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(1961) 02 KL CK 0023

High Court Of Kerala

Case No: Criminal R.P. 318 of 1959

Achuthan	APPELLANT
Vs	
Bappu and Others	RESPONDENT

Date of Decision: Feb. 20, 1961

Citation: (1961) KLJ 342

Hon'ble Judges: S. Velu Pillai, J; Anna Chandy, J

Bench: Division Bench

Advocate: K. Kunhirama Menon, for the Appellant; K. Mohamed Naha, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Anna Chandy, J.
The petitioner is the accused in Sessions Case No. 27 of 1959 of the Sessions Court of Kozhikode. He was committed to the said court by the learned Sub-Magistrate, Tirur, who on the same day disposed of a "counter-case" filed by the petitioner by discharging the accused persons. This revision is against the order of the Magistrate in the latter case which has been upheld in revision by the learned District Magistrate of Kozhikode. On 1.2.1958 at 8 P. M. there was an incident in which several people got injured. The petitioner''s version of it is as follows:-On 1.12.1958, while the petitioner was returning home from the shop of one Moosakutti, the respondents and one Thami, the brother of the 2nd respondent, who were lying in wait for him hiding by the side of a dilapidated goat-pen set upon him and beat him and caused injuries to him. The said Thami who was armed with a knife attempted to stab the petitioner. The knife fell down during the tussle and the petitioner armed himself with that. He heard the first respondent directing the others to do away with him and prompted by the instinct of self-preservation he waved the knife to protect himself as a result of which the respondents and Thami received injuries. Thami died of the injuries.

2. The petitioner who was also injured was removed to the hospital along with the second respondent in a car. There the statement of the petitioner was recorded first and then the

statement of the second respondent. The police charged a case against the petitioner for the murder of Thami but no case was registered on the complaint of the petitioner on the ground that the offence reported was a non-cognizable one. Thereupon accused 1 preferred a complaint before the Sub-Magistrate, Tirur. That case was tried by the Magistrate and the accused were discharged as stated earlier. The murder case against the accused which has been committed is stayed as per the orders of this Court.

3. As mentioned already the complainant"s case is that he had been to the bazaar to purchase oummin seed for preparing a medicine for his ailing mother and it was on this way back after purchasing it that the accused in his case lay in wait for him and assaulted him. The complainant had five injuries including a lacerated wound 2" x scalp-deep on his head and was treated as an inpatient in the hospital for thirteen days. Including the complainant eight witnesses were examined of whom P. W. 3 is the shop-keeper from whose shop the complainant had purchased oummin seed. P. W. 7 the doctor who treated the complainant for his injuries and the rest are neighbors who were cited to prove the incident. The learned Sub-Magistrate considered the evidence as if he were trying the case with a view to dispose of it finally and came to the conclusion that "there were no witnesses except the complaint"s relations P. Ws. 2, 4, 5 and 6 to speak to the beating, the complainant was the aggressor in stabbing the deceased Thami and others, and compared to the overt acts committed by him the injuries that have probably been inflicted on his head by Thame with the stick are trival". For these reasons the learned Magistrate discharged the accused holding that no case was made out against the accused which if unrebutted would warrant their conviction. Evidently the Magistrate did not attach any significance to the fact that it was a case counter to the Sessions Case in which the complainant was charged for the murder of Thami and which he committed to the Sessions Court, the same day he discharged the accused in the case.

4. The learned District Magistrate to whom the order was taken in revision noticed this defect in the approach made by die Sub-Magistrate and after referring to the principles enunciated in Thota Ramakrishnayya and Others Vs. The State, regarding the procedure to be adopted by courts when dealing with a case and counter, came to the conclusion that normally the lower court should have committed this case along with the other case. He went to the extent of observing that "If I were the trial Magistrate I would have committed that case also without expressing any opinion on the facts to be tried along with the other case". However without mentioning a word about the evidence he ended up with a bald Statement that it will not be possible to convict the accused on the evidence in the case, and dismissed the revision application.

5. Shri Kunhirama Menon, the Learned Counsel for the petitioner contended for the position that where there is a case and counter, one of which is exclusively triable by the Sessions Court, the other even if it be triable by a Magistrate has necessarily to be committed to the Sessions Court to be tried and disposed of by the same court and in such a case the Magistrate has no jurisdiction to discharge the accused and he is bound to commit the case irrespective of the question whether a case has been made out for

committal. However we need not decide the correctness of this rather wide proposition in this case which can be disposed of on the short ground that the approach made by the Sub-Magistrate to the counter case is fundamentally defective in that he appreciated the evidence with a view to finding out whether there was a case for conviction and not whether there was a prima facie case for commitment. The learned Magistrate failed to take into consideration the fact that it was a case counter to the Sessions Case, dealing with an incident which formed part of the same transaction as the subject matter of the Sessions Case and which constituted the defense of the complainant as the accused in the Sessions Case and that unless both the cases are tried by the same Judge, the entire picture will not be available to him.

6. The principle that normally a case and counter should be tried and disposed of by the same court has been well recognized and even the Learned Counsel for the respondent does not take exception to that rule. The reasoning behind this principle as has been stated by Waller & Cornish JJ. in In re Goriparthi Krishtamma (1922-2 Mad. Cr. C. 238 (and quoted in Thota Ramakrishnayya and Others Vs. The State, is as follows:-

A case and a counter case arising out of the same should always, if practicable be tried by the same court. Each party represent themselves as having been the innocent victim of the aggression of the other. Neither will, as prosecution witnesses admit that they retaliated on the other, for the obvious reason that they are themselves on trial in the other case. As accused, they do not as a rule let in any defense evidence, relying on the evidence they have given in the other case as prosecution witnesses. The result is that no court can grasp the real facts unless it tries both cases.

In this case therefore the Magistrate has to appreciate the evidence not in order to find out whether it is sufficient to convict the accused but to see whether a prima facie case has been made out for commitment to the Sessions Court along with the main case.

We are therefore quashing the order of discharge and sending the case to the Sub-Magistrate for fresh disposal according to law and in the light of the observations made above. He will have to follow the procedure laid down in Chapter XIII of the Criminal Procedure Code so that no prejudice is caused to the accused. The order passed by this Court staying the trial of the Sessions Case will be in force till the disposal of the counter case by the Magistrate. The Magistrate will dispose of this case as expeditiously as possible since the trial of the Sessions Case has been held up for a long time.