
(1957) 06 KL CK 0023
In the High Court Of Kerala

Pedru	Vs	APPELLANT
State of Kerala		RESPONDENT

Date of Decision : 06-06-1957

Acts Referred:

Penal Code, 1860 (IPC) — Section 323, 325, 34
Probation of Offenders Act, 1958 — Section 3, 4, 5, 6

Citation : (1958) CriLJ 175 : (1957) 1 KLJ 558

Hon'ble Judges : K. Sankaran, J

Bench : Single Bench

Judgement

Sankaran, J.—This is a revision petition filed by the accused in C.C. No. 60 of 1956 on the file of the Sub-Magistrate at Fort Cochin. All the four accused in that case stood charged with having committed the offences punishable under Sections 325 and 323 read with Section 34 of the Indian Penal Code. The prosecution case against them is that at about 11-30 p.m. on 9-4-1956 when P.W. 3 came out of his house the first accused approached him and beat him. On hearing his cries P.Ws. 1 and 2 also came out. By this time accused 2 and 4 also rushed to the place. Accused 2 and 4 beat P.Ws. 1 and 2 with hands. The third accused beat P.W. 1 with a stick. The first accused also beat P.W. 1 with the torch M.O. 2. The next morning P.Ws. 1 and 2 went to the police station and gave the statement Ex. P-I about this occurrence. The police registered a case against accused and P.Ws. 1 and 2 were sent to the Medical Officer for treatment. Exhibits P-5 and P-6 are the wound certificates describing the injuries found on P.Ws. 1 and 2. Exhibit P-7 is the wound certificate describing the injuries found on P.W. 3. After a due consideration of the evidence on the prosecution side the learned Sub-Magistrate found that the acts proved against the accused were sufficient to make out the offence u/s 323 read with Section 34 and that there was no clear and convincing evidence to make out the charge u/s 325. Accordingly the Magistrate acquitted the accused of the charge u/s 325, but found them guilty of the offence u/s 323 read with Section 34. At the same time the learned Magistrate felt that the circumstances disclosed by the evidence in

the case were such as to justify action being taken against the accused u/s 4 of the Madras Probation of Offenders Act (Act III of 1937). But the Sub-Magistrate was not specially empowered to pass the necessary orders under that Act. Accordingly, he submitted the records in the case to the Sub-Divisional Magistrate at Fort Cochin who was empowered to act under the said Act. The accused were also directed to be produced before the Sub-Divisional Magistrate. The judgment of the Sub-Magistrate wherein he had considered the evidence against the accused and found them guilty of the offence u/s 323 read with Section 34 and had recorded his opinion that this was a fit case to be dealt with u/s 4 of the Probation of Offenders Act, was also sent along with the records. The Sub-Divisional Magistrate, in his turn, concurred in the finding of the Sub-Magistrate that all the accused were guilty of the offence u/s 323 read with Section 34 of the Indian Penal Code and that the case is a fit one where action should be taken against accused 2 to 4 u/s 4 of the Probation of Offenders Act. Accordingly an order was passed by the learned Sub-Divisional Magistrate directing "that Accused 2 to 4 shall be released on their entering into a bond for a sum of Rs. 100 with two sureties each for a like sum to appear and receive sentence when called upon for a period of one year and in the mean while to keep the peace and be of good behaviour." It was also directed that the 4th accused will be under the supervision of the Additional District Probation Officer, Shoranur, during this period. So far as the first accused is concerned, the Sub-Divisional Magistrate was of the view that his antecedents were such as to call for a substantive sentence being awarded to him. Accordingly he was convicted u/s 323 read with Section 34 and sentenced to pay a fine of Rs. 200 and in default to undergo simple imprisonment for two months. Against the order passed by the Sub-Divisional Magistrate all the four accused preferred an appeal to the Session Court at South Malabar. The learned Sessions Judge altered the conviction u/s 323 read with Section 34 into a conviction u/s 323 alone. Subject to this modification, the order of the Sub-Divisional Magistrate was confirmed and the appeal was dismissed. In the present revision petition filed by the accused, they have challenged the sustainability of the orders passed by the lower Courts against them.

2. One of the points urged on behalf of the, revision petitioners is that the lower Courts erred in relying solely on the report of the District Probation Officer, Shoranur, and holding that there was a previous conviction against the first accused for the offence of gambling. I think that this objection has to prevail. No such report received behind the back of the accused could be used as evidence against them. The Probation Officer has not been examined in the case and his report has not been formally proved. No other record also has been produced to prove the alleged previous conviction as against the first accused. All the same, the fact that there is no proof about such previous conviction against the first accused cannot by itself vitiate the conviction entered against him in the present case. The sustainability of such conviction must necessarily depend on the sufficiency of the evidence on record in this case

3. Regarding the sufficiency and the reliability of the prosecution evidence against the accused, the lower Courts have concurrently found that the evidence of P.Ws. 2 to 4 is trustworthy and the acts alleged against the accused have been clearly proved by the evidence of these witnesses supported by the documentary evidence in the case. It was urged on behalf of the revision petitioners that the lower Courts have not considered the evidence against each of the accused and have not recorded findings as to the specific acts committed by each of them. I see no force in this contention. In paras. 4 and 5 of the Sub-Magistrate's judgment he has discussed the prosecution evidence as against each of the accused and has referred to the specific acts committed by each of them and the finding that they were guilty of the offence u/s 323 was passed on such an appreciation of the evidence. It was mainly on the strength of that finding that the Sub-Divisional Magistrate convicted the first accused u/s 323 and passed the order u/s 4 of the Probation of Offenders Act as against the remaining accused. In the appeal also the learned Sessions Judge has in para. 2 of his judgment independently considered the evidence against each of the accused and has come to the conclusion that the specific acts alleged against each of them have been proved. Both the Courts have made special mention of the evidence 01 P.W. 4, a respectable and independent witness and have stated that the evidence of this witness fully corroborates the evidence of P.Ws. 1 to 3.

4. Still another point urged on behalf of the revision petitioners is that the procedure adopted by the Sub-Magistrate and the Sub-Divisional Magistrate was illegal and that the Sub-Divisional Magistrate had no jurisdiction to deal with the case against the first accused. The point raised is that in the view taken by the Sub-Magistrate, that there was a previous conviction against the first accused alone, the case as against accused 2 to 4 should alone have been submitted to the Sub-Divisional Magistrate for being dealt with u/s 4 of the Probation of Offenders Act and that the case as against the first accused should have been disposed of by the Sub-Magistrate himself. This - objection has lost all its force in the light of the finding on the other objection that no previous conviction has been proved as against the first accused. This latter objection has been upheld and it has been found that there is no legal proof that there has been any previous conviction as against the first accused. In this view of the matter, the Sub-Magistrate could refer the case of the first accused also to the Sub-Divisional Magistrate to be dealt with u/s 4 of the Probation of Offenders Act along with accused 2 to 4. Even apart from this aspect of the case, it cannot be said that the Sub-Magistrate acted illegally in submitting the case as against all the four accused to be dealt with u/s 4 of the Probation of Offenders Act. The section which enables such a reference to be made is Section 5 of that Act, That section runs as follows:

Notwithstanding anything contained in Sections 3 and 4, where any first offender is found guilty of an offence by a Magistrate of the Third Class, or a Magistrate of the Second Class not specially empowered by the Provincial Government in this behalf, and the Magistrate is of opinion that the powers conferred by the said

sections should be exercised, he shall record his opinion to that effect and submit the proceedings to a Magistrate of the First Class or Sub-Divisional Magistrate, forwarding the accused to, or taking bail for his appearance before such Magistrate, who may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken.

5. There is nothing in this section to indicate that when an offender coming under the category referred to in Section 5 is tried along with others not falling under that category, the Sub-Magistrate is bound to split up the case and submit the records to the Sub-Divisional Magistrate in respect of the offender falling under the first category alone. It is not also stated in Section 5 of the Act that the Sub-Divisional Magistrate to whom the case is submitted under that section can take action only u/s 3 or Section 4 of the Act. On the other hand the Sub-Divisional Magistrate is free to "pass such sentence or make such order as he might have passed or made if the case had originally been heard by him." This means that instead of passing an order u/s 3 or Section 4 of the Probation of Offenders Act, the Sub-Divisional Magistrate could in an appropriate case straightaway convict and sentence the accused as if he was himself trying the case. In the present case the worst that can be said is that such a power was exercised by the Sub-Divisional Magistrate while dealing with the first accused. In justification of his conviction and sentence the Sub-Divisional Magistrate has observed as follows:

The offence proved against him shows the high-handed nature of his action for which deterrent punishment is called for.

6. As already pointed out, the conviction entered against the first accused and the sentence awarded to him u/s 323 of the Indian Penal Code have been confirmed by the learned Sessions Judge in appeal. Section 6 of the Probation of Offenders Act lays down that an order u/s 3 or Section 4 of that Act may be made by an appellate Court also. This means that such a jurisdiction may be exercised by the appellate Court even if the trial Court had not adopted the procedure prescribed by Section 5. Where the Sub-Magistrate is not empowered to take action under that Act in a case where he is of opinion that the case is a fit one where the powers conferred by that Act have to be exercised, he has to record his opinion to that effect and submit the proceedings to a Magistrate of the First Class or a Sub-Divisional Magistrate who is empowered to take action under the said Act. Viewed in all these aspects it is clear that the procedure followed in this case by the Sub-Magistrate and the Sub-Divisional Magistrate cannot be said to have been illegal or improper so as to justify and interfere in revision.

7. In the result, this revision petition is dismissed.