
(2003) 11 KAR CK 0035

Karnataka High Court

Case No: Cr.P. No. 3942 of 2003

Smt. Mallamma

APPELLANT

Vs

The State of Karnataka

RESPONDENT

Date of Decision: Nov. 7, 2003

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 233, 233 (3), 313, 482, 66

Citation: (2004) ILR (Kar) 157

Hon'ble Judges: M.S. Rajendra Prasad, J

Bench: Single Bench

Advocate: C.H. Hanumantharaya, for the Appellant; C. Ramakrishna, HCGP, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Rajendra Prasad, J.

Though the matter is listed for admission, by consent of both sides, the matter is taken up for final disposal.

2. This petition, by accused No. 2, is filed u/s 482 Cr.P.C., praying to set aside the order dt. 31-10-2003 passed by the XXIII Addl. City Civil and Sessions Judge, Bangalore, in SC No. 460/96, and to direct the Trial Court to secure the presence of DW4 and to proceed with the case, challenging the legality and validity of the proceedings.

3. The Court has heard the arguments of Sri C.H. Hanumantharaya, the learned Counsel on behalf of the petitioner and Sri C. Ramakrishna, HCGP on behalf of respondent - State.

4. The learned Counsel for petitioner strenuously contended that the material on record clearly goes to show that the order impugned is illegal and invalid. The

learned Sessions Judge had failed to afford full and fair opportunity to the petitioner to prove the defence side and for no fault of the petitioner process had not been served on the witness and for that reason the claim of the petitioner cannot be defeated. The learned Counsel also contended that the learned Sessions Judge is not right in closing the case of the accused in a hurried manner. Hence, the learned Counsel has prayed for allowing for petition.

5. On the contrary, the learned Counsel for respondent strenuously contended that the order impugned is legal and proper and the material on record clearly goes to show that the accused had failed to examine the witnesses in spite of giving sufficient opportunity and it was an old case and the learned Sessions Judge, therefore, totally justified in passing the impugned order. Hence, learned Counsel has prayed for dismissal of the petition.

6. The Court has carefully perused the material on record and gave its anxious thoughts over the rival contentions raised at the Bar.

7. From the material on record, it is seen that the petitioner is one of the accused in the said case where the petitioner along with others are facing trial in respect of various offences under IPC and in particular, Section 302 IPC. After examination of the accused u/s 313 Cr.P.C. the Trial Court had called upon the accused to enter defence. Accused Nos. 1 to 5, in particular, had filed a memo furnishing the list of witnesses and DWs 1 and 2 had been examined. At that stage, on 27-9-2003, the summons issued to Dr. Krishnappa, CMO, Victoria Hospital, Bangalore, had been served and witness had remained absent. The learned Sessions Judge had ordered for issue of bailable warrant to the witness and on 22-10-2003 the bailable warrant was returned without execution with an endorsement that the witness had refused the process. Later on, the Court ordered for issue of NBW and on 31-10-2003, the NBW issued to the witness had not been returned. At that stage, the learned Sessions Judge felt that it was an old case and in spite of issuing NBW, the accused Nos. 1 to 5 have not let in further defence evidence, hence the Trial Court closed the side of the accused and the matter is posted for arguments. At this stage, instant petition has been filed.

8. It is settled principle of law that the powers of this Court u/s 482 Cr. P.C. are to be exercised with due care, caution and circumspection and in rarest of rare cases.

9. From the material on record, it is seen that the accused have been facing serious charge of murder, in addition to other charges. At this stage it is necessary to quote the provisions of Section 233(3) of Cr.P.C.

"If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice."

The provisions of Section 233 Cr.P.C. provide that the accused has a right to seek attendance of any witness and the Court has been enjoined with the power of compelling such witness to appear before the Court unless the Court records reasons for turning down the claim of the accused.

10. In the case on hand the Trial Court has not turned down the claim of the accused on any of said grounds. Such being the case, the Trial Court ought to have compelled the attendance of the witness (Dr. Krishnappa) in the process known to law. In spite of the Trial Court issuing summons, bailable warrant and NBW that witness did not turn up. In this regard, it must be stated that Dr. Krishnappa being a government Servant, the provisions of Section 66 of the Cr.P.C. had to be followed and the learned Sessions Judge had not followed the said procedure at all.

11. It is also necessary to make a mention that bailable warrant has been issued in pursuance of the order dated 27-9-2003 and the warrant had been returned with an endorsement that the witness had refused the process. From this, it is clear that the serving authorities are not bothered about the seriousness and sanctity attached to the warrant. The very phrase indicated that it is a bailable warrant and the same should be executed on the witness and the witness should offer bail and if the witness refuses to offer bail, he should be arrested and produced before the Court. In the case on hand, the serving authority have not bothered to see that the bailable warrant is executed in the manner it is required to be done the learned Sessions Judge also did not feel it proper to call for report or explanation from the SHO concerned.

12. It is also necessary to mention that the matter had been posted to 31-10-2003 and NBW to the said Dr. Krishnappa had returned unexecuted. Even on this date, the learned Sessions Judge did not call for a report or explanation from the SHO for non-execution of the NBW and also did not report the matter to the Higher ups in the Police Department requiring action to be taken against the concerned. The learned Sessions Judge had closed the side, particularly, on the ground that the case is an old case and the case had been pending at that stage from 5-7-2003. From this, it is clear that the learned Sessions Judge had closed the side of the accused without affording full opportunity to the accused to Put forth his defence. It is elementary principle of law that the Court of law should provide full and fair opportunity to both sides to prove of the contentions raised and this exercise should be done within four corners of the law. In the case on hand, patently, the accused had been facing trial in respect of the offence including the offence of murder and the presence of Dr. Krishnappa was not secured by the Court, for no fault on the part of the accused and patently, the learned Sessions Judge had not passed order for issue of process following the provisions of Section 66 of the Cr.P.C.

13. Taking all these aspects into consideration, in the opinion of this Court, it would be in the ends of justice, if the petition is allowed as prayed with a direction to the learned Sessions Judge to compel the attendance of Dr. Krishnappa in the process

known to law and then proceed with the case.

14. In the result, the petition is allowed. The order impugned is hereby set aside. The matter is remanded to the lower Court with a direction to proceed with the case in accordance with chapter VI of the Cr.P.C. in compelling the attendance of the witness - Dr. Krishnappa and then proceed with the case in accordance with law.