

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH

MONDAY, THE 17TH DAY OF JANUARY 2022 / 27TH POUSHA, 1943

CRL.MC NO. 6702 OF 2021

AGAINST THE ORDER IN CRMP 2040/2021 IN SC 118/2018 OF
ADDITIONAL SPECIAL SESSIONS COURT SPE/CBI-III, ERNAKULAM

PETITIONER/COMPLAINANT:

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

BY ADVS.
SHRI.P.NARAYANAN, ADDL.PUBLIC PROSECUTOR
SHRI.SAJJU.S., SENIOR G.P.

RESPONDENTS/ACCUSED NOS.1 TO 10:

- 1 SUNIL N.S. @ PULSAR SUNI,
AGED 29 YEARS
S/O. SURENDRAN, NEDUVELIKKUDY HOUSE,
ELAMBAKKAPILLY KARA,
NETTANCITY, VENGOOR WEST, ERNAKULAM 683 546.
- 2 MARTIN ANTONY, AGED 25 YEARS
S/O. ANTONY,
PUTHUSSERY HOUSE, THIRUMUDIKUNNUKARA, KORATTY EAST
P.O., TRISSUR 680 308.
- 3 MANIKANDAN B., AGED 29 YEARS
S/O. BABU,
MANAPPATTIPARAMBIL HOUSE, H.NO. 95, AKG NAGAR,
KMASJIDROAD, THAMMANAM POONITHURA VILLAGE
ERNAKULAM 682 032.

-:2:-

- 4 VIJEESH . V.P.,
AGED 30 YEARS
S/O. RAMAKRISHNAN,
MANAGALASSERY HOUSE, CHUNDAGAPOYYIL PONNAYAM
P.O., KATHIROOR, THALASSERY, KANNUR 670 642.
- 5 SALIM H @ VADIVAL SALIM,
AGED 22 YEARS
S/O. HASSAN,
PALIKKAPARAMBIL HOUSE, KUNNUMPURAM, AIMS
PONEKKARA, EDAPPALLY NORTH, ERNAKULAM 682 024.
- 6 PRADEEP,
AGED 23 YEARS
S/O. USHA SREEDHARAN,
PAZHAYANILATHIL HOUSE, CHATHANKIRI, PERINGARA
VILLAGE, THIRUVALLA, PATHANAMTHITTA 689 108.
- 7 CHARLY THOMAS,
AGED 43 YEARS
S/O. THOMAS, POOPPALI HOUSE, KILIYANTHARA 32
MILE, VELLAMANA VILLAGE, IRITTI TALUK, KANNUR 670
703.
- 8 P. GOPALAKRISHNAN @ DILEEP,
AGED 49 YEARS
S/O. PADMANABHAPILLA, PADMASAROVARAM HOUSE,
KOTTARAKADAVU ROAD, ALUVA, ERNAKULAM 683 101.
- 9 SANILKUMAR @ MESTIRISANIL,
AGED 41 YEARS
S/O.K.N. PILLA,
SNEHABHAVAN HOUSE, VETTIPURAM, MILAPPARA VILLAGE,
KOZHENCHERY TALUK, PATHANAMTHITTA, 689 641.
- 10 VISHNU,
AGED 39 YEARS
S/O. ARAVINDAN, KUNNATH HOUSE, CHEMBUMUKKU,
KAKKANAD, THRIKKAKARA NORTH VILLAGE, ERNAKULAM
682 021.

Cr1.M.C.Nos.6702 & 6703/2021

-:3:-

BY ADVS.
V.V.PRATHEEKSH KURUP
ALEX JOSEPH(K/918/2002), NISHA K PETER K/564/03
M.A.VINOD
A.MOHAMMED
K.V.SABU
B.RAMAN PILLAI (SR.)
T.R.S.KUMAR
K.L.SREEKALA
PHILIP T.VARGHESE
THOMAS T.VARGHESE
ACHU SUBHA ABRAHAM
V.T.LITHA
K.R.MONISHA
SHRUTHI SARA JACOB
NITYA R.
SUJESH MENON V.B.
MAHESH BHANU S.
NIKHIL K SABU
R.KAMAL RAM
BHAGYA SHREE KAMATH K.V.
JAYARAJ REJI
AKHIL K SABU

OTHER PRESENT:

SRI T A SHAJI -DGP, SRI B RAMANPILLAI-SR ADV

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION
ON 7.01.2022, ALONG WITH Cr1.MC.6703/2021, THE COURT ON
17.01.2022 PASSED THE FOLLOWING:

Cr1.M.C.Nos.6702 & 6703/2021

-:4:-

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH

MONDAY, THE 17TH DAY OF JANUARY 2022 / 27TH POU SHA, 1943

CRL.MC NO. 6703 OF 2021

**AGAINST THE ORDER IN CRL.MP 2039/2021 IN SC 118/2018 OF
ADDITIONAL SPECIAL SESSIONS COURT SPE/CBI-III, ERNAKULAM**

PETITIONER/COMPLAINANT:

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

BY ADVS.
SHRI.P.NARAYANAN, ADDL.PUBLIC PROSECUTOR
SHRI.SAJJU.S., SENIOR G.P.

RESPONDENTS/ACCUSED NOS.1 TO 10:

- 1 SUNIL N.S. @ PULSAR SUNI,AGED 29 YEARS
S/O. SURENDRAN, NEDUVELIKKUDY HOUSE,
ELAMBAKKAPILLY KARA, NETTANCITY, VENGOOR WEST,
ERNAKULAM 683 546.
- 2 MARTIN ANTONY,AGED 25 YEARS
S/O. ANTONY, PUTHUSSERY HOUSE,
THIRUMUDIKUNNUKARA, KORATTY EAST P.O., TRISSUR
680 308.
- 3 MANIKANDAN B., AGED 29 YEARS
S/O. BABU, MANAPPATTIPARAMBIL HOUSE, H.NO. 95,
AKG NAGAR, KMASJIDROAD, THAMMANAM POONITHURA
VILLAGE ERNAKULAM 682 032.

-:5:-

- 4 VIJEESH V.P., AGED 30 YEARS
S/O. RAMAKRISHNAN, MANAGALASSERY HOUSE,
CHUNDAGAPOYYIL PONNAYAM P.O., KATHIROOR,
THALASSERY, KANNUR 670 642.
- 5 SALIM H @ VADIVAL SALIM,
AGED 22 YEARS
S/O. HASSAN, PALIKKAPARAMBIL HOUSE, KUNNUMPURAM,
AIMS PONEKKARA, EDAPPALLY NORTH, ERNAKULAM 682
024.
- 6 PRADEEP, AGED 23 YEARS
S/O. USHA SREEDHARAN, PAZHAYANILATHIL HOUSE,
CHATHANKIRI, PERINGARA VILLAGE, THIRUVALLA,
PATHANAMTHITTA 689 108.
- 7 CHARLY THOMAS, AGED 43 YEARS
S/O. THOMAS, POOPPALI HOUSE, KILIYANTHARA 32
MILE, VELLAMANA VILLAGE, IRITTI TALUK, KANNUR 670
703.
- 8 P. GOPALAKRISHNAN @ DILEEP, AGED 49 YEARS
S/O. PADMANABHAPILLA, PADMASAROVARAM HOUSE,
KOTTARAKADAVU ROAD, ALUVA, ERNAKULAM 683 101.
- 9 SANILKUMAR @ MESTHIRISANIL,
AGED 41 YEARS
S/O.K.N. PILLA, SNEHABHAVAN HOUSE, VETTIPURAM,
MILAPPARA VILLAGE, KOZHENCHERY TALUK,
PATHANAMTHITTA, 689 641.
- 10 VISHNU,
AGED 39 YEARS
S/O. ARAVINDAN, KUNNATH HOUSE, CHEMBUMUKKU,
KAKKANAD, THRIKKAKARA NORTH VILLAGE, ERNAKULAM
682 021.

BY ADVS.

V.V.PRATHEEKSH KURUP

ALEX JOSEPH

M.A.VINOD

Cr1.M.C.Nos.6702 & 6703/2021

-:6:-

A.MOHAMMED
K.V.SABU
B.RAMAN PILLAI (SR.)
T.R.S.KUMAR
BHAGYA SHREE KAMATH K.V.
JAYARAJ REJI
AKHIL K SABU
R.KAMAL RAM
NIKHIL K SABU
K.L.SREEKALA
PHILIP T.VARGHESE
THOMAS T.VARGHESE
ACHU SUBHA ABRAHAM
V.T.LITHA
K.R.MONISHA
SHRUTHI SARA JACOB
NITYA R.
SUJESH MENON V.B.
MAHESH BHANU S.
NISHA K.PETER

OTHER PRESENT:

SRI T A SHAJI -DGP, SRI B RAMAN PILLAI-SR ADV

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON 7.01.2022, ALONG WITH Cr1.MC.6702/2021, THE COURT ON 17.01.2022 PASSED THE FOLLOWING:

“C.R.”

O R D E R

Dated this the 17th day of January, 2022

These Crl.M.Cs are preferred by the State challenging two separate interlocutory orders passed by the Additional Special Sessions Court (SPE/CBI)-III, Ernakulam in Crl.M.P.Nos.2039/2021 and 2040/2021 in SC No.118/2018 dated 21st December, 2021.

2. The respondents are the accused. The offences alleged are under Sections 120(B), 109, 342, 366, 354, 354(B), 357, 376(D), 506(1) 201, 212 r/w S.34 of IPC and Sections 66(E) and 67(A) of IT Act, 2008.

3. The prosecution case in short is that, on the night of 17/2/2017, the survivor, a South Indian cine actress, was abducted and sexually assaulted in a moving vehicle at Ernakulam while returning from shooting location by the accused Nos.1 to 6. The prosecution alleges that the accused No.8, a South Indian cine actor and producer, who is the master mind of the crime hatched the criminal conspiracy with the remaining

accused to commit the offence.

4. The case which received national attention has reached this Court and the Apex Court on more than one occasion at different stages. The Apex Court by its order dated 16th August, 2021 has directed the Court below to complete the trial within six months which will expire on 15/2/2022.

5. The crime was registered on the date of occurrence itself. The investigation was conducted by a special team. The final report was initially filed on 18/4/2017. Thereafter, another special team conducted further investigation and filed supplemental final report on 22/11/2017. The examination of the witnesses commenced at the Court below on 30/1/2020. As many as 202 witnesses (PWs 1 to 202) were examined on the side of the prosecution. It is submitted at the Bar that only the main investigating officer was remaining. At that juncture, the prosecution filed two petitions at the Court below as CrI.M.P. No.2039/2021 and CrI.M.P.No.2040/2021. The former one was u/s 91 of the Code of Criminal Procedure (for short, the Cr.P.C) to summon eight witnesses to produce certain documents and the latter one u/s 311 of Cr.P.C was to summon sixteen witnesses to

examine them. The respondents/accused stoutly opposed both the petitions. The respondents Nos.7 and 8/accused Nos.7 and 8 filed objection statements. The Court below after hearing both sides dismissed Crl.M.P.No.2039/2021 and partly allowed Crl.M.P.No.2040/2021 by the impugned orders. Out of the 16 witnesses sought to be summoned in Crl.M.P.No.2040/2021, the Court below allowed to summon four witnesses alone. Being aggrieved by the rejection of the prayer for summoning the remaining witnesses, the State preferred Crl.M.C.No.6702/2021. Being aggrieved by the dismissal of Crl.M.P.No.2039/2021, it preferred Crl.M.C.No.6703/2021. Since both the Crl.M.Cs are interconnected, I am disposing of the same together.

6. I have heard Sri.T.A.Shaji, the learned Director General of Prosecution appearing for the petitioner/State, Sri.B.Raman Pillai, the learned Senior Counsel appearing for the respondent No.8/accused No.8, Sri.Pratheeksh Kurup, the learned counsel for the respondent No.1/accused No.1, Sri.Alex Joseph, the learned counsel for the respondent No.2/accused No.2, Sri.M.A.Vinod, the learned counsel for respondent No.3/accused No.3, Sri.A.Mohammed, the learned counsel for the respondent

No.4/accused No.4 and Sri.K.V.Sabu, the learned counsel for the respondent Nos. 5 and 6/accused Nos. 5 and 6,

7. Sri.T.A.Shaji, the learned Director General of Prosecution appearing for the petitioner, submitted that Section 311 of Cr.P.C. confers a very wide power on the Court to summon any person as a witness or to recall and reexamine any person already examined at any stage of any inquiry, trial or other proceeding and further Section casts a duty upon the Court to summon and examine or recall and reexamine any such person, if his evidence appears to be essential to the just decision of the case. A liberal approach shall be the rule and all other parameters become exceptional, submitted the learned Director General of Prosecution. He further submitted that the power conferred u/s 91 are enabling in nature aimed at arming the Court to enforce and to ensure the production of any document necessary for the purpose of any trial by issuing a summons to those in possession of the document and the language of the said provision would indicate that the width of the powers is unlimited. According to the learned Director General of Prosecution, the Court below ought to have allowed both the petitions as prayed

for. In support of his argument, the learned Director General of Prosecution has cited the following decisions of the Apex Court: ***Mohanlal Shamji Soni v. Union of India and Another*** [1991 Supp (1) SCC 271], ***Mannan Shaikh and Others v. State of West Bengal and Another*** [(2014) 13 SCC 59], ***State represented by the Deputy Superintendent of Police v. Tr.N. Seenivasagan*** (2021 SCC Online SC 212), ***Rejendra Prasad v. Narcotic Cell*** (1999 KHC 417) and ***Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal And Others*** [(2020) 7 SCC 1]. Per contra, Sri.B.Raman Pillai, the learned Senior Counsel appearing for the respondent No.8/accused No.8 submitted that the Court below rightly rejected the request of the petitioner to summon the witnesses and to produce the documents as it was found that the attempt of the prosecution was to fill up the lacuna and to prolong the proceedings. The learned Senior Counsel further submitted that issuing summons to the remaining witnesses listed in CrI.M.P.No.2040/2021 will cause serious prejudice to the accused and none of those witnesses even remotely appear to be essential for just decision of the case. The Counsel further submitted that the recalling of

-:12:-

the witnesses and summoning large number of additional witnesses when only investigating officer remains to be examined is with ulterior motive to tutor all those witnesses and fill up the great lacunae and to supply the omission after the defence of the accused was exposed in its entirety during cross-examination of nearly 200 witnesses. The prayers sought for in Cr1.M.P.No. 2039/2021 are beyond the scope of S.91 of Cr.P.C. and no person can be directed to create a document in the manner sought for by any party and seeking such a direction is improper and illegal, added the Senior Counsel. In support of his arguments, the learned Senior Counsel cited two decisions of the Apex Court: **Rajaram Prasad Yadav v. State of Bihar and Another** [(2013) 14 SCC 461] and **Swapan Kumar Chatterjee v. Central Bureau of Investigation** [(2019) 14 SCC 328]. The Counsel appearing for the remaining accused endorsed and supported the argument advanced by the learned Senior Counsel. In addition, the learned counsel for the accused No.4 cited the following decisions of the Apex Court: **U.T. Of Dadra and Haveli and Others v. Fatehsinh Mohansinh Chauhan** [(2006) 7 SCC 529], **Himanshu Singh Sabharwal v. State of M.P. and**

Others [(2008) 3 SCC 602], **Mannan Shaikh v. State of West Bengal** [(2014) 13 SCC 59] and **State of Haryana v. Ram Mehar and Others** [(2016) 8 SCC 762] and the learned counsel for the accused Nos.5 and 6 cited two decisions of this Court: **K.V.Vijyadas v. State of Kerala** (2017 (4) KHC 91) and **Manoj G. v. State of Kerala** (2019 (3) KHC 906).

8. The legal position as regards Section 311 of Cr.P.C is well settled. A reading of Section 311 of Cr.P.C makes it clear that any Court can summon any person as a witness or to recall and re examine any person already examined at any stage. The exercise of the said power is conditioned by the requirement that such exercise must be essential to just decision of the case. The section is not intended only for the benefit of the accused. It may equally benefit the prosecution. It is trite that wider the power, greater is the responsibility of the Court which exercise it. Since the power conferred u/s 311 is wide, its exercise has to be done by the Court with caution and circumspection. The existence of a valid and strong reason to meet the ends of justice is *sine qua non* to invoke the power. The power shall not be resorted to fill up the lacuna left by the prosecution or by the defence, or to the

disadvantage of the accused or to cause serious prejudice to the defence of the accused or to give an unfair advantage to the opposite party. Nor could the power under the provision be exercised if the Court is of the view that the application has been filed as an abuse of process of Court. It is for the Court to consider all the circumstances and decide whether prayer to summon or recall a witness is genuine. No straitjacket formula can be prescribed. This is the sum and substance of the dictum laid down in the decisions cited by both sides and stated in the previous paragraph.

9. The prosecution, in CrI.M.P.No.2040/2021, has sought to summon total sixteen witnesses which include six witnesses who were already examined, one witness cited, but not examined and nine additional witnesses who were not cited as witnesses in the final report. PWs 43, 45, 54, 69, 73 and 120 are the six witnesses who were sought to be recalled, out of whom, the Court below as per the impugned order, allowed recalling of three witnesses - PWs 45, 54 and 120. The prayer to recall the remaining three witnesses - PWs 43, 69 and 73 was disallowed. Out of the nine additional witnesses sought to be summoned, the

-:15:-

court below allowed to summon only one witness - Smt.Prathibha, the finger print expert. The prayer to recall the remaining eight additional witnesses was disallowed. So also the prayer to summon one witness (CW240 Sri. Sathyamoorthy), who was cited, but not examined, was also rejected.

10. PW43 was examined by the prosecution to prove the alleged conspiracy between accused Nos.1 and 8. He was working as groundsman at Tennis Club, Kinattingal, Thrissur. He was the only witness who alleged to have found the accused Nos.1 and 8 together at Kinattingal Tennis Club on 13/11/2006. Two specific grounds are urged in support of the prayer to recall and examine PW43. The first among the two grounds urged is that he should be recalled to identify accused No.1 on the premises that when PW43 was examined, he was not present in the Court. It is pertinent to note that the identity of the accused No.1 by PW43 was not disputed as revealed from the deposition including questions put during cross-examination by the counsel for the accused No.1. That apart, it is specifically recorded in the deposition of PW43 that "*counsel for A1 submitted that he is not challenging the identity of A1*". Thus, there is absolutely no

-:16:-

necessity to recall him for identifying the accused No.1. The second ground urged is that witness should be further asked about events witnessed by him and about facts stated by him in his 164 statement to bring about the facts and to clear ambiguity in the evidence. The said statement is so vague. It is not specifically stated for what purpose further examination is necessary. A perusal of the deposition of PW43 would show that he was examined in length in chief examination by the Special Public Prosecutor running into seven pages. He was also reexamined by the prosecution extensively running into three pages. He was examined as early as on 3/9/2020. It is after exhausting all the legally permissible avenues, the prosecution has now belatedly come up with a ground that PW43 "*should be further asked*" without stating any further details. If the party who called the witness is given even fresh opportunity to ask questions after the cross-examination and reexamination are concluded, it will provide an opportunity to negate the facts extracted during cross-examination as rightly argued by the learned Senior Counsel for the accused. Such a course is not contemplated u/s 311 of Cr. P.C.

-:17:-

11. The next witness who was sought to be recalled is PW73. According to the prosecution, part of the quotation amount was given by the accused No.8 to the accused No.1 and the same was received by him. PW73 was examined to prove the same. PW73 in cross examination stated about certain monetary transaction between the accused No.1 and himself based on MO60 agreement executed between them. According to the prosecution, it is necessary to recall him to bring the details and correctness of the said monetary transaction. It is to be noted that MO60 is a document produced and marked by the prosecution. Certain monetary transactions between PW43 and the accused No.1 based on MO60 were brought out in cross-examination. Thereafter, the learned Special Public Prosecutor reexamined the witness also. In reexamination, questions were put touching MO60 as well. He was examined as early as on 8/10/2020. Now, after all these exercise, if the prosecution is allowed to challenge the deposition made during cross-examination after a lapse of more than one year, it will definitely cause prejudice to the accused.

12. The third witness sought to be recalled is PW69. He

-:18:-

was one among the first witnesses who visited the survivor at the residence of PW5. According to the prosecution, he could not fully narrate all the important facts within his knowledge as stated in his previous statements when he was examined at the Court below and, hence, he has to be further examined to bring out the entire facts in his knowledge. He was examined on 30/9/2020. His chief examination itself consists of 19 pages. After the examination, reexamination was also conducted by the prosecution. Apart from generally stating that he has to be further examined to bring out the entire facts within his knowledge, no valid or specific reason has been assigned warranting his reexamination.

13. As stated already, PWs 43, 69 and 73 were sought to be recalled and reexamined after more than one year of their examination. There is absolutely no explanation about the long delay. No cogent or sufficient reason has been stated for their reexamination. The general statement that the entire facts could not be brought out when they were examined cannot be construed as a valid or sufficient reason to recall and reexamine them. Their examination was done by a Special Public Prosecutor

in the presence of the investigating officer. All of them supported the prosecution. Recalling and reexamination of a witness cannot be done to fill up lacuna or to cover up the defect or to rectify the mistake crept in evidence [**K.V.Vijyadas** (supra)]. The apprehension put forward by the defence that if they are recalled they will be tutored and that will cause prejudice to the accused cannot be ruled out. Where the prosecution evidence has been closed long back and the reasons for recalling of the witnesses is not satisfactory, the recalling of the witnesses at a belated stage would, no doubt, cause great prejudice to the accused and cannot be allowed [**Swapan Kumar Chatterjee** (supra)]. The Court below rightly rejected the prayer for recalling PWs43, 69 and 73. No interference is called for on the said finding of the Court below.

14. The prosecution has also sought to examine nine additional witnesses who were not cited as witnesses in the final report. Out of whom, except one (Smt. Prathibha), the prayer to examine the remaining eight was disallowed. One Mr. Joseph @ Jose was sought to be summoned and examined to identify the accused No.2 as the driver of the vehicle bearing registration

-:20:-

No.KL-37 F 5744 which was allegedly used for the commission of the offence. PW166 deposed that the above said vehicle in which PW1 was taken to Ernakulam was regularly used by Mr.Joseph @ Jose. According to the prosecution, it is necessary to summon him as an additional witness to prove that the said vehicle was not available with him on 17/2/2017, the date of incident, as the same was taken by accused No.2 to bring PW1 to Ernakulam. The prosecution examined number of witnesses (including PW45 and PW166) to prove the fact that accused No.2 drove the vehicle mentioned above on the date of the incident to bring PW1 to Ernakulam. This fact was not seen disputed by the accused No.2 also. Hence, the examination of the said witness is absolutely unwarranted. One Mr.Nikhil Sackaria Korah who introduced accused No.8 in a television programme on Manorama Online is the next additional witness sought to be summoned. Absolutely no reason has been stated in the petition about the purpose of his examination and the relevance of the interview with the crime. PW120 deposed that his friend had sustained injury on account of a fall when they were in a crowd to view the programme Mazhavillazhakilamma at Willington Island. He was

-:21:-

allegedly admitted at the Medical Trust Hospital, Ernakulam and treated by one Dr.Harikumar who issued a wound certificate. The said Dr.Harikumar has been cited as an additional witness in order to prove the wound certificate and also about the treatment provided to the injured. The purpose of the examination of the said witness has not at all been disclosed in the petition. The relevancy of the said witness to the facts of the case has also not been disclosed. Moreover, the friend of PW120 who was injured has not been cited as a witness. Without showing any valid reason, the prosecution cannot ask to issue summons to additional witnesses at a highly belated stage. No doubt, the Court cannot shut down the opportunity to adduce evidence for just decision of the case, but wide power u/s 311 has to be exercised with utmost care and caution. There is nothing on record to show that the examination of these additional witnesses is necessary for just decision of the case so as to invoke S.311 of Cr.P.C. Hence, I see no reason to interfere with the rejection of the prayer for recalling these three additional witnesses.

15. Four additional witnesses viz. Smt. Nileesha, Sri. Kannadasan, Sri. Suresh D., and Smt. Usha were also sought to

be summoned to prove the customer application forms filed by them to obtain mobile connections allegedly used by the accused Nos.3, 4, 5 and 7. According to the prosecution, examination of those additional witnesses is necessary to prove as to how the said mobile phones reached the hands of the accused persons. It is the case of the prosecution that those mobile phones were used to commit conspiracy. The CDRs of the calls between the accused persons through those mobile phones were also produced. The photostat copies of the customer application forms signed by the above witnesses were marked as prosecution exhibits. In Cr1.M.P.No.2039/2021 which was filed u/s 91 of Cr.P.C., the prosecution sought to summon, among other things, the originals of those application forms as well. The prayer to summon the above four additional witnesses was turned down by the court below on the ground that the prayer to summon the original customer application forms was dismissed as per the order in Cr1.M.P.No.2039/2021. I am inclined to allow the prayer in Cr1.M.P.No.2039/2021 to summon those original customer application forms (Reasons will be discussed in the later part of this order). Hence, it is necessary to examine the above

-:23:-

mentioned four witnesses to prove those original customer application forms. That apart, the prosecution will be able to let in evidence how those mobile phones reached the hands of the accused only through the oral evidence of these witnesses. For these reasons, I am of the view that the request to examine those witnesses is to be allowed.

16. The last additional witness in the list is the First Class Judicial Magistrate Smt.Leena Rasheed who recorded statement of the approvers. u/s 360(4) of Cr.P.C. The statement was already marked. The approvers were also examined. In these circumstances, the learned Director General of Prosecution fairly conceded that the examination of the Magistrate is not necessary.

17. The prosecution has further sought to examine one witness viz., Sri. Sathyamoorthy (CW240) who was cited in the final report, but not examined. He was the Nodal Officer of BSNL. He was cited to prove the customer application forms and CDRs along with the certificate u/s 65B of the Evidence Act in respect of the phones allegedly used by the accused persons. Those documents are Exts. P200(a), P201, P201(a), P202, P202(a), P203, P204, P204(a), P205, P205(a), P206, P207, P207(a),

P208(series), P209, P209(a), P210(series), P211 (series), P212 (series), P212(a) and P213 (series). Since he was laid up, another witness viz. Sri.P.K.Sajeev was examined as PW175 on his behalf. The petition filed by the prosecution on 31st March, 2021 to substitute CW240 would show that the permission was, in fact, sought to examine the then Nodal Officer Sri. Saju George who was acquainted with the signature of Sri.Sathyamoorthy on his behalf. But he was not examined. Later on, another petition was filed as Cr1.M.P.No.1224/2021 on 22nd July, 2021 seeking permission to examine Sri. P.K.Sajeev for and on behalf of Sri.Sathyamoorthy. It was allowed and he was examined as PW175. In fact, certificate u/s 65B was issued by Sri.Sathyamoorthy. He was the person who was conversant with the original customer application forms and CDRs mentioned above and he is the proper person to prove those documents. True, the prosecution could have been more vigilant to examine him earlier. But, the fact remains that he could not be examined in time as he was laid up. If proper evidence could not be adduced or a relevant material could not be brought on record in time due to any inadvertence or omission, the Court should be

magnanimous in permitting such mistake to be rectified [**Rajaram Prasad Yadav** (supra)]. Hence, I am of the view that the permission can be granted to summon and examine CW240.

18. The prayer in the CrI.M.P.No.2039/2021 is two fold. It is the case of the prosecution that the accused persons contacted one another and also with other witnesses on several occasions immediately prior, during and subsequent to the commission of the crime as a part of conspiracy using various mobile phones. The prosecution also alleged that accused No.1 while in judicial custody at District Jail, Kakkanad secretly obtained a mobile phone with the help of PW176 and contacted him as well as other witnesses in furtherance of the conspiracy PW176 had with the accused No.1. In order to prove the use of those mobile phones, the photostat copies of the customer application forms pertaining to those mobile numbers were produced along with the final report and marked during the evidence subject to proof. According to the prosecution, original application forms are available in the custody of respective mobile companies. Hence, the respective nodal officers who are in custody of those documents were sought to be summoned to produce the original

-:26:-

of the customer application forms. This is the first prayer. CW240, the Nodal Officer of BSNL, furnished CDRs of eight mobile numbers and also issued corresponding certificates u/s 65B(4) of the Evidence Act which were marked as Exts. P201, P202, P204, P205, P207, P209, P210 and P212. Similarly PW144, the Assistant Superintendent of District Jail, had produced Exts. P149 and P152 certificates u/s 65B(4) of the Evidence Act pertaining to Ext. P148 pen drive allegedly containing visuals of C1 Block, District Jail, Kakkanad as well as Ext. P151 pen drive containing visuals of guard room area of the District Jail, Kakkanad. According to the prosecution, the above mentioned certificates marked in evidence are not fully in terms of S.65B(4) of the Indian Evidence Act. The second prayer is to summon certificates fully in terms with S.65B(4) from PW144 and CW240. The Court below rejected both prayers.

19. The first prayer was rejected holding that there was undue delay in filing the petition and no satisfactory explanation was shown for non production of the original till filing of the petition. It is true that the original of the customer application forms mentioned above were not produced along with the final

report. However, it is trite that the documents which were not produced along with the final report can be produced even after submission of the final report. The photocopies of the customer application forms marked in evidence were produced along with the final report and the copy of the same were given to the accused.

20. Sections 61 and 62 of the Evidence Act read together show that the contents of a document must, primarily, be proved by the production of the document itself (original) for the inspection of the Court. Section 63 categorizes five kinds of secondary evidence. Photocopy of a document (copy made by mechanical process) is one among them. Section 64 provides that document must be proved by primary evidence except in cases provided in Section 65. Section 65 provides when secondary evidence can be given [clauses (a) to (g)]. Secondary evidence relating to contents of a document is inadmissible until the non production of the original is accounted for so as to bring it within one or more other of the cases provided in Section 65. The party who proposes to adduce secondary evidence is bound to explain the non availability of the original. To admit a photocopy in

-:28:-

evidence, it is necessary to lay the foundation of reception of secondary evidence [**J. Yashoda v. K.Shoba Rani** [(AIR 2007 SC 1721)]. That apart, the secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact true copy of the original.

21. As per the evidence of the Nodal Officers, the originals of the customer applications now sought to be produced were kept in the warehouse of the mobile companies and the same were available. So, it is a case where non production of the original is not properly accounted for. It is well settled that neither mere admission of a document in evidence amount to its proof nor mere marking of an exhibit of a document dispense with its proof which is otherwise required to be done in accordance with law. As stated already, the photocopies of the original customer application forms were produced along with the final report and copies of the same were furnished to the accused. Now, the prosecution wants to summon its original. It is true that there is a delay in filing the application. The matter of delay is fatal only if the parties attempt to obtain any unfair advantage. In this case, no new document is attempted to be

introduced. The only prayer is to produce the original of the documents which were already marked. By producing the originals, no undue advantage will be obtained by the prosecution and no prejudice would be caused to any of the accused. Hence, the first prayer can be allowed.

22. The second prayer is stoutly objected by the defence. The learned Senior Counsel, Sri.B.Raman Pillai, strenuously submitted that the Court exercising power u/s 91 can only ask for production of the document and law does not permit Court issuing further direction to produce a document incorporating or drafting a particular content in the document. What is sought for is to direct production of documents including detailed certificate u/s 65B(4) of the Evidence Act satisfying all requirements. The Court below also found that the attempt of the prosecution is to fill up lacuna by directing the concerned authorities to produce the documents in a particular manner and if such a direction is issued, it would cause prejudice to the accused.

23. Section 91 of Cr.P.C empowers a Court to issue summons for the production of a document in the possession or

power of a person if such document is necessary or desirable for the purpose of any inquiry or trial. True, ordinarily, the said power cannot be stretched to direct a person to create a document and to produce the same. The document must be one in existence and believed to be in the possession or power of the person to whom summons is to be issued to produce it. No Court can issue a summons u/s 91 to any person to produce a document after preparing it. [**Sarath Kumar v. State of Kerala and Another** (2019 (5) KHC 298)]. But, in a case where the person authorized to issue certificate u/s 65B(4) of the Evidence Act issues a defective certificate, or a certificate not in conformity with the said provision, a direction to the said person to issue a proper certificate in terms of the provision is permissible in view of the law laid down by the Apex Court in **Arjun** (*supra*).

24. Section 65A of the Evidence Act provides that the “contents of electronic records may be proved in accordance with the provisions of Section 65B”. Section 65B provides for “admissibility of electronic evidence”, without the need to produce the original, if the electronic record (being a document) is supported with a certificate under Section 65B(4) of the

Evidence Act. A two-Judge Bench of the Apex Court in **State (NCT of Delhi) v. Navjot Sandhu** [(2005) 11 SCC 600] while examining the provisions of Section 65B, held that in a given case, it may be that the certificate containing the details in Sub section (4) of Section 65B is not filed, but that does not mean that secondary evidence cannot be given. It was held that the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, Sections 63 and 65. Irrespective of the compliance with the requirements of Section 65B, which is a provision dealing with admissibility of electronic records, there is no bar in adducing secondary evidence under the other provisions of the Evidence Act, namely, Sections 63 and 65, it was held. However, later, a three-Judge Bench of the Apex Court in **Anvar P.V. v. P.K. Basheer** [(2014) 10 SCC 473] held that Section 65B of the Evidence Act is a complete code in itself and being a special law, the general law under Sections 63 and 65 has to yield. **Navjot Sandhu** (supra) was held as 'not a good law', by specifically observing that Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record. It was further held that the

electronic record produced in evidence has to be accompanied with a certificate issued under Section 65B(4) to be admissible in law. However, it was clarified that there would be no need of producing certificate under Section 65B(4) if the original electronic record as such is produced as primary evidence. The three-Judge Bench of the Apex Court in **Arjun** (supra) agreed with the law laid down in **Anvar** (supra), but gave certain clarifications to the same. The Apex Court reiterated that special provisions of Section 65A and Section 65B of Evidence Act is a complete code in themselves and that a written certificate under Section 65B(4) is *sine qua non* for admissibility of evidence by way of electronic record. However, it was clarified that the requisite certificate in sub-section (4) is unnecessary if the original document itself is produced.

25. S.65B does not speak of the stage at which such certificate must be furnished to the Court. In **Anvar** (supra), the Apex Court observed that such certificate must accompany the electronic record when the same is produced in evidence. However, in **Arjun** (supra), it was held that so long as the hearing in a trial is not yet over, the requisite certificate can be directed

to be produced at any stage, so that information contained in electronic record form can then be admitted, and relied upon. It was clarified that the contemporaneous production is required only in cases where such certificate could be procured by the person seeking to rely upon an electronic record. It was specifically held that in cases where either a defective certificate is given, or in cases where such certificate has been demanded and is not given by the concerned person, the Judge conducting the trial must summon the person/persons referred to in Section 65B(4) of the Evidence Act, and require that such certificate be given by such person/persons. The Apex further clarified that “This, the trial Judge ought to do when the electronic record is produced in evidence before him without the requisite certificate in the circumstances aforementioned” (Para 52). The Rajasthan High Court in ***Paras Jain v. State of Rajasthan*** (2015 SCC OnLine Raj 8331) examined the issue as to whether a “contemporaneous certificate” under Section 65B would be required for admissibility of a CD in evidence. It was held that there is no requirement of procurement of a certificate under Section 65B at the time of taking the electronic record and the

same could be procured later and submitted at the time of production of such document in evidence. That was also a case where the certificate was produced along with the final report, but it was not in a proper form and during the course of hearing, the certificate in the prescribed form was produced. In **Arjun** (supra), the Apex Court concurred with the law laid down by the Rajasthan High Court in **Paras Jain** (supra). The dictum laid down in **Arjun** (supra) when applied to the facts of the case, I have no hesitation to conclude that the second prayer to summon certificates in terms with Section 65B(4) is only to be allowed.

26. The learned Senior Counsel submitted that the directive of the Apex Court to complete the trial will be over by 15/2/2022 and both the petitions were filed by the prosecution with ulterior motive to protract the trial and to avoid a verdict from the court below. The learned counsel further submitted that the Special Public Prosecutor tendered resignation and, hence, it may not possible to examine the additional witnesses without delay. In answer to this submission, the learned Director General of Prosecution, after having discussion with the investigating officer who was present in the court during arguments, submitted

that all the witnesses sought to be summoned are very much available and the documents sought to be summoned are also ready with the concerned persons and he will ensure that the witnesses are present and the documents are produced and the further evidence is completed within the time prescribed by the court.

In the light of the above findings, the order impugned in CrI.M.C.No.6703/2021 stands set aside and CrI.M.P.No.2039/2021 stands allowed. The order impugned in CrI.M.C.No.6702/2021 to the extent rejecting summoning of five additional witnesses viz., Smt.Nilesha, Sri.Kannadasan, Sri.Suresh D, Smt.Usha and Sri. Sathyamoorthy (CW240) is set aside. The prayer to examine these witnesses stands allowed. The entire exercise of adducing additional evidence allowed as per this order shall be completed within ten days from the date of the receipt of the copy of this order by the Court below. The Director General of Prosecution shall see that a new Special Public Prosecutor is deputed or some other alternative arrangement is made to conduct the case on behalf of the prosecution and ensure that the examination of the witnesses and production of the documents as allowed as per this

Cr1.M.C.Nos.6702 & 6703/2021

-:36:-

order is done within the period of ten days. The accused shall also co-operate to complete the additional evidence within this period. Cr1.M.C.s are, accordingly, disposed of.

Sd/-

DR. KAUSER EDAPPAGATH

JUDGE

Rp

APPENDIX OF CRL.MC 6703/2021

PETITIONER ANNEXURES

- Annexure 1 TRUE COPY OF THE PETITION, DATED
16.11.2021 IN CRIMINAL MP 2039/21 FILED
UNDER SECTION 91 CR.PC.
- Annexure 2 COPY OF THE OBJECTION FILED BY THE
COUNSEL FOR THE 8TH RESPONDENT.
- Annexure 3 CERTIFIED COPY OF THE ORDER DATED
21/12/2021 IN CRIMINAL MP NO. 2039/2021
IN SC NO. 118/2018 OF THE ADDITIONAL
SPECIAL SESSIONS COURT (SPE/CBI-III)
ERNAKULAM.

APPENDIX OF CRL.MC 6702/2021

PETITIONER ANNEXURES

- Annexure 1 TRUE COPY OF THE PETITION DATED
16.11.2021 IN CRIMINAL MP 2040/21 FILED
UNDER SECTION 311 CR.P.C.
- Annexure 2 THE TRUE COPY OF THE OBJECTION FILED BY
ACCUSED NO. 8 TO THE ANNEXURE -1
PETITION.
- Annexure 3 CERTIFIED COPY OF THE ORDER DATED
21/2/2021 IN CRIMINAL MP NO. 2040/2201
IN SC NO. 118/2018 OF THE ADDITIONAL
SPECIAL SESSIONS, CORT (SPE/CBI)III/
ERNAKULAM.