IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE BECHU KURIAN THOMAS

THURSDAY, THE 23RD DAY OF FEBRUARY 2023 / 4TH PHALGUNA, 1944

CRL.MC NO. 5515 OF 2019

CRIME NO.400/2010 OF Kelakom Police Station, Kannur

SC 602/2012 OF ADDITIONAL SESSIONS COURT - III, THALASSERY

PETITIONER/ACCUSED:

THACHANALIL SHYJU
AGED 42 YEARS, S/O MATHEW,
THACHANALIL HOUSE,
KELAKAM AMSOM, SANTHIGIRI,
KANNUR DISTRICT-670215.

BY ADVS.
SRI.V.JOHN SEBASTIAN RALPH
SRI.V.JOHN THOMAS
SRI.B.DEEPAK
SRI. RALPH RETI JOHN
SRI.VISHNU CHANDRAN
KUM. KEERTHANA SUDEV

RESPONDENT/COMPLAINANT:

STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA ERNAKULAM, COCHIN-31.

SRI.VIPIN NARAYAN, PUBLIC PROSECUTOR

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 14.02.2023, THE COURT ON 23.02.2023 PASSED THE FOLLOWING:

"C.R."

BECHU KURIAN THOMAS, J.

Crl.M.C.No.5515 of 2019

Dated this the 23rd day of February, 2023

ORDER

The issue raised for consideration in this petition is whether the prosecution can produce an additional document after completing the prosecution evidence.

2. Petitioner is indicted for murder in S.C. No.602 of 2012 on the files of the Additional Sessions Court-III, Thalassery. The prosecution alleges that on Christmas eve in the year 2010, petitioner caused the death of one Sri. Sathyan and also attempted to murder PW2 and thereby committed the offences punishable under sections 302 and 307 of the Indian Penal Code, 1860.

3. After the prosecution witnesses were examined, two applications were filed by the Public Prosecutor as CMP No. 4274/2019 and CMP No. 4275/2019 under section 91 and section 311 of the Cr.P.C, respectively. In the first of the applications, prosecution sought to examine the Sub Inspector of Police of Kelakam Police Station as an additional witness while in the latter application, they sought the production of a certified copy of FIR and First Information Statement in crime No. 54 of 2009 of Kelakam Police Station.

4. According to the prosecution, the motive for the crime in the case under

trial was a previous incident of restraint and assault by the accused that occurred on 19.04.2009, for which FIR No.54 of 2009 was registered. The prosecution further contended that, instead of producing FIR No.54 of 2009, by a bonafide mistake, FIR No.53 of 2009 was produced and marked to prove the motive. The prosecution prayed that the said document was a vital piece of evidence to prove its case, and hence it was necessary to issue summons to the Sub Inspector of Police who registered FIR No.54 of 2009 of Kelakam Police Station to examine him and also to direct production of the said document.

5. The accused objected to the application and pleaded that the prosecution is attempting to bring about a change in the prosecution case, and if the document is permitted to be brought on record, it will prejudice the defence case.

6. By the impugned order, the learned Sessions Judge allowed the application after observing that the additional evidence sought to be produced is essential to render a just decision in the case. It was also observed by the learned Sessions Judge that the attempt of the prosecution was not to fill up any lacuna but only to tender and mark the correct documents and whether the additional documents will prove the motive for the crime or not can be decided only subsequently.

7. Sri. John S. Ralph the learned Counsel for the Petitioner vehemently contended that the defence had put questions to the witnesses, especially PW2,

based upon the document produced as FIR No.53 of 2009 and that there was no mistake in producing the said document, as PW2 himself was a victim in the aforesaid crime. The learned Counsel argued that the entire defence evidence was based upon the alleged motive relying upon FIR No.53 of 2009. However, after realising that the prosecution failed to prove the alleged motive, they are attempting to bring in new evidence for varying the prosecution case. It was further submitted that on an earlier occasion also, the prosecution had sought production of an additional document and despite the objection raised by the defence, the court had allowed the same. The learned Counsel submitted that the prosecution's attempt was only to delay the proceedings further and to overcome the lacuna in its case, which is not permissible under law.

8. Sri. Vipin Narayan, learned Public Prosecutor on the other hand contended that the failure to produce FIR No.54 of 2009 was a bonafide mistake since, instead of the said document, FIR No.53 of 2009 was produced. The prosecutor further pointed out that the mistake arose since the FIR produced also related to an incident between the accused and the deceased and therefore it was a bonafide mistake. According to the learned Public Prosecutor, the general rule that the prosecution has after investigation, crystalized its case is subject to an exception that if the prosecution had mistakenly failed to produce the document, the court could permit such document to be brought on record. Reliance was placed on the decision in **Central Bureau of Investigation v.**

R.S.Pai and Another [(2002) 5 SCC 82].

9. Petitioner is being prosecuted for the offence of murder. Admittedly the prosecution had completed its evidence. During the trial, one of the injured witnesses was examined as PW2. He deposed that in the year 2009 he was brutally assaulted by the accused and a prior enmity is the reason for the said assault. The said witness had also referred to FIR No.53 of 2009 and stated that the reason for the enmity is based upon the said incident in the aforesaid crime. However when the investigating officer, gave his evidence, he stated that the deceased and the injured were the accused in FIR No.54 of 2009 of Kelakam police station. Therefore in order to prove the motive for the offence, one of the vital pieces of evidence is FIR No.54 of 2009. However, what was produced before the court and marked in evidence was FIR No.53 of 2009 instead of FIR No.54 of 2009. Unfortunately, the prosecution is alleged to have produced and marked only FIR No.53 of 2009, and now they want to produce and mark FIR No.54 of 2009.

10. It is trite that the prosecution cannot fill up any lacuna during the trial. Reference can be made to a recent decision in **Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal and Others** [(2020) 7 SCC 1].

11. However, the term lacuna cannot be interpreted to mean the deficiency of the prosecutor. The term lacuna means an inherent defect or an inherent flaw in the prosecution case. The lacuna that cannot be permitted to be

filled up can only mean the inherent flaw or defect in the prosecution case. A defect in the prosecution case is not the equivalent of a human error committed by the prosecution during the evidence stage either in producing relevant material or in eliciting answers. An oversight on the part of the prosecutor cannot be termed as a lacuna in the prosecution case. The principle that prosecution is not permitted to fill up a lacuna in its case therefore cannot be extended to mean those errors committed during the conduct of a trial, brought about on account of human frailties or mistakes.

12. In this context it is relevant to refer to the judgment in **Rajendra Prasad v. Narcotic Cell through its Officer-in-charge, Delhi** [(1999) 6 SCC 110]. In the said decision the Supreme Court held that no party in a trial could be foreclosed from correcting errors and that if proper evidence was not adduced or relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting the said mistake to be rectified. The following observations from the aforesaid judgment are apt in the present circumstances;

> *"Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal court is*

administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better."

13. Similarly, in the decision in **P.ChhaganLal Daga v. M. Sanjay Shaw** [(2003) 11 SCC 486] the Supreme Court had held that "the power to receive evidence in exercise of Section 311 of the Code could be exercised "*even if evidence on both sides is closed*" *and such jurisdiction of the Court is dictated by the exigency of the situation and fair play"*. It was also observed that the only factor which should govern the court in the exercise of powers under Section 311 should be whether such material is essential for a just decision in the case. Even a reading of Section 311 of the Code would show that Parliament has studded the said provision lavishly with the word "any" at different places indicating the widest range of powers conferred on the court in that matter.

14. Apart from the above, it is worthwhile to observe that when the prosecution fails to produce a document due to a mistake, an exception can be carved out from the general rule that the prosecution cannot be permitted to fill up a lacuna. In the decision in **Central Bureau of Investigation v. R.S.Pai and Another** [(2002) 5 SCC 82] the Supreme Court held that it was open for the investigating officer to produce relevant documents if they had been omitted to be produced by a bonafide mistake. The following observations are relevant. "*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 investigation 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 police officer is required to forward to the Magistrate, all the documents or the relevant extracts thereof on which 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…….. 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 investigation."

15. Thus there is no embargo on the production of additional documents during a trial if they are essential for arriving at a proper decision. If the requirements of justice command the production of such a document, the trial judge can permit such production, based on principles of fair play and good sense. No fetter can be placed on the right of the party to produce such a document.

16. On a perusal of the deposition of PW2 and on a consideration of the circumstances of the case, I am satisfied that the omission to produce FIR No.54 of 2009 was a bonafide mistake which requires to be rectified. Fair play and good sense demand that the production of a document purported to be vital is permitted. I am satisfied that the omission to produce FIR No.54 of 2009 is a bonafide mistake committed by the investigating agency as well as the prosecution and the accused cannot be permitted to take advantage of the said omission. The reasons stated in the impugned order for allowing the application under section 311 of Cr.P.C is totally tenable and does not call for any interference.

17. In view of the above, this Crl.M.C is devoid of any merit and is hence dismissed. However, it is clarified that if the prosecution examines any witnesses or produces any documents, the accused will be at liberty to recall the witnesses already examined for cross-examination, if so advised. Taking into consideration the fact that the crime is of the year 2012, the learned Sessions Judge shall take appropriate steps to complete the trial and dispose of the case in a time-bound manner preferably within three months from today.

Sd/-

BECHU KURIAN THOMAS
JUDGE

vps

APPENDIX OF CRL.MC 5515/2019

PETITIONER'S/S' ANNEXURES:

ANNEXURE 1	**COMMON ORDER DATED 27.07.2019 IN CRL.M.P.NO.4274/2019 AND 4275/2019 IN S.C.NO.602/2012 ON THE FILES OF ADDL.SESSIONS COURT III,THALASSERY.**
ANNEXURE 2	**PETITION FILED BY THE PROSECUTION U/S 311 CRPC.**
ANNEXURE 3	**OBJECTION FILED BY THE DEFENCE**
ANNEXURE 4	**TRUE COPY OF THE DEPOSITION NO.PW2.**
ANNEXURE 5	**TRUE COPY OF THE FIR IN CRIME NO-53/2009 OF KELAKOM POLICE STATION.**
ANNEXURE 6	**TRUE COPY OF THE YADASTHU AND THE LIST OF WITNESS IN S.C.NO-602/2012 ON THE FILE OF THE ADDITIONAL SESSIONS COURT III THALASSERRY**