

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.S.DIAS

TUESDAY, THE 7<sup>TH</sup> DAY OF NOVEMBER 2023 / 16TH KARTHIKA, 1945

CRL.REV.PET NO. 342 OF 2011

AGAINST THE ORDER DATED 29.11.2010 IN C.M.P.NO.1067/2010 OF CP  
No.39/2009 OF JUDICIAL MAGISTRATE OF FIRST  
CLASS-III, THIRUVANANTHAPURAM

REVISION PETITIONER/COMPLAINANT:

STATE OF KERALA,  
REP. BY THE STATE PUBLIC PROSECUTOR,  
HIGH COURT OF KERALA, ERNAKULAM.

By PUBLIC PROSECUTOR

RESPONDENTS/ACCUSED:

- 1 N.R.SHAJI,  
S/O. BABU RAJ,  
THIRUPURAM THENGUTHAI VEEDU, THIRUPURAM DESOM,  
THIRUPURAM VILLAGE. (A5) .
- 2 KALADI JAYACHANDRAN,  
S/O.SREERAMACHANDRAN NAIR,  
LEKHA NIVAS, T.C.50/1640, KALADI WARD,  
MANACAUD VILLAGE. (A6) .
- 3 ANEESH,  
S/O.GIRISUDHAN,  
THAITHODE VEEDU, ATHIYANNOOR DESOM,  
ATHIYANNOR VILLAGE,  
NEYYATTINKARA TALUK. (A8) .
- 4 ANILKUMAR,  
S/O.SEKHARAN NAIR,  
SUNI SADANAM VEEDU,  
WARD NO.8, PANA VOOR VILLAGE (A10)
- 5 JYOTHISHKUMAR,  
S/O.VAMADEVAN NAIR,  
NV HOUSE, WARD NO.7, PANA VOOR VILLAGE. (A12) .
- 6 AZIM,  
S/O.ABU SALIM,  
VENGANAM VEEDU,

- KONGANAMKODE, WARD NO.7,  
PANAVOOR VILLAGE (A13).
- 7 VIJAYAN,  
S/O.SADASIVAN,  
VATTUKOTTUKONAM,  
THOOMBAMPARABU, ARCHANA NAGAR,  
PONGUMMOODU WARD, ULLOOR VILLAGE (A16).
- 8 SABU D.,  
S/O.SHANMUGHAN,  
THALIYAL THAMBATHIL VEEDU,  
THALIYAL WARD, MANANCAUD VILLAGE. (A18).
- 9 MANIKUTTAN,  
S/O.APPU,  
VADAKKEVILA PUTHEN VEEDU,  
THALIYAL WARD,  
MANACAUD VILLAGE (A19).
- 10 RAJESH,  
S/O.MOHANACHANDRAN NAIR,  
NADUVILAKATHUVEEDU, THALIYAL WARD,  
MANACAUD, VILLAGE (A20).
- 11 SHIBU,  
S/O.MANIYAPPAN,  
PUTHUVAL PUTHEN VEEDU,  
T.C.79/72,  
VINAYAKA NAGAR,  
KADINAMKULAM WARD,  
KADAKAM PALLI VILLAGE (A26).
- 12 RAJEEV,  
S/O.MOHANACHANDRAN NAIR,  
THAMBERIVILAKATHU VEEDU,  
TC 50/1370 (OLD), NEAR THALIYAL SIVA TEMPLE,  
THALIYAL WARD,  
MANACAUD VILLAGE (A28).
- 13 UMESH PREM,  
S/O.PREMAKUMAR,  
KUNJUVEEDU,  
TC 50/1630 (OLD) NEAR THALIYAL PUMP HOUSE,  
THALIYAL WARD, MANACAUD VILLAGE (A29).

- 14 BIJU,  
S/O.SUDHAKARAN,  
SREENAGAR PETTIVILAKATHU VEEDU,  
KUDAPPANAKUNNU WARD,  
KUDAPPANAKUNNU VILLAGE (A30).
- 15 SURESH,  
S/O.THANKAPPAN,  
TC 3634  
KIZHAKKATHIL, PERUMTHANNI WARD,  
PALKULANGARA VILLAGE (A40).
- 16 AMBILI,  
S/O.SIVANANDAN,  
VAYALIL PANAYIL VEEDU,  
MEDICAL COLLEGE WARD (A41).
- 17 BAIJU,  
S/O.RAMAKUMARAN,  
JAYA COTTAGE, KARIPPUR, KARIPPUR VILLAGE (A42).

OTHER PRESENT:

SR PP SMT PUSHPALATHA M K

THIS CRIMINAL REVISION PETITION HAVING COME UP FOR  
ADMISSION ON 07.11.2023, THE COURT ON THE SAME DAY DELIVERED THE  
FOLLOWING:

“CR”

*Dated this the 7<sup>th</sup> day of November,2023*

## **ORDER**

Does the Court of the Committing Magistrate have the jurisdiction to entertain an application to grant consent to withdraw from the prosecution?

2. The State of Kerala has filed the revision petition questioning the correctness of Annexure A-3 order passed by the Court of the Judicial First Class Magistrate-III, Thiruvananthapuram, dismissing the application filed by the Assistant Public Prosecutor under Section 321 of the Code of Criminal Procedure,1973 (*‘Code’, for short*).

### **Relevant factual matrix:**

3. The prosecution case is that, on 15.07.2003, 500 identifiable persons owing allegiance to a political party conducted an unauthorised march in

Thiruvananthapuram. When the Police attempted to foil their attempt, the agitators turned violent and attacked the police, causing hurt to them and damaging public property. The Museum Police registered Crime No.214/2003 and, after investigation, laid Annexure-A1 final report against 44 accused alleging them to have committed the offences under Sections 143, 147, 148, 149, 307, 323, 324, 332, 333, 114 and 115 of the Indian Penal Code, 1860, and Section 3(2)(e) of the Prevention of Damage to Public Property Act, 1984.

4. The learned Magistrate, by order dated 26.08.2009, committed the case against 27 accused namely accused Nos.1 to 4, 7, 9, 11, 14, 15, 17, 21 to 25, 27, 31 to 39, 43 and 44 to the Court of Session. Nonetheless, the committal proceeding against the remaining 17 accused — respondents 1 to

17 — is pending as C.P.No.39/2009.

5. At the above stage, the Assistant Public Prosecutor (*'APP', for short*) filed Annexure A-2 application, seeking consent to withdraw from the prosecution because the Government had stated no objection in withdrawing the prosecution and the prospects of a successful prosecution was bleak.

6. The learned Magistrate dismissed the application by the impugned Annexure-A3 order. Annexure-A3 order is illegal, improper and irregular. Hence, the revision petition.

7. Heard; Smt. Pushpalatha M.K., the learned Senior Public Prosecutor appearing for the revision petitioner – State.

8. Based on the prosecution case, the Police had laid Annexure A-1 final report before the learned Magistrate, who committed the case against 27

accused to the Court of Session and the case against the remaining 17 accused, i.e., the respondents, is pending committal.

9. At this juncture, the APP filed Annexure A-3 application to withdraw from the prosecution. Not only did the learned Magistrate entertain the application, but he also dismissed the same by the impugned order.

10. The provisions that are germane for dealing with the proposition on hand are Sections 209 and 321 of the Code of Criminal Procedure, which read as follows:

**“S.209. Commitment of case to Court of Session when offence is triable exclusively by it.-**

When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall—

(a) commit, after complying with the provisions of section 207 or section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment has been made;

(b) subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of, the trial;

(c) send to that Court the record of the case and the documents and articles, if any, which are to be produced in evidence;

(d) notify the Public Prosecutor of the commitment of the case to the Court of Session.”

**S.321. Withdrawal from prosecution**

The Public Prosecutor or Assistant Public Prosecutor in charge of a case may, with the consent of the Court, at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried; and, upon such withdrawal —

(a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;

(b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences; Provided that where such offence—

(i) was against any law relating to a matter to which the executive power of the Union extends, or

(ii) was investigated by the Delhi Special Police Establishment under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or

(iii) involved the misappropriation or destruction of, or



damage to, any property belonging to the Central Government, or

- (iv) was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty, and the Prosecutor in charge of the case has not been appointed by the Central Government, he shall not, unless he has been permitted by the Central Government to do so, move the Court for its consent to withdraw from the prosecution and the Court shall, before according consent, direct the Prosecutor to produce before it the permission granted by the Central Government to withdraw from the prosecution.”

11. As per Section 209, once it appears to the Magistrate that the offence is exclusively triable by a Court of Session, he has no other option but to commit the case to the Court of Session. The relevant word is ‘commit the case’ and not the accused.

12. It may be true that the Public Prosecutor/ the Assistant Public Prosecutor is the sole repository of power to move an application under Section 321 for the consent of the court to withdraw from the

Prosecution, but the pertinent question is whether the same can be entertained by the Court of the committal Magistrate.

13. A careful analysis of Section 209 shows that, once it appears to the Magistrate that the offence is exclusively triable by the Court of Session, then other than for considering matters relating to bail and remand as provided under clauses (a) to (d) of the said provision, the Magistrate has no implicit power to entertain any other matter, including an application under Section 321.

14. The records reveal that the learned Magistrate has already committed the case against 27 out of the 44 accused to the Court of Session on 26.08.2009. Notwithstanding the committal, the APP filed Annexure-A2 application before the learned Magistrate, which was accepted on file.

15. The learned Magistrate, without analysing the above provisions and unmindful of the committal order passed, entertained and dismissed Annexure-A2 application by Annexure A-3 order.

16. While dealing with an identical situation, that is whether an application for discharge can be entertained during the committal stage, the Hon'ble Supreme Court in ***Ajay Kumar Parmar v. State of Rajasthan*** [(2012) 12 SCC 406] observed that, as per the scheme of the Code, particularly Sections 207 to 209, it is the legislative mandate that the Magistrate has to commit the case to the Court of Session when the offence is exclusively triable by the Court of Session. However, a contrary view has been taken by the Hon'ble Supreme Court in ***Rajendran Kumar Jain v. State Through Spl. Police Establishment and Others*** [(1980) 3 SCC 435].

17. In the present case, the learned Magistrate, after being convinced that the offences are exclusively triable by the Court of Session, committed the case against 27 accused to the Court of Session. Thereafter, the learned Magistrate had no jurisdiction to entertain the application filed under Section 321. The procedure adopted and the order passed by the learned Magistrate in the instant case are wrong and erroneous. The course available to the Magistrate was to direct the revision petitioner to file the application before the Court of Session.

18. An upshot of the above discussion is that the revision petition is to be allowed by setting Annexure A-3 order and granting liberty to the revision petitioner to move the application before the Court of Session.

In the result,

- (i) The impugned order is set aside.
- (ii) Annexure-A2 application is dismissed.
- (iii) The learned Magistrate is directed to dispose of C.P.No.39/2009, in accordance with law, as expeditiously as possible.
- (iv) The revision petitioner would be at liberty to move an application under Section 321 of the Code before the Court of Session.
- (v) If such an application is filed, the same shall be considered and disposed of by the Court of Session in accordance with law.

Sd/-

**C.S.DIAS,JUDGE**

DST/07.11.23

//True copy//

P.A.To Judge

