

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE BECHU KURIAN THOMAS

TUESDAY, THE 5TH DAY OF JULY 2022 / 14TH ASHADHA, 1944

OP(CRL.) NO. 257 OF 2022

CRIME NO.297/2017 OF NEDUMBASSERY POLICE STATION, ERNAKULAM
AGAINST SC NO.118/2018 OF ADDITIONAL SPECIAL SESSIONS COURT
(SPE/CBI)-III, ERNAKULAM

PETITIONER:

STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR
HIGH COURT OF KERALA
ERNAKULAM, PIN - 682031

BY ADVS.

SRI. T.A.SHAJI, DIRECTOR GENERAL OF PROSECUTION
SRI. P.NARAYANAN, ADDL.PUBLIC PROSECUTOR
SRI.SAJJU.S., SENIOR G.P.

RESPONDENT/COMPLAINANT:

1 XXXX (VICTIM)

*2 P.GOPALAKRISHNAN @ DILEEP
AGED 53 YEARS,
PADMA SAROVARAM HOUSE,
KOTTARAKADAVU, ALUVA,
ERNAKULAM DISTRICT

(*ADDL.R2 IS IMPEADED AS PER ORDER DATED
01/07/2022 IN IA 2/2022 IN OP(CRL)NO.257/2022)

BY ADVS.
SRI.B.RAMAN PILLAI (SR.)
SMT.T.B.MINI
SRI.PHILIP T.VARGHESE
SRI.V.AJAKUMAR
SMT.ACHU SUBHA ABRAHAM
SMT.V.T.LITHA
SMT.K.R.MONISHA
SRI.ARJUN RAJA P.C.

O.P.(CrI.) No.257/22

-:2:-

SMT.NITYA R.
SRI.SUJESH MENON V.B.

THIS OP (CRIMINAL) HAVING COME UP FOR ADMISSION ON
01.07.2022, THE COURT ON 05.07.2022 DELIVERED THE
FOLLOWING:

"C.R."

BECHU KURIAN THOMAS, J.

O.P.(Cri.) No.257 of 2022

Dated this the 5th day of July, 2022

JUDGMENT

A request to forward an electronic document to the forensic lab for analysis was declined by the impugned order. The document in issue is in the custody of the court, in the pending trial and was already subjected to analysis. The request of the investigating officer to forward the electronic document for examination was made after the court had permitted the conduct of a further investigation into the alleged crime. Terming the rejection as a restriction on the powers of investigation, the State has preferred this original petition.

2. An actress of repute is alleged to have been sexually assaulted on the night of 17th February 2017 in a moving car. The prosecution alleges that during the commission of the alleged brutality, accused had also taken a video of the assault on a mobile phone which was later transferred to a memory card. The memory card containing the videos was subjected to a forensic examination

during the investigation. After the final report was filed, since the copy of the memory card was not furnished to the accused as it contained obscene videos, the eighth accused challenged the refusal. Finally, the Supreme Court by judgment in **P.Gopalkrishnan Alias Dileep v. State of Kerala and Another** [(2020) 9 SCC 161], held that the content of the memory card is an electronic record and ought to be regarded as a document. However, taking note of the privacy of the victim and her identity, the trial court was directed to provide an opportunity for inspection of the document for an effective defence during the trial and also directed a cloned copy to be made and kept with the Central Forensic Science Laboratory.

3. The document was again sent to the Forensic Laboratory, as directed by the Supreme Court for making the cloned copy and report was given to the Special Court. Thereafter, trial commenced before the Special Sessions Court. Numerous witnesses were examined and several documents were also marked. The memory card containing the obscene videos was marked as Ext.P262 and the report as Ext.P263. The Examiner of the said document was examined as PW192 too. On the day the case was posted for examining the Investigating Officer, the prosecution informed the court that they are commencing a further investigation due to certain revelations. Though the trial was being carried out under timelines issued by the Supreme

Court, the Special Court granted permission for further investigation. On 03-06-2022, the High Court of Kerala extended the time for further investigation till 15-07-2022.

4. In the meantime, the Investigating Officer come across the report dtd 29-01-2020 issue from the Forensic Laboratory indicating a change in the hash value of the electronic record. On 04-04-2022, the Investigating Officer filed a forwarding note, requesting the Special Court to forward the electronic document once again to the Forensic Lab for further examination for two purposes. By the impugned order dated 09-05-2022, the learned Special Court dismissed the petition after observing that the details sought for by the Investigating Officer are already available in Ext.P263 and in the deposition of PW192 - the expert examiner. It was thus concluded that the purpose for seeking the details of access to the document again, is unintelligible, ill-conceived and ill-motivated and declined to allow the request.

5. Detailed arguments were put forth by all counsel. Sri.T.A.Shaji, learned Director General of Prosecutions, appearing on behalf of the petitioner questioned the impugned order and urged, along with Adv.V.Ajayakumar and Smt.T.B. Mini, both of whom appeared for the survivor, that the trial court ought not to have declined to send the document for forensic examination.

6. In contrast, Sri.B.Raman Pillai, the learned Senior Counsel and Adv.Philip T.Varghese appearing on behalf of the additional respondent vehemently contended that the entire attempt of the prosecution was to malign the Court as well as the accused and no purpose would be achieved by sending it for forensic examination.

7. I have considered the submissions of the respective Counsel.

8. Irrefutably, when the trial of the case had reached the last of the prosecution witnesses, the Investigating Officer commenced a further investigation after obtaining permission from the Special Court. Though the trial court had initially granted time till 15-04-2022, it was extended to 30-05-2022 and the High Court has now, by order dated 03-06-2022 extended the time till 15-07-2022 to complete the further investigation. The investigation has been directed to be completed positively by the said date, taking note of the direction of the Supreme Court to complete the trial by 16-08-2021, which period is long over. Obviously, further investigation cannot continue endlessly, that too, beyond the period permitted by the court.

9. Article 21 of the Constitution of India mandates, as interpreted by the Supreme Court, that the procedure in a criminal trial must be fair, just and reasonable and not fanciful or oppressive. The assurance of a fair trial is the imperious command of the rule of

law. This command springing from Article 21 is all-pervasive and has a ubiquitous influence over every provision of law in our Country. In fact, the Supreme Court has observed that 'the hovering omnipresence of Article 21 over every provision of Cr.P.C cannot be lost sight of'. [See the decision in **Vinubhai Haribhai Malaviya and Others v. State of Gujarat and Another** [(2019) 17 SCC 1]. Thus the interpretation of the provisions of Cr.P.C must of necessity ensure adherence to Article 21, in both letter and spirit.

10. Endless investigation may prejudice a fair trial. However, no time limit has been legislatively fixed for completing criminal investigations, except for offences relating to rape. The investigation into an offence alleging rape, must be completed within two months as per section 173(1A) of the Cr.P.C. The present case falls within the category of offences specified in section 173(1A) of Cr.P.C.

11. Be that as it may, once the further investigation is permitted, the manner and the nature in which the investigation is to be effected cannot be the lookout of the Court. As long as the Investigating Officer is exercising his powers of investigation within legal bounds, Courts should seldom interfere, unless the Court is convinced that the Investigating Officer is acting with malafides or is abusing his powers of investigation or there is a non-compliance of the

provisions of Cr.P.C. [See the decisions in **Abhinandan Jha and Others v. Dinesh Mishra** (AIR 1968 SC 117), **State of Bihar and Another v. J.A.C. Saldanha and Others** [(1980) 1 SCC 554], **Subramanian Swamy v. Director, Central Bureau of Investigation and Another** [(2014) 8 SCC 682] and **P. Chidambaram v. Directorate of Enforcement** [(2019) 9 SCC 24].

12. When the Court is convinced that the investigation is not proper, the Court is vested with all powers, incidental or implied, to ensure a proper investigation. This power will encompass all stages of an investigation. The Courts can thus monitor the investigation to ascertain whether it is being carried on in proper lines, including in the collection of evidence as observed in **Vinubhai Haribhai Malaviya's Case (supra)**.

13. Notwithstanding the above powers, Courts must be careful not to dictate the manner of collecting evidence. The nature of evidence to be collected and its relevance are to be decided by the Investigating Officer during the time of investigation. The power of monitoring an investigation should not be extended to denude the Investigating Officer from collecting any piece of evidence, that he assumes to be relevant or may be relevant. Courts must bear in mind that, in criminal jurisprudence, the burden is upon the prosecution to

prove its case. The investigation must therefore possess materials to bring home the truth of the 'fact in issue'.

14. The issues arising in this case, must therefore be appreciated against the backdrop of the above legal principles.

15. The Cyber Forensic Division of the State Forensic Science Laboratory, Thiruvananthapuram is a notified lab under section 79A of the Information Technology Act, 2000. The application of the prosecution dated 04-04-2022 for forwarding the electronic document for examination to the aforesaid lab had mentioned two aspects for verification and they are:

1. Whether any folder or files in the memory card are accessed after 18-02-2017?

2. Furnish a copy of file properties of all files and folders.

16. Though the above request is not properly worded, and as observed by the trial court is 'unintelligible', the fact remains, from a practical perspective, the requests for forwarding documents for forensic examination are generally not detailed and are filed in a routine manner. However, the ineptitude of the draftsman in the investigating team should not lead to the creation of any loopholes in the prosecution case. It is true that a part of the above request, atleast to some extent, is already answered in the report available

with the court. But certain aspects of the request are not available in the report already furnished/available in the court.

17. In the report dated 29-01-2020 there is a reference to a change in the hash value of the memory card. The hash value of an electronic document is claimed to be like a fingerprint, ensuring the authenticity of a document. The change in hash value could be due to different reasons. Whether the change in hash value is of any relevance or not cannot be decided or considered at this stage of the proceedings. However, the Court cannot foresee, whether or not the prosecution may be called upon to explain the reason for the change in the hash value. After the investigation became aware of the change in hash value of the document, failure to identify the reason for the change in hash value can, though not necessarily, fall in the realm of a lacuna in the prosecution case, arising out of an incomplete investigation. To deny the request of the investigation to forward the document for re-analysis can have the possibility of prejudicing the investigation and in turn the prosecution. Even if ultimately, the analysis of the document is found to be superfluous, or of no consequence, still, the said facet of investigation and of the prosecution cannot be prejudged. Therefore, the contention of the second respondent that the details sought are already available to the prosecution is of no avail

18. Notwithstanding the above, it needs to be observed that the investigation cannot be permitted to enter into a roving enquiry into matters which it has no authority to pursue. Access to a document after it was produced in Court cannot be a matter of investigation or relevant for investigation under any circumstances whatsoever, since only the Court can pursue that, in view of the bar in taking cognizance under section 195 of the Cr.P.C. As a means to ensure that the investigation is in consonance with the provisions of the Code, the Court can certainly sieve the requirement of analysis of the already marked document.

19. However, the present requirement of the investigation is not for initiating any action, but only for ascertaining certain details, which it assumes to be of relevance in the investigation. If in case, during the trial, the Court is called upon to form an opinion on the electronic document, especially that relating to the change in hash value or the details of the memory card, the prosecution must be able to provide the requisite evidence. The opinion of the Examiner of the electronic record becomes a relevant fact under section 45A of the Indian Evidence Act 1872. If the Investigating Officer is not provided with an opportunity to produce before the Court such opinion, which may explain the change in the hash value or its impact, it can lead to a failure of justice. Therefore, declining to allow the request to forward

the document for analysis is a manifest error and the same requires to be corrected. The impugned order Ext.P4 is therefore liable to be set aside.

20. Once the impugned order is set aside it is only proper to remit the matter to the Special Court itself for issuing appropriate orders on the basis of the observations in this Judgement. However, having regard to the need for a speedy conclusion of the investigation, I am of the view that this Court should, in exercise of the supervisory jurisdiction under Article 227 of the Constitution of India, direct the Special Court to forward the document Ext.P262 to the State Forensic Laboratory as requested for, with specific timelines to submit the report as sought for.

21. In view of the above, I set aside Ext.P4 order dated 09-05-2022 in S.C. No.118/2018 and direct the Additional Special Sessions Court (SPE/CBI Cases) III, Ernakulam to immediately, at any rate not later than two days from the date of receipt of a copy of this Judgement, forward the document Ext.P262 to the State Forensic Science Laboratory, through the mode envisaged by law. There will be a further direction to the State Forensic Science Laboratory to analyse the document as requested in the forwarding note and submit a report to the Investigating Officer with a copy to the Court in a sealed cover

within an outer period of seven days from the date of receipt of the document. It is reiterated that the timelines specified must be adhered to without fail so that further investigation and trial of the case are not delayed.

The original petition is allowed as above.

Sd/-

**BECHU KURIAN THOMAS
JUDGE**

vps

APPENDIX OF O.P. (CRL.) 257/2022

PETITIONER'S EXHIBITS

- Exhibit P1 COPY OF THE ORDER DATED 3-06-2022 IN
CRL. M.A 13/2022 IN CRL.MC NO.803/2022
- Exhibit P2 COPY OF THE REPORT DATED 29-01-2020 FROM
THE FSL., THIRUVANANTHAPURAM
- Exhibit P3 COPY OF THE FORWARDING NOTE DATED 4-4-2022
SUBMITTED BEFORE THE TRIAL COURT BY THE
INVESTIGATING OFFICER
- Exhibit P4 COPY OF THE PROCEEDINGS DATED 09-05-2022
REJECTING EXHIBIT P3 FORWARDING NOTE
- Exhibit P5 TRUE COPY OF CYBER FORENSIC ANALYSIS
REPORT NO.DD-91-2017 DATED 03-03-2017