

(1985) 12 KL CK 0002
In the High Court Of Kerala
Case No : Criminal M. C. No. 883 of 1985

B. Esakimuthu Achari and Another	APPELLANT
Vs	
Asst, Collector of Central Excise Trivandrum and Another	RESPONDENT

Date of Decision : 04-12-1985

Acts Referred:

Constitution of India, 1950 — Article 21
Criminal Procedure Code, 1973 (CrPC) — Section 243(2), 243(2), 251, 257(i), 313

Citation : (1986) 23 KLJ 188

Hon'ble Judges : S. Padmanabhan, J

Bench : Single Bench

Advocate : P. Sukumaran Nair and K. Padmanabhan Nair, for the Appellant; P.V. Madhavan Nambiar, for the Respondent

Final Decision : Allowed

Judgement

S. Padmanabhan, J.—Accused 1 and 2 in C. C No 29 of 1985 on the file of the Additional Chief Judicial Magistrate, Ernakulam are the petitioners. The petition was filed u/s 82 of the Criminal Procedure Code, for quashing an order passed by the Magistrate, invoking the inherent jurisdiction of this Court. The Assistant Collector, Central Excise, Trivandrum Division, first respondent in this petition, is the complainant in the above case. The complaint was filed u/s 85 read with Sections 8, 27 and 55 of the Gold (Central) Act, Both the accused are goldsmiths. Inspection of their shop by the Superintendent of Central Excise was on 4-9-1981. As per Ext. P1 mahazar prepared by the Superintendent of Central Excise the accused were found in possession of 1114.150 grams of gold ornaments and primary gold in excess of what is shown in their register. It is in this background that they were prosecuted

2. The prosecution witnesses were examined and both the accused were questioned u/s 313 of the Criminal Procedure Code. The accused were called upon to enter their defence and they filed a schedule of 28 witnesses with a petition to examine them. On that petition the Magistrate issued the impugned

order dated 3-9-1985, the operative portion of which reads:

Therefore, the accused are allowed to examine four persons as witnesses on their behalf at State costs from the persons included in the schedule filed by them. The accused shall file a statement indicating the names of the four persons whom they wish to examine from out of the 28 persons shown in the witness schedule filed by them.

It is this order that is sought to be quashed.

3. The witnesses sought to be examined are to prove their defence by explaining how the excess quantity came into their possession. The first accused wanted to prove that he is having pawn business in the shop and the excess gold ornaments were pledged with him by different persons. He wanted to examine each and every person who pledged ornaments with him so that he could explain possession of the entire excess ornaments in order to show that he did not commit any offence. Second accused wanted to prove that the primary gold included in the excess quantity was entrusted to him by one Subramoni. The Magistrate proceeded on the assumption, as seen from order, that all the witnesses were to prove the same point. At one place he said that all the witnesses are cited to prove one and the same point viz., the entries in a receipt book produced by them. At another place it was observed "All the witnesses included in the witness schedule are for the purpose of proving one and the same point viz., the witnesses pledged gold ornaments with the accused." These two statements themselves will not go together. It was on this assumption that the Magistrate held that examination of all the witnesses is not necessary and three or four among them alone need be examined.

4. Section 243(2) of the new Criminal Procedure Code corresponding to Section 251 (9) of the Old Code reads:

If the accused, after he has entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice and such ground shall be recorded by him in writing.

5. Conviction and sentence involves deprivation of the fundamental rights of citizens even though it is according to the procedure established by law and permitted under Article 21 of the Constitution. Every accused is entitled to fairness of trial as enshrined in the Constitution. Fair trial includes fair and proper opportunities allowed by law to prove his innocence. Adducing evidence in support of the defence is a valuable right. Denial of that right means denial of fair trial, Section 243(2) authorises the defence to make an application for the summoning of its witnesses and imposes the duty upon the court to summon such witnesses. Court cannot avoid that duty unless it considers that such

application should be refused for any of the reasons specified in the sub-section. Refusal could be had only if the court considers that the application is for the purpose of vexation or delay or for defeating the ends of justice. None of these grounds were found by the Magistrate. Only ground on which the Magistrate refused to issue process to all the witnesses was that in view of the purpose it is not necessary to examine all the witnesses. In deciding the purpose, also Magistrate went wrong. When the accused wants possession of each and every item to be explained by examining the persons who pledged the same, it is not for the court to say that selected representatives from the witnesses alone need be examined. Refusal could be only on the above three grounds and the reasons are also to be recorded. When the court, declines to issue process to witnesses without recording cogent reasons there is no fair trial and in such a case conviction cannot stand because it will be an illegality. It is for the accused to say what amount of evidence he thinks, it proper to place on record in his defence and it is not for, the, Magistrate to say that, examination of any witness is necessary or not for the defence. What the sub-section says is "any witness", so that an accused who has not availed of an opportunity to cross-examine certain prosecution witnesses after a charge has been framed and hence calls them as defence witnesses is entitled to cross-examine them unless barred under the proviso. Whether the examination of the witness is going to serve the desired purpose for the defence is not a matter for the consideration of the court except in considering the three questions of vexation, delay or defeating the ends of justice. Court cannot dictate that so much of defence evidence is sufficient.

6. In view of the stand taken by the petitioners before me, I do not think that the Magistrate was justified in coming to the above conclusion. From what was argued before me it is clear that the purpose of examination of each and every witnesses is not one and the same. The petitioners want each and every person who pledged the ornaments with the first petitioner to be examined for proving the act of pledging that particular item of ornament. Pledging of one item of ornament by one person may not sometimes be capable of proof by examination of another person who has not pledged that ornament. In this view, the opinion of the Magistrate does not appear to be correct. I think refusal of the prayer of the petitioners will amount to denial of fairness of trial in the above circumstances. A similar question came up for consideration before the Federal Court in *Sudhir Kumar Butt v. The King* (A.I.R. (36) 1949 FC 6). In that case the provision that came up for consideration was Section 257(i) of the Criminal Procedure Code. In that decision it was held:

It is to be noted that the language of the section is imperative and the trial court has no discretion under it to refuse to issue process to compel the attendance of any witness cited by the accused after he has entered upon his defence, unless it is of the opinion that the application should be refused for any of the reasons which are specified in the section and which it is bound to record.

In that case the witness schedule filed by the defence was rejected by the trial

court. Setting aside that order the case was sent back with a direction to examine the witnesses in the schedule filed by the defence. But some of the witnesses alone were examined and the remaining witnesses in the list could not be examined due to various reasons. The accused were thereafter convicted. The matter again came up before the Supreme Court. Supreme Court set aside the conviction on the ground that the conviction without examining all the witnesses allowed to be examined, for whatever reason, will be denial of fair trial. It was held: Whatever one may think of the merits of the appellants' contention they cannot be convicted without an opportunity being given to them to present their evidence, and that having been denied to them, there has been no fair trial, and the conviction of the appellants, S. K. Dutt, J K. Bose and P. C. Ghosh cannot stand. The result may be unfortunate. But it is essential that rules of procedure conducive to ensure justice should be scrupulously followed, and courts should be jealous in saying that there is no breach of them. The appeals will be allowed, and the appellants acquitted.

In this case the learned Magistrate has not found that any of the reasons mentioned in Section 243(2) of the Criminal Procedure Code is there for the purpose of rejecting the prayer of the petitioners. I have already adverted to the ground mentioned by the Magistrate and found that it is not acceptable in view of the provisions of Section 243(2) of the Criminal Procedure Code. The offences are punishable with imprisonment for 7 years and under Rule 206 of the Criminal Rules of Practice it is the duty of the State to meet the expenses for examination of the witnesses even if they are defence witnesses. But that fact could not be taken as a consideration in the matter of allowing examination of witnesses. The expense that will have to be incurred by the State for procuring the attendance of the witnesses should not be taken as a criterion for denying justice that is otherwise due to the accused for the purpose of fair trial.

The CrI. M. C. is therefore allowed and the order passed by the Magistrate is set aside. The matter is sent back. The Magistrate will be free to consider the matter afresh in the light of what is stated above and in view of the provisions of Section 243 (2) of the Criminal Procedure Code. He will be free to pass appropriate orders on the merits.