
(2001) 03 KL CK 0022

High Court Of Kerala

Case No: Criminal M.C. No. 1638 of 1999

Somasundaram

APPELLANT

Vs

Chandra Bose

RESPONDENT

Date of Decision: March 15, 2001

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 301, 301(1), 301(2), 311

Citation: (2001) 1 KLJ 701

Hon'ble Judges: M.R. Hariharan Nair, J

Bench: Single Bench

Advocate: B. Raman Pillai and S. Vijayakumar, for the Appellant; S. Parameswaran, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Hon"ble Mr. Justice, M.R. Hariharan Nair

1. The petitioner, who is the accused in C.C. No. 153/94 of the Chief Judicial Magistrate's Court, Alappuzha, is aggrieved that CrI.M.P. No. 7651/98 filed by the counsel assisting the Public Prosecutor, who is conducting the case, was allowed enabling him to recall P.Ws. 4 and 5 who were already examined. Mr. S. Vijayakumar, who appeared for the petitioner, submitted that the powers of a counsel who is allowed to assist the Public Prosecutor are limited and that he is incompetent to file an application of the nature involved here. The right to recall a witness vests with the Assistant Public Prosecutor and the mere fact that some one is appearing to assist him does not clothe him with the authority to file an application to recall the witness.

2. Even though the respondents entered appearance, the counsel was found absent on 12-3-01 and 14-3-01 and the case was adjourned to this date and today also the learned

counsel for the respondents is found absent. Hence I am disposing of the CrI. M.C. based on the arguments advanced by the learned counsel for the petitioner.

3. It is Sec. 301 of the Code of Criminal Procedure that enables the court to allow a counsel to assist the Public Prosecutor. It is useful to quote the said provision here:

301. Appearance by Public Prosecutors.- (1) The Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any court in which that case is under inquiry, trial or appeal.

(2) If in any such case any private person instructs a pleader to prosecute any person in any court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so instructed shall act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor, and may, with the permission of the court, submit written arguments after the evidence is closed in the case.

As is clear from the above while sub-section (1) stipulates that the Public Prosecutor or Assistant Public Prosecutor is competent to appear and plead without any written authority, what sub-section (2) enables is assistance to the Assistant Public Prosecutor by another counsel of the party's choice. However, as clear from the section itself, what is important in this regard is the grant of permission by the court. Even if the permission is granted, the role of the said counsel allowed to assist the Assistant Public Prosecutor is very much limited. The rein is still held by the Public Prosecutor. If the court so permits, the assisting counsel can submit written arguments after the evidence is closed in the case. That is all. The Section does not envisage any other authority or independent power for the counsel who is engaged to assist the Assistant Public Prosecutor. In other words, even after permission is granted for rendering assistance under Sec. 301(2) of the Cr.P.C., the responsibility for conduct of the prosecution continues to be with the Assistant Public Prosecutor. It naturally follows that he is the person who is to decide how the prosecution should proceed and whether recall of any witness under Sec. 311 is necessary. According to me, the right to file an application under Sec. 311 in a case where the court grants permission under Sec. 301(1) of the Cr.P.C. is available only to the Assistant Public Prosecutor and not to the counsel who is allowed to assist the Assistant Public Prosecutor.

4. Viewed from this perspective, CrI.M.P. No. 7651/98 filed by the de facto complainant through the counsel assisting the Public Prosecutor was not maintainable. The impugned order passed in the petition allowing recall of P.Ws. 4 and 5 for further cross-examination on the ground that no prejudice will be caused to the counter petitioners is therefore improper and unsustainable. In the circumstances, this CrI.M.C. is allowed and CrI.M.P. No. 7651/98 filed before the Judicial First Class Magistrate's Court-II, Cherthala, is dismissed as not maintainable. This, however, will not stand in the way of the Assistant Public Prosecutor concerned, if he is so inclined, to file appropriate petition under Sec. 311 of the Cr.P.C. with regard to the recall of the witnesses in question.