

(2008) 04 KL CK 0042
In the High Court Of Kerala
Case No : Criminal M.C. No. 1397 of 2007

Haridas P. Nair

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 07-04-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 224, 479, 482
Kerala Abkari Act, 1077 — Section 55
Penal Code, 1860 (IPC) — Section 120B, 224, 225, 34

Citation : (2008) 04 KL CK 0042

Hon'ble Judges : V. Ramkumar, J

Bench : Single Bench

Advocate : K. Ramakumar, for the Appellant; P.G. Thampi, Director General of Prosecution, for the Respondent

Judgement

V. Ramkumar, J.—In this petition filed u/s 482 Code of Criminal Procedure, the Petitioner who is a legal practitioner seeks to quash Annexure A FIR in crime No. 84 of 2007 of Chittur Police Station and all further proceedings pursuant thereto on the ground that the same amounts to an abuse of the process of the court.

2. I heard Senior Advocate Sri K. Ramakumar appearing for the Petitioner and Senior Adv. Sri P.G Thampi, the learned Director General of Prosecution, who is also the Chairman of the Kerala Bar Council.

A YOUNG LAWYER'S SUPPLICATION

3. Advocate Sri K. Ramakumar, the learned Counsel for the Petitioner made the following submissions before me in support of this petition:

The Petitioner herein is a 33 year old legal practitioner in the High Court of Kerala. He was appearing for Sunil Kumar (the 3rd accused in CR. No. 3/2007 of the Chittur Excise Range). That was a case involving an Abkari offence. On behalf of the said accused person, the Petitioner moved an application for bail before Sri N.V. Raju, who was the Judicial Magistrate of First Class, Chittur. On 13-4-2007,

the Magistrate rejected the application and remanded the accused to judicial custody till 24-4-2007. The accused was entrusted to the charge of one Radhakrishnan, Head Constable of Chittur Police Station. It appears that while the 3rd accused in CR No. 3/2007 was in charge of the said Radhakrishnan, he escaped from custody. The Head Constable tried to maintain contact with the absconding accused through the mobile phone supplied to him by the Petitioner on his request. The said attempt of the Head Constable was to ensure that the absconding accused reports back to the court. Since the absconding accused did not return even after waiting for sometime, the Head Constable appears to have filed a statement before the Magistrate to the effect that the Petitioner herein, who was the counsel appearing for the absconding accused, was responsible for his escape. The Petitioner who was the counsel for the absconding accused was perfectly entitled to meet his client whose bail had been rejected, to tender him the necessary legal advice for moving a superior Court for bail. That cannot amount to rescuing the accused who was in judicial custody. The learned Magistrate forwarded the said statement of the Head Constable to the Chittur Police u/s 156(3) Code of Criminal Procedure. The Police registered the present FIR as Crime No. 84/2007 against four persons namely (Sunil Kumar, the accused in CR 3/2007), the Petitioner herein and two of the sureties of the accused in CR 3/2007 for offences punishable under Sections 224, 225 (part 2) and 120(B) read with 34 IPC. Significantly, the Head Constable who was having custody of the accused and who was responsible for the escape of the absconding accused was not shown as an accused nor was any action taken against him. This was because of the common knowledge among the legal practitioners of Chittur that the said Head Constable was maintaining intimate relationship with the Magistrate. Consequent on the registration of the aforesaid crime, the Petitioner herein was arrested by the Chittur Police in the night of 13-4-2007 at about 11.50 p.m. and produced at the residence of the Magistrate who remanded the Petitioner to judicial custody. An application for bail filed by the Petitioner was rejected by the Magistrate with caustic remarks against the Petitioner. The observations in the bail order practically hold the Petitioner guilty. The Magistrate forgot that since the escape of the accused was from judicial custody, the Magistrate would be a material witness in the case. Therefore, he should have sent the case to some other Magistrate for registration of the crime and other follow-up measures. No person who is likely to be a witness can be the Judge in the case in view of Section 224 Code of Criminal Procedure (Section 479 Code of Criminal Procedure?). Significantly, one of the material objects in the case against the Petitioner is his professional robes and it is not clear as to how the same can be a material object at all. The incident leading to the registration of Annexure A FIR actually reveals the deep rooted conspiracy between the Magistrate and the Head Constable on account of the intimate relationship between them. On 18-4-2007, the Petitioner moved the Sessions Court, Palakkad for bail. The learned Additional Sessions Judge posted the case to 19-4-2007 for arguments. Even though the learned Public Prosecutor did not oppose the application for bail, the Additional Sessions Judge posted the case for orders to

20-4-2007. The Petitioner was, therefore, constrained to move this Hon'ble Court by filing a bail application as B.A. No. 2513 of 2007. On 19-4-2007, this Court granted bail to the Petitioner after observing that the Magistrate who would have been a competent witness in the case should not have dealt with the case and after noting that no case had been registered against the Head Constable from whose custody the accused had escaped and who was primarily answerable for the escape of the absconding accused. Even if all the allegations in the complaint are true, neither Section 224 nor Section 225 Part II IPC is attracted. The entire proceedings culminating in the registration of Annexure A FIR constitute a gross abuse of the process of the court and is solely motivated to save the skin of the real accused in the case namely the Head Constable, Radhakrishnan. Further continuance of the proceedings pursuant to Annexure A FIR will amount to manifest injustice to the Petitioner resulting in failure of justice.

THE STAND OF THE STATE PUBLIC PROSECUTOR/ CHAIRMAN OF THE STATE BAR COUNCIL

4. Advocate Sri P.G Thampi, the Director General of Prosecution, who is also the Chairman of the State Bar Council made the following submissions before me:

The incident in which a member of the Bar has been arrayed as an accused on the allegation that he prompted the absconding accused to escape from custody and was remanded to judicial custody and his bail application was rejected by the Magistrate, has been viewed with great concern by the members of the Bar. There has been a hue and cry among the legal fraternity. There have been demands from various Bar Associations that the incident should not be lightly viewed and that the matter should be brought to the notice of the Hon'ble Chief Justice and the Judge in charge of Palakkad District. That was accordingly done. Various bodies of legal practitioners have passed resolutions condemning the conduct of the Magistrate and clamouring that appropriate disciplinary action should be taken against the Magistrate. This unfortunate incident has sparked off agitations which have not died out even after the lapse of nearly one year.

JUDICIAL RESOLUTION

5. Before reserving the judgment in this case I asked Senior Advocates Sri K. Ramakumar and Sri P.G. Thampi whether there would be a quietus to this unfortunate episode in case the Petitioner herein were to be exonerated by this Court. Sri K. Ramakumar fairly conceded that in that event the Petitioner will be withdrawing the private complaint filed by him against the Magistrate and that he is not desirous of seeing that this unfortunate discord between the Bench and the Bar escalates to undesirable proportions to the detriment of the system. Sri P.G. Thampi was, however, non-committal presumably due to the unpredictability of a sizeable number of the members whom he represents.

6. After hearing both sides and after perusing the lower court records, even though I am not persuaded to fully accept the contentions of the Petitioner, I

have, nevertheless, no doubt in my mind that the Petitioner, a budding member of the noble profession of law does not deserve the indictment and the consequent prosecution which may completely mar his career. But certainly this case should provide him sufficient opportunity for introspection and will be a turning point in his life. I have carefully avoided mentioning certain unfounded and personal allegations levelled against the Magistrate whose remarks were called for by me on the administrative side and who has denied those allegations made behind his back. I have no reason whatsoever to believe that those allegations are true. When feelings run high, men have the tendency to exaggerate matters particularly when there are vested interests to supply distorted and garbled versions founded on figments of fertile imagination. I, therefore, do not attach much importance to those allegations.

7. I now proceed to consider the occurrence as revealed by the records.

THE FACTUAL SCENARIO

8. On 2-4-2007 the Petitioner herein (Adv. Haridas P. Nair) moved an anticipatory bail application (B.A. 1765 of 2007) before the High Court (this Court) on behalf of one Sunil Kumar who was the 3rd accused in C.R. No. 3 of 2007 of Chittur Excise Range for an offence punishable u/s 55(a) of the Abkari Act for allegedly transporting in a lorry 8192 litres of spirit in 256 cans at 7 p.m. on 22-2-2007. This Court was not inclined to grant anticipatory bail to the said Sunil Kumar who on detection, had unsuccessfully attempted to make good his escape from the lorry in which the contraband spirit was being transported. This Court, therefore, directed the said Sunil Kumar to surrender before the Magistrate concerned and to file an application for regular bail which application was directed to be disposed of preferably on the same date on which it was filed. The said order was passed on 2-4-2007 itself. On 13-4-2007 Sunil Kumar, the accused in the Abkari offence surrendered before the J.F.C.M., Chittur presided over by Sri N.V. Raju. On the same day a bail application was filed as C.M.P. No. 1016 of 2007 by the Petitioner herein along with Adv. Krishnadas P. Nair for the enlargement of the said Sunil Kumar on bail. As per order dated 13-4-2007 pronounced at 3.45 p.m. the learned Magistrate rejected the bail application and remanded Sunil Kumar to judicial custody till 22-4-2007. Thereafter, the Magistrate retired to his chamber. Before the issue of a remand warrant for entrusting the accused with the police for the purpose of his detention in jail on judicial custody, accused Sunil Kumar with whom the Petitioner herein had a word in private, ran out of the Court and escaped from Court custody. At about 5.15 p.m. one Radhakrishnan (HC 2906) the Head Constable attached to Chittur Police Station and who was on court duty in the Magistrate's Court at Chittur submitted a statement before the Magistrate. The said statement in vernacular Malayalam is to the following effect:

Today on 13-4-2007 I was deputed from Chittur Police Station for court duty and I reached the J.F.C.M. Court at 10.30 a.m. After lunch, at about 3.45 p.m. when the case of Sunil Kumar, the 3rd accused in Chittur Excise Crime 3 of 2007 was called the said accused came and stood in the dock. The learned Magistrate

pronounced orders rejecting his bail application and asked the accused to get down from the dock and remain inside the court itself. The Magistrate then retired to his chamber. While so, the Advocate who was appearing for accused Sunil Kumar called the accused to the Veranda of the court under the pretext of talking something in private with him. The two sureties who had come to court for bailing out accused Sunil Kumar were also present with the Advocate. At that time the Advocate got a call in his mobile phone. The accused and the sureties were seen talking with each other. Soon after the counsel completed the call, accused Sunil Kumar suddenly ran out. After crossing the gate when he moved quickly outside the Court compound, his Advocate was seen proceeding towards the Bar Association pretending as if nothing happened. Even though I ran after the accused Sunil Kumar, the latter got into a car which was waiting outside the court and sped towards 5th line area. I immediately informed the police station for apprehending accused Sunil Kumar. I then returned to the court. After meeting the advocate who was appearing for Sunil Kumar I asked him the mobile number of Sunil Kumar and the Advocate gave the number as 9846040851. I then borrowed the mobile phone of the Advocate and called Sunil Kumar. Styling myself as the Advocate, I asked Sunil Kumar to come back to the Court. Then Sunil Kumar retorted saying "was it not on your advice that I ran away and why are you now saying so". I understand that the mobile phone number of the Advocate is 9446384780. It was as a part of a conspiracy to rescue the accused from the custody of the court in the event of the court denying bail to the accused that the accused escaped from custody and his Advocate, sureties and Ors. pursuant to the conspiracy hatched between them, were helping Sunil Kumar to escape from custody. I understand that the case against the absconding accused Sunil Kumar is for an offence punishable u/s 55(a) of the Abkari Act and the names of his sureties are Sunil Kumar and Karthikeyan. On enquiries made by me regarding the name of the Advocate who was appearing for Sunil Kumar, what is revealed by the court records is that his name is Krishnadas P. Nair. But, when I asked the Advocate his name from the Court he revealed his name as Haridas P. Nair. Appropriate action may be taken in the matter.

The learned Magistrate treated the above report as a complaint and forwarded the same to the Station House Officer, Chittur Police Station u/s 156(3) Code of Criminal Procedure. On receipt of the complaint, the Chittur Police registered a case as Crime No. 84 of 2007 against Sunil Kumar the absconding accused, the Petitioner herein and the two sureties namely Sunil Kumar and Karthikeyan for offences punishable under Sections 224, 225 (part ii) and 120B read with Section 34 I.P.C. The Petitioner along with accused Nos. 3 and 4 were arrested at 11.50 p.m. on the same day. The Petitioner was taken to the residence of the Magistrate who remanded him till 24-4-2007. The mobile phones of the Petitioner herein (A-2) and one of the sureties by name Sunil Kumar (A-3) were seized and produced under a mahazar in which the outgoing and incoming calls, as revealed in the Petitioner's mobile phone, have been recorded. The Petitioner

herein who was the 2nd accused in Crime No. 84 of 2007 filed C.M.P. 1042 of 2007 before the learned Magistrate seeking bail. On 17-4-2007 the learned Magistrate dismissed the bail application. On 18-4-2007 the Petitioner moved the Sessions Court for bail. The Addl. Sessions Judge was holding charge of the Sessions Judge. The said bail application was posted to the next day for arguments. On the next day the bail application was posted for orders to 20-4-2007. In view of the delay in disposal of the bail application the Petitioner moved this Court by filing B.A. 2513 of 2007 and this Court as per Annexure C order dated 19-4-2007 directed the immediate release of the Petitioner giving him the benefit of executing a bond thereafter. The Petitioner herein was thus released from custody. This in short, is what transpired in this case.

JUDICIAL EVALUATION

9. The argument that Sunil Kumar, the accused in C.R. 3 of 2007 escaped from the custody of Radhakrishnan, the Head Constable and it was to save the skin of the said Head Constable that he has been purposely not made an accused in the case, does not appeal to me. The said Head Constable was deputed from the Chittoor Police Station for Court duty as a routine measure. After rejecting Sunil Kumar's bail application and after remanding him to judicial custody, the Magistrate had retired to his chamber. It is only when an accused person is physically entrusted to the custody of a police officer on a remand warrant addressed to the Superintendent of the Sub Jail concerned for the purpose of detention of the accused in judicial custody, could it be said that the accused is in the custody of a police officer. Until then, the accused is in the custody of the Court. In the instant case, the Magistrate had not issued the remand warrant. Hence, it cannot be said that accused Sunil Kumar was in the custody of Radhakrishnan, the Head Constable. The Head Constable's duty was only to guard the court hall and Chamber of the Magistrate. Therefore, it cannot be said that the Head Constable was keeping custody of Sunil Kumar or that the Head Constable was responsible for the escape of Sunil Kumar.

10. The learned Magistrate admittedly did not witness the sudden and unforeseen act of accused Sunil Kumar making good his escape. The Magistrate came to know of the incident only on the report of the Head Constable who gave the report only after making a futile attempt to chase and apprehend accused Sunil Kumar. The Head Constable also had only witnessed the Petitioner herein having some dialogue with his client Sunil Kumar. The Head Constable did not over-hear the conversation between the Petitioner herein and Sunil Kumar. In the report of the Head Constable also there is no statement to the effect that the Petitioner had uttered any words actively or passively prompting his client Sunil Kumar to escape from court custody. No doubt, the Head Constable had stated that after Sunil Kumar had vanished, he called Sunil Kumar using the mobile phone of the Petitioner and pretending himself to be the Advocate when he asked Sunil Kumar to return to the Court, Sunil Kumar allegedly asked him as to why he was demanding him to come back to the court since it was the Petitioner

Advocate who had asked him to run away. This aspect of the matter can be said to have been proved only if the exact conversation through the mobile phones is decoded and produced as an item of evidence.

11. There is nothing to indicate that the learned Magistrate took a vindictive attitude towards the Petitioner. When information is conveyed to a Magistrate that an accused in court custody has suddenly escaped from custody, anybody will get perplexed, if not wild. The immediate reaction will be to recapture the fugitive. The act of the Magistrate in forwarding the report of the Head Constable to the Chittur Police Station and thereafter remanding the Petitioner to judicial custody and subsequently rejecting the Petitioner's bail application are all consistent with the conduct of any judicial officer placed in similar circumstances. This is particularly so when the report of the Head Constable contained suggestions in no unmistakable terms that the Petitioner under the pretext of having a talk in private with his client was really stage-managing his client's escape. This evidently prompted the Magistrate to reasonably believe that the Petitioner was a privy to the whole operation. That explains the action of the Magistrate in remanding the Petitioner to judicial custody and subsequently rejecting the Petitioner's bail application, although it could be said that the rejection of the bail application of the Petitioner, a member of the Bar, could have been avoided. May be, it was a natural reaction springing from the righteous indignation that an Advocate who is an officer of the Court should not have extended a helping hand to an accused person to flee from justice. But I can certainly say that there was absolutely no mala fides behind the action of the Magistrate. There is absolutely no material to suggest that the professional robes of the Petitioner were seized as a material object. The only two material objects which were seized under a mahazar were the mobile phone of the Petitioner herein and the mobile phone of Sunil Kumar (the 3rd accused in C.R. No. 84 of 2007) who was one of the two sureties of the absconding accused Sunil Kumar. By no stretch of imagination could it be said that the Magistrate, who even according to the Petitioner had not witnessed the escape of Sunil Kumar, would have become a witness in this case so as to oblige him to transfer the case to Anr. Court. Moreover, the statutory interdict u/s 479 Code of Criminal Procedure is also against trying the case. Otherwise, it will amount to stretching the law to the unreasonable extent of saying that a Magistrate who forwards a complaint to the Police u/s 156(3) Code of Criminal Procedure and thereafter rejects a bail application of the accused consequent on a police report and cognizance of the offence, is debarred from trying the case.

12. This was indeed an unfortunate incident which took a different turn consequent on the sudden abscondence of Sunil Kumar, the accused in the Abkari Crime. The circumstances and concatenation of events were such as to furnish a legitimate ground for the Magistrate to suspect the Petitioner of having engineered the escape of Sunil Kumar. It might have occurred to the Magistrate that the whole episode was pre-planned. But it was not so. Placed in such circumstances, it cannot be said that either the Head Constable or the Magistrate

acted illegally in performing their respective roles. In that process, however, pain has been inflicted on a member of the Bar. The learned Magistrate also was transferred out of the station to a non-judicial post even after a clean report in his favour was submitted in the enquiry ordered by the Hon''ble Chief Justice. There are minor sacrifices which the Bench and the Bar can ungrudgingly make in the cause of justice. The curtain should fall here, and there should not be any more bickerings or simmering agitations on account of this incident. More than the question as to whether the provisions of the Indian Penal Code registered against the Petitioner are attracted or not, it is the majesty and purity of the system which are supreme. I, therefore, quash the F.I.R. in Crime No. 84 of 2007 of Chittur Police Station so far as it relates to the Petitioner/2nd accused. The investigation, with regard the remaining three accused persons can, however, continue.

This Crl. M.C. is allowed as above.