
(1968) 07 KL CK 0038
In the High Court Of Kerala
Case No : Criminal Appeal No. 336 of 1967

State	Vs	APPELLANT
Gopala Pillai Sadasivan Pillai		RESPONDENT

Date of Decision : 16-07-1968

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 422, 68, 69, 70, 71

Citation : AIR 1969 Ker 250 : (1969) CriLJ 1142 : (1968) KLJ 853

Hon'ble Judges : T.C. Raghavan, J

Bench : Single Bench

Advocate : A.G, for the Appellant;

Judgement

T.C. Raghavan, J.—respondent was acquitted of a charge u/s 409 of the Penal Code; and the State has filed the appeal The appeal has been admitted; and in spite of the best efforts of the State, notice in the appeal has not been served on the respondent; his where about are not known.

2. The latter part of Section 422 of the Code of Criminal Procedure applies to a case like this; and the appellate Court shall cause a notice to be given to the accused. This provision is mandatory, which appears from the language of the section itself; and the Supreme Court has also said so in Mohamed Dastagir Vs. The State of Madras, . In that case a counsel wrote to the Registrar of the Madras High Court that he had instructions to appear for the accused. Thereafter, the Registrar issued a notice to him when the appeal became ready and the Registrar also issued a notice to the accused. The counsel also appeared before the High Court at the time of the hearing of the appeal, nevertheless, the appeal was allowed and the accused was convicted and sentenced. In the appeal filed by the accused before the Supreme Court, it was argued that the provision of Section 422 of the Code of Criminal Procedure was not complied with. In considering this contention, the Supreme Court said, inter alia, that Section 422 did not speak of the notice being served on the accused; it only stated that notice was to be given to the accused. The Supreme Court consequently held

that, in the circumstances mentioned above, service on the counsel of the accused was good and sufficient.

3. In the above decision the Supreme Court referred to an earlier decision of the same Court In Crl. Appeal No. 1 of 1950 (SC) (an unreported decision). In that decision the Supreme Court said that Section 422 of the Code of Criminal Procedure was mandatory; and that compliance with it was an essential preliminary to the hearing of the appeal. The Supreme Court said further that the arrest of the accused under a non-bailable warrant In such a case could not be the substitute for a notice of appeal as required by Section 422. In Crl. Appeal No. 1 of 1950 (SC) the father of the accused Instructed a lawyer to appear and the lawyer appeared too. However, the appellate Court set aside the order of acquittal and convicted the accused; and against that the accused filed Crl. Appeal No. 1 of 1950 (SC) before the Supreme Court. Ultimately, the Supreme Court set aside the conviction and sentence and remanded the appeal for re-hearing to give an opportunity to the accused to be heard.

4. In addition to the arguments of the Public Prosecutor Sri. V. M. Nayanar also argued *amicus curiae*. One of the other decisions brought to my notice is AIR 1954 231 (Nagpur) by Mudholkar and Choudhuri, JJ. Their Lordships held in that case that though the accused might be absconding, that would be no ground for hearing the appeal in his absence; that the Court might Issue a proclamation against an absconding respondent u/s 87 of the Code of Criminal Procedure, but the issue of a proclamation was not equivalent to substituted service; and that, if the accused person, despite the proclamation, (remained absent, all that the Court could do was to attach his property. Ultimately, it was held that the Court had no option but to adjourn the case till such time as the respondent was served or he appeared before the Court.

5. This decision indicates one of the courses open to me in a case like this: and that may probably be the best course. But, the decision of the Nagpur High Court appears to be based on the view that the accused had to be served personally. As indicated by the Supreme Court, what Section 422 requires is not a personal service on the accused, but that the appellate Court should cause a notice to be given to the accused. It might then follow that the course adopted by the Nagpur High Court was not necessary. And the further question naturally arises whether, if personal service is not required, substituted service can be allowed.

6. Another decision brought to my notice is *Siba v. Kailash Chandra Jena* (1965) 31 Cut LT 37. In that case also Misra, J, observes that the service on the respondent in an appeal against acquittal should be personal. Though Misra, J. refers to the decision of the Supreme Court in *Mohammed Dastagir's* case AIR 11960 SC 756, the learned Judge does not appear to advert to the observation of the Supreme Court that the service need not necessarily be on the accused.

7. Two other decisions cited before me are *Udesing Pratapsing v. State of Gujarat* ILR 1965 Guj 883 and *Palaniswamy Gounder v. Nataraja Gounder* (1966) 2 Mad

LJ 149. I do not think that these decisions are very helpful for the decision of the question before me.

8. If service on the respondent need not necessarily be personal, the question arises whether the provisions relating to service of summons in Chapter VI of the Code of Criminal Procedure may be applied to a case like this. In an appeal against acquittal the only legal requirement is that the respondent should be heard before, his acquittal is converted into conviction; there is normally no question of taking evidence: the trial is over. Section 422 of the Code does not indicate how a notice to the accused is to be served, in a case in which the criminal court has the power to issue a summons to the accused to compel his appearance, Sections 68 - 74 of the Code must apply. In such a case Section 69 provides for personal service, if it is practicable; and Section 70 provides for service when the person summoned cannot be found, i.e., cannot be personally served. Then Section 71 provides the procedure when service cannot be effected either u/s 69 or u/s 70. Giving due consideration to the decisions cited before me and also taking into consideration the fact that the matter before me is an appeal, I feel that the procedure contemplated by Chapter VI relating to service of summons can be applied to a case like this. The decisions holding contra, as already indicated, proceed on the basis that service of notice u/s 422 should be personal, which the Supreme Court has not accepted in *Mohamed Dastagir Vs. The State of Madras*, already discussed.

9. For the foregoing reasons I direct that notice may be taken as contemplated by Section 70 of the Code of Criminal Procedure; and that if service cannot be effected even under that section, then the procedure laid down by Section 71 may be adopted.