
(1984) 11 KL CK 0002
In the High Court Of Kerala
Case No : Criminal R.P. No. 436 of 1984

R. Gopalan

APPELLANT

Vs

The state of Kerala and Others

RESPONDENT

Date of Decision : 20-11-1984

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 200, 256, 284
Penal Code, 1860 (IPC) — Section 34, 500

Citation : (1985) KLJ 151

Hon'ble Judges : V. Bhaskaran Nambiar, J

Bench : Single Bench

Advocate : M.N. Sukumaran Nair, B. Raman Pillai, Sunny Varghese and S. Vijayakumar, for the Appellant;

Judgement

V. Bhaskaran Nambiar, J.—Can a complainant claim to be examined on Commission? Does he cease to be a complainant when a court takes cognisance of the case and has he to be treated merely as a witness entitled to the protection u/s 284 of the Code of Criminal procedure? Defamation can be the subject of a civil action. It can also set the criminal law in motion. The petitioner preferred the criminal process and filed a complaint alleging that the accused has committed an offence u/s 500 read with section 34 I. P. C. The court has taken cognisance of the case and issued notice to the accused. The accused has entered appearance.

2. But then, the complainant does not want to appear in court. And he has his reasons. He is old, at 85 years of age and infirm to move out of the house. He, therefore prays that he be examined on commission in his house.

3. The accused objects. He submits that law and logic are both on his side. Law, according to him, compels the complainant to face the accused in court and there in no logic for the accused to go to the complainant's house. He, therefore, submits that a complainant cannot be examined on commission and in this case, the complainant is old; but not infirm; if he can stand examination and cross-

examination in his house, he can as well face trial in open court. To compel the accused to go to the complainant's house is to invite humiliation and harassment. The accused cannot be prejudiced and the commission cannot be ordered.

4. u/s 284 of the Code, the Court may issue a commission for the examination of a witness when it is necessary for the ends of justice and the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience, which under the circumstances of the case would be unreasonable. But a commission shall be issued when the President, or the Vice president of India or the Governor of a State or the Administrator of a Union Territory is to be examined as a witness.

5. A complainant has to be examined on oath when the Magistrate takes cognisance of the offence (Section 200). If a complainant does not appear in court on the day appointed for the appearance of the accused or any day subsequent thereto, the Magistrate has to acquit the accused unless there are reasons for adjournment. If the complainant is represented by pleader or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance (Section 256). If the accused is acquitted the complainant can appeal after obtaining special leave.

6. While the Code provides that a private individual can institute criminal proceedings and figure as a complainant, it is significant that whenever the Code intended to declare the rights of the complainant, define his duties and specify the remedies available to him, it has in clear unmistakable language used the expression "complainant". Section 200 adopts both the words "complainant" and "witnesses" and Section 284 understandably omits the word "complainant" and confines it to "witness".

The complainant continues to be a complainant till the case is over and even when he is examined in court, he does not lose his identity or character as a complainant. It as a complainant, his examination in the presence of the accused is peremptory, as a witness his claim to be examined in the privacy of his house cannot be prejudicial to the accused. His privilege as a witness has to surrender to this duties as a complainant and to the rights of the accused. In this view Section 284 of the Code cannot be invoked by a complainant to be examined on commission.

7. In a very old but identical case, where also the complaint was for defamation. Justice Straight in 1882 observed in the Matter of the Petition of Farid-Un-Nissa (I. L. R. 5 Allahabad 92) thus:-

"But the matter now before me appears to be of an exceptional character, and while I agree; as Mr. Hill ingeniously urged, that the petitioner, though a complainant, is none the less a witness. I nevertheless think that the fact of her being a person who has set the criminal law in motion materially alters her position as regards the question under consideration. As I pointed out in the

course of the argument, she had the alternative of bringing a suit, and if she had adopted that course, S. 640 of the CPC would have protected her. But she has thought proper to cite her alleged defamer in a Criminal Court, and it is his right and privilege to have her evidence taken in his presence in such Court. Were it otherwise, it is impossible to conceive the dangers and mischiefs that would arise, the false charges that would be preferred, the malicious prosecutions to which persons would be subjected.

I must unhesitatingly say that the taking of evidence on commission in criminal Cases should be most sparingly resorted to. Such a thing is unknown to English practice, and out here ought not to be adopted save in extreme cases of delay, expense, or inconvenience. The Criminal Courts of this country have difficulty enough to deal with the false charges made, and the perjured testimony given by prosecutors and witnesses, whose demeanour and truth they have personal opportunity of estimating, without having their labours complicated with the written evidence of parties not before them. I think the order of the Magistrate in the present case was substantially right, and I refuse the prayer of the petitioner. I, however, direct the Magistrate, if the complainant is found to be a "pardahnashin" lady, and if she elects to attend and support her charge, to allow her to be brought into his room at the Court-house in her palki, or if this is not feasible, to make such other arrangements, as may enable her to remain in it and strictly preserve her privacy, and subject her to the least inconvenience or annoyance, for the purpose of recording her evidence according to law in the presence of the accused, after identification by some approved female witnesses.

I agree.

8. The Calcutta High Court in *Express v. Counsel* (I.L.R. 8 Calcutta, 896) has condemned the practice of examination on commission and observed thus:-

Wilson, J., refused the application, saying that, in a criminal case the issue of commission would be a most unsatisfactory course of proceeding, and one dangerous to the interests of the prisoner.

On the question as to whether a complainant was entitled to be examined on commission, the Calcutta High Court in *Abhoyeswari v. Kishori Mohan* (A. I. R. 1914 Calcutta 479) has observed thus:-

But in any case it is perfectly well settled that process cannot be issued against an accused person, either by the Magistrate first taking cognizance of an offence, or by the Magistrate to whom the case is transferred under the proviso to S.200, Criminal P. C., unless and until the Magistrate issuing process has first examined the complainant. And this is perhaps more necessary in the case of a pardanashin lady than in other cases to enable the Magistrate to satisfy himself that the complaint is really her own action. In the present case, if the complaint is ill founded, it would be difficult, if not impossible, to fix the Rani with any responsibility for the proceeding.

I see no reason, however, why the complainant should not be examined under S. 503, Criminal P. C. The terms of that section are very wide. They refer not only to an inquiry and a trial, but to any other proceeding. The section authorizes the examination of any witness and a complainant is certainly, in my opinion, a witness. There is indeed less objection to the first examination of a complainant than to the examination of a witness under this section, in as much as in the examination of a complainant, before a process is issued, the accused is not entitled to be present or to cross-examine.

9. There is no necessity to dissent from the Calcutta view that the complainant is still a witness: but the problem is to reconcile the conflicting rights and duties when the complainant happens to be his own witness.

10. In the present case, even assuming that the complainant is entitled to be examined on commission, I do not think that the circumstances of this case warrant the exercise of discretion in his favour. It is nobody's case that he is not in a fit state to be examined as a witness. He is prepared to face the cross-examination as well. The only question is whether this should take place in his house. If the accused, who is said to have defamed the complainant, apprehends that he is likely to be insulted, humiliated and harassed when he goes to the complainant's house, it cannot be brushed aside as unrealistic and untenable. The fact that the presence of the accused is dispensed with in court does not advance the cause of the complainant, for, the accused may very well be interested in being present at the time of examination and may feel that in fact his presence is required for cross-examination. The house of the complainant is said to be 34 kilometres away from the court house.

11. As the complainant is old and infirm, if the petitioner moves the lower court, I am sure that the court will provide him at his expense a reclining seat when he is examined. It is submitted by the learned counsel for the petitioner that he has no objection even the petitioner being examined on commission even in the office of the counsel for the accused. If he can be taken to the office of the counsel, I do not think why he cannot be taken to the court on well.