
(2000) 06 KL CK 0062
In the High Court Of Kerala
Case No : Criminal M.C. 2470 of 2000

N.G. Reji and Others

APPELLANT

Vs

State of Kerala and Another

RESPONDENT

Date of Decision : 19-06-2000

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 202, 218(1), 223, 313, 482
Penal Code, 1860 (IPC) — Section 109, 114, 120B, 302, 323

Citation : (2000) 06 KL CK 0062

Hon'ble Judges : R. Rajendra Babu, J

Bench : Single Bench

Advocate : P.K. Ashokan and George Kutty Mathew, for the Appellant; K. Gopalakrishna Kurup, Public Prosecutor, for the Respondent

Judgement

R. Rajendra Babu, J.—The Petitioner's who are accused Nos. 4, 5, 7, 10 and 38 in S.C. 187/99 pending before the Additional Sessions Court, Kottayam, filed this petition for staying the above proceedings till the final disposal of CrI. A. 418/2000 pending before the Supreme Court.

2. S.C. 187/99 is popularly known as the Suryanelli rape case. It was registered as crime 6/96 on 17th January 1996 on the basis of the F.I. Statement given by the father of the girl for manmissing. The girl was a boarding student in the Little Flower Girls High School, Nallathanni. She was missing from 16th January 1996 onwards and the F.I. Statement was given on 17th January 1996. On 26th February 1996 the girl returned home and narrated the story of her being raped by various persons at various places. The police investigated the case and filed chargesheet against 42 persons including the Petitioners. One of the accused in the above case died and two absconded and the remaining 39 were facing trial. They were alleged to have committed offences under Sections 120B, 363, 365, 366A, 368, 372, 373, 376, 376(g), 392 and 109 read with 34 I.P.C. For the trial of the above case a special court was constituted. 97 witnesses were examined and various documents were proved. The prosecution evidence was closed and

the accused were being questioned u/s 313 Code of Criminal Procedure.

3. During the investigation of the case the prosecutrix filed a private complaint before the Judicial First Class Magistrate's Court, Peerumedu as CrI. M.P. 1436/99 alleging that on 19th February 1996 she was raped by Sri P.J. Kurian on two occasions at the Kumali Guest House. It was further alleged that she had mentioned the name of Sri. P.J. Kurian to the investigating team of officers, but they had deliberately excluded his name in the charge. It was further alleged that other accused also raped her at Kumali Guest House prior to 19th February 1996 and thereafter. The Magistrate after an enquiry u/s 202 Code of Criminal Procedure took cognizance of the offence and numbered the case as G.P. 21/99 and issued summons to the accused. Sri Kurian, the accused in the above C.P. 21/99 filed CrI. M.C. 2419/99 before this Court to quash the proceedings and that petition was dismissed which is reported in 2000 (1) KLT 388. The accused viz. P.J. Kurian took up the matter before the Supreme Court in CrI. A. 418/2000 and the Supreme Court stayed the proceedings against Kurian in C.P. 21/99. As the allegations in both the cases are identical and arise out of the same transactions, both the cases are to be consolidated and to have a single trial. As the case under the police report had already been committed before the committal of the private complaint, the trial in S.C. 187/99 is a nullity and it is vitiated and hence the proceedings pending before the Sessions Court in S.C. 187/99 has to be stayed till the private complaint filed on the same set of facts is committed.

4. Heard the learned Counsel for the Petitioners and the Public Prosecutor.

5. The main argument advanced by the learned Counsel for the Petitioners was that both the police charge and the private complaint arise in the course of the same transaction and as such both the cases are to be consolidated and there should be a single trial. It was further argued that C.P. 21/99 pending before the Magistrate's Court also has to be committed and both the cases are to be clubbed or consolidated and there should be a single trial of both the cases. According to the learned Counsel for the Petitioners the prosecutrix had been raped by a number of persons at different places and she had been raped by different persons at the Guest House, Kumali and the accused in the private complaint also was one among them who raped the prosecutrix on a particular day i.e. on 12th June 1996. It was further argued that the girl had been raped at the same place by other persons prior to 19th June 1996 as well as thereafter, and the offence alleged to have been committed by Kurian also is in the course of the same transaction and thereby both the cases are to be consolidated and jointly tried in accordance with Section 223 Code of Criminal Procedure. He was placing reliance on a Full Bench decision of this Court in *Kesavan Natesan v. Madhavan Peethambaran* 1984 R.L.K.N. 36. That was a case where police laid a charge against one person for the commission of the offence u/s 302 I.P.C. and the Magistrate committed the case to the Sessions Court. Thereafter a private complaint was filed against two persons viz. the accused in the police charge and

another person alleging the commission of offence under Sections 302 and 323 read with 114 I.P.C. The Magistrate committed the above case also to the Sessions Court. The Sessions Judge clubbed both cases and a single trial was held. The procedure adopted by the Magistrate committing both the cases was challenged before this Court. The main question raised before this Court was whether the Magistrate can take cognizance of the private complaint and commit the case as he had already taken cognizance of the same offence and had committed the case before the Sessions Court. There it was held that where the commission of the offence was again brought to his notice by another agency or person with a contention that the offence involves certain more acts and more persons than as alleged in the case originally brought to him, it is his duty to look into those allegations and decide if he is to issued process and conduct an enquiry or trial, as the case may be. Further it was held that the procedure adopted by the Sessions Judge in clubbing both the cases and trying together was proper. The facts of the above case do not have any similarity with the facts of the present case. That was a case where one of the accused was common in both the cases viz. in the police charge as well as in the private complaint. The clubbing of both the cases was essential as both cases were in respect of the same incident and one of the accused had to face two trials if separately tried. In the above circumstances, the clubbing of both the cases was necessary to avoid a further trial so far as one of the accused was concerned. The above decision cannot have any application in the present case where the accused are different in both the cases. The Petitioners are accused in S.C. 187/99 whereas the sole accused in C.P. 21/99 Kurian was not an accused in the police charge.

6. The learned Public Prosecutor argued that the private complaint filed by the prosecutrix has not yet reached before the Sessions Court whereas in S.C. 187/99, the examination of witnesses had already been over and some of the accused had been questioned u/s 313 Code of Criminal Procedure and there was no chance for the Sessions Judge to club both the cases and no purpose would be served by staying the proceedings and waiting for C.P. 21/99 to be committed to the Sessions Court. It was further argued that even if C.P. 21/99 is committed, the evidence already let in in S.C. 187/99 cannot be read as evidence in C.P. 21/99 and as such there is no possibility for consolidation or for a joint trial in the above case. In the nature of the evidence and the circumstances, the above argument of the learned Public Prosecutor has some force and has to be accepted.

7. The learned Counsel for the Petitioners advanced an alternative argument that if both the cases cannot be clubbed or consolidated, those cases are to be tried simultaneously and are to be disposed of by separate judgments. The learned Counsel for the Petitioners placed reliance on a decision of the Supreme Court in *Harjinder Singh Vs. State of Punjab and Others*, . That was a case where the police filed a chargesheet against three persons alleging the commission of offences including an offence u/s 302 I.P.C. A counter case also had been registered by the police against the de facto complainant in the other cases and

others making them as the aggressors. Thereafter a private complaint was filed against 9 persons viz. the three persons arrayed as accused in the police charge and six other persons. There the Supreme Court held that the consolidation of both cases was not permissible u/s 223 as the prosecution version in the two cases were materially different, contradictory and mutually exclusive and the accused persons were also not the same and in the above circumstances the evidence had to be recorded separately in both the cases and the cases had to be disposed of simultaneously. The above decision also do not have any relevance in the present case as the offences alleged to have been committed by the accused in S.C. 189/99 and the offence alleged to have been committed by Kurian are exclusive and different even though technically it can be said that it was done in the course of the same transaction.

8. The learned Counsel for the Petitioner placed reliance on the decision of the Supreme Court in *Balbir Vs. State of Haryana and Another*, That was a case where a crime was registered against two persons for murder on the basis of a statement given by the nephew of the deceased. The police, after investigation, filed a charge-sheet against a different person who was not named in the F.I. Statement. Aggrieved by the above, the nephew, who lodged the F.I. Statement filed a complaint before the Magistrate against the two persons named in the F.I. Statement. There both the cases were tried by the same Sessions Court simultaneously and the accused in the police charge was acquitted and the accused in the private complaint were convicted. There a contention was raised that both the cases should have been consolidated but the same was not accepted, as the version of the police charge was contradictory and mutually exclusive. The above decision also has no application in the present case, as in the above case two different versions had been raised in two separate cases regarding the death of the same person. In *Mani v. Swaminathan* 1986 KLT 17 this Court held that the police charge against a person and a private complaint filed against three persons viz. the accused in the police charge as well as two other persons should be tried together by the same court, but not to be consolidated. It was further held that the evidence should be recorded in both the cases one after the other and after recording prosecution evidence in one case, judgment should be withheld and then the evidence in the other case will have to be recorded and thereafter both the cases should be simultaneously disposed of by two separate judgments, taking care that the judgment in one case is not based on the evidence recorded in the other. There also one accused was common in both cases. In fact the above decision also cannot have any application in the present case.

9. The learned Public Prosecutor placed reliance on the decision of this Court in *Peter v. Kurian* 1994 (1) KLT 17 where the application of Section 223 had been considered. There it was held:

It is in the discretion of the court to decide whether two cases need be jointly tried. The commencing words in Section 223 of the Code are: "May be charged

and tried together". From those words what can be discerned is that a discretion is conferred on the court to decide whether any particular two or more cases need joint trial if offences have been committed in the course of the same transaction. If the cases are substantially different from each other, though the same incident is the basis for both cases, court may have to bear in mind the possibilities of such trial causing prejudice to the defence. The real test is whether prejudice would be caused to the accused in such joint trial. Proviso to Section 223 indicates that ven cases not falling under any of the categories enumerated in the section can nevertheless be jointly tried if the accused would express the desire in writing to have such joint trial and if no prejudice would be caused to the accused. Section 218(1) of the Code directs that every charge for different offences should be tried separately. But there also an option is given to the accused to request the court to conduct a joint trial. When accused makes a request for joint trial, the court can presume that no prejudice would be caused to him by adopting that course.

So far as the Petitioners are concerned, there is no chance of any prejudice to be caused to them even if both the cases are tried separately. But if the case against Kurian is tried jointly with the present case and the evidence let in the above case is treated as part of the evidence in the private complaint, much prejudice would be caused to him. In fact the clubbing or joint trial of both cases would be prejudicial to the accused in the private complaint. In *Manikandan Vs. Pandian and Others*, the Supreme Court held that the police charge and the private complaint need not be consolidated and tried together though the case instituted on the private complaint is in respect of the same offence for which the chargesheet had been filed against one of the accused. There it was held that it would be proper to record the evidence separately in both the cases unless the witnesses are common and the cases are to be tried one after another. That was a case where the police filed a chargesheet against one person for murder. Thereafter the first informant filed a private complaint against three persons including the accused in the police chkrge. There it was alleged that the complainant had given information to the police implicating all the three persons in the F.I. Statement but the "police did not mention the name of all the three persons in the F.I. Statement. Then the private complaint was quashed by the High Court u/s 482 Code of Criminal Procedure. The above order was challenged before the Supreme Court and the above order of the High Court was set aside by the Supreme Court and the police charge and the private complaint were directed to be tried separately. None of the above decisions can have any application in the present case where the private complaint is instituted against a person who is not an accused in the police charge and none of the accused in the police charge is an accused in the private complaint. The allegations in both the cases are independent, separate and mutually exclusive. The evidence in the police charge had already been recorded and the case had reached the stage of examination of the accused u/s 313 Code of Criminal Procedure. The private complaint has not yet reached before the Sessions Court and hence there is no

possibility of clubbing or simultaneous trial of both the cases. The reading of any evidence recorded in the police charge would, in fact, be prejudicial to the accused in the private complaint who is not an accused in the police charge. In order to attract Section 223, at least one accused should be common in both cases and both cases should be in respect of the same incident. The allegations in the private complaint constitute a separate offence of rape and hence the case against him can be tried separately and no prejudice would be caused to the Petitioners by separate trials. The long delay in filing this petition i.e. after the examination of all the witnesses and at the stage of recording the statement of the accused u/s 313 Code of Criminal Procedure also would disentitle them to the prayer for stay of the proceedings. Considering all the above circumstances, the prayer for staying the proceedings pending before the special court in S.C. 187/99 cannot be allowed. Hence this petition has only to be dismissed.

In the result this petition is dismissed.