

(2008) 06 KL CK 0022

In the High Court Of Kerala

Case No : Criminal R.P. No. 122 of 2008

Chaithanya R. Menon (Dr.) @ Mini

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 06-06-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 192, 200, 202, 202(2), 204(2)
Penal Code, 1860 (IPC) — Section 107, 34, 494

Citation : (2009) 2 ALT(Cri) 70 : (2008) CriLJ 3392 : (2008) 2 ILR (Ker) 782 :
(2008) 2 KLJ 789

Hon'ble Judges : V. Ramkumar, J

Bench : Single Bench

Advocate : Rajit and Ranjit Babu, for the Appellant; K.L. Narasimhan, N. Krishna Prasad and C.M. Nazer, PP, for the Respondent

Final Decision : Allowed

Judgement

V. Ramkumar, J.—The Revision Petitioner (Dr. Chaithanya R. Menon @ Mini) challenges the order dated 30-10-2007 passed by the J.F.C.M., Kunnamangalam discharging all the 8 accused persons u/s 245(1) Cr. P.C.

2. In the private complaint filed by the revision petitioner against her husband the 2nd respondent herein (Dr. Suresh T.N.) and 7 others, she alleged the commission of the offence of bigamy punishable under Sections 494 read with 107 and 34 IPC. According to her, she is the lawfully wedded wife of the 2nd respondent herein (Dr. Suresh T.N.), their marriage having Been solemnized on 18-1-1998 2nd one male child was also born in that wedlock and while sot the marital partners fell apart and on accused, the 3rd respondent herein (Mini) with the connivance and assistance of her relatives who are accused Nos. 3 to 8.

3. The learned Magistrate, as per the impugned order discharged all the accused persons. Hence this revision.

4. I heard Advocate Sri. Rajit, the learned Counsel appearing for the revision

petitioner and Advocate Sri. N. Krishna Prasad, the learned Counsel appearing for the accused persons.

5. The facts leading to the impugned order can be summarized as follows:

After filing the private complaint dated 3-8-2006, the sworn statement of the complainant as well as two of her witnesses were recorded by the Magistrate u/s 200 Cr. P.C. on 18-11-2006. Thereafter process was issued to the accused persons. After the Reused entered appearance, being a warrant trial case, the Magistrate proceeded to take all evidence for the prosecution u/s 244(1) Cr. P.C. During that stage CWs 1 and 2 who were examined as PWs 2 and 3 and who had initially supported the revision petitioner/complainant, turned hostile to the prosecution when they were cross-examined by the defence. Thereupon the revision petitioner filed CMP No. 4605 of 2007 u/s 311 Cr. P.C. for re-opening the evidence and to permit her to examine one more witness. That petition was dismissed by the learned Magistrate on 19-10-2007 for the reason that Section 244 Cr. P.C. does not envisage the examination of witnesses whose names did not figure in the list of witnesses filed under Sub-section 2 of Section 204 Cr. P.C. Thereafter, as per the impugned order dated 30-10-2007 the learned Magistrate discharged the accused u/s 245(1) Cr. P.C. for the reason that no case against the accused had been made, out which, if rebutted, would warrant their conviction.

6. Advocate Sri. N. Krishnaprasad, the learned Counsel appearing for the contesting respondents/accused made the following submissions before me:

This revision has been preferred only against the order of discharge of the accused u/s 245(1) Cr. P.C. The earlier order dated 19-10-2007 passed by the Magistrate dismissing the application (CMP No. 4605 of 2007) filed by the complainant u/s 311 Cr. P.C. has not been challenged and that order has become final. It is not permissible for the revision petitioner to assail that order by merely taking aground in the memorandum: of revision. Since the order of discharge is not an order passed consequent on the rejection of the petition filed u/s 311 Cr. P.C., without challenging the order on the petitioner u/s 311 Cr. P.C. the revision petitioner cannot succeed. Even if the revision petitioner were to challenge the order dismissing her application u/s 311 Cr. P.C. filed for examining a new witness, she will not succeed since at the stage of taking evidence for the prosecution u/s 244(1) Cr. P.C. the complainant is not entitled to produce a new witness whose name does not figure in the witness list filed u/s 204(2) Cr. P.C. The only material before the Magistrate was the hearsay " evidence of the complainant examined as PW 1 and the testimony of PWs 2 and 3, both of whom turned hostile to the prosecution.

7. I am afraid that I cannot agree with the above submissions. It is true that this revision is directed only against the order dated 30-10-2007 discharging the accused u/s 245(1) Cr. P.C. But in the grounds of revision, the revision petitioner has challenged the order passed by the learned Magistrate on the petition filed u/

s 311 Cr. P.C. and which was numbered as CMP No. 4605 of 2007. Section 397 Cr. P.C. is really a suo motu power of the Session Judge as well as the High Court to examine the correctness, legality or propriety of any finding, sentence or order, recorded or passed in any proceedings before any inferior court. While in the case of the Sessions Judge, the revisional power is confined only to a case the record which has been called for by him, in the case of the High Court a perusal of Sub-section 1 of Section 401 Cr. P.C. will indicate that the High Court has wider powers to consider the legality, regularity or propriety of any finding, sentence or order which otherwise comes to its knowledge. This distinction has been noticed in *State v. Baby* 1981 KLT 27 and *John Samuel v. State of Kerala* 1985 KLT 902. Hence, if this Court is Satisfied that the order passed by the learned Magistrate in CMP No. 4605 of 2007 is not proper or legal, then power does exist in this Court u/s 401(1) Cr. P.C. to set aside the said order as well, even if the same is not specifically challenged by the revision petitioner.

8. I now proceed to consider the permissibility of examining a new witness at the stage of pre-charge evidence u/s 244(1) Cr. P.C. The fallacy into which the learned Magistrate fell while dismissing CMP No. 4605 of 2007 is the view taken by him that the evidence of no new witness could be taken u/s 244(1) Cr. P.C. unless his name figures in the list of witnesses filed u/s 204(2) Cr. P.C. If the witnesses whose sworn statements are recorded u/s 200 Cr. P.C. in a private complaint involving warrant trial procedure do not support the complainant at a later stage of pre-charge evidence u/s 244(1) Cr. P.C., as in this case, it is not as if the complainant is helpless and the pre-charges evidence should be confined only to those witnesses whose names figure in the witness list referred to in Section 204(2) Cr. P.C. If such a view is taken, then it may result in failure of justice as has happened in this case.

9. Sub-section (2) of Section 204 Cr.P.C. only insists that a list of witnesses should be filed before summons or warrant is issued against the accused. Cognizance of the offences in this case was taken by the Magistrate after taking the sworn statements of the revision petitioner/complainant and two of her witnesses who were then examined as CWs. 2 and 3 u/s 200 Cr. P.C. At that time CWs. 2 and 3 supported the complainant. Thereafter CWs 2 and 3 were examined as PWs 2 and 3 u/s 244(1) Cr. P.C., after their attendance before court was secured on the strength of summons issued to them u/s 244(2) Cr. P.C. It was at that stage that both PWs. 2 and 3 turned hostile to the prosecution. Thereupon the complainant filed CMP No. 4605/2007 u/s 311 Cr. P.C. for examining a new witness to support her contentions.

10. At the stage of examination of the complainant and his witnesses, if any, present, u/s 200 Cr. P.C. the law does not insist that the complainant should produce all his witnesses. The position is the same during the stage of enquiry u/s 202 Cr. P.C. also unless the complainant alleges the commission of an offence exclusively triable by a court of Session thereby attracting the proviso to Section 202(2) Cr.P.C. Sections 200 and 202 Cr. P.C. are extracted here below:

Section 200. Examination of complainant:- A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that, when the complainant is made in writing, the Magistrate need not examine the complainant and the witnesses-

(a) If a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate u/s 192:

Provided further that if the Magistrate makes over the case to another Magistrate u/s 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

Section 202: Postponement of issue of process - (1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him u/s 192, may, if he thinks fit [and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction] postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other persons he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made-

(a) Where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions; or

(b) Where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath u/s 200.

(2) In an enquiry under Sub-section (1), the Magistrate may, if he thinks fit, take evidence of witness on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under Sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant.

But, when the case reaches the stage of pre-charge evidence u/s 244(1) Cr. P.C., the obligation of the Magistrate is to take all such evidence as may be produced in support of the prosecution. That is obviously why Sub-section (2) of Section

244 Cr. P.C. has authorised the Magistrate to issue summons to any witness, on the application of the prosecution either to give evidence or to produce any document or thing.

Section 244 reads as follows:

Section 244. Evidence for prosecution- (1) When, in any warrant ? case instituted otherwise than on a police report the accused appears or is brought before a Magistrate, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution.

(2) The Magistrate may, on the application of the prosecution, issue a summons to any of its witnesses directing him to attend or to produce any document or other thing.

(emphasis supplied)

11. There is/therefore, no warrant for the assumption that u/s 244(1) Cr. P.C. the Magistrate can take the evidence of only those witnesses whose names figure in the witness list filed earlier, presumably along with the complaint. Section 204(2) Cr. PC. Cannot be so construed as to fetter the power of the Magistrate to issue summons to a new witness u/s 244(2) Cr.P.C. In any view of the matter, Section 311 Cr. P.C. gives ample power to the Magistrate to summon and examine any person for arriving at a just decision in the case. The testimonial reliability and evidentiary value of the testimony of such a person are matters within the realm of appreciation of evidence. I am, therefore, satisfied that the view taken by the learned Magistrate while dismissing CMP No. 4605 of 2005 filed u/s 311 Cr. P.C. is erroneous. So far as the petition is concerned, the order passed thereon is a final order or is at least, an intermediate order which is -revisable. Even otherwise, this Court has the power u/s 482 Cr. P.C. ex debito justitia, to ensure, that an illegality committed by the lower court does not result in miscarriage of justice. The order dated 19-10-2007 passed by the Magistrate dismissing the said application is accordingly set aside. Resultantly, the impugned order discharging the accused u/s 244(1).Cr. P.C. is also set aside and the Magistrate shall give the revision petitioner an opportunity of examining the additional witnesses sought to be examined as per CMP No. 4605 of 2007. The learned Magistrate shall thereafter consider the entire evidence before it and pass appropriate orders in accordance with law. The parties shall appear before the court below without any further notice on 25-6-2008.

This Criminal Revision Petition is allowed as above.