

(2012) 10 KL CK 0113
In the High Court Of Kerala
Case No : Criminal A. No. 705 of 2012 (C)

State of Kerala

APPELLANT

Vs

Shibu Cherian and Others

RESPONDENT

Date of Decision : 16-10-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 248(1)
Penal Code, 1860 (IPC) — Section 114, 143, 147, 148, 149

Citation : (2012) 10 KL CK 0113

Hon'ble Judges : V.K. Mohanan, J

Bench : Single Bench

Advocate : Laliza T.Y., P.P, for the Appellant; Sooraj T. Elenjickal, for R1 and Sri. K. Nirmalan, for R1, for the Respondent

Final Decision : Dismissed

Judgement

V.K. Mohanan, J.—As both the appeals are arising out of the same judgment of the trial court and the question of law and the facts involved

are the same and also the parties are the same, the above appeals are heard together and being disposed of by this common judgment. CrI. A. No.

705 of 2012 was filed at the instance of the State and CrI. A. No. 848 of 2012 was filed at the instance of the defacto complainant. The impugned

judgment is dated 5.1.2011 in C.C. No. 1719/04 of the court of Judicial First Class Magistrate-I, Ernakulam. By the above judgment, the

accused, 14 in numbers, who faced the prosecution for the offence punishable u/s 114, 143, 147, 148, 448, 427, 506(ii) r/w 149 of IPC are

acquitted u/s 248(1) of Cr. P.C. Against the above judgment, the State has preferred CrI. A. No. 705 of 2012. Initially, as the State appeal was

filed belatedly, notice was ordered in the delay petition and subsequently the delay was condoned after hearing the respondents and the State.

When the above State appeal came up for consideration, the learned Public Prosecutor has brought to the notice of this Court that Crl. A. No.

508 of 2011, which was filed by the defacto complainant in the above case, was pending before the court of Additional District and Sessions court

Ad hoc (II)-Ernakulam and accordingly by order dated 8.6.2012, this Court directed the registry to call for the said appeal and post alongwith the

State appeal so as to avoid a conflicting judgment. Thus, Crl. A. No. 508 of 2011, which was filed by the defacto complainant in the Additional

District and Sessions court, was called for and after assigning appropriate number, posted alongwith Crl. A. No. 848 of 2012, and thus these

appeals are heard together on admission.

2. I have heard Smt. Laliza T.Y., learned Public Prosecutor for the State, Sri. George Zachariah Eruthickal Learned Counsel for the appellant in

Crl. A. No. 848 of 2012 and Sri. K. Nirmalan Learned Counsel for the respondents in both the above appeals.

3. The prosecution case is that a dispute regarding the boundary of the properties of PW1 and the first accused were pending and thus the first

accused abetted accused Nos. 2 to 14 to scare off Pws. 1 to 3 and to force them to sell their property and in furtherance of their common

intention, A2 to A14 formed themselves into an unlawful assembly and towards materialisation of their common object at 7 p.m. on 30.11.2003,

they trespassed into the property of the defacto complainant in which their house bearing No. VI/631 is situating and they damaged the window

glass of the said house by throwing stones and bricks and they tried to damage the front door of the said house. It is also the allegation that they

partially demolished the compound wall of the said house and the accused caused a loss of Rs. 5,000/- to PW1 and they also intimidated and

threatened to kill Pws. 1 to 3. Thus A1 abetted the commission of offence by A2 to A14. Hence, according to the prosecution, the accused 14 in

numbers have committed the offence punishable u/s 114, 143, 147, 148, 448, 427, 506(ii) r/w 149 of IPC.

4. On the basis of the above allegation, crime No. 304/03 of Mulamthuruthy police station was registered for the said offences and on completing

the investigation, report was filed before the trial court based upon which cognizance was taken for those offences and instituted C.C. No. 1719 of

2004. During the trial of the case, Pws. 1 to 9 were examined and Exts. P1 to P4 were marked. M.O. 1 glass pieces, M.O. 2 brick pieces and

M.O. 3 letter box are identified and marked as material objects. No evidence either oral or documentary produced from the side of the defence.

The trial court after considering the entire evidence and materials came to the conclusion that the prosecution did not convincingly prove that

accused Nos. 2 to 14 trespassed into the compound of the property of PW1 and committed mischief in that property and also found that the

prosecution did not prove that accused Nos. 2 to 14 criminally intimidated Pws. 1 to 3 and that A1 abetted the commission of the offence by A2

to A14. The trial court has come to the finding that, "the deposition of Pws. 1 to 3 regarding the commission of the alleged offence is inconsistent".

According to the court, their deposition did not tally with the statement given by Pws. 1 to 3 to the police u/s 161 of Cr. P.C. It is on the basis of

the above finding, the learned Magistrate acquitted the accused u/s 248(1) of Cr. P.C. It is the above finding and order of acquittal are challenged

in this appeal.

5. Smt. Laliza T.Y. learned Public Prosecutor and Sri. George Zachariah Eruthickal Learned Counsel for the appellant in Crl. A. No. 848 of

2012, are unanimous in their submissions that the trial court has miserably failed to appreciate the evidence properly and came to an erroneous

conclusion and the learned Magistrate, simply based upon the 161 statement of the witnesses has held that the prosecution has not succeeded in

proving its case against the accused. Learned Counsel for the appellant in Crl. A. No. 848 of 2012 has pointed out that though the name of A1 has

already been stated to the police in Ext. P1 FI Statement as Kattayil Shibu, the learned Magistrate went wrong in saying that his name is not stated

in the FI Statement. It is also the submission of the said counsel that, PW4's evidence shows that when he was present in the nearby house

alongwith A1, he heard some noise from the property of PW1 and the said evidence was ignored by the learned Magistrate. It is also the

submission of the counsel for the said appellant that the evidence of Pws. 1 to 3 has established the presence of A1 and other accused in the

courtyard of the house of PW1, and therefore the prosecution witnesses have clearly stated about the involvement of the accused in the

commission of the above offences but the learned Magistrate has not considered those evidence in its proper perspective.

6. On the other hand, the counsel for the respondents, sticking on the findings and observation of the learned Magistrate and supporting the same,

has submitted that the evidence of prosecution is not sufficient to establish the essential ingredients of the offences charged against the accused, and

the prosecution has not proved the overt act of the accused in the commission of the alleged offences. According to the Learned Counsel , the

present case was filed falsely due to the animosity of PW1 towards the accused connected with the civil dispute as well as the criminal case

pending. Therefore, the counsel submits that no interference is warranted.

7. I have carefully considered the arguments advanced by Smt. Laliza T.Y., learned Public Prosecutor for the State and Sri. George Zachariah

Eruthickal Learned Counsel for the appellant in Crl. A. No. 848 of 2012 and Sri. K. Nirmalan Learned Counsel for the respondents. I have also

gone through the judgment of the trial court.

8. In the light of the rival arguments advanced by the counsels, the question that arises for consideration is whether the appellants have succeeded

in making out a prima facie case in support of their challenge against the judgment of the trial court and the order of acquittal recorded in favour of

the respondents/accused. At the outset it is to be noted that, even according to PW1 and the prosecution, the incident alleged in the present case

was taken place on the failure for settlement of the civil dispute between PW1 on one side and the accused on the other. It is also a fact beyond

dispute that Pws. 1 to 3 in the present case had filed C.C. No. 198 of 2004 against all the accused in the present case, except A1 and A5, prior to

the institution of the present case. It is also beyond dispute that the same parties had filed another case against A1 prior to the present case. Thus,

it can be seen that a serious civil dispute as well as several criminal cases are pending between the same parties. It is in the above backdrop of the

facts, the learned Magistrate has considered the case on hand.

9. It is beyond dispute that the deposition of Pws. 1 to 3 before the court regarding the entire incident was that, they have seen the accused in the

front courtyard of the house of PW1 and that too through the windows. The evidence of these witnesses are not sufficient to prove the overt act of

each of the accused consisting of 14 in numbers, since none of these witnesses had deposed anything in this regard. Regarding the demolition of the compound wall and breaking of the windows and the attempt to open the front door, absolutely there is no evidence as to who had done it.

According to the Learned Counsel , the learned Magistrate has committed wrong in his finding that the name of A1 is not mentioned in the FI

Statement. On going through Ext. P1 FI Statement, a copy of which is made available to me by the counsel for the appellant in Crl. A. No. 848 of

2012, it could be noted that PW1 has stated the names of 7 accused in the FI Statement. Though PW1 has claimed that, himself and other

witnesses had got prior acquaintance with all the other accused, only 7 names are mentioned in Ext. P1 FI Statement. It is true that in Ext. P1

statement, the name of one Kattayil Shibu has been stated and the exact name of A1 who is the rival of PW1 is Kattayil Shibu Cheriyan, with

whom he had acquaintance. Still then, the name shown is only Kattayil Shibu. It is pertinent to note that, in the police charge and in the court

charge, there are no allegation against A1 that he was present at the place of occurrence at the time of the incident. So regarding the presence of

A1, the case of PW1 is not tallying with the police charge as well as with the court charge.

10. The learned Magistrate has pointed out several substantial improvements made by the prosecution witnesses, namely Pws. 1 to 3. The above

fact itself shows that the prosecution witness made substantial improvements from their 161 statement so as to canvass a conviction against the

accused. In such a situation, according to me, the learned Magistrate is fully correct and justified in refusing to act upon the evidence of Pws. 1 to 3

who are enemical to the accused. Except the names of 7 accused which were mentioned in the FI Statement, the names of other 7 accused, with

whom Pws. 1 to 3 had got prior acquaintance, are not mentioned in the FI Statement. As correctly observed by the learned Magistrate, the

prosecution agency has no claim that they have questioned PW1, after Ext. P1 FI statement, to get the name of A8 to A14, so as to include the

same in the FIR. Hence, it cannot be said that the finding of the learned Magistrate is incorrect. Thus going by the judgment of the trial court, it can

be seen that the trial court has refused to believe the case of the prosecution and found that the prosecution has failed to prove its case beyond

reasonable doubt because of the inconsistencies and improvements contained in the deposition of these witnesses, particularly in the backdrop of

the animosity of Pws. 1 to 3 to the accused. So the findings of the court below are supported by the evidence and materials on record which

according to me cannot be treated as perverse or illegal. The existence of prior civil dispute and criminal case itself are sufficient to show that this

case is a continuation of the animosity among Pws. 1 to 3 and the accused. In the decision in State of Rajasthan v. Darshan Singh @ Darshan Lal

(2012 (4) Supreme 72), the Apex Court has held that, the jurisdiction of the appellate court to interfere with the order of acquittal is very limited.

The apex court has held:

In exceptional cases where there are compelling circumstances and the judgment under appeal is found to be perverse, the appellate court can

interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial

Court's acquittal bolsters the presumption of his innocence.

Therefore, on examination of the facts and circumstances involved in the present case and in the light of the dictum laid down by the Honourable

Apex Court, I am of the view that, the appellants have miserably failed to make out a prima facie case in support of their challenge against the

impugned judgment of the trial court. No exceptional cases or compelling reasons are made out to interfere with the order of acquittal recorded by

the trial court in favour of the accused.

Therefore, I find no merit in this appeal and accordingly, the same is dismissed.