

MYSORE HIGH COURT

State of Mysore

Vs

Koti Poojary

Criminal Revn. Petn. No. 395 of 1963

(A.R. Somnath Iyer, J.)

20.10.1964

JUDGMENT

A.R. Somnath Iyer, J.

1. This is a revision petition presented by the State against an order made by the Sub Divisional Magistrate, Puttur, discharging the two respondents under Section 119 of the Code of Criminal Procedure in proceedings commenced under Section 109(a) of the Code of Criminal Procedure for an order that the two respondents should be called upon to furnish security for good behavior.

2. The information which was furnished to the Magistrate by the Police was that on December 22, 1962 at 5.30 a.m. the two respondents were found in the verandah of the shop of a certain Ethirajulu Chettiar by P.Ws. 1 and 2 who were doing their beat work. The evidence given by P.Ws. lands was that when they flashed their torch lights, the respondents concealed themselves behind the pillars of the verandah and that when those two constables came nearer, the respondents came out to the road and began to run but were chased by P.Ws. 1 and 2 and caught with the assistance of P.Ws. a Gurkha watchman, who was coming in the opposite direction riding on a bicycle.

3. The further evidence was that on the person of these two respondents there were at least 4 articles which were recovered a rubber belt, a cutting plier, a knife and its sheath. It is on the basis of these materials that the Magistrate was asked to make a direction that the respondents should furnish security for good behavior.

4. The Magistrate was disposed to take the view that it was not established that the respondents had made themselves liable to furnish any security under Section 109 of the Code of Criminal Procedure. He was of the view that the evidence given by P.Ws. 1 and 2 and P.W. 3, the Gurkha watchman, was by itself quite insufficient to found an order under its provisions. He further

pointed out that a certain. Ramakrishna Hegde who attested the mahazar under which the articles were stated to have been recovered from the respondents, was not examined, and in the absence of his evidence it was not safe to rely upon, the evidence of the other three witnesses.

5. Mr. N.C. Mahajan, the learned Government Pleader appearing for the State, made the criticism that the animadversions made by the Magistrate against the testimony of P.Ws. 1, 2 and 3 were uncalled for. In para 5 of the order made by the Magistrate, he observed :

"So far as the evidence of P.W. 3 is concerned, it is being attacked by the learned counsel for the respondents that he is at the mercy of the Police and he requires the help of the Police by nature of his work. There is some truth with regard to his suggestion. It is not rather out of place to observe that P.W. 3 is interested in giving evidence which is favorable to the Police. It is observed by many of the High Courts of this country that it is unsafe to rely solely on the evidence of the Police officials especially when it is a case where the complaint is laid by the Police for binding over under security, proceedings."

In my opinion, Mr. Government Pleader is right in advancing the argument that the Magistrate was not right in thinking that the evidence of P.W. 3 or the evidence of P.Ws. 1 and 2 was liable to be discarded for the reasons stated by the Magistrate. There was no material on the basis of which the Magistrate could have come to the conclusion that P.W. 3 was a person who would oblige the police witnesses' P.Ws. 1 and 2 and give false evidence. P.W. 3 is a Ghurka watchman employed by some private agencies and the mere fact that he performs duties as. night watchman can hardly be a sufficient reason for reaching the conclusion that he would be 'at the, mercy' of the police as stated by the Magistrate and would therefore be willing to give false evidence just to oblige them. Likewise I am willing to accede to the argument advanced by Mr. Government Pleader that the Magistrate was not right in thinking that the testimony of the police witnesses is always insufficient to found an order under Chap. VIII of the Code of Criminal Procedure. In the very nature of things in a case like this-where the two respondents were found standing in the verandah of a shop at 3-30 a.m. it is impossible for any one to expect any disinterested witnesses to be present on the occasion to corroborate the testimony of the two constables who gave evidence about the presence of the two respondents at that hour in the verandah of the shops. The question whether the testimony of a police witness is by itself sufficient or trustworthy is one upon which no one can formulate-any rule of universal application. The testimony of a police witness is not liable to be rejected merely on the ground that he belongs to the police force provided it has otherwise the characteristic of credit-worthy evidence. The hazardous generalization made by the Magistrate that there should always be independent testimony to support an application for security under Chap. VIII of the Code of Criminal' Procedure invites the denunciation that it is unreasonable. In my opinion, the Magistrate was not right in making an order of discharge merely on the ground that P.Ws. 1 and 2 were police witnesses or merely on the ground that P.W. 3 is a night Ghurka-watchman.

6. If this was all that could be said about this-matter, this revision petition should succeed. But

Mr. Ganapathi Bhat appearing for the respondents has advanced the argument that even if the testimony of these 3 witnesses is accepted, there would be no ground for making an order against the respondents since it was not established (that the case fell within clause (a) of Section 109 of the Code of Criminal Procedure. Section 109 reads :

109. "Whenever a Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class receives information-

(a) that any person is taking precautions to conceal his presence within the local limits of such Magistrate's jurisdiction, and that there is reason to believe that such person is taking such precautions with a view to committing any offence, or

(b) that there is within such limits a person who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself, such Magistrate may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behavior for such period, not exceeding one year, as the Magistrate thinks fit to fix."

7. It is not contended on behalf of the State that the present case is one which falls within clause (b). The case presented before the Magistrate was that the case fell within clause (a). That being so, what should have been established was that the respondents were taking precautions to conceal their presence and that there was reason to believe that such concealment was with a view to the commission of an offence. If the evidence of P.Ws. 1 and 2 is believed, it follows that when the respondents saw them from a distance they did try to conceal their presence which they did by standing behind the pillars of the varandah where 'they were standing. So it may be said that the first ingredient necessary to bring the accused within clause (a) was established. But what had further to be established was the second ingredient that that concealment had for its aim the committing of an offence. The argument constructed by Mr. Bhat was that even according to the evidence of P.Ws. 1 and 2, the concealment by the respondents was not with a view to commit any offence but with a view to conceal themselves from the two constables so that they might avoid the unnecessary embarrassment which they apprehended by their presence being noticed by the two constables. In support of this argument, Mr. Bhat depended upon a decision of Somasundram, J. in *Thandavarayan In re (1955) 2 Mad LJ 859* in which the elucidation made was that the mere fact that a person who was observed to have been standing on the foot-steps of a shop at 12.15 a.m. with his face covered with a white cloth when the police were going on their night rounds and not even the fact that when he was so seen by the policemen he moved briskly and afterwards ran before he was apprehended, would not be a ground for thinking that there was reason to believe that there was any concealment with a view to commit an offence. Mr. Bhat pointed out that just as in the present case the appellant in the Madras case was also having on his person an iron bar when he was arrested and brought to the station. Somasundram, J. was disposed to take the view that neither the fact that the appellant was found on the foot-steps of a shop at an odd hour in the night nor the fact that he covered his face with a cloth when he was observed by the policemen nor the fact that he walked away briskly or was apprehended after he

was chased, could support the view that there was any concealment within the meaning of clause (a) of Section 109 Code of Criminal Procedure.

8. In my opinion, in order to bring a case within clause (a) of Section 109 of the Code of Criminal Procedure, two ingredients should be established. The first is that there was an attempt on the part of the person against whom proceedings are commenced to conceal his presence. The second is that there is reason to believe that such concealment was with view to committing an offence. That being so, even if there is an attempt at concealment of the presence of the person, so long as there is no reason to believe that such concealment is attributable to an endeavour to commit an offence, the matter would not be one falling within clause (a).

9. The question whether both these two ingredients were established in a given case is for the court before which the proceedings are commenced to determine. In the case before me the Magistrate was inclined to think that neither of these two ingredients had been established. I must say that I do not find it possible to concur in the view taken by the Magistrate that the first ingredient was not established. I have no doubt in my mind that the evidence of P.Ws. 1 and 2 more than abundantly established the attempt on the part of the respondents to conceal their presence when they saw the two constables approaching them with their torch lights flashed on them. But the question is, whether such concealment had for its object the commission of an offence I find it extremely difficult to say that such was the object of the concealment. As Mr. Ganapati Bhat has rightly urged, it is only reasonable to say that the purpose of the concealment was that the respondents may not be seen by the constables. Mr. Government Pleader, however, urged that it such was the purpose of concealment, the inference which should be drawn is that they concealed themselves in that way so that they might be free to carry on with their intended burglary after the policemen proceeded along with their night duty, beyond the shop of Ethirajalu Chettiar. It may be that there is something to be said in this submission made by the Government Pleader, but I am disposed to take the view that it is more in the nature of a speculation to suggest that the respondents intended to commit an offence and that they concealed themselves behind the pillars of the varandah so that they might continue or commence their burglary operations after the policemen passed along. If clause (a) of Section 109 requires that there should be reason to believe that the concealment was with a view to committing an offence, it means that there should be material on the basis of which that deduction is possible, and any speculation in regard to that matter is surely impermissible.

10. While I do not share the view taken by the Magistrate that the evidence of P.Ws. 1 to 3 is liable to be discarded on the ground stated by him and I have no doubt in my mind that their evidence to the extent it goes is not proved to be untrustworthy, I take the view that it was not established in this case that the concealment by the respondents was with a view to committing an offence.

11. In that view of the matter and adhering to the familiar principle that an order of discharge,

should not be disturbed by this Court unless it is demonstrated to be obviously improper, I decline to disturb the order made by the Magistrate. This revision petition is dismissed.
Petition dismissed.