N THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

WEDNESDAY, THE 24TH DAY OF MAY 2023 / 3RD JYAISHTA, 1945

CRL.MC NO. 3922 OF 2023

AGAINST CRL.M.P. NO.629/2023 IN SC NO.517/2022 ON THE FILE OF THE 1ST ADDITIONAL SESSIONS COURT, THRISSUR
CRIME NO.268/2021 OF OLLUR POLICE STATION

PETITIONER/2ND ACCUSED :

SUNDARAN
AGED 61 YEARS
S/O RAGHAVAN, KAILATHUVALAPPIL HOUSE,
THEMALIPPADAM DESOM, EDAKUNNI VILLAGE,
THRISSUR DISTRICT, PIN – 680306

BY ADV RAJESH CHAKYAT

RESPONDENT/COMPLAINANT-STATE :

1 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, PIN – 682031

2 THE SUB INSPECTOR OF POLICE
OLLUR POLICE STATION,
THRISSUR DISTRICT, PIN - 680360

SRI VIPIN NARAYAN, SR PP

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON 24.05.2023, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

"CR"

ORDER

The petitioner herein is the 2nd accused in S.C. No.517/2022 on the file of the First Additional Sessions Court, Thrissur. In the aforesaid case, he is accused of having committed the offences punishable under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for brevity, "the Act"). The challenge in this petition is mounted against the order dated 05.04.2023 in Crl. M.P.No. 629/2023, by which the application filed by the learned Public Prosecutor to produce and mark the photocopy of a document was allowed.

2. Before delving into the merit of the order impugned, short facts which led to the passing of the order are required to be stated:

The prosecution allegation is that the petitioner was acting as the caretaker of the house owned by a certain Vincent. The allegation is that the 1st accused, for the purpose of sale, procured 27.530 kg of Ganja from Tamil Nadu, and the same was entrusted to the petitioner. The petitioner is alleged to have kept the contraband on the Veranda of the house. Based on

source information, a search was conducted, and the contraband articles were allegedly seized.

3. Trial commenced, and during the fag end of examination of the detecting officer, who was being examined as PW1, an application was filed by the prosecution to produce a photocopy of the document prepared by the investigating officer at the time of conducting the search of the house. The said document disclosed that the detecting officer had informed the accused in writing that he had the right to insist on the presence of a Judicial Magistrate or a Gazetted Officer to witness the search. The petitioner answered in the affirmative, and his signature was collected. However, the said document was not produced along with the final report. The application was filed purportedly under Section 65(c) of the Indian Evidence Act, stating that the original of the record is lost and requesting that the prosecution be permitted to place on evidence a true photocopy of the same.

4. The petitioner filed a detailed objection objecting to the course adopted by the prosecution. He contended that in none of the prosecution records or in the statement of the witnesses reference is made to any such document prepared under Section 50 of the Act. It was also contended that the document was introduced to fill up the lacunae in the prosecution case.

5. The Sessions Judge rejected the objection raised by the petitioner and allowed the prosecution to mark the document by holding that the genuineness of the document can be looked into at a subsequent stage.

6. Sri. Rajesh Chakyat, the learned counsel appearing for the petitioner, submitted that no reasons whatsoever have been stated by the learned Additional Sessions Judge while proceeding to allow the application. All that is stated is that the genuineness of the document can be looked into at a subsequent stage, and only the admissibility of the document is required to be decided at the stage when the document was tendered in evidence. According to the learned counsel, the contention of the petitioner that the document is fabricated and brought into existence to set up false evidence as against the petitioner was not considered by the learned Sessions Judge.

7. The learned Public Prosecutor would rely on the law laid down by the Apex Court in **Central Bureau of Investigation v. R.S Pai and another** [2002 (5) SCC 82], and it was argued that there is no prohibition in producing the documents at a subsequent stage. According to the learned counsel, even if some mistake is committed by the Investigating Officer in

not producing the relevant documents at the time of submitting the report or the charge sheet, it would be open to the investigating officer to produce the same with the permission of the court. It is further submitted that if the contention of the petitioner is that the document is fabricated, it is open to the petitioner to raise his contentions before the trial court at the appropriate stage, and there is no reason to suspect that the learned Sessions Judge shall not consider his contentions in accordance with the law. Finally, it is submitted that the document only shows that the petitioner was informed of his right to be searched in the presence of a Gazetted Officer and that the petitioner had availed the said right.

8. I have considered the submissions advanced. The records would reveal that while the seizing officer was being examined in Court, it was noticed by the learned Public Prosecutor that a document relied on by the prosecution was not placed before the court. The original of the record was also missing. The first question is whether there is any embargo in following the said course.

9. In **R.S. Pai** (supra), the above issue had come up for consideration, and the Apex Court answered the question as under:

> **7.** From the aforesaid sub-sections, it is apparent that normally, the

> investigating officer is required to produce all the relevant documents at the time of submitting the charge-sheet. At the same time, as there is no specific prohibition, it cannot be held that the additional documents cannot be produced subsequently. If some mistake is committed in not producing the relevant documents at the time of submitting the report or the charge-sheet, it is always open to the investigating officer to produce the same with the permission of the court. In our view, considering the preliminary stage of prosecution and the context in which the police officer is required to forward to the Magistrate all the documents or the relevant extracts thereof on which the prosecution proposes to rely, the word "shall" used in sub-section (5) cannot be interpreted as mandatory, but as directory. Normally, the documents gathered during the investigation upon which the prosecution wants to rely are required to be forwarded to the Magistrate, but if there is some omission, it would not mean that the remaining documents cannot be produced subsequently. Analogous provision under Section 173(4) of the Code of Criminal Procedure, 1898 was considered by this Court in *Narayan Rao* v. *State of A.P.* [AIR 1957 SC 737] and it was held that the word "shall" occurring in sub-section (4) of Section 173 and sub-section (3) of Section 207-A is not mandatory but only directory. Further, the scheme of sub-section (8) of Section 173 also makes it abundantly clear that even after the charge-sheet is submitted, further investigation, if called for, is not precluded. If further investigation is not precluded then there is no question of not permitting the prosecution to produce additional documents which were gathered prior to or subsequent to the investigation. In such cases, there cannot be any prejudice to the accused. Hence, the impugned order passed by the Special Court cannot be sustained.

10. As held by the Apex Court, if some mistake is made by the investigating officer by not producing some document of relevance at the time of submitting the report or the charge sheet, it is always open to the

investigating officer to produce the same with the permission of the court. The next question is whether the course adopted by the Sessions Judge to allow the document to be received on file warrants interference. In this context, it would be profitable to refer to the law laid down in the above context by the Hon'ble Supreme Court.

11. In **Bipin Shantilal Panchal v. State of Gujarat** [AIR 2001 SC 1158], the Hon'ble Supreme Court noted the archaic practice before the trial court with regard to the raising of objections at the time of admission of material in evidence during the evidence stage and had observed as under:

> "13. It is an archaic practice that during the evidence collecting stage, whenever any objection is raised regarding admissibility of any material in evidence the court does not proceed further without passing order on such objection. But the fallout of the above practice is this: Suppose the Trial Court, in a case, upholds a particular objection and excludes the material from being admitted in evidence and then proceeds with the trial and disposes of the case finally. If the appellate or revisional court, when the same question is re-canvassed, could take a different view on the admissibility of that material in such cases the appellate court would be deprived of the benefit of that evidence, because that was not put on record by the Trial Court. In such a situation the higher court may have to send the case back to the Trial Court for recording that evidence and then to dispose of the case afresh. Why should the trial prolong like that unnecessarily

> on account of practices created by ourselves. Such practices, when realised through the course of long period to be hindrances which impede steady and swift progress of trial proceedings, must be recast or re-moulded to give way for better substitutes which would help acceleration of trial proceedings.
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> 14. When so recast, the practice which can be a better substitute is this: Whenever an objection is raised during evidence taking stage regarding the admissibility of any material or item of oral evidence the Trial Court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the court finds at the final stage that the objection so raised is sustainable the Judge or Magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. (However, we make it clear that if the objection relates to deficiency of stamp duty of a document the court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed"

12. However, in **Criminal Trials Guidelines Regarding Inadequacies and Deficiencies, In Re. v. State of Andra Pradesh and Ors**. [(2021) 10 SCC 598], a three Judge Bench of the Apex court had occasion to hold that the judgment rendered in **Bipin** (supra) shall not be treated as binding. The observations of the Apex Court can be found in paragraphs No. 12 to 15 of the judgment, which reads as under:

12. It was pointed out by the learned Amici Curiae that the practice adopted predominantly in all trials is guided by the decision of this Court in *Bipin Shantilal Panchal* v. *State of Gujarat* [*Bipin Shantilal Panchal* v. *State of Gujarat*, (2001) 3 SCC 1] with respect to objections regarding questions to be put to witnesses. This Court had termed the practice of deciding the objections, immediately as "*archaic*" and indicated what it felt was an appropriate course : (SCC pp. 5-6, paras 13-15)

"*13*. It is an archaic practice that during the evidence-collecting stage, whenever any objection is raised regarding admissibility of any material in evidence the court does not proceed further without passing order on such objection. But the fallout of the above practice is this : Suppose the trial court, in a case, upholds a particular objection and excludes the material from being admitted in evidence and then proceeds with the trial and disposes of the case finally. If the appellate or the revisional court, when the same question is recanvassed, could take a different view on the admissibility of that material in such cases the appellate court would be deprived of the benefit of that evidence, because that was not put on record by the trial court. In such a situation the higher court may have to send the case back to the trial court for recording that evidence and then to dispose of the case afresh. Why should the trial prolong like that unnecessarily on account of practices created by ourselves. Such practices, when realised through the course of long period to be hindrances which impede steady and swift progress of trial proceedings, must be recast or remoulded to give way for better substitutes which would help acceleration of trial proceedings.

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substitute is this : Whenever an objection is raised during evidence taking stage regarding the admissibility of any material or item of oral evidence the trial court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the court finds at the final stage that the objection so raised is sustainable the Judge or Magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. (However, we make it clear that if the objection relates to deficiency of stamp duty of a document the court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed.)

15. The above procedure, if followed, will have two advantages. First is that the time in the trial court, during evidence-taking stage, would not be wasted on account of raising such objections and the court can continue to examine the witnesses. The witnesses need not wait for long hours, if not days. Second is that the superior court, when the same objection is recanvassed and reconsidered in appeal or revision against the final judgment of the trial court, can determine the correctness of the view taken by the trial court regarding that objection, without bothering to remit the case to the trial court again for fresh disposal. We may also point out that this measure would not cause any prejudice to the parties to the litigation and would not add to their misery or expenses."

13. It was argued by the Amici Curiae that the procedure, whereby the courts record answers to all questions, regardless of objections, leads to prolonged and lengthy cross-examination, and

more often than not, irrelevant facts having no bearing on the charge or the role of the accused, are brought on record, which often result in great prejudice. It is pointed out that due to the practice mandated in *Bipin Shantilal Panchal* [*Bipin Shantilal Panchal* v. *State of Gujarat*, (2001) 3 SCC 1] , such material not only enters the record, but even causes prejudice, which is greatly multiplied when the appellate court has to decide the issue. Frequently, given that trials are prolonged, the trial courts do not decide upon these objections at the final stage, as neither the counsel addresses arguments. Therefore, it is submitted that the rule in *Bipin Shantilal Panchal* [*Bipin Shantilal Panchal* v. *State of Gujarat*, (2001) 3 SCC 1] requires reconsideration.

14. During a trial, in terms of Section 132, every witness is bound to answer the questions she or he is asked; however, that is subject to the caveat that he or she is entitled to claim silence, if the answers incriminate him or her, by virtue of Article 20(3) of the Constitution. Every Judge who presides over a criminal trial, has the authority and duty to decide on the validity or relevance of questions asked of witnesses. This is to be found in Section 148 of the Evidence Act, which reads as follows:

"**148. *Court to decide when question shall be asked and when witness compelled to answer***.—If any such question relates to a matter not relevant to the suit or proceeding, except insofar as it affects the credit of the witness by injuring his character, the court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following considerations—

(1) such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies;

(2) such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies;

(3) such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence;

(4) the Court may, if it sees fit, draw, from the witness's refusal to answer, the inference that the answer if given would be unfavourable."

15. Apart from Section 148, there are other provisions of the Evidence Act (Sections 149-154) which define the ground rules for cross-examination. During questioning, no doubt, the counsel for the party seeking cross-examination has considerable leeway; cross-examination is not confined to matters in issue, but extends to all *relevant facts*. However, if the court is not empowered to rule, during the proceeding, whether a line of questioning is relevant, the danger lies in irrelevant, vague and speculative answers entering the record. Further, based on the answers to what (subsequently turn out to be irrelevant, vague or otherwise impermissible questions) more

> questions might be asked and answered. If this process were to be repeated in case of most witnesses, the record would be cluttered with a jumble of irrelevant details, which at best can be distracting, and at worst, prejudicial to the accused. Therefore, this Court is of opinion that the view in *Bipin Shantilal Panchal* [*Bipin Shantilal Panchal* v. *State of Gujarat*, (2001) 3 SCC 1] should not be considered as binding. The Presiding Officer therefore, should decide objections to questions, *during the course of the proceeding, or failing it at the end of the deposition of the witness concerned*. This will result in de-cluttering the record, and, what is more, also have a salutary effect of preventing frivolous objections. In given cases, if the court is of the opinion that repeated objections have been taken, the remedy of costs, depending on the nature of obstruction, and the proclivity of the line of questioning, may be resorted to. Accordingly, the practice mandated in *Bipin Shantilal Panchal* [*Bipin Shantilal Panchal* v. *State of Gujarat*, (2001) 3 SCC 1] shall stand modified in the above terms.

13. The Apex Court was of the opinion that the view in **Bipin** (supra) should not be considered as binding, and the Presiding Officer has to decide objections to questions during the course of the proceeding or failing it at the end of the deposition of the witness concerned. This will result in de-cluttering the record and, what is more, also have a salutary effect of preventing frivolous objections. I find that the learned Sessions Judge has acted strictly in terms of the directions issued by the Apex Court. The document has only been tendered in evidence, and it has been received

on file, subject to the objection raised by the petitioner, and its genuineness and veracity will be dealt with at the trial stage.

14. Having considered the entire facts, I do not think that any interference is warranted to the order passed by the learned Sessions Judge. It is made clear that it would be open to the petitioner to raise all available contentions, including that there is no reference to the document in the earlier records and that the said document has been brought into existence to substantiate that the mandatory formalities under Section 50 have been complied with. The learned Sessions Judge may either accept or eschew the evidence after considering the merits of the contentions advanced by both sides at the time of the final hearing. By adopting this course, no prejudice would be caused to the accused.

In that view of the matter, I am of the considered opinion that the impugned order does not warrant any interference.

This Crl.M.C will stand dismissed.

Sd/-

RAJA VIJAYARAGHAVAN V,
JUDGE

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APPENDIX OF CRL.MC 3922/2023

PETITIONER ANNEXURES :

Annexure 1	A TRUE COPY OF THE F.I.R IN CRIME NO.268/2021 OF OLLUR POLICE STATION
Annexure 2	A TRUE COPY OF THE FINAL REPORT IN CRIME NO.268/2021 OF OLLUR POLICE STATION
Annexure 3	A TRUE COPY OF THE CRL.M.P.NO.629/2023 IN S.C.NO.517/2022 DATED 13.02.2023 AND THE DOCUMENT ATTACHED
Annexure 4	A TRUE COPY OF THE OBJECTION FILED BY THE PETITIONER IN CRL.M.P.NO.629/2023 IN S.C.NO.517/2022
Annexure 5	A TRUE COPY OF THE OBJECTION FILED BY THE 1ST ACCUSED IN CRL.M.P.NO.629/2023 IN S.C.NO.517/2022
Annexure 6	A TRUE COPY OF THE ORDER DATED 05.04.2023 IN CRL.M.P.NO.629/2023 IN S.C.NO.517/2022 ON THE FILE OF I ADDITIONAL SESSIONS COURT, THRISSUR