

(2013) 02 KL CK 0094

High Court Of Kerala

Case No: Criminal R.P. No. 2598 of 2012

State of Kerala

APPELLANT

Vs

Shaji and Another

RESPONDENT

Date of Decision: Feb. 4, 2013

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 173(2), 173(8), 239
- Kerala Forest Act, 1961 - Section 27(1)(e)

Citation: (2013) 2 KHC 81 : (2013) 2 KLJ 146

Hon'ble Judges: K. Harilal, J

Bench: Single Bench

Advocate: M.P. Madhavan Kutty Spl. GP, for the Appellant;

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

K. Harilal, J.

This Revision is directed against the order passed by the Judicial First Class Magistrate-I, Idukki in C.M.P. Nos. 1689/2012 & 1690/2012 in C.C. No. 345/2010. The Revision Petitioner herein is the Complainant in O.R. No. 1/2009 of Nagarampara Police Station in Neriamangalam Forest Range and respondents herein are the accused Nos. 2 and 3 in the above occurrence/The offence alleged against the respondents and accused Nos. 1, 4, 5 and 6 are punishable u/s 27(1)(e) of the Kerala Forest Act, 1961. According to the Prosecution on 23/4/2009 the accused trespassed into Enippara Bhagom of Nagarampara Reserve forest cut and removed a portion of a rosewood tree and thereby caused a loss to the State Government. On 23/04/2009, the Deputy Ranger. Nagarampara Forest Station prepared Form-I report and submitted before the concerned Judicial First Magistrate Court, The 5th accused was arrested on 16/5/2010. The other accused could not be arrested and Form-II report, (Final Report) was filed before the Judicial First Class Magistrate

Court on 21/5/2010. The learned Magistrate took cognizance of the offence and issued summons to the accused. The Accused Nos. 1 to 5 took bail from the Magistrate.

2. On receipt of the final charge, the learned Magistrate served summons to all the Accused. The Accused Nos. 2 and 3, who are the respondents herein filed petitions u/s 239 of the Cr.P.C. stating identical contentions; for discharging them from the charge for which the prosecution has been initiated against them. The respondents herein are not the Accused in the said final charge. As per the final report, the name and address of the 2nd accused is mentioned as Shaji, S/o. Mathew, aged 28, years, Parayil House, Pazhayari-Kadukkakandam, Kanjilkuzhy Panchayath, Thodupuzha Taluk and the name, and address of the 3rd accused is shown as Sajikumar, S/o. Sankaran. Thazhathethil House, Pazhayari-Kadukkakandam, Kanjilkuzhy Panchayath, Thodupuzha Taluk. The warrant which had been issued against them returned with an endorsement that the Accused Nos. 2 and 3 are absconding. Thus the Forest Officials could not produce the persons against whom warrant had been issued as the 2nd and 3rd accused before the court. At that juncture, the Forest Officials started a false and illegal attempt to substitute and produce the respondents herein as the 2nd and 3rd accused in lieu of the real and original accused Nos. 2 and 3 in the charge, against whom they failed to execute warrant. The Forest Range Officer filed Annexure-II report stating that correct address of the Accused Nos. 2 and 3 are different. According to the Forest Range Officer, the correct address is Shaji, S/o. Narayanan, Vazhappallil House, Kadukkandam Bhagarh, Pazhayarikandam and Saji, S/o. Scaria, Vattukunnel House, Kadukkandam Bhagam, Pazhayarikandam P.O.

3. According to the Respondents, the persons named in the original Form-II report are actual persons living in the locality and they have committed the offence. To substantiate their argument they produced their identity cards and voters list which shows photographs, name and address of the real accused persons against whom Form-II (Final Report) has been filed as well as the respondents herein. The name and address of the 2nd and 3rd Accused mentioned in Form-II report are seen same as that of their name and address stated in the voters list. According to the Respondents, one year after filing of the final report when arrest warrant returned unexecuted, taking undue advantage of the resemblance of their names with that of the original Accused No. 2 and 3 in the Form II report, the Revision Petitioner is trying to substitute them as Accused Nos. 2 and 3, without conducting a further investigation. There was no additional report or further investigation report to show that the real accused persons are respondents herein. By way of filing a report to change address of the 2nd and 3rd accused, the Revision petitioner is trying to substitute respondents herein, and such a procedure is impermissible under law and amounts to abuse of power of an investigating officer.

4. The A.P.P. filed objection stating that the respondents herein are the real second and third accused persons. Due to a mistake that occurred during investigation stage, the address of the 2nd and 3rd accused was wrongly mentioned in Form-II report. A report was filed on 11/8/2011 before the Court to correct the mistake and the correct address of the accused persons were intimated to the court. There is no need of a further investigation for making such a correction. After hearing both sides, the Teamed Magistrate allowed the petition for discharging the Respondents on the following reasons:

5. The father's name, age and address of the respondents/present accused Nos. 2 and 3 are entirely different from one mentioned in Form-II report except resemblance in names. When the learned Magistrate went through the records, the Magistrate found that at one occasion when process was ordered, the Deputy Ranger has filed a report to the effect that "no such addressee". From the voters list produced by the petitioner in C.M.P. No. 1689/2012 (1st respondent), it is clear that there, are, in fact, such persons with same name and address as that of the names mentioned in Form-II report as 2nd and 3rd Accused. The case records show that, warrant issued to arrest and produce 2nd and 3rd accused who are residing in the address shown in Form-II report were returned stating that the persons are absconding. Except the resemblance in names, there is nothing to connect the respondents with the crime. There is overwhelming proof to support the petition for discharge.

6. The learned Special Government Pleader Shri M.P. Madhavankutty submits that the learned Magistrate failed to consider legal as well as factual aspects while passing the impugned order. The Special Government Pleader pointed out that respondents took bail in pursuance of the warrant issued in the address stated in Annexure- II report seeking change of address. Thereafter, the learned Magistrate cannot take a contrary stand that respondents are not the real accused in the above case. According to the Special Government Pleader, there was no need to take bail in this matter, if they were not the real accused. The learned Special Government Pleader further submits that neither an additional report nor a further investigation report is necessary for this purpose. A report requesting to make a correction in the Form-II report is sufficient to serve the purpose.

7. I have given my anxious consideration to the contentions raised by the learned Special Government Pleader. Going by the records, it could be seen that the offence was detected on 23/5/2009 and Form-II Report (Final Report) was filed on 21/5/2010, whereas Annexure-II report, seeking a permission to correct address of the persons who were already implicated in Form-II report was filed on 11-8-2011. It is pertinent to note that this correction petition was filed after more than two years and also it was after returning of warrant stating that the accused are absconding. At this juncture, it is relevant to note that the Petitioner in C.M.P. No. 1689/2012 produced a voters list showing the photograph with name and address of the real 2nd accused

against whom warrant issued as per final report. Going by the mahazar and the statement of an occurrence witness by name Asan Bhaskaran annexed to Final Report it could be seen that voters list was shown to the said witness and he identified all the accused from the voters list. Therefore, the document produced along with Final Report (Form-II) itself shows that there is no possibility of mistaken identity. How the Deputy Ranger connected the respondents herein with the offence without conducting a further investigation particularly when persons mentioned in the Final Report are living persons and reportedly absconding. In the above context, the case of the respondents that after return of warrant repeatedly, the forest officials are trying to implicate and substitute the respondents in the place of accused Nos. 2 and 3 referred to in Form-II report appears to be more probable and believable. I am of the opinion that in a Criminal Prosecution such a substitution of a new accused by a mere correction petition, without, further investigation and consequential additional further investigation report to that effect u/s 173(8) of the Code of Criminal Procedure, is impermissible after filing of final report and after returning of warrant stating that accused are absconding. Had it been a genuine mistake? The Forest Officials could have conducted a further investigation and filed a further report for substituting the real accused much earlier.

8. The learned Special Government Pleader submits that if the prosecution is allowed to prosecute the case against the respondents, they would be able to produce more clinching evidence to prove the case against the respondents. I am not inclined to accept the said argument on the reason that Criminal Prosecution cannot be allowed to continue as an experimental exercise so as to identify the real accused during the course of trial after filing of the final report. The prosecution must have a definite case regarding the identity of the accused against whom final report has been forwarded. The substitution of a different person by a correction petition after filing of the final report when the warrant which had been issued earlier returned unexecuted stating that the person against whom warrant had been issued is absconding, is an improper procedure causing miscarriage of justice. Therefore, I find no illegality, irregularity or impropriety in the impugned order passed by the learned Magistrate. I am of the opinion that in a criminal prosecution such a substitution of a new accused by a mere correction petition, without further investigation and consequent additional further investigation report u/s 173(8), is impermissible after filing of final report u/s 173(2). The forest Officials should have borne in mind the above basic principles of investigation, while investigating offences under the Forest Act. The prosecution contended that the present accused took bail in furtherance of warrant issued in the address shown in Annexure-II report. So there after Magistrate cannot take a contrary stand that they are not the real accused person. It is true that in obedience to the warrant issued by the court, the respondents appeared before the court, took bail and thereafter pleaded for discharging them on the ground that they are substituted in the place of absconded real accused, without further investigation. When a person gets summons or

warrant requiring him to appear before the court alleging a cognizable and non-bailable offence to which he is implicated even if he is innocent or implicated erroneously, it is incumbent upon him to appear before the court, take bail and satisfy the court at the first opportunity itself as provided u/s 239 Cr.P.C. that the charge against him is groundless. It is the remedy open to an innocent accused who believes in Rule of Law. Here such an approach taken by the respondents herein cannot be taken as a reason to draw an adverse inference against them that they are the real accused and otherwise they would not have appeared before the court in obedience to the warrant and took bail.

The CrI. Revision Petition is devoid of merit. In the result, the CrI. Revision Petition is dismissed.