
(1981) 06 KL CK 0008
In the High Court Of Kerala

Subbayyan Achari Gopalan Achari

APPELLANT

Vs

The State of Kerala

RESPONDENT

Date of Decision : 17-06-1981

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 110, 111, 116, 274

Citation : (1981) CriLJ 1359

Hon'ble Judges : U.L. Bhat, J

Bench : Single Bench

Judgement

U.L. Bhat, J.—This is a petition filed by one Subbayyan Achari Gopalan Achari, who is now in judicial custody and is facing proceedings u/s 110(a) of the Code of Criminal Procedure, 1973 (for short the "Code"). The petitioner was heard in person at one stage. Subsequently a member of this bar bag been appointed as the State Counsel to address arguments on his behalf. The learned Advocate General also has been heard,

2. On 21-12-1980, the Sub-Inspector of Police, Punalur submitted a report to the Second Class Judicial Magistrate, Punalur stating that in the early hours of the morning on 21-12-1980 the petitioner was found suspiciously hiding in a varandah of a Hardware Shop near Punalur market and he was trying to escape when he was found by the police and .he gave evasive and misleading answers when he was questioned by the police regarding his identity and address, that he could not satisfactorily account for his presence there and that the police officer was satisfied that he was present there to commit an offence. A bunch of keys and other articles were found in his custody and they were seized under a mahazar. After investigation it was found that he was D. C. No. 20 of Konni Police Station and has convictions for several offences to his credit. Report u/s 110(a) of the Code was laid against him before the Executive Sub-Divisional Magistrate, Adoor, who thereupon passed a preliminary order u/s 111 of the Code on 7-2-1981. The accused denied the substance of the information read out to him and the enquiry commenced on 21-3-1981. Meanwhile, the petitioner went on

submitting petitions to the Second Class Judicial Magistrate, Punalur. Executive Magistrate, Adoor, the District Collector and the Chief Judicial Magistrate. Initially he sent a petition to this Court, which is numbered as Cr. M.C. No. 90 1981. He again sent another, petition to this Court reminding about his earlier petition. In the present petition he alleges that he is being harassed by police officers of one police station after the other and he was implicated in a series of security proceedings, that he was in judicial custody in a prior security proceedings, that he sent a petition to the Supreme Court of India and the Supreme Court by its order reported in *Gopalanachari Vs. State of Kerala*, directed those proceedings to be dropped on 12-11-1980, that he was released from the jail a few days thereafter and within a month thereof, he has been arrested again in connection with the present case, that the present proceedings initiated against him are mala fide and that he is not liable to be proceeded against under Chapter VIII of the Code.

3. The final report submitted by the Sub-Inspector of Police specifically refers to five prior convictions against the present petitioner for property offences, including theft, house breaking, etc. and also a conviction in another security proceeding. The learned Advocate General submitted before me that besides those cases, the petitioner was involved as accused in over two dozen Criminal cases, which however, are not mentioned in the final report. In order that a Magistrate should be enabled to pass either a preliminary order or a final order as contemplated under Chapter VIII of the Code, the first prerequisite is that the petitioner must be a person, who is by habit, thief, house-breaker, etc. The scope of the proceedings which could be taken against a person u/s 110 of the Code has been explained by the Supreme Court in the decision reported in *Gopalanachari Vs. State of Kerala*, The Court has to bear in mind two fundamental aspects, viz., (i) that every citizen of this country has certain liberties guaranteed to him under the Constitution and those liberties cannot be tampered with by any unreasonable action on the part of any police officer, and (ii) that when the liberty enjoyed by an individual is enjoyed in such a fashion that it becomes hazardous to the community at large, that liberty could be curtailed as contemplated in Chapter VIII of the Code. These provisions are intended to control persons who are habitual criminals, i.e. persons so hardened and incorrigible that ordinary provisions of the penal law and the normal fear of punishment are not sufficient deterrents or adequate safeguard for the public. The provisions are intended to curb dangerous activities of such criminals and to secure the interests of the community from injury at their hands. Yet, at the same time, it must be realised that these provisions constitute a harsh law which can be used for oppressive purposes. Therefore, these provisions must be used with caution and discretion so as to avoid the same becoming a machinery for oppression. Magistrates who are put in charge of enforcement of these provisions have to bear these principles in mind and exercise their discretion in a judicious manner. The expression "by habit" must also be care-fully understood by the Magistrates. "Habit" implies a tendency or capacity resulting from frequent

repetition of the same or the similar acts. It indicates depravity of or criminality in character, evidenced by frequent commissions of offences. "Habit" has to be established by aggregate of facts. The mere fact of previous conviction is not sufficient to justify application of these provisions. There must be a number of convictions regarding previous acts. There must be proof of such convictions or course of conduct by evidence of general reputation or prior acts. There must be some additional facts or circumstances to show that the person concerned has done some act or resumed avocation that indicates on his part an intention to return to his former course of life and to pursue a career which prejudicially affects the community interests. At the same time, it has to be remembered that even a thief or a burglar is entitled to locus penitentiae when he has served out his punishment. It is only when he violates this grace which law extends to him and thereby shows that he is unreformed that these provisions should be put into operation in order to secure guarantee to the society that he will not once again endanger the life of the community. It is bearing in mind these salutary principles, that police or the magistracy should approach their duties in so far as security proceedings are concerned.

4. The present petition can at best be treated as a petition requiring this Court to exercise its inherent jurisdiction or power to quash the proceedings. To exercise such power in this case would be to go into the facts and circumstances of the case in detail in order to arrive at a conclusion whether the person concerned is fit enough to be dealt with under Chapter VIII of the Code. That it appears to me, is not the function or duty of this Court in the exercise of the inherent jurisdiction of this Court. Of course, if there is something to show that the proceedings involve gross abuse of process of court, the Court will not hesitate to interfere. But such a conclusion cannot be arrived at on the material in the records in this case. It is for the Magistrate concerned to look into the evidence and the circumstances and come to a conclusion whether the petitioner is of such a character and conduct and whether his acts fit him into" the description in Section 110(a) of the Code. In this view, I do not think that any interference is called for.

5. Before parting with the case, I would like to deal with one of two important aspects of the case. The Supreme Court has repeatedly pointed out that when a person in jail is brought before court of law and if there is possibility of the proceedings before the court resulting in his being deprived of his liberty and in his continuance in the jail, legal aid has to be given to him if he is not able to arrange for legal aid by himself. The Supreme Court has also repeatedly pointed out that if the State is not in a position to render legal aid to such an accused person in custody, whether it be on account of financial stringency or otherwise, the entire proceedings may be vitiated by such failure on the part of the State to render legal aid. Evidently this matter was not borne in mind by the learned Magistrate who proceeded with the enquiry against the petitioner. The Magistrate will see to it that free legal aid is secured to the petitioner in the conduct of the proceedings. I find from the records that one witness was examined. After

having secured legal aid to the petitioner, the learned Magistrate will recall that witness and give an opportunity to the legal aid counsel to further cross-examine that witness, if he so chooses. I also find that the evidence of P. W. 1 is not taken down properly. The procedure to be followed in regard to matters covered by Chapter VIII of the Code is the procedure to be followed in Summons cases (see Section 116(2) of the Code). The manner of recording the evidence in summons cases is laid down in Section 274 of the Code. The Magistrate is not called upon to record the evidence verbatim either in question form or otherwise. He is required to take only a memorandum of the substance of the evidence in the hand of the court. Of course care must be taken to see that the substance is a completely representative of the total evidence, so adduced.

6. I find that in his repeated petitions sent to the Magistrate, the Chief Judicial Magistrate and Ors., the petitioner has been requesting that he should be released. The learned Magistrate could have treated this either as an application for dropping the proceedings or at least as an application for bail. It is surprising that after so many months since the petitions were filed, his request for release has not been adverted to or considered by the learned Magistrate. The, Magistrate will immediately consider whether bail is to be granted to the petitioner and pass appropriate orders thereon.

7. This petition is disposed of in the manner indicated above. I would like to place on record the valuable assistance given to me by the learned Advocate General and the learned State counsel Sri Siby Mathew.

8. Issue carbon copy of this order to the Advocate General immediately free of costs. Send back the records of this case immediately.