
(1983) 05 KL CK 0001
In the High Court Of Kerala
Case No : File No. Criminal 13025 of 1983

K. Nazeema

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 30-05-1983

Acts Referred:

Constitution of India, 1950 — Article 21

Criminal Procedure Code, 1973 (CrPC) — Section 374, 374(3), 378, 397, 401

Citation : (1983) KLJ 291

Hon'ble Judges : P. C. Balakrishna Menon, J

Bench : Single Bench

Advocate : T. P. Kelu Nambiar Amicus Curiee, for the Appellant;

Judgement

P. C. Balakrishna Menon, J.—By this petition addressed to the Hon"ble the Chief Justice, and forwarded by the Superintendent, Central Prison, Cannanore, to this Court a young girl Nazeema, aged 18 years the 1st accused undergoing imprisonment on conviction by the Judicial II Class Magistrate, Cannanore in C. C. No- 253 of 1983 for an offence u/s 47 of the Kerala Police Act (the Act for short) invokes the revisional jurisdiction of this Court u/s 397 read with Section 401 of the Criminal Procedure Code to set aside the conviction and sentence imposed on her. The prosecution case against the four accused persons is that Nazeema, the first accused was seen in the company of three youngsters, accused 2 aged 21 years and accused 3, and 4 both aged 18 years at about 9.15 p.m. on 27-2-1983 at the Sree Narayana Park within the Cannanore Municipal town by P.W. 1, the Sub Inspector of Police, Cannanore Town Police Station, while on petrol duty with the Control room party, the accused had willfully trespassed into the municipal park, they could not satisfactorily account for their presence at the time and place, where they were apprehended and they had therefore committed an offence punishable u/s 47 of the Act The Judicial Magistrate of the IInd Class Cannanore who tried the case found the accused guilty of the offence charged against them and all the four accused were convicted and sentenced to undergo simple imprisonment for six months and also to pay a fine of Rs. 500/-

in default of payment of which they are to undergo simple imprisonment for a further term of one month.

2. From the records of the case it is seen that the first accused had no Counsel to defend her. The only evidence in the case is of P. W. 1 the Sub Inspector of Police who arrested the accused and of P. W. 2 a Head Constable attached to the Cannanore Town Police Station. The substance of the evidence of these witnesses is that P.W, 1 the Sub Inspector of Police while on petrol duty along with the Control room party on 27-2-1983 saw the accused persons in the municipal park at about 9.15 p.m., The accused were seen quarrelling among themselves. The Sub Inspector and the Police party got into the park and saw the first accused a girl aged 18 years standing and accused 2, 3 and 4 quarrelling. The 1st accused had bared her breast and on being questioned she told the Sub Inspector of Police that she had gone to witness a cinema show along with the 2nd accused who had brought her to the park where accused 3 and 4 had joined them the 4th accused took out a hundred rupee note and insisted that he should be the first to have the company of the first accused. This provoked a quarrel among accused 2 to 4 whereupon the police party headed by P.W. 1 came to the spot arrested the accused and took them into custody. It is on the basis of the evidence of these two witnesses that the trial Magistrate has found the accused guilty of an offence u/s 47 of the Act. Section 47 of the Act (Act 5 of 1961) is extracted below:

47. Penalty for willful trespass. -

Whoever without reasonable excuse willfully enters into or on any dwelling house or other building or on any land or ground attached thereto or on any boat, vehicle or vessel, or on any ground belonging to the Government or appropriated to public purposes shall be liable on conviction to imprisonment for a term not exceeding six months or to fine not exceeding five hundred rupees or to both.

The prosecution has no case that the earlier part of the Section applies to the facts of the present case. The only case is that the accused had without reasonable excuse willfully entered into the Sree Narayan Park which according to the prosecution is a ground appropriated to public purpose. There is no definition of the expression "ground appropriated to public purpose" in the Act. "Public Place" is defined in Section 2, sub-section (vi) to mean "any place to which the public have access whether as of right or not, and shall include every public building and monument and the precincts thereof". There is no dispute that the Sree Narayana Park is a public place within the meaning of the Act to which the public have access. There are provisions in the Act in Chapter IV under which Police Officers are empowered to preserve order in public places. Entry into public place is not however made an offence under any of the provisions of the Act. The argument of the learned Public Prosecutor is that a public place such as a municipal park is a ground appropriated to public purpose and an unauthorized entry into such a place is an offence u/s 47 of the Act. The question therefore is whether the entry of the accused persons into the municipal park is a willful entry without reasonable excuse to a ground appropriated to public

purpose within the meaning of Section 47 of the Act. A municipal park is a place intended for the public to enter. Section 47 is captioned under its marginal note as "penalty for wilful trespass". Even though the marginal note cannot be used for the interpretation of the Section, it can certainly be relied on as indicating the drift of the Section. In the decision of the Supreme Court in *Indian Aluminium Company v. K. S. E Board*, reported in AIR. 1975 S. C. 1967 it is stated at page 1977 thus:

It is true that the marginal note cannot afford any legitimate aid to a construction of a section, but it can certainly be relied upon as indicating the drift of the section, or, to use the words of Collins M. R. in *Bushell v Hammond*, (1904) 2 K.B 563 "to show what the Section was dealing with.

A reading of Section 47 itself would clearly indicate that it is only such entry as would amount to trespass that is dealt with in the Section. The Section begins with the words "whoever without reasonable excuse willfully enters into". No such question will arise if the entry is into a land where the public are allowed access. It is only such entry into the places mentioned in Section 47 as would amount to trespass that will constitute an offence under the Section. Even if the municipal park is to be construed as a ground appropriated to public purpose, unless the entry into the park amounts to a trespass there cannot be an offence u/s 47 of the Act. This position appears to be fairly clear from the Section itself and the drift of the Section as indicated by its marginal note makes it abundantly clear that it is only such acts which would amount to trespass that are dealt with in the Section. The evidence of P.W. 1 relied on by the court below shows that the park is a public place, and its gates will be closed at 9 p.m. There is nothing on record to show that entry into or remaining inside the park after 9 p.m. is prohibited. A "public place" according to its definition in the Act is a place to which public have access whether as of right or not. As already noticed entry into a public place is not made an offence under the Act. Under these circumstances, I have no hesitation to hold that the charge against the revision -petitioner does not disclose any offence u/s 47 of the Kerala Police Act.

3. The learned Public Prosecutor submits that the remedy of the petitioner is by way of an appeal under Sub-Section (3) of Section 374 Criminal

Procedure Code to the Court of Session and this Court has no jurisdiction to entertain this petition as a revision u/s 397 read with Section 401 of the Code.

4. Learned Counsel Sri. T. P. Kelu Nambiyar, who appeared on behalf of the petitioner, as amicus curie, to assist the Court submits that the remedy of an appeal to the Court of Session is not a bar against this Court entertaining this petition as a revision against the conviction and sentence entered against the revision -petitioner. It is true that an appeal would lie to the Court of Session u/s 374(3) Criminal Procedure Code but the further question is whether a right of appeal is a bar against this Court entertaining a revision against the conviction and sentence.

5. Learned Public Prosecutor relies on the decision of a Division Bench of this Court in *E. S. I. Corporation v Ratnanarayanan* (1980 K. L. T. 772) in support of his proposition that this Court cannot entertain a revision in respect of a matter which can appropriately be the subject-matter of an appeal before the Sessions Court. The Division Bench in the aforesaid decision was concerned with the question whether a right of appeal on grant of special leave under sub-section (4) of Section 378 Criminal Procedure Code would bar a revision against the order of acquittal at the instance of the complainant, Kader J. on behalf of the Bench stated thus at Page 777;-

In a recent case in *Krishnanlal Oberoi v Corporation of Cochin* (1979 K.L.T 75) a learned Single Judge of this Court considered this question elaborately and held that an appeal does lie against an order of acquittal in a case instituted on a complaint, The requirement that the complainant has to seek special leave and only if it is granted he can present the appeal, does not, according to the learned Judge, mean that no appeal lies against the order of acquittal. With great respect, we are in full agreement with the decision of the learned single Judge and we find no ground to reconsider this decision, which, according to us, lays down the correct position of law on the point.

The result is that the revision filed by the *E. S. I. Corporation* against the order of acquittal is not maintainable in view of the prohibition in sub-section (4) of Section 401 Criminal Procedure Code and we hereby set aside the order of the learned Sessions Judge remanding the case to the trial court and dismiss the revision application"

This decision is perfectly in consonance with sub-section (4) of Section 401 Criminal Procedure Code extracted below:

Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed"

The aforesaid provision of the Code does not however interdict this Court from entertaining a revision suo motu when an illegal order resulting in miscarriage of justice is brought to its notice. In the present case, the impugned order of conviction which I have found to be unsustainable in law is brought to the notice of this Court by way of a petition by the first accused submitted to the Hon''ble the Chief Justice and forwarded by the Superintendent. I do not see anything in sub-section (4) of Section 401 Criminal Procedure Code that would affect the jurisdiction of this Court to entertain a revision to set right a manifest injustice occasioned on account of an illegal order passed by a subordinate court. The Supreme Court in its decision in *Eknath Shankarrao Mukkavar Vs. State of Maharashtra*, :

The provision of Section 401 (4) is a bar to a party, who does not appeal when appeal lies, but applies in revision. Such a legal bar u/s 401 (4) does not stand in the way of the High Court's exercise of power of revision, suo motu which

continues as before in the new Code".

This Court in exercise of its suo motu power of revision u/s 397 Criminal Procedure Code has a duty to correct a clear illegality when brought to its notice to prevent miscarriage of justice. The Supreme Court in *Municipal Corporation of Delhi v Giridharilal Sapuru and Others* (AI.R 1981 S. C. 1169) stated thus at page 1170:

Without going into the nicety of this too technical contention, we may notice that Section 397 of the Code of Criminal Procedure enables the High Court to exercise power of revision suo motu and when the attention of the High Court was drawn to a clear illegality the High Court could not have rejected the petition as time barred thereby perpetuating the illegality and miscarriage of justice.

Khalid J. in *Mohammed v State of Kerala* reported in 1982 KLT 105, following the aforesaid decisions of the Supreme Court held that Section 401 (4) Criminal Procedure Code is not a bar against the High Court entertaining a revision suo motu. The learned Judge observed:

"All that is necessary for the High Court to exercise is right is to make it aware of an order made by a subordinate court which has to be corrected".

6. This petition serves the purpose of conveying the information regarding the illegality of the order passed by the learned Magistrate to enable this Court to take up the matter in suo motu revision. The objection raised by the learned Public Prosecutor against the maintainability of the revision is without substance, and it is accordingly overruled-

7. I have already found that entry into "a public place" such as a municipal park does not constitute an offence u/s 47 of the Kerala Police Act. The charge in the present case is for an offence u/s 47 for the reason of the petitioner's entry into the municipal park. The charge itself does not disclose an offence, and this Court would have in the exercise of its inherent powers u/s 482 of the Criminal Procedure Code quashed the proceeding before the Magistrate even before the conviction is entered against the accused if a petition had been filed in that behalf. Vide the decisions of the Supreme Court in *Madhu Limaye v. State of Maharashtra* (AIR 1978 S. C. 47), *R. P. Kapur v State of Punjab* (AIR 1960 S.C. 866) and *State of Karnataka v L. Muniswami and Others* (A.I.R. 1977 S. C. 1489). The mere fact that the proceedings have ended in an illegal order of conviction does not preclude this Court from exercising its power of revision suo motu to correct an illegality and to avert a gross miscarriage of justice.

8. I would like to add that if we had an effective system for free legal aid to the poor, the petitioner would not have been left undefended at the trial. The Supreme Court in its decision in *Hussainara Khatoon and Others Vs. Home Secretary, State of Bihar, Patna*, has pointed out the right to free legal services an essential ingredient of just and fair procedure for a person accused of an offence, this must be held implicit in the guarantee of Article 21 of the

Constitution, and the State is under a constitutional mandate to provide a lawyer to an accused person, if the needs of justice so require. In the decision in *Khatri v State of Bihar* reported in AIR 1981 S.C. 928 it is held at page 931:

Moreover this constitutional obligation to provide free legal services to an indigent accused does not arise only when the trial commences, but also attaches when the accused is for the first time produced before the Magistrate. It is elementary that the jeopardy to his personal liberty arises as soon as a person is arrested and produced before a Magistrate, for it is at that stage that he gets the first opportunity to apply for bail and obtain his release as also to resist remand to police or jail custody. That is the stage at which an accused person needs competent legal advice and representation, and no procedure can be said to be reasonable, fair and just which denies the legal advice and representation to him at this stage. We must therefore hold that the State is under a constitutional obligation to provide free legal services to an indigent accused not only at the stage of trial, but also at the stage when he is first produced before the Magistrate as also when he is remanded from time to time

9. The result is I allow this revision, and set aside the conviction and sentence passed by the Judicial Magistrate of the II Class, Cannanore against the revision petitioner. The revision petitioner is set at liberty forthwith. The fine if paid will be refunded to her. I record my appreciation of the assistance rendered to this Court by Advocate Sri T. P. Kelu Nambiyar, the President of the Kerala Advocates' Association, who appeared as amicus curie and argued the case in detail.