

Abdul Basheer Vs Abdul Khader and Others

Court: High Court Of Kerala

Date of Decision: Feb. 26, 2015

Acts Referred: Constitution of India, 1950 - Article 20

Criminal Procedure Code, 1973 (CrPC) - Section 160, 173(2), 173(8), 311, 311A

Evidence Act, 1872 - Section 45, 73

Penal Code, 1860 (IPC) - Section 420

Hon'ble Judges: K. Ramakrishnan, J.

Bench: Single Bench

Advocate: P. Venugopal and M. Revikrishnan, for the Appellant; Babu S. Nair and K. Rakesh, Advocates for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

K. Ramakrishnan, J.

The first respondent/accused in CrI.M.P. No. 1973/2014 in C.C. No. 217/2011 on the file of the Chief Judicial

Magistrate Court, Manjeri is the revision petitioner herein.

2. The case was charge sheeted by the Sub Inspector of Police, Manjeri in Crime No. 465/2011 of Manjeri police station, which was registered

on the basis of a complaint given by the defacto complainant before the Deputy Superintendent of Police, Malappuram, which was forwarded to

the concerned Station House Officer through proper channel, against the revision petitioner alleging an offence under section 420 of the Indian

Penal Code.

3. After investigation, final report was filed and the case was taken on file as C.C. No. 217/2011 on the file of the Chief Judicial Magistrate Court,

Manjeri. When the revision petitioner appeared, after hearing both sides charge was framed for the offence under section 420 of the Indian Penal

Code and the same was read over and explained to him and he pleaded not guilty. Thereafter the case was posted for evidence and summons was

issued on CWS 1 to 3. At that time, the complainant came to understand that expert opinion on the handwriting of the revision petitioner was not

obtained. So he earlier filed CrI.M.P. No. 998/2014 for sending the document for expert opinion alleging that the case cannot be proved without

that evidence. But that petition was dismissed on the ground that the application is not maintainable as the application can be filed only by the

Public Prosecutor concerned and also observed that in view of the bar under section 311A of the Code of Criminal Procedure (hereinafter

referred to as "the Code" for short) since he was not in custody during the course of investigation, such a petition cannot be entertained and

dismissed the application. Thereafter, the complainant filed Crl.M.P. No. 1973/2014 for further investigation under section 173(8) of the Code for

enabling the investigating officer to conduct investigation in respect of the letter said to have been given by the revision petitioner and that

application was allowed, which is being challenged by the revision petitioner by filing this petition.

4. Heard the counsel for the revision petitioner and the learned counsel for the first respondent.

5. The counsel for the revision petitioner submitted that the purpose for which further investigation was ordered was agitated by the petitioner by

filing Crl.M.P. No. 998/2013 which was dismissed earlier and the present petition is also filed for the same purpose which should not have been

allowed by the court below. Further, even during further investigation, in view of the bar under section 311A of the Code, the investigating agency

cannot compel the petitioner to give his handwriting or signature. So the court below was not justified in ordering further investigation under such

circumstances.

6. The counsel for the first respondent submitted that if the court feels that for the purpose of proper administration of justice further investigation is

required, the court can order further investigation. That power cannot be curtailed. Further, if further investigation is ordered, the investigating

agency can adopt all legal methods for collecting the handwriting and that can be sent for expert opinion and that will only aid the investigating

agency to come to a correct conclusion as to whether the offence alleged has been established or not and no prejudice will be caused to the

revision petitioner as well.

7. The learned Public Prosecutor supported the submission of the counsel for the first respondent.

8. The case of the defacto complainant was that there was some transaction between the revision petitioner and the first respondent, in which some

amount was obtained from the defacto complainant by the revision petitioner and he did not pay the amount and so he filed a complaint before the

Deputy Superintendent of Police, Malappuram which was forwarded to the Station House Officer, Manjeri for proper action, on the basis of

which, Annexure-A crime was registered as Crime No. 465/2011 of Manjeri police station against the revision petitioner alleging an offence under

section 420 of the Indian Penal Code. It is also an admitted fact that, after investigation, final report was filed and it was taken on file as C.C. No.

217/2011 on the file of the Chief Judicial Magistrate Court, Manjeri. Summons was issued to the accused/revision petitioner and he appeared and

charge was framed under section 420 of the Indian Penal Code and when summons was issued to the witnesses, the defacto complainant filed

Crl.M.P. No. 998/2013 for sending the alleged letter said to have been given by the revision petitioner for receipt of the amount for expert opinion

and that petition was dismissed by the learned Magistrate by Annexure-B order dated 21.5.2014 where it has been observed that the petitioner

has no right to file an application for sending the document for expert opinion by filing a petition through private counsel and only the Assistant

Public Prosecutor of the court can do the same and since final report is filed, the power under section 311A of the Code cannot be invoked as the

accused was not in custody earlier. It is thereafter that the petitioner filed the present application Crl.M.P. No. 1973/2014 for further investigation

under section 173(8) of the Code and the revision petitioner filed Annexure-B objection and the learned Magistrate by the impugned order

allowed the application, which is being challenged by the revision petitioner.

9. Section 173(8) of the Code reads as follows:

Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been

forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or

documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of

sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-

section (2).

10. Sections 311 and 311A of the Code read as follows:

311. Power to summon material witness, or examine person present:- Any Court may, at any stage of any inquiry, trial or other proceeding under

this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine

any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to

be essential to the just decision of the case.

311A. Power of Magistrate to order person to give specimen signatures or handwriting:- If a Magistrate of the first class is satisfied that, for the

purposes of any investigation or proceeding under this Code, it is expedient to direct any person, including an accused person, to give specimen

signatures or handwriting, he may make an order to that effect and in that case the person to whom the order relates shall be produced or shall

attend at the time and place specified in such order and shall give his specimen signatures or handwriting:

Provided that no order shall be made under this section unless the person has at some time been arrested in connection with such investigation or

proceeding.

11. Sections 73 and 45 of the Evidence Act read as follows:

73. Comparison of signature, writing or seal with others admitted or proved:- In order to ascertain whether a signature, writing or seal is that of the

person by whom it purports to have been written or made, any signature, writing, or seal admitted or proved to the satisfaction of the Court to

have been written or made by that person may be compared with the one which is to be proved, although that signature, writing, or seal has not

been produced or proved for any other purpose.

The Court may direct any person present in Court to writ any words or figures for the purpose of enabling the Court to compare the words or

figures so written with any words or figures alleged to have been written by such person.

45. Opinion of experts: when the Court has to form an opinion upon a point of foreign law or of science or art, or as to identity of handwriting or

finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of

handwriting or finger impressions are relevant facts. Such persons are called experts.

12. Sections 160 of the Code reads as follows:

Section 160. Police officer's power to require attendance of witnesses: (1) Any police officer making an investigation under this Chapter may, by

order in writing, require the attendance before himself of any person being within the limits of his own or any adjoining station who, from the

information given or otherwise, appears to be acquainted with the facts and circumstances of the case. And such person shall attend as so required:

Provided that no male person under the age of fifteen years or above the age of sixty five years or a woman or a mentally or physically disabled

person shall be required to attend at any place other than the place in which such male person or woman resides.

(2) The State Government may, by rules made in this behalf, provide for the payment by the police officer of the reasonable expenses of every

person, attending under sub-section (1) at any place other than his residence.

13. The defacto complainant has the right to file an application for further investigation, if the investigation was not proper and material evidence

has not been collected and if the court is satisfied that further investigation is required for proper administration of justice, the court can allow the

application as well. The locus standi in respect of filing the application for further investigation was considered by the courts in Anayara Rajendran

v. State of Kerala (Laws (KER) 2013-5-99) and Achuthanadhan v. State of Kerala (Laws (KER) 2013-8-125). Further, once investigation is

ordered for the purpose of collecting additional material to prove the prosecution case, then the police will get all the power of conducting

investigation even for applying for custody of the accused for that purpose for further questioning and collecting materials. Further, in the decision

reported in Prem Vijayan Vs. State of Kerala, , this Court has observed that acceptance of a final report will not oust the jurisdiction of the

Magistrate to take cognizance of the offences on the basis of a complaint filed by the defacto complainant. Further in the decision reported in

Reeta Nag Vs. State of West Bengal and Others, the Supreme Court has only held that the court cannot order reinvestigation and reinvestigation

can be ordered only in exceptional circumstances. Once an objection has been filed to the final report by the complainant, the court can either treat

that objection as complaint and proceed with that or order further investigation under section 173(8) of the Code.

14. The counsel for the revision petitioner submitted that, the purpose for which further investigation is now sought for was considered by the court

below while considering the application for sending it for expert earlier and it cannot over come that by ordering further investigation and it is

barred under Section 311A of the Code of Criminal Procedure as well. But it may be mentioned here that if the court has felt that further

investigation is required in the interest of justice and further material has to be collected to adjudicate the matter in the proper manner, for that

purpose further investigation can be ordered and unless it is illegal, the same cannot be interfered by the Hon"ble High Court while exercising the

power under Section 397 of the Code of Criminal Procedure. It is the prerogative of the trial court to consider whether there is any defect in the

investigation or whether further materials sought for by the investigation if any by the defacto-complainant is required for proper adjudication of the

case and after considering those aspects if court below is satisfied that further investigation is required, then court has got power under Section

173(8) of the Code of Criminal Procedure to order further investigation, as it is prerogative of the trial court magistrate on this aspect. See

Hasanbhai Valibhai Qureshi Vs. State of Gujarat and Others,

15. Further the application filed under section 311A of the Code was earlier dismissed on the ground that, the petitioner has no right to file an

application and it has to be filed by the Public Prosecutor and also he was not arrested earlier and as such by virtue of Proviso to Section 311A of

the Code of Criminal Procedure, after final report is filed, the application cannot be filed for the purpose mentioned. This was so held in the

decision reported in B.C. Radhakrishnan and Others Vs. Saju Thuruthikunnen and Another, . In the same decision relying on the decision of the

Hon"ble Supreme Court in The State (Delhi Administration) Vs. Pali Ram, , this Court has observed that, the power of the court under Section 73

and 45 of the Evidence Act is not taken away by virtue of incorporation of Section 311A of the Code of Criminal Procedure and it is for the court

to consider as to whether that is required for proper adjudication. Further in the same decision, it has been observed that, the direction can be

given to enable the same to be compared by the handwriting expert as well.

16. Further, once further investigation is ordered, the investigating agency will be getting all the powers conferred under the code for the purpose of

conducting investigation so as to probe into the materials to be collected, for which purpose the further investigation is ordered. They can issue

notice to the accused to answer the questions for that purpose. See M.N. Sreedharan and Others Vs. State of Kerala, That may include getting

the signature and handwriting of the accused as part of the investigation and it was settled by the Hon"ble Supreme Court and that will not affect

the right of the accused under Article 20 of the Constitution of India. Further, since once final report has already been filed and court has taken

cognizance of the case and accused appeared and charge has been framed, they can apply to the court under Section 73 of the Evidence Act to

get the hand writing and signature either for comparison by court or sent the same for expert opinion as well invoking the power under section 73

of the Evidence Act. They can also collect admitted hand writings available from other sources during the relevant period and forward the same

along with disputed document to expert for getting opinion through court as well.

17. So merely because an application under Section 311A of the Code of Criminal Procedure was earlier dismissed on technical ground, is not a

bar for the investigating agency to proceed with further investigation in accordance with law and collect materials required for adjudication of the

case and file supplementary report under Section 173(2) read with Section 173(8) of the Code of Criminal Procedure and it is for the court to

consider as to whether that supplementary report has to be acted upon or not. Sending the disputed letter for expert opinion as part of the

investigation cannot be said to affect the right of the accused also, as if the opinion of the expert is obtained and if it is in favour of the accused, that

may be helpful for him to prove his innocence as well. So under the circumstances, there is no merit in the submission made by the counsel for the

revision petitioner that the court below was not justified in ordering further investigation for the purpose mentioned in the petition and the same

lacks merits and the same is liable to be rejected. There is no illegality committed by the court below in passing the impugned order directing

further investigation under Section 173(8) of the Code of Criminal Procedure and the order does not call for any interference. So the revision lacks

merits and the same is liable to be dismissed.

In the result, the revision petition is dismissed. Interim order of stay is vacated and Crl.M.A. No. 6269/2014 is dismissed.

Office is directed to communicate a copy of this order to the concerned court immediately.