
(1974) 09 KL CK 0014
In the High Court Of Kerala

K. Madusudanan Namboodiri

APPELLANT

Vs

Unni Nair and Others

RESPONDENT

Date of Decision : 30-09-1974

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 246
Penal Code, 1860 (IPC) — Section 34, 380

Citation : (1975) CriLJ 751

Hon'ble Judges : S.K. Kader, J

Bench : Single Bench

Judgement

S.K. Kader, J.—This is an appeal against acquittal, filed by the complainant in a private complaint, C.C. No. 252 of 1972, on the file of the court of the Additional First Class Magistrate, Quilandi.

2. The appellant filed a complaint against the respondents alleging that they on July 30, 1972 at about 8 p.m. criminally trespassed into the house belonging to him and committed theft of vessels and other articles worth about Rs. 6,000/-. The learned Magistrate took the complaint on file u/s 380 read with Section 34 of the Indian Penal Code. On the appearance of the accused, the prosecution examined two eye-witnesses to the occurrence and they were P.W. 1 the complainant and P.W. 2 who was said to be present in the house at the time of the incident.

3. When examined u/s 342 of the Code of Criminal Procedure, 1898, on the evidence of P. Ws. 1 and 2, the accused denied the prosecution case.

4. The learned Magistrate on being satisfied that there were sufficient grounds for presuming that the accused have committed the offences alleged, framed a charge against the accused, the respondents herein, u/s 380 of the Indian Penal Code.

5. Thereafter the case was posted to 26-10-1973 for further cross-examination of P. Ws. 1 and 2 and on that day P.W. 1 was discharged after his further cross-

examination and re-examination. But the learned Magistrate holding that the complainant failed to produce P.W. 2 for further cross-examination closed the case, eschewed the evidence of P.W. 2 on the ground that he has not been made available by the complainant for the purpose of further cross-examination and acquitted the accused on the ground that it will not be safe to convict the accused on the sole testimony of P.W. 1 without independent corroboration.

6. Attacking this order of acquittal, the counsel for the appellant contended that the learned Magistrate has violated the provisions of Section 256 of the Code of Criminal Procedure, 1898, that he failed to note that under this section it was his duty to issue summons to make the prosecution witnesses available for cross-examination, that there is no duty cast in law on the complainant to produce the witnesses for the purpose of cross-examination, that the complainant cannot be penalised for the absence of the witnesses, that the order of acquittal eschewing the evidence of P.W. 2 is clearly illegal and therefore the order of the learned Magistrate has to be set aside and the case sent back for fresh disposal in accordance with law.

7. The case in question is both a warrant and cognizable case. This case is governed by the provisions of the Code of Criminal Procedure, 1898, and being a private complaint the relevant sections applicable to the case are Sections 252 to 259 of this Code. Section 256 confers a right on an accused to further cross-examine a prosecution witness already examined before framing of the charge against him. The purpose of this section is to secure an accused an opportunity to cross-examine the prosecution witnesses after he has been given notice of the specific charge which he has to answer. This section provides that where an accused "claims to be tried, he shall be required to state at the commencement of the next hearing of the case or, if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith, whether he wishes to cross-examine any, and, if so, which, of the witnesses for the prosecution whose evidence has been taken, and if he says he does so wish, the witnesses named by him shall be recalled and, after cross-examination and re-examination (if any), they shall be discharged." (The underlining is mine). The corresponding section in the Code of Criminal Procedure, 1973, is Section 246, which is almost verbatim reproduction of the old section and there is no change or difference in this regard. It is clear from the express words used in this section that the duty of recalling the witnesses when an accused wants to cross-examine them is cast on the magistrate and that no duty is cast under this section on the complainant to produce the prosecution witnesses for the purpose of cross-examination. In a warrant case, after charge is framed, the complainant will be out of picture and it is the duty of the magistrate to secure such of the witnesses for the prosecution as are required by the accused for further cross-examination. The procedure to be adopted by the magistrate u/s 256 of the Code of Criminal Procedure is to make all efforts to secure the attendance of the witnesses to enable the accused to further cross-examine them, if it is found necessary, even by the issue of coercive process. It is illegal for a magistrate to eschew the evidence of a

prosecution witness examined before the framing of the charge against the accused on the ground that he or she was not produced by the complainant for the purpose of cross-examination. A complainant in a warrant case after framing of the charge cannot be directed to produce a prosecution witness, himself, as it is the duty of the magistrate to exercise his powers under the section referred to and secure the witnesses for their further (Cross-examination by the accused. But in a case, where a complainant offers and undertakes to produce the witness himself in court for the purpose of their further cross-examination and thereby prevents the magistrate from taking appropriate steps under the relevant section in the Code of Criminal Procedure and if the witnesses are absent on the date, fixed for their further cross-examination, the complainant cannot be permitted to turn -found and say that it is the duty and responsibility of the magistrate to secure the (presence of the witnesses by exercise of his powers under the relevant section in the Code of Criminal Procedure. The records in the -case do not show that the complainant in the case has undertaken himself to produce "PW 2 in court and it is clear that the learned Magistrate has failed to discharge his -duties by exercising his powers u/s 256 of the Code of Criminal Procedure to secure the presence of PW 2 for the purpose of further cross-examination by the accused and he has thereby committed an illegality. My conclusions in this regard find full support in a catena of decisions of various High Courts, and the following are a few among them. *Bharata Rona Vs. Rama Nahak*, ; *Kanduri Misra v. Sahadeb Kunda* (1965) 2 Cri LJ 295 (Orissa); *Mohd. Qasim v. Gokul Tewari* (1963) 1 Cri LJ 346 (All); *N. R. Murthy v. P. D. Narayan* AIR 1957 Mys 18 : 1957 Cri LJ 209 and *Kunj Behari Yadav Vs. Basdeo Yadav and Others*, .

8. As already stated, on the ground that P.W. 2 was not made available for further cross-examination, his evidence was -eschewed by the trial court and then, by finding that the evidence of P.W. 1 was not "corroborated by any independent evidence, -acquitted the accused. This order of acquittal in the light of the facts and circumstances stated above, is clearly illegal. The counsel for the respondents was not able to point out any ground to sustain the order of acquittal.

I therefore set aside the order of acquittal passed in C.C. No. 252 of 1972 on the file of the Additional First Class Magistrate Quilandi, remit the case back to that court for disposal afresh in accordance with law and in the light of the observations made in this judgment.