
(1984) 11 KL CK 0010
In the High Court Of Kerala
Case No : Criminal M.C. No. 700 of 1984

State of Kerala

APPELLANT

Vs

Vijayan and Raju

RESPONDENT

Date of Decision : 20-11-1984

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 162, 164, 482
Evidence Act, 1872 — Section 9

Citation : (1985) KLJ 8

Hon'ble Judges : V. Bhaskaran Nambiar, J

Bench : Single Bench

Advocate : Thomas V. Jacob, for the Respondent

Judgement

V. Bhaskaran Nambiar J.

1. An unknown procedure and an unprecedented relief naturally provoked the State to invoke the jurisdiction of this Court u/s 482 of the Code of Criminal Procedure. Majeendran was shot dead on the morning of 9th October, 1981. The suspect, the first accused, avoided the police and absconded for about three years. In July 1984 he surrendered before the Judicial Magistrate of the IInd Class, Ernakulam. He was remanded and is now in Judicial custody. The Deputy Superintendent of Police, C.B.C.I.D., Quilon, barely within a fortnight thereafter, reported to the Chief Judicial Magistrate that during investigation 9 witnesses stated that they did not know the respondent, the first accused, personally but could recognise him by sight and therefore prayed that a Magistrate may be authorised to conduct a "identification" parade. The Chief Judicial Magistrate directed the Judicial IInd Class Magistrate, Ernakulam, to conduct the identification parade in accordance with law. The Magistrate, in his turn, requested the superintendent of the Jail to arrange at least 10 persons of the same stature and complexion of the first accused for the parade. The parade scheduled to be conducted at 2-30 p.m. on 25-7-1984 could not be conducted as the accused was reported sick. Eventually the identification was conducted on

7-8-1984 and as per the proceedings drawn by the Magistrate on the same day, it is seen that he selected 10 persons from the Sub Jail with the help of the Sub Jail Superintendent who appeared to him of the "same, stature, complexion, build and age of the accused, Rajan. All of them were having moustache."

2. On the same date, at about 2 p.m., the counsel for the first accused filed an application making very serious allegations against the Magistrate who was about to conduct the investigation parade and also sought permission from the Magistrate "to interview the petitioner (accused) so that he may be given necessary instructions regarding the precautionary measures to be taken in the parade". He also prayed that the accused be given "all safeguards and protection at every stage of the investigation". This application is Crl. M. P. 2277 of 1984. As the identification parade was conducted without the "precautionary advice of the counsel of the accused", after the parade, on 9-8-1984, the counsel filed yet another application Crl. M. P. 2684 of 1984 in which he prayed that he may be permitted "to go and interview those non suspects who participated in the identification parade who are now available in the Sub Jail". This was of course an extraordinary request, for, the counsel of an accused did not have any statutory or constitutional right to go to a Sub Jail and interview the prisoners accused in other cases, just for information which was likely to assist him in his defence in the future.

3. On 13-8-1984, the Chief Judicial Magistrate passed a common order in both the applications. He rejected all the allegations made against the judicial Magistrate of the Second Class after obtaining a report from him and also perusing the file relating to the identification parade. There has been no challenge against those findings in this court, and rightly too. He, however, granted the prayer of the counsel for the respondent to "interview the non-suspects who participated in the parade, if they are available in the Jail". He was of the view that this request could be allowed "in the interest of justice". The State prosecutor has filed the application challenging this part of the order. The order was stayed by this court: but it is said that the counsel, in the mean while, armed with the order, went to the Sub Jail, and interviewed some suspects. No report, has so far been filed in court and there is nothing on record to show the particulars gathered by the counsel. If the order of the Chief Judicial Magistrate is without jurisdiction, anything done pursuant thereto cannot have any validity either. The information gathered by the counsel, in that event, cannot be pressed into service at a later stage.

4. The short question is whether the Chief judicial Magistrate, Ernakulam, had jurisdiction to permit a counsel appearing for an accused to visit the Sub Jail to interview suspects in other cases, and collect evidence to ascertain whether an identification parade conducted by a Judicial Magistrate was proper or not. To decide this question, therefore, it is necessary to understand the true nature and scope of an identification parade.

5. The following decision of the Supreme Court (1) Ramkishan Mithanlal Sharma

Vs. The State of Bombay, . (2) Deep Chand Vs. The State of Rajasthan, and (3) Harnath Singh Vs. State of Madhya Pradesh, throw considerable light on these questions.

6. During investigation, identification may be necessary to recognise properties which are the subject-matter of offence or of persons concerned in the offence. Recognition is itself a conscious reminder and a positive representation. Recognition thus involves statements express or implied. A hit, a tip, a glance, a wave, a nudge, a touch, a sign and these and other gestures may indicate identity and thus constitute implied representations of convincing credibility. These representations when communicated from the core of evidence regarding identity and a identification parade is thus intended to establish the identity of the suspect from an assembly of persons. A statement made to a police officer is inadmissible in evidence u/s 162 of the Code of Criminal Procedure. A statement made to a police officer regarding identification is also within the mischief of section 162. If, however, the identification parade is conducted under the exclusive direction and supervision of Panch witnesses, the statement involved even by implication in the process of recognition and identification will be outside the purview of Section 162.

7. It is not reasonably practicable to have identification proceedings conducted by private citizens. As a rule therefore, the identification proceedings are held by the Magistrates at the request of the investigating officers. He prepares a memorandum and his attention is confined to the steps to be taken to ensure that the witnesses were able to identify certain persons alleged to have been concerned in the commission of the crime or to identify the objects involved in the offence.

8. In fact, the Privy Council in AIR 1936 253 (Privy Council) , observing that it was undesirable that Magistrates and Judges should be in the position of witnesses, expressed thus:-

it would be particularly unfortunate if Magistrates were asked at all generally to act rather as police Officers than as judicial persons to be by reason of their positions; freed from the disability that attaches to Police Officers under S. 162 of the Code;

and to be at the same time freed, notwithstanding their position as Magistrates, from any obligation to make records u/s 164. In the result they would indeed be relegated to the position of ordinary citizens as witnesses and then would be required to depose to matters transacted by them in their official capacity unregulated by any statutory rules of procedure or conduct whatever.

9. This decision was considered by the Supreme Court in Deen Chand's case (AIR 1961 S. C. 1527) and it was held that the Privy Council decision did not preclude a Magistrate from deposing to relevant facts; but what was necessary was to ensure "that evidence not strictly admissible is not admitted" and statements not recorded in the manner provided by Section 164 of the Crl. P.C.

are inadmissible, even if the Magistrate conducting the identification were to speak about the same in the witness box. In other words, under the guise of conducting an identification parade, it is not the province of a Magistrate to record "other statements which have a bearing in establishing the guilt of the accused except in accordance with Section 164 of the Code." He is not expected and he cannot interrogate witnesses to elicit any other fact or call them to make any statement beyond mere identification. Those Statements if recorded, would be clearly inadmissible in evidence.

10. Kerala Prison Rules Provide for interviews and communications with prisoners. Rules 435 to Rule 451-A in Chapter XXV of these rules specify the facilities available for convicted, unconvicted and civil prisoners for interviewing or otherwise communicating either orally or in writing with their relatives, friends and legal advisers. The Superintendent of Jail has been given sufficient discretion in these matters.

11. There is also the identification of the Prisoner's Act, 1920 (Central Act XXXIII of 1960 providing statutory powers for, the taking of measurement, finger impression, foot prints and photographs of person convicted of or arrested in connection with certain offences.

12. The present direction of the Chief Judicial Magistrate is not covered by any statutory provisions. The case is still at the "investigation stage. The powers of court at that stage do not extend to give directions either to the prosecution or to the defence regarding the conduct of the investigation or the shaping of the defence. In fact, the Supreme Court in *State of West Bengal Vs. S.N. Basak*, observed thus:-

As to the powers of the judiciary in regard to statutory right of the police to investigate, the Privy Council in 71 IInd App 203 at p. 212: (AIR 1945 18 (Privy Council)), observed as follows:-

The functions of the judiciary and the police are complementary, not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course subject to the right of the court to intervene in an appropriate case when moved under S. 491 of the Criminal procedure Code to give directions in the nature of habeas corpus. In such a case as the present however, the court's functions begin when a charge is preferred before it, and not until then. It has sometimes been thought that S. 561A has given increased powers to the court which it did not possess before that section was enacted. But this is not so. The section gives no new powers, it only provides that those which the already inherently possesses shall be preserved and is inserted, as their Lordships think, lest it should be considered "that the only powers possessed by the court are those expressly conferred by the Criminal procedure Code and no inherent power had survived the passing of the Act.

With this interpretation, which has been put on the statutory duties and powers

of the police and of the powers of the Court, we are in accord.

13. It is the statement of witnesses in court that constitute substantive evidence. The sworn testimony of a witness in court as to the identity of a person requires corroboration which is provided by an earlier identification parade. This is a relevant fact u/s 9 of the Evidence Act. When there is no substantive evidence as to the identity of the accused, the earlier identification parade is no longer of any assistance to the prosecution. An identification parade on its own force does not constitute substantive evidence (Sheikh Hasib alias Tabarak Vs. The State of Bihar,). Identification of property and persons concerned in an offence is thus a step in the process of investigation. The criminal court is not a part of that investigating machinery. It does not aid investigation or retard its progress. Its function to act judicially arises after the charge sheet is filed. The formula, "interest of justice", is not available to the subordinate criminal judiciary beyond the frontiers of the statutory provisions and does not enable entry into the corridor of investigation. The direction of the Chief Judicial Magistrate, Ernakulam, allowing the counsel for the accused in this case to interview suspects in other cases was thus wholly without jurisdiction. It was absolutely wrong and unjustified. The direction is thus set aside and anything done in pursuance thereof shall be completely ignored.