

(2004) 08 KL CK 0004
In the High Court Of Kerala
Case No : CRRP 1908 of 2004

M.P. Abdul Nazar

APPELLANT

Vs

S.V. Dileepkumar and Another

RESPONDENT

Date of Decision : 05-08-2004

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 315, 315(1), 357(3), 446
Negotiable Instruments Act, 1881 (NI) — Section 138, 139

Citation : (2005) 3 BC 28 : (2004) CriLJ 4707 : (2004) 2 KLJ 406 : (2004) 3 KLT 264 : (2004) 4 RCR(Criminal) 454

Hon'ble Judges : R. Basant, J

Bench : Single Bench

Advocate : V.G. Arun, T.R. Harikumar and Jaiby Paul, for the Appellant; Praisly Joseph, for the Respondent

Judgement

R. Basant, J.—What are the ramifications of the right to silence - the glorious right to silence as it is often referred to, in a criminal prosecution under Sec. 138 of the N.I. Act? Is Sec. 315 of the Cr.P.C. applicable in such a prosecution? These questions arise for consideration incidentally in this revision petition. This revision petition is directed against a concurrent verdict of guilty, conviction and sentence in a prosecution u/s 138 of the N.I. Act.

2. The cheque is for an amount of Rs. 20,000/-. Signature in the cheque is admitted. The cheque was dishonoured on the ground of insufficiency of funds. Notice of demand, though duly received and acknowledged, did not evoke any response. No defence evidence whatsoever was adduced before the trial court. The complainant examined himself as PW1 and proved Exts. P1 to P11. At the stage of trial, a contention was raised that the cheque was not issued voluntarily for the discharge of any legally enforceable debt/liability. Some miscreants had trespassed into the house of the accused. The father of the accused owed amounts to some of those miscreants in some transaction. They forcible compelled the accused to sign blank cheques and they took them away. One of those cheques is misutilised to foist this false complaint. This, in short, is the

defence urged.

3. Courts below concurrently came to the conclusion that the complainant has succeeded in establishing all the ingredients of the offence punishable u/s 138 of the N.I. Act. Accordingly, they proceeded to pass the impugned judgments.

4. Called upon to explain the nature of challenge which the petitioner wants to mount against the impugned concurrent judgments, the learned counsel for the petitioner only reiterates the contention raised before the courts below that the cheque was not issued for the discharge of any legally enforceable debt/liability. It was obtained and taken away by force by the miscreants including the complainant.

5. Less said about this contention, the better. On probabilities, this contention is certainly found to be unacceptable. There is no contemporaneous conduct, even suggestive on the part of the accused, which would indicate or establish the probability of the accused being coerced to part with the cheques in the circumstances in which he claims to have done it. We have the evidence of PW1. His evidence is eminently supported by his ability to produce the cheque in question which admittedly bears the signature of the accused. The eloquent silence/inaction of the accused on receipt of the statutory notice of demand threatening prosecution clinches the issue finally in favour of PW1. Execution of the cheque having been proved, the presumption u/s 139 of the N.I. Act comes into play and no worthwhile attempt has been made to rebut that presumption.

6. The counsel contends that the accused had filed a suit against the complainant and two others as O.S. 253 of 2000. The documents relating to that suit have been produced and marked as Exts. P8 to P11. These documents have not been referred to at all by the trial court. The counsel laments that the trial court had not adverted to Exts. P8 to P11 at all. The appendix to the trial court's judgment does not also show that Exts. P8 to P11 were marked. If Exts. P8 to P11 were marked before the trial court, the trial court was certainly in error in not adverting to those documents at all. But that omission has not resulted in any prejudice or miscarriage of justice.

7. The learned Sessions Judge, in the appellate judgment, has adverted to Exts. P8 to P11 in detail. Exts. P8 to P11, as rightly found by the learned Sessions Judge, can only reveal that the accused had raised such a contention. But he has totally failed to substantiate that contention.

8. I do find that the Appellate Judge has committed an error in observing in paragraph 6 of the appellate judgment that:-

Except for the suggestions here and there, even the accused is not prepared to go into the box to prove his case.

9. The learned Sessions Judge was certainly wrong in making a comment about the accused not being prepared to go into the witness box to prove his case. That observation runs counter to the mandate of Section 315(1) Cr.P.C. which I

extract below:

S. 315: Accused person to be competent witness:-1) Any person accused of an offence before a criminal court shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial;

Provided that-

a) he shall not be called as a witness except on his own request in writing;

b) his failure to give evidence shall not be made the subject of any comment by any of the parties or the Court or give rise to any presumption against, himself or any person charged together with him at the same trial.

2) XXXXXXXX

(emphasis supplied)

10. It is the mandate of Proviso (b) to Section 315(1) that the failure of the accused to give evidence "shall not be subject to any comment by any of the parties or the court or give rise to any presumption against himself or any person charged together with him at the same trial".

11. This provision gives expression to the right to silence of an accused person recognised by the anglo saxon system of jurisprudence. The accused need not open his mouth. It is for the prosecution to prove its case. The prosecution case has to be proved; proved beyond doubt, beyond reasonable doubt, nay beyond the shadow of reasonable doubt. The accused is entitled to the glorious right to silence. He need not reveal his defence. He may plead, not plead or even take up conflicting or mutually contradictory pleas. The law in its majesty, we are told, concedes to the accused the glorious right to silence.

12. Winds of change may be coming. Can a system afford to concede to an indictee the right not to actively assist the adjudicator in the attempt to discover truth? What rule of natural justice will be violated if the system insists that the accused must reveal his version to the court during trial? Can law be far removed from the common sense of the community? Should not fact finding procedure in a criminal trial also conform to the common sense of the polity? What is law if it is not the quintessence of the common sense of the community? Is criminal trial merely an expensive and technically complicated game played by the prosecution and the accused where the rules are more important and end irrelevant? The trauma of the star chamber persecutions must have been an unbearable one for the anglo saxon system. But should not the Indian system be able to invent and develop a procedure consistent with native prudence and common sense which would help us to avoid such trauma and at the same ensure a more efficient and fool proof mechanism for discovery of truth?

13. Does the concept of right to silence augur well with the refined common sense of the community? If A complains to you that B has beaten him what

would you, if you are ordinarily prudent do? Will you ask B whether he had beaten A and hear his version? Or will you, before asking B what had happened, ask A to get witnesses to prove that B had beaten him? Will a prudent mind in our polity permit A to argue simultaneously that he was not there at the scene at all (alibi); if he were there, he had not beaten A; if he were there and he had beaten him in self defence, and that even if he does not have the right of self defence he may be exonerated as the incident did not take place in the manner spoken to by A and his witnesses? Fundamental questions! But we have to face them. The system cannot run away from them.

14. If law is far removed from the common sense of the enlightened polity, it becomes unintelligible to the community. They will not be able to understand or digest decisions of courts and their procedure. Such alienation will be at the peril of law. Credibility and acceptability of the system will be lost. If law cannot achieve what it should, alternate mechanisms and methodologies including the ugly head of private vengeance would be raised. Can the conflicting interests be harmonised? Is a humane and efficient truth discovery process possible for the Indian criminal justice system? Is it possible to avoid the trauma of persecution ensuring at the same time efficiency and efficacy? It is certainly time for the system to address itself to these vital concerns. Justice is certainly too serious a business to be left to the lawyers and judges only. Public opinion - of the refined variety, has to assert itself. Opinion makers including the law fraternity have to activate themselves.

15. Have I digressed unnecessarily? Have I unnecessarily transgressed my limits and touched the sacred cow of our criminal jurisprudence? Judgments do and have to resolve the law on hand. They do and have to interpret and lay down the law. But what is not all. Judgments can also highlight the perceived gap between the ideal future law and the imperfect present law. Judges cannot make the law. They can only interpret the law. But a Judge is not disabled to give vent to his disappointment about the inadequate tools in the truth discovery process. That can be food for thought regarding Law tomorrow, where there may or need not be golden threads in fabrics used for daily efficient wear. Those who cannot afford sufficient clothes to cover themselves may not be able to insist on unnecessary golden threads in their clothes.

16. Of Law today - there can be no dispute. S. 315(1) holds the field with rigour. No court can comment on the non examination of the accused. No Judge can make such a comment even in cases where the law has placed a burden on the accused. The court can say that the burden has not been discharged, that there is no evidence to discharge the burden "but cannot comment on the failure, omission or refusal of the accused to examine himself.

17. In these circumstances, the learned Sessions Judge was obviously in error in making the comment extracted above, relating to the failure of the accused to take the witness stand. Even in a prosecution for the offence punishable u/s 138 of the N.I. Act, Section 315 Cr.P.C. operates with vigour. Of course, the burden is

on the accused u/s 139 of the N.I. Act to rebut the presumption against him. But no court would be justified in commenting on the failure/refusal of the accused to take the witness stand in support of the defence set up by him. It appears to be necessary to caution the courts on this aspect as it is often found that comments do creep into judgements against the inability/failure of the accused to examine himself as witness. There can be no doubt on the question. The accused need not examine himself as a witness and even if he wants, he must apply to the court u/s 315 Cr.P.C. Only then can he examine himself. His omission/failure/refusal to examine himself cannot be the subject matter of any comment or justify any presumption or finding against him. The incorrect impression deserves to be dispelled at the earliest.

18. The learned counsel for the petitioner then contends that the sentence imposed is excessive. He now faces a sentence of simple imprisonment for three months.

19. I am surprised to note that in spite of the dictum in *Anil Kumar v. Shammy* (2002(3) KLT 852), the courts below have not chosen to invoke the powers u/s 357(3) Cr.P.C. nor has any reasons been shown to justify that course. There is no contention that any amount has been paid. There is no contention that any decree has been passed by any civil court relating to the amount covered by the cheque. In these circumstances, certainly in the interests of justice, powers u/s 357(3) Cr.P.C. ought to have been invoked. The impugned judgments do not at all reveal any reason why such direction u/s 357(3) Cr.P.C. has not been issued. That aspect has not been adverted to at all.

20. I have already adverted to the principles governing imposition of sentence in a prosecution u/s 138 of the N.I. Act in the decision reported in *Anil Kumar* cited supra. I am satisfied that in the facts and circumstances of this case, it is not necessary to insist on imposition of any deterrent substantive sentence of imprisonment on the petitioner. Leniency can be shown on that aspect. But, it must, at the same time, be zealously ensured that the complainant, who has been compelled to fight two rounds of legal battle and to wait from the year 2000 for the redressal of his grievance, is adequately compensated. The challenge can succeed only to the above extent.

21. In the result

a) This revision petition is allowed in part.

b) The impugned verdict of guilty and conviction are upheld.

c) But the sentence imposed is modified and reduced. In supersession of the sentence imposed on the petitioner by the court below, he is sentenced to undergo imprisonment till rising of court. He is further directed to pay an amount of Rs. 27,500/- (Rupees Twenty Seven thousand five hundred only) as compensation u/s 357(3) Cr.P.C. and in default, to undergo simple imprisonment for a period of 45 days. If realised, the entire amount shall be released to the

complainant.

The learned Magistrate shall take necessary steps for execution of the modified sentence hereby imposed. The petitioner shall appear and his sureties shall produce him before the court below on 11.10.2004 for execution of the sentence. Needless to say that the learned Magistrate shall be at liberty to take necessary action against the petitioner and his sureties u/s 446 Cr.P.C. if the petitioner does not appear before the learned Magistrate as directed above.