

(2010) 04 KL CK 0052

High Court Of Kerala

Case No: Criminal Rev. Petition No. 1128 of 2010

Prasad Jacob (US Citizen)

APPELLANT

Vs

State of Kerala and The Station
House Officer

RESPONDENT

Date of Decision: April 6, 2010

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 397, 397(2), 399, 401, 437
- Penal Code, 1860 (IPC) - Section 143, 147, 148, 149, 153A
- Press and Registration of Books Act, 1867 - Section 14

Citation: (2010) CriLJ 4137 : (2010) 2 ILR (Ker) 633 : (2011) 6 RCR(Criminal) 353

Hon'ble Judges: V. Ramkumar, J

Bench: Single Bench

Advocate: T. Ramprasad Unni, for the Appellant; S. Rajeev, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

V. Ramkumar, J.

In this Revision filed u/s 397 read with Section 401 Cr.P.C., the revision petitioners who are accused Nos. 1 to 5 in Crime No. 72 of 2010 of Perumpetty Police Station, challenge the order dated 29-3-2010 passed by the Sessions Judge, Pathanamthitta, cancelling the bail granted to the petitioners by the Judicial Magistrate of the First Class (J.F.C.M. for short), Thiruvalla.

2. I heard Sr. Advocate Sri K. Ramakumar, the learned Counsel appearing for the revision petitioners, Adv. Sri Rajeev, the learned Counsel appearing for the de facto complainant and Sri V.G. Govindan Nair, the learned Director General of Prosecution. I also called for and perused the records.

THE BACKGROUND FACTS

3. The turn of events (according to the prosecution) culminating in the impugned order can be summarised as follows:

A. One P.J. Samkutty (Sam Jacob) of Punnakkal family in Chungappara in Pathanamthitta District having the pen name "Shamu Coimbatore" was the author of a book titled "Chinvad Palam" (the invisible bridge to heaven). The said book is purportedly published from Angamaly in Kerala and also from Queens Villa, New York, U.S.A.

B. Samkutty referred to above died on 7-3- 2007. A1 to A3 are his brothers and A4 is his son. They are employed abroad. A5 is a Pastor who was residing in the house of the deceased. All the five accused persons belong to the Christian Community.

C. On 22-3-2010 from 9.30 a.m. to 2.30 p.m. the accused persons were attending the funeral of deceased Samkutty at the residence of A2 at Chungappara.

D. At about 4 p.m. on 22-3-2010 copies of Chinvad Palam authored by the deceased were circulated among the Christians who had attended the funeral. The aforesaid book contains imputations against Prophet Muhammed (Muhammed Nabi) depicting him as a womaniser who kept concubines besides his wives for sexual satiation. The Book makes reference to the law regarding the sharing of plundered goods by declaring that 1/5th of the booty should go to Allah and his messengers and the rest should go to the plunders. There are citations in the said book sufficient to incite communal feelings and to maliciously insult the religious feelings of the Muslims and promoting enmity between two classes. Ninety copies of the book were seized from an Innova Car parked there and bearing Reg. No. KL28-6147 belonging to A3 and in which the accused persons had come to Chungathara.

E. At 7 p.m. on 22-03-2010 one Shaji, S/o. Kochumuhammed Rawther and who is the President of the Muslim Juma Ath, Kottangal gave the first information statement before the Officer-in-charge of Perumpetty Police Station to the effect that by circulating copies of the above book the accused persons had promoted feelings of disharmony, enmity, hatred and ill-will between different classes on the ground of religion or race. The Sub Inspector of Perumpetty Police Station accordingly registered a case as Crime No. 72 of 2010 for offences punishable under Sections 143, 147, 153A and 295A read with Section 149 I.P.C. Section 505(2) and (3) I.P.C. and Section 14 of the Press and Registration of Books Act, 1867 were also added.

F. On 23-3-2010 A1 to A5 were arrested and produced before the J.F.C.M., Thiruvalla who remanded them to judicial custody. A1 to A5 filed CrI.M.P. 2219 of 2010 u/s 437 Cr.P.C. before the learned Magistrate seeking their enlargement on bail. Eventhough the said application was opposed by the learned Asst. Public Prosecutor contending inter alia that if the accused were enlarged on bail there would be communal violence and there was also the likelihood of the accused fleeing from justice, the learned Magistrate as per order dated 24- 3-2010 granted bail to the accused subject to the following conditions:

- i) Bail granted on executing a bond for Rs. 50,000/- each with two solvent sureties each for the like sum.
- ii) The accused shall appear before the investigating officer on all Mondays and Wednesdays till the filing of final report or until further orders.
- iii) They shall not enter into the limits of Perumpetty Police Station without the permission of the Magistrate's Court except for the compliance of condition No. 2 imposed.
- iv) They shall surrender their passport before this Court and the same shall be retained with the Court in safe custody until further orders.
- v) They shall co-operate with the investigation and shall appear before the investigating officer as and when required for the purpose of investigation.

G. At about 6.30 p.m. on 24-3-2010 infuriated by the imputations made against Prophet Mohammed in the book "Chinvad Palam" circulated in that area, certain Muslims of Chungappara (which is an area thickly populated by Muslims) unleashed violence resulting in the Perumpetty Police registering a case as Crime No. 73 of 2010 for offences punishable under Sections 143, 147, 148 and 427 read with Section 149 I.P.C. The Book Shop belonging to the deceased who was the author of the book was attacked by the Muslims who resorted to vandalism.

H. As authorised by the Sub Inspector, the A.S.I. (George John) of the Police Station searched for the accused in the houses of their relatives to direct the accused to appear before the Investigating Officer at 10 a.m. on 26-3-2010 in terms of bail condition No. V, but in vain. Thereafter, on 25-3-2010 at 9.10 p.m. Advocate Sri Mammen Alexander who was the counsel appearing for the accused were contacted over his mobile phone (9447267627) from the office of the Circle Inspector, Mallappaly and the accused were directed to appear before the Investigating Officer at 10 a.m. on 26-3-2010. But the accused did not appear as directed. (Vide report dated 26-3-2010 filed by the Investigating Officer before the Magistrate informing the latter that the accused have violated the bail conditions and are not co-operating with the investigation and requesting the Magistrate to cancel their bail). But the learned Magistrate did not pass any orders on the above report.

I. On 26-3-2010 the Public Prosecutor filed before the Sessions Court, Pathanamthitta CrI.R.P. 11 of 2010 on behalf of the State of Kerala challenging the order granting bail to the accused and also seeking for cancellation of the bail for violation of the bail condition regarding reporting before the Investigating Officer. An affidavit of the Investigating Officer was also subsequently filed to the following effect:

I am the Officer investigating Crime No. 72 of 2010 of Perumpetty Police Station. The accused persons have committed offences punishable under Sections 153A, 295A and 505(2) & (3) read with Section 34 I.P.C. and also an offence punishable u/s 14 of

the Press and Registration of Books Act, 1867. The accused were enlarged on bail 24-3- 2007 by J.F.C.M.I. Thiruvalla. But, they have flouted the bail conditions and the above Revision Petition has been filed for cancellation of their bail. Eventhough the accused were called upon to appear before the Investigating Officer at 10 a.m. on 26- 3-2010 they failed to report. Since the accused persons are hiding somewhere, they could not be given notice. But their counsel Advocate Ummen Alexander had been informed through phone. Inspite of that the accused have not co-operated with the Investigating Officer and they have thereby violated Bail Condition No. (v). The presence of the accused is necessary for the further investigation of the case. The original manuscript of the offending book and details regarding the printing press where the book was printed etc. are to be unearthed. It is understood that the accused have a printing press at Dubai. For collecting details regarding the said Printing Press, police custody of the accused is inevitable. There is also the possibility of members of the aggrieved community attacking the accused persons and causing destruction of their properties. There is grave danger to the lives and properties of the accused. Consequent on the acts of violence by members of the Muslim Community at 6.30 p.m. on 24-3-2010 at Chungappara a case has been registered as Crime No. 73 of 2010. If clashes between Christians and Muslims were to erupt in that locality there is a threat to public tranquility.

J. On 29-3-2010, the learned Sessions Judge after hearing both sides allowed the Revision and set aside the bail order and cancelled the bail granted to the accused u/s 439(2) Cr.P.C. It is the said order which is assailed in this Revision Petition filed on 31-3-2010.

K. Since this Court was not inclined to pass an order of stay of arrest of the petitioners, A2 and A3 have been arrested and remanded to judicial custody pending this Revision.

L. One Pastor Babu George, alleged to be the publisher of the offending Book has been arrested and arrayed as the 6th accused in this case.

ARGUMENTS ON BEHALF OF THE ACCUSED

4. Sr. Advocate Sri K. Ramakumar made the following submissions before me in support of the Revision:

The revision petitioners who are three brothers and son of one Sam Jacob who died on 7-3-2010 were, along with a Pastor (A5), attending the funeral of the said Sam Jacob from 9.30 a.m to 2.30 p.m. on 22-3-2010. They had absolutely no knowledge or role in the alleged distribution of the copies of the book titled "Chinvad Palam" written by Sam Jacob. Except their presence at the time of the funeral, no overt acts have been attributed to the petitioners. Just as mere possession of obscene books without anything more cannot constitute an offence punishable u/s 292(2) I.P.C. (Vide [Abdul Rasheed Vs. State of Kerala](#),), mere possession of copies of the offending book in the house of the deceased cannot amount to an offence

punishable u/s 153-A I.P.C. The petitioners have no connection with the said book and even Sam Jacob the author of the book has died. Since the petitioners were attending the funeral no conscious role could be attributed to the petitioners. Even according to the statement in the first information report, copies of the book were given to Christians. There is no case that the book was circulated among Muslims. Section 153-A or Section 295-A I.P.C. are not at all attracted even going by the allegations in the F.I.R. The observation by the learned Sessions Judge that no mens rea is necessary for the offence punishable u/s 153-A I.P.C. is clearly wrong in the light of the decision of the Apex Court in [Balwant Singh and another Vs. State of Punjab](#), . Merely because the Muslim community in that area had announced a hartal that is not a ground for cancelling the bail granted to the petitioners. The petitioners are prosecuted solely with a view to pamper the organized Muslim community there who command tremendous clout. The learned Magistrate who granted bail to the petitioners had imposed stringent conditions safeguarding the interests of the prosecution. The first day for reporting before the Investigating Officer, after the petitioners were enlarged on bail fell on 29-3-2010. But the revision petition for cancellation of the bail alleging failure on the part of the accused to report before the Investigating Officer was filed on 26-3-2010. On 29-3-2010 the petitioners were not allowed to put their signatures when they reported before the Investigating Officer in obedience to the bail order. Hence, it is not correct to say that the accused flouted the bail conditions regarding reporting before the Investigating Officer. Conduct of the accused subsequent to their release on bail and other post-bail supervening circumstances alone are relevant considerations in an application for cancellation of bail. ([State Vs. Amarmani Tripathi](#),). The legality or propriety of the order granting bail is irrelevant in an application for cancellation of bail. There was no ground made out for cancellation of the bail granted to the petitioners. At any rate, the bail granted to the petitioners could not have been cancelled by the State by filing a Revision instead of a petition u/s 439(2) Cr.P.C. before the Sessions Court. An order granting bail is an interlocutory order. (Vide paragraph 6 of [Amar Nath and Others Vs. State of Haryana and Another](#),). It cannot be an intermediate order as well. The position has been further elucidated in [State Rep. by Inspector of Police and Others Vs. N.M.T. Joy Immaculate](#), . The Revision was thus barred in view of Section 397(2) Cr.P.C. When the Revision itself was not maintainable, the Sessions Judge had no jurisdiction to cancel the bail by passing orders in an incompetent Revision.

JUDICIAL EVALUATION

5. I am afraid that I find myself unable to agree with the above submissions made on behalf of the revision petitioners/accused. The fact that the book titled "Chinvad Palam" (the invisible Bridge to Heaven) contains statements derogatory to the holiness attributed to Prophet Mohammed cannot admit of any doubt. The Book is in vernacular Malayalam. In the preface dated 3-3-2009 by the author it is stated that it is wrong to attack Christians and the Bible in secular India and the author

hopes that the book could be of use to prevent the Muslim brothers from attacking the Christian faith. Given below are a few excerpts from the Book:

a) The most part of Quo ran has been copied from the Bible and other scriptures by Jews (page 95).

b) Haj Pilgrimage is a source of wealth bringing financial gain to Islam.

c) The law regarding the sharing of plundered goods is that 1/5th of the booty should go to Allah and his messengers and the balance alone should go to the plunderers. (Page 69).

d) At the age of 25 Mohammed Nabi married Khadeeja who was aged 40 years and who was to be venerated as his mother. (Page 57).

e) It is unfortunate that innocent Mohammed Nabi who was keeping more than four wives besides concubines imposed the iron rule that Musalmans should not have more than four wives. Let not the Muslim comrades say that he is a womaniser, cheat, thief and murderer (page 72).

f) Muhammed Nabi who committed so many atrocities and wrongs was so healthy and succulent that he was capable of having sex with as many as 30 women on a single day. Would Muhammed have done such an act if there was an iota of honesty in him? It was not among Christians that Muhammed came. Muhammed is a person who destroyed the holy cross. How can the Christians consider him as the soul of truth? (Page 14).

g) Concubinage means keeping women other than the wife for satiating one's sexual urges. Eventhough brothels for prostitution are permitted in civilized countries, there is no legal sanction for concubinage. This law came into force in many countries from the fourth Century onwards. Rahana, Thulki Budhiya, Mariya, Sulekha, Mary and her sister Sherina were some of the concubines of Muhammed Nabi. (Page 91).

6. Even a confirmed atheist will not dare to make such blasphemous statements about a person who is worshiped and venerated not only by the Muslims but also by members of all other religions. The fundamental right to freedom of speech and expression in a secular State is not an absolute license to injure the religious faiths and beliefs of fellow citizens. Those who take the risk of scurrilous attack on divine personalities, whether out of fanaticism or out of religious perversion, and publish their work of sacrilege and those who disseminate such works should be prepared to face the consequences. Such offenders of religion cannot be heard to contend that the State is pampering Muslim fundamentalism. The harmony in life lies in harmonising the inequalities. Even assuming that copies of the offending book were circulated only among Christians, I fail to see as to how the penal provisions relied on by the prosecution are not attracted. First Information Report is only to set the criminal law in motion. It cannot be treated as the final report to find out whether

there is evidence to substantiate the alleged offences. Of course, the question as to whether all or any of the accused persons committed the acts attributed to them will have to be eventually decided only during the course of investigation or after trial, in case the accused are charge-sheeted. All the offences punishable under Sections 153(A), 295(A) and 505(2) & (3) I.P.C. are cognizable and non-bailable offences. Even though the Assistant Public Prosecutor appearing before the Magistrate had opposed the bail application, contending inter alia that if bail was granted to the accused persons there would be communal violence and that there was also the likelihood of the accused persons absconding, the learned Magistrate did not consider those possibilities seriously, but instead, was carried away by the submission made on behalf of the accused that the accused persons had come from the Gulf countries only for attending the funeral ceremony of deceased Samkutti and that the accused persons could be granted bail on stringent conditions.

7. Registration of Crime No. 73 of 2010 by the Police consequent on the communal violence that erupted in the evening of 23-3-2010 resulting in the attack on the book shop of the deceased by the Muslims and the failure on the part of the accused to report before the Investigating Officer as directed will clearly show that the apprehension expressed by the Assistant Public Prosecutor were real and they came out to be true. Post-bail supervening circumstances and post-bail conduct of the accused are not the only grounds relevant for consideration while cancelling the bail already granted. The law is now well settled after the three Judges' Bench verdicts of the Supreme Court that if the order granting bail is perverse for the reason that irrelevant material of substantial nature was taken into account or relevant material omitted from consideration, the superior Court would be justified in cancelling the bail. (See [Dinesh M.N. \(S.P.\) Vs. State of Gujarat](#), and Narender K. Amin v. State of Gujarat and Anr. (2008) 13 SCC 584). The same position had been reiterated by the Apex Court in Subodh Kumar Yadav v. State of Bihar 2009 (9) SCALE 621 : 2009 (2) KLD 353.

8. It has already been seen that the investigating officer who was unable to contact the petitioners (who had made themselves scarce after they were enlarged on bail) contacted their counsel and directed the accused to be present before the investigating officer at 10 a.m. on 26-3-2010. But they failed to appear before him. This was a clear violation of condition No. V of the bail order justifying cancellation of the bail. I am not impressed by the argument on behalf of the accused that they were not permitted to sign on their reporting before the Investigating Officer on 29-3-2010. No such grievance had ever been voiced at any point of time before any Court so far until their bail was cancelled. Moreover, the learned Director General of Prosecution submitted that the claim now made by the petitioners that they reported before the investigating officer on 29-3-2010 but were not permitted to sign, is absolutely false.

9. Eventhough the learned Counsel for the petitioners faintly argued that the bail was cancelled without hearing the petitioners no such ground has been taken in the revision petition. Moreover, this Court got the matter clarified from the learned Sessions Judge who has confirmed that the impugned order was passed after hearing the learned Counsel for the accused. The cause title of the impugned order also bears testimony to the response given by the Sessions Judge.

10. It is true that cancellation of the bail was sought by the State by filing a revision before the Sessions Court instead of moving the Sessions Court u/s 439(2) Cr.P.C. But when the grant of bail itself was unwarranted and unsustainable in the light of [Dinesh M.N. \(S.P.\) Vs. State of Gujarat](#), etc. it cannot be said that the order of the Magistrate granting bail will not come under the purview of Sections 397 and 399 read with Section 401 Cr.P.C. enabling the Sessions Court to sit in Revision over the order passed by the Magistrate granting bail and dismiss the bail application and consequently cancel the bail granted to the accused. The bar of revision u/s 397(2) Cr.P.C. is only in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding pending before an inferior criminal Court. Here, the learned Magistrate passed the order granting bail not in any appeal, inquiry, trial or other proceeding pending before him. Since the order granting bail was passed during the crime stage in an independent application filed for the purpose and not in an interlocutory application filed in any pending proceeding before the Magistrate, the order passed by the magistrate cannot be termed as an interlocutory order within the meaning of Section 397(2) Cr.P.C. The observations in paragraph 6 of Amar Nath's Case (Supra) AIR 1977 SC 2125 will show that passing orders for bail and such other steps in aid of pending proceedings may amount to interlocutory order. The operative portion of the impugned order shows that the learned Sessions Judge invoked his power u/s 439(2) Cr.P.C. to cancel the bail. In any view of the matter, the quoting of a wrong provision of law cannot deprive the Court of its power to grant a relief which that Court is empowered to grant. I, therefore, do not find any good reason to interfere with the impugned order passed by the Sessions Court, Pathanamthitta. This Revision is accordingly, dismissed. It is made clear that the observations in this order as well as in the impugned order have been made only for the purpose of disposing of the Revision Petitions and nothing more. Dated this the 6th day of April, 2010.