shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to fine.

15. In the present case, proclamation was issued under Section 82 of the Code of Criminal Procedure. In C.P. No. 24 of 2009, the offence alleged being under Section 402 of the Indian Penal Code, Sub-section (4) of Section 82 of the Code of Criminal Procedure would also apply. The learned Magistrate issued warrant for the arrest of the petitioner. The warrant was routed through the City Police Commissioner, Ernakulam. Section 73 of the Code of Criminal Procedure empowers the Magistrate to direct a warrant to any person within his local jurisdiction for the arrest of (a) any escaped convict (b) proclaimed offender or (c)

any person who is accused of a non-bailable offence and is evading arrest. The Magistrate is empowered to forward a warrant of arrest to any police officer within his local jurisdiction. Therefore, there was nothing wrong in directing the City Police Commissioner to execute the warrant. The Code of Criminal Procedure does not provide for directing a warrant to the police officer of a particular rank. Section 73 contains only the limitation that such warrant shall be directed to any person within the local jurisdiction of the Magistrate issuing the warrant.

16. In *Kunhunni Nair v. State of Kerala* 1961 KLT 463, Justice Anna Chandy considered the question whether a warrant issued by the Judicial Magistrate of the First Class, Jaipur City, which was forwarded to the Secretary, Government of Kerala, for execution was illegal. Interpreting the provisions of Section 83(1) of the Code of Criminal Procedure, 1898, which corresponds to Section 78(1) of the Code of Criminal Procedure, 1973, it was held as follows:

4. A further objection was taken before this Court that the warrant issued by the First Class Magistrate, Jaipur City was forwarded to the Secretary, Government of Kerala who in turn forwarded the same to the Sub-Magistrate, Mukundapuram for execution and as such the provision of Section 83(1) of the Code which requires the warrant to be forwarded to the Magistrate within the local limits of whose jurisdiction it is to be executed, has been violated. It is conceded that the warrant was forwarded to the Secretary to the Government who in turn forwarded the same to the Sub-Magistrate. However, that will not in any way affect the validity of the warrant or the jurisdiction of the Magistrate, Mukundapuram to execute the warrant. Section 83(1) enjoins that:

When a warrant is to be executed outside the local limits of the jurisdiction of the Court issuing the same, such Court may instead of directing such warrant to a police officer, forward the same by post or otherwise to any Magistrate or District Superintendent of Police or the Commissioner of Police in a presidency-town within the local limits of whose jurisdiction it is to be executed. It is only a provision enabling the Magistrate who issues a warrant to be executed outside his jurisdiction, to forward the same to the authorities within the local limits of whose jurisdiction it is to be executed, instead of directing the warrant to a police officer,

and it does not specify the route or channel the warrant may take.

17. The issuance of a warrant for the arrest of a proclaimed offender under Section 82(1) or 82(4), is for the purpose of ensuring his presence before Court. The warrant issued in a pending case is aimed at apprehending the accused and bringing him before Court so that he can be tried for the offence. The power to issue warrant is conferred on the Magistrate for securing the presence of the accused. For issuing a warrant, the Magistrate need not necessarily act on a report filed by the police officer. Any information can be relied on by the Magistrate to issue a warrant. In a case where warrants were repeatedly issued and the presence of the accused could not be secured, it would not be illegal or improper if the Magistrate gathers the necessary information from newspapers that a particular accused is available at a particular place. No adjudicatory process is involved therein. The purpose is only to secure the presence of the accused and not to find him guilty. The newspaper report was not relied on by the learned Magistrate for the purpose of arriving at the conclusion as to the guilt or otherwise of the accused, or to arrive at a conclusion on a disputed question of fact involved in the case, but to secure the presence of the accused before the Court for the purpose of trial. It cannot be said that the information gathered by the learned Magistrate in the present case constitutes his personal knowledge. It was an information which was available before the public at large. The bar of using the personal knowledge in a case is in the matter of deciding upon the merits of the case. Administration of justice requires that the offenders are brought to book and tried. Securing the presence of the accused is a step in aid for his trial. It cannot be said that the information regarding presence of the accused in a particular place should be brought to the notice of the Court only by the investigating officer or in the form of an affidavit or in the form of a report. Taking effective steps to secure the presence of the accused before Court forms part of the duty of the Magistrate and for that purpose, any information can be relied on by the Magistrate.

18. Let us examine the matter in another angle. A common man who had occasion to read newspapers knew that the petitioner was stated to be available in a particular village in Tamil Nadu. However, the police officer to whom warrant was

directed, filed reports that the petitioner was not available in his address. If the Magistrate were to shut his eyes to the information which was available to any common man and if the Magistrate were to rely only on the report of the police officer and to act as a helpless authority, the people will lose faith in Courts. It is to be noted that the petitioner has no case that he is not the person who was ordered to be arrested. The petitioner has no case that he was not available in the particular village or that he was not arrested from that place. There is no dispute regarding the identity of the person arrested.

19. In the light of the aforementioned provisions in the Code of Criminal Procedure, I do not find any infirmity in the order passed by the learned Magistrate or in the manner in which the learned Magistrate proceeded with. For the aforesaid reasons, I am of the view that the observations made by the learned Sessions Judge criticizing the steps taken by the learned Magistrate are liable to be expunged. I do so.

For the reasons stated above, the Bail Applications are dismissed. The learned Magistrate and the learned Sessions Judge shall expedite the trial of the aforementioned cases in which the petitioner is the accused.

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