

**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT**

**THE HONOURABLE MR.JUSTICE K. BABU**

**TUESDAY, THE 7<sup>TH</sup> DAY OF FEBRUARY 2023 / 18TH MAGHA, 1944**

**CRL.MC NO. 926 OF 2023**

**AGAINST THE ORDER DATED 24.01.2023 IN CMP 2895 OF 2022 IN CC  
1584/2016 OF JMFC, KALAMASSERY, ERNAKULAM**

**PETITIONERS/ACCUSD NOS. 1 AND 3:**

- 1 ANILKUMAR,  
AGED 46 YEARS,  
S/O BALAKRISHNAN, KAITHAVALAPPIL HOUSE,  
MANJUMMEL KARA ,ELOOR VILLAGE,  
ERNAKULAM P, PIN - 683501
  
- 2 MANORAMA,  
AGED 74 YEARS  
W/O BALAKRISHNAN, KAITHAVALAPPIL HOUSE,  
MANJUMMEL KARA, ELOOR VILLAGE, ERNAKULAM,  
PIN - 683501

BY ADVS.  
SRI.PRASUN.S  
SRI.N.A.RETHEESH

**RESPONDENTSCOMPLAINANT/STATE:**

STATE OF KERALA  
REPRESENTED BY PUBLIC PROSECUTOR,  
HIGH COURT OF KERALA,  
ERNAKULAM, PIN 682 031

BY ADV.  
SRI.G.SUDHEER, PP

**THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON  
07.02.2023, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

**CR**

**K.BABU, J.**

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Crl.M.C.No.926 of 2023  
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Dated this the 7<sup>th</sup> day of February, 2023

**ORDER**

The challenge in this Crl.M.C. is to the order dated 24.01.2023 passed by the Judicial First Class Magistrate Court-I, Kalamasery, in CMP No.2895 of 2022 in C.C.No.1584 of 2016. The petitioners are accused Nos. 1 and 3, respectively, in the above-mentioned Calendar Case.

2. The petitioners face charges under Sections 498 A and 324, read with Section 34 of IPC.

3. After the closure of the prosecution evidence and the examination of the petitioners/accused under Section 313 Cr.P.C., the petitioners applied to summon the Assistant Commissioner of Police, Ernakulam, to be examined as defence witness.

4. The petitioners proposed to examine the Assistant Commissioner of Police to establish that the investigation made by the Police was biased. The petitioners also wanted to establish custodial torture of Petitioner No.1 at the instance of the defacto complainant (PW1) by the Police.

5. The Trial Court rejected the plea of the petitioners. The

relevant portion of the order is extracted hereunder:

“9. Considering all the aforesaid circumstances, I find that the examination of the witness sought by accused will not in any way disrupt the case of the prosecution. Even if the witness sought to be examined by the accused in the witness list is examined, that will not affect the credibility of the prosecution case. Crime is of the year, 2014. In my view, this will protract the trial of this case without any use and it is unwarranted. Hence, the petition is only liable to be dismissed.”(sic)

6. Heard, Sri.Prasun S., the learned counsel for the petitioners and the learned Public Prosecutor.

7. The learned counsel for the petitioners contended that what should be the nature of the evidence is not a matter which should be left only to the discretion of the Court, and it is the accused who knows how to prove his defence.

8. The learned Public Prosecutor opposed the prayer on the ground that the attempt of the petitioners is to prolong the trial.

9. The learned counsel for the petitioners contended that the investigation made by the Police, which led to the submission of the final report, was biased, which could be established only by examining the Assistant Commissioner of Police, Ernakulam. The learned counsel further contended that the petitioners/accused could not be held liable for the prolonged pendency of the matter, and the same alone could not be a ground to deny the opportunity of the petitioners to lead

evidence to rebut the prosecution evidence.

10. To appreciate the rival contentions, it is useful to refer to Sec. 243 of Cr.P.C., which reads as under:

**“243. Evidence for defence.- (1)** The accused shall then be called upon to enter upon his defence and produce his evidence; and if the accused puts in any written statement, the Magistrate shall file it with the record.

(2) If the accused, after he has entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross- examination, or the production of any document or other thing, the Magistrate shall issue such. process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice and such ground shall be recorded by him in writing:

Provided that, when the accused has cross- examined or had the opportunity of cross- examining any witness before entering on his defence, the attendance of such witness shall not be compelled under this section, unless the Magistrate is satisfied that it is necessary for the ends of justice.

(3)The Magistrate may, before summoning any witness on an application under sub- section (2), require that the reasonable expenses incurred by the witness in attending for the purposes of the trial be deposited in Court.”

11. Sub-section (2) of Section 243 Cr.P.C. highlights the right of the accused to lead evidence to rebut the case of the prosecution. The Court cannot deny fair and proper opportunities to the accused to prove his innocence. This is a valuable right. If this right is denied, there is no Fair Trial. Denial of that right is the denial of the Fair Trial, which elaborates the fundamental right guaranteed under Article 21 of the Constitution.

12. Unless it is established that the application to summon a witness is made for vexation or delay or for defeating

the ends of justice, the trial Court has no discretion in the issuance of process to compel the attendance of any witness cited by the accused. The trial Court is bound to issue process to the witness proposed by the accused in a case where there is nothing to show that the attempt of the accused is to defeat the ends of justice.

13. In **Kalyani Baskar v. M.S. Sampooram [(2007) 2 SCC 258]**, the Apex Court observed that a Fair Trial includes fair and proper opportunities allowed by law to prove the innocence of the accused and adducing evidence in support of the defence is a valuable right and denial of that right means denial of fair trial.

14. In the present case, the trial Court has concluded that the evidence of the witness proposed to be examined by the petitioners/accused may not help them. The question here is, can the trial Court decide the nature of evidence to be adduced in defence?

15. The accused is the person who is aware of the nature of evidence to be adduced to rebut the prosecution evidence. The Court cannot exercise discretion in the choice of witnesses and the quality of defence evidence.

16. On the scope of Section 243 (2) Cr.P.C, in **T.Nagappa v. Y.R. Muralidhar [(2008) 2 SCC (Cri.) 677]**, the Apex Court held thus:

“9. What should be the nature of evidence is not a matter which should be left only to the discretion of the court. It is the accused who knows how to prove his defence. It is true that the court being the master of the proceedings must determine as to whether the application filed by the accused in terms of sub-section (2) of Section 243 of the Code is bona fide or not or whether thereby he intends to bring on record a relevant material. But ordinarily an accused should be allowed to approach the court for obtaining its assistance with regard to summoning of witnesses, etc. If permitted to do so, steps therefor, however, must be taken within a limited time. There cannot be any doubt whatsoever that the accused should not be allowed to unnecessarily protract the trial or summon witnesses whose evidence would not be at all relevant.”

17. The delay in the proceedings is another reason for the Trial Court to reject the prayer for summoning the witness cited by the accused. The fact that a matter has been pending for a long time cannot affect the valuable right of the accused to rebut the prosecution evidence.

18. In **Manju Devi v. State of Rajasthan [(2019) 6 SCC 203]**, the Apex Court held that the age of a case, by itself, cannot be decisive when a prayer is made for the examination of a material witness.

19. The learned Magistrate lost sight of these salutatory principles while rejecting the prayer for leading defence evidence.

20. No materials have been placed before the Court to infer that the attempt of the petitioners/accused is to defeat the ends of justice.

21. The inevitable consequence is that the order

impugned is liable to be quashed.

In the result, Annexure-1 order dated 24.01.2023 in CMP No.2895 of 2022 in C.C.No.1584/2016 on the file of the Judicial First Class Magistrate Court, Kalamassery, is set aside. The Trial Court shall issue summons to the witness cited by the defence.

Sd/-  
**K.BABU**  
**JUDGE**

VPK

**APPENDIX OF CRL.MC 926/2023**

PETITIONER ANNEXURES

- Annexure A1 THE TRUE COPY OF THE AFORESAID ORDER DATED 24.01.2023 IN C.M.P.NO.2895 OF 2022 IN C.C.NO.1584 OF 2016 OF THE JUDICIAL FIRST CLASS MAGISTRATE COURT, KALAMASSERY
- Annexure A2 THE TRUE COPY OF THE PETITION CMP NO 2895 OF 2022 DATED 02.12.2022 PREFERRED ON BEHALF OF THE PETITIONERS/ACCUSED SEEKING THE LEADING OF DEFENSE EVIDENCE AND THE PRODUCTION OF DOCUMENTS ON BEHALF OF THE DEFENSE
- Annexure A3 THE TRUE COPY OF THE WITNESS LIST DATED 02.12.2022 PREFERRED ON BEHALF OF THE PETITIONERS/ACCUSED BEFORE THE COURT BELOW
- Annexure A4 THE TRUE COPY OF THE STATEMENT UNDER SECTION 313(5) OF THE CODE OF PROCEDURE DATED 24.11.2022 PREFERRED ON BEHALF OF THE PETITIONER/ACCUSED BEFORE THE COURT BELOW
- Annexure A5 THE TRUE COPY OF THE SAID COMPLAINT DATED 05.08.2014 PREFERRED BY THE SECOND PETITIONER/3RD ACCUSED BEFORE THE DEPUTY COMMISSIONER OF POLICE ERNAKULAM
- Annexure A6 THE TRUE COPY OF THE DEPOSITION OF PW11 BEFORE THE COURT BELOW
- Annexure A7 THE TRUE COPY OF THE DEPOSITION OF PW14 BEFORE THE COURT BELOW