

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K. BABU

WEDNESDAY, THE 8TH DAY OF FEBRUARY 2023 / 19TH MAGHA, 1944

CRL.MC NO. 1058 OF 2023

(AGAINST THE ORDER DATED 19.01.2023 IN SESSIONS CASE NO.754/2020 IN
CMP NO.8(a)/2023 IN CRIME NO.841/2019 OF ELATHUR POLICE STATION ON THE
FILES OF THE COURT OF SPECIAL JUDGE, FAST TRACK SPECIAL COURT,
KOYILANDY (SESSIONS DIVISION)

PETITIONER/PETITIONER/ACCUSED:

YASIN SUNU
AGED 58 YEARS
S/O MOIDEEN KOYA, MUBARAK HOUSE,
THALAKOLATHUR P.O, PURAKATTERY,
KOZHIKODE-673303.

BY ADVS.SRI.SHARAN SHAHIER
RAKHY BABY

RESPONDENT/RESPONDENT/STATE:

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

BY PUBLIC PROSECUTOR SRI.G.SUDHEER

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON
08.02.2023, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

“C.R”

ORDER

The challenge in this CrI.M.C is to the order dated 19.01.2023 in CMP No.8(a)/2023 in Sessions Case No. 754/2020 on the file of the Fast Track Special Court, Koyilandi. The petitioner faces charges under Section 8 r/w Sections 7, 9(m), and 9(i) r/w Section 10 of the POCSO Act, 2012 and Section 511 r/w Section 377 of the Indian Penal Code.

2. The Court below proceeded with the trial. The petitioner participated in the trial. After examination of the petitioner under Section 313 Cr.P.C., the Court posted the case for defence evidence. The counsel for the petitioner submitted an application pleading that the petitioner had mental problems and that he was incapable of understanding the consequences of his acts. The learned counsel for the petitioner wanted to subject the petitioner to medical examination.

3. The learned Public Prosecutor resisted the application contending that the petitioner/accused was capable of understanding the proceedings and no materials were produced before the Court to show that the petitioner had mental incapacity of any nature at any time.

4. After hearing both sides, the Trial Court passed the following order :

"When this petition was taken up for hearing, it was asked to the learned counsel for accused that what was really intended by this petition. This was asked to the learned counsel only to understand whether petition was filed for conducting an enquiry under 329 Cr.P.C. or the accused is taking his mental condition as a defence against the prosecution allegation. It is clarified by the learned counsel for accused that he want to make the mental state of accused as a defence against the contentions of prosecution. That means accused want to take defence pointing out his mental state. So there is no need to conduct any enquiry u/s.329 Cr.P.C. More over, during the prosecution evidence, PW.1 to PW.19 were examined and all of these witnesses were thoroughly cross examined after getting proper instruction from the accused. Thereafter questioning of accused was done u/s.313 Cr.PC, wherein accused was capable of answering all the questions put to him. So he is capable of understanding the allegation made against him and frame defence.(sic)

The petitioner is already on bail. In the petition itself it is mentioned that he want to make his mental condition as a defence against the prosecution allegation. The petitioner is free to make any defence with respect to the case against him. But there is no need for this court to send petitioner before the medial board for understanding his mental condition. Such steps are required only in a case where enquiry u/s. 328, 329 Cr.P.C. are conducted. In this case no such enquiry is warranted.(sic)"

5. Heard the learned counsel for the petitioner and the learned public prosecutor.

6. Is the Court always bound to conduct a detailed enquiry, whenever a counsel for the accused raises a point before a Sessions Judge that the accused is of unsound mind?

7. The relevant statutory provision is Section 329 Cr.P.C., which reads thus :-

"329. Procedure in case of person of unsound mind tried before Court.—(1) If at the trial of any person before a Magistrate or Court of Session, it appears to the Magistrate or Court that such person is of unsound mind and consequently incapable of making his defence, the Magistrate or Court shall, in the first instance, try the fact of such unsoundness and incapacity, and if the Magistrate or Court, after considering such medical and other evidence as may be produced before him or it is satisfied of the fact, he or it shall record a finding to that effect and shall postpone further proceedings in the case."

(emphasis added)

8. Going by the statutory provision, the essential condition for the applicability of this Section is that it must appear to the Court that the accused brought before it is of unsound mind.

9. The word 'appears' in the provision is guidance for construction. It refers to a circumstance with some indication that makes it appear to the judge that the accused is of unsound mind and consequently incapable of making his defence.

10. Forming such an opinion one way or another constitutes the first stage of the proceedings. Certainly, the word 'appears' in the provision is of

a lesser degree of probability than proof. The presiding Judge is a judicially trained personage who would form such an opinion with utmost care to protect the accused's interest.

11. If there is something in the demeanour of the accused or in the facts of the case, which raise doubt in the mind of the Court that the accused is of unsound mind and consequently incapable of making his defence, it is obligatory on the Court to try the said fact before proceeding with the trial into the charge.

12. If it necessitates embracing upon the next stage, the Court has to record such medical and other evidence as may be produced before it. Then the Court is required to apply its mind to the evidence produced before it and record its findings as to whether the person in question is of unsound mind and consequently incapable of making his defence or not. This is the mandate of Sec.329 Cr.P.C.

13. While considering the corresponding provision in the old Code (Section 465), in ***I.V.Shivaswamy vs. State Of Mysore AIR 1971 SC 1638***, the Supreme Court held that the Section requires that there should be an enquiry if it appears to the Sessions judge that the accused was insane, but if it does not appear to him so, it is not necessary that he should conduct a regular enquiry under the second limb. The Supreme Court observed that this does not mean that whenever a counsel raises a point before a Sessions Judge, he has to straight away hold an elaborate enquiry into the matter. If,

on examining the accused, it does not appear to him that the accused is insane, it is not necessary that he should go further and send for and examine the medical witnesses and the other relevant evidence. Of course, if he has any serious doubt in the matter, the Sessions Judge should hold a proper enquiry.

14. In the present case, the proceedings before the Court below would reveal that the accused has actively participated in the trial. The Trial Judge recorded that the witness was examined by the counsel for the defence after getting proper instructions from him and in the examination under Sec.313 Cr.P.C, he was found to be capable of answering all questions put to him. It seems that the Sessions Judge examined the accused and was satisfied that it did not appear to him that the accused was insane. Consequently, the Trial Court held that no enquiry under Section 329 Cr.P.C. was required.

The order impugned, therefore, requires no interference. The CrI.M.C. lacks merit. It stands dismissed.

Sd/-
K.BABU
Judge

SM

APPENDIX OF CRL.MC 1058/2023

PETITIONER'S ANNEXURES

- ANNEXURE 1 : A TRUE COPY OF THE FIR AND FINAL REPORT DATED 20.12.2019 IN SC NO.754/2020.
- Annexure 2 : A TRUE COPY OF THE PETITION FILED THROUGH THE COUNSEL CMP NO. 8(a)/2023 IN SC 754/2020 BEFORE THE HONORABLE FAST TRACK COURT POCSO OFFENCES KOYILANDY.
- Annexure 3 : A TRUE COPY OF THE ORDER DATED 19.01.2023 IN CMP 8(a)/2023 IN IN SC 754/2020 BEFORE THE HONORABLE FAST TRACK COURT POCSO OFFENCE KOYILANDY.
- Annexure 4 : A TRUE COPY OF THE ORDER DATED 18.05.2022 IN CRL MC 2742/2022.