

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE K.HARIPAL

THURSDAY, THE 16TH DAY OF SEPTEMBER 2021 / 25TH BHADRA, 1943

CRL.MC NO. 3532 OF 2021

CMP 87/2021 IN SC 368/2014 OF ADDL. SESSIONS COURT, NEYYATTINKARA,
THIRUVANANTHAPURAM

PETITIONER/1ST ACCUSED:

SELVARAJ

AGED 58 YEARS

S/O. ALEXANDER, PITTAL MAYITTIVILAKAM HOUSE, VARUTHATTU
PURAYIDAM, PUTHIYATHURA, KARUMKULAM DESOM,
THIRUVANANTHAPURAM DISTRICT.

BY ADVS.

RENJITH B.MARAR

SANTHOSH.M.JOSE

LAKSHMI.N.KAIMAL

ARUN POOMULLI

SURABHI SANTHOSH

BIJU VIGNESWAR

MEERA M.

RESPONDENT/STATE:

THE STATE OF KERALA

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

SR.PP - SRI. T.R. RENJITH

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON
03.09.2021, ALONG WITH Cr1.MC.3535/2021, THE COURT ON 16.09.2021
PASSED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE K.HARIPAL

THURSDAY, THE 16TH DAY OF SEPTEMBER 2021 / 25TH BHADRA, 1943

CRL.MC NO. 3535 OF 2021

CMP 86/2021 IN SC 368/2014 OF ADDL. SESSIONS COURT, NEYYATTINKARA,
THIRUVANANTHAPURAM

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THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON
03.09.2021, ALONG WITH Cr1.MC.3532/2021, THE COURT ON 16.09.2021
PASSED THE FOLLOWING:

C.R.

ORDER

These are petitions filed under Section 482 of the Code of Criminal Procedure seeking to quash Annexure A2 and A4 orders of the Additional Sessions Judge, Neyyattinkara in CMP.87/2021 and CMP.86/2021 in SC.368/2014 respectively.

2. Petitioner in both these Crl.M.Cs is one and the same. He is the first accused in SC. 368/2014 of Additional Sessions Court, Neyyattinkara, which is the culmination of investigation in crime No.490/2012 of Kanjiramkulam police station, Thiruvananthapuram. That is a case registered alleging offence under Sections 143, 147, 341, 324, 307, 302 r/w 149 of IPC. The alleged incident had happened at 9:45 p.m. on 27.10.2012. There are ten accused in the crime. It is alleged that they formed an unlawful assembly and, in prosecution of their common object, committed murder of one Christudas and one Antony and caused injuries to three others; all the accused are members of the same family. After investigation, charge sheet was laid and the accused are facing trial. According to the petitioner, the prosecution evidence was partly completed in February 2020 and thereafter, even during pandemic, the defence had participated in completing the trial; prosecution

evidence was completed on 22.12.2020. Then the learned Additional Sessions Judge adjourned the case 15 times for recording statements of the accused under Section 313 of the Cr.P.C. Ultimately, on 23.07.2021 statements of the accused were recorded under Section 313 of the Cr.P.C. and the case was posted to 26.07.2021 for enquiry under Section 232 of the Cr.P.C. Then the petitioner filed the said CMP Nos.86/2021 and 87/2021. CMP. 86/2021 was filed under Sections 233(3) and 91 of the Cr.P.C. for issuing summons to Dy.S.P. of Crime Branch CID, HHW-1, Jawahar Nagar, Kawdiar for the purpose of causing to produce a report in file No.169/CB/HHW-1/SU/15 and statement of all witnesses recorded in file No.D1/5484/CR/2015 dated 26.03.2015. Similarly, CMP.87/2021 was filed for issuing summons to witnesses mentioned in the witness list for producing documents and adducing oral evidence. There are three witnesses in the list; they are Sri. S. Rafeek, Deputy Superintendent of Police, Crime Branch CID, HHW-1, Thiruvananthapuram and the purpose is to prove further investigation report submitted by him and the report dated 18.05.2015. Others are two medical officers. There is no dispute with regard to the summoning of defence witness Nos.2 and 3.

3. By Annexure- A2 order dated 30.07.2021, the learned Additional Sessions Judge allowed CMP.86/2021 in part. He permitted to summon

witness Nos.2 and 3, that is the medical officers. However, petition to summon the said Rafeek, the Dy.S.P. was disallowed on the premise that no further investigation was conducted by him and that no such report is available before court; statements of such witnesses as part of further investigation also were not available. CMP. 87/2021 was also dismissed in view of the dismissal of CMP. 86/2021 as regards the summoning of the Dy.S.P. Challenging these orders the petitioner has approached this Court under Section 482 of the Cr.P.C.

4. I heard Sri.Renjith B. Marar, the learned counsel for the petitioner and Sri.Hrithwik C.S. as well as Sri. Renjith T.R., the learned Senior Public Prosecutors appearing for the respondent State.

5. According to the learned counsel for the petitioner, the embargo under Section 172(3) of the Cr.P.C. is not applicable in the facts of the case. He has not called for the Case Diary. He had filed application under Sections 233(3) and 91 of the Cr.P.C. for summoning the Dy.S.P. who conducted further investigation and also for producing statements recorded by him for the purpose of contradicting and impeaching some of the prosecution witnesses. According to him, the report given by the said Rafeek, Dy.S.P. and previous statements of some of the prosecution witnesses have already been obtained by him under the Right to Information Act and that the said Dy.S.P. is now working elsewhere so

that the custodian of the records, who is the successor Dy.S.P., has to be summoned under Section 91 Cr.P.C. for the purpose of producing documents. He wants to examine the said Rafeek for the purpose of contradicting the witnesses. According to the learned counsel, when prosecution witnesses were examined, he had already put questions bearing in mind the statements given by them to Sri. Rafeek and now during examination under Section 233 Cr.P.C. he wants to impeach the credit of such witnesses who were examined for the prosecution. Even though the prosecution does not rely on those documents, the indefeasible right of the accused persons to impeach the testimony of witnesses cannot be denied. According to him, statements have already been obtained from such witnesses and that exercise will be completed only if these documents are produced and proved through the officer who had recorded the same.

6. The learned counsel also relied on the decisions reported in **State of Kerala v. Raghavan and others [1974 Cr.LJ 1373]**, **Shamshul Kanwar v. State of U.P. [AIR 1995 SC 1748]**, **State of Kerala v. Babu and others [AIR 1999 SC 2161]** and also **Mahaveer Chandrakar v. State of Chattisgarh [MANU/CG/0668/2017]**.

7. On the other hand, according to the learned Senior Public Prosecutors, no such further investigation was conducted by the said Rafeek, Dy.S.P., Crime Branch so that the learned Additional Sessions Judge is right in

rejecting the application. Both of them have stated in clear terms that no further investigation was conducted. There is only one investigation conducted by the local police and all the witnesses were examined on the side of the prosecution. According to them, the embargo under Section 172(3) of the Cr.P.C. is absolute, that such a document is not available for the defence.

8. As stated earlier, petitioner is the first accused in a double murder case. There are ten accused in the charge and all of them are facing trial. After closing the prosecution evidence, the accused were questioned under Section 313(1)(b) Cr.P.C. and thereafter enquiry under Section 232 Cr.P.C. was conducted and the accused were called upon to enter on their evidence in defence. At that time, the said petitions, CMP.Nos.86/2021 and 87/2021 were filed by the petitioner. By Annexure-A4 order, CMP.86/2021 was dismissed by the learned Additional Sessions Judge and Annexure-A2 shows that CMP.87/2021 was partially allowed. The petitioner is aggrieved by the stands taken by the learned Additional Sessions Judge in declining his attempts to adduce evidence by examining Sri.Rafeek and proving the statements of witnesses recorded by him.

9. Even though the petitioner had proceeded as though there was a further investigation conducted by Dy.S.P. Rafeek and had laid a report, such a report is not available. It seems that the learned Judge also was informed that a

further investigation was done. But the learned Senior Public Prosecutors have submitted that such a further investigation was not conducted, there was only one investigation which was conducted by the local police. After or during the course of investigation by the local police, some of the suspects had moved the Home Minister requesting to transfer the investigation to the Crime Branch. On that representation, Dy.S.P. Rafeek, who was in the Crime Branch, was directed to make an enquiry and he conducted formal enquiry, examined some of the witnesses including the Investigating Officer who was the Circle Inspector of the local police station and made a report. In other words, it was only a 'petition enquiry' as the learned Public Prosecutor put in. Copy of that report and statements recorded during the enquiry have already been obtained by the petitioner under the Right to Information Act. Using these previous statements, when prosecution witnesses were examined, questions were put to them by the defence counsel. According to the learned counsel, in order to contradict their stand and to impeach the testimony of some of the witnesses, examination of the Dy.S.P. is inevitable. Similarly, previous statements given by some of the witnesses before the Dy.S.P. also have to be produced for the purpose of proving the contradictions. The definite case of the prosecution is that one of the deceased, that is Christudas, was stabbed by the 1st accused when the 2nd accused had caught hold of him. According to the defence, during 'further investigation',

some of the witnesses had given a different version that one CW3 Brijin had stated that Christudas was stabbed by accused No.3 Arogyadas. There are similar other contradictions also. The purpose of summoning and examining the Dy.S.P. and also to prove statements recorded by him is to bring out the contradictions crept in the testimony of material witnesses, which, according to the learned counsel, are very material.

10. After having gone through rival contentions and materials made available before Court, I do not find any reason to reject the contentions raised by the petitioner. No doubt, the embargo under Section 172(3) of the Cr.P.C. cannot come into play for the simple reason that no such further investigation was conducted by Dy.S.P. Rafeek. Even if there was further investigation, as rightly pointed out by the learned Senior Public Prosecutors, the defence is not entitled to summon or use the same. It was only a formal enquiry conducted by the Dy.S.P. on the feasibility of referring the case to the Crime Branch for further investigation. The matter ended there. The Dy.S.P., Crime Branch had given a report to the Superintendent of Police, Crime Branch along with statements of some of the witnesses questioned by him including that of the Investigating Officer. No action was taken on the report. However, the defence could get a climbing stem. According to them, statements given by some of the prosecution witnesses to the Enquiry Officer were on different lines; bearing in mind such

previous statements, witnesses were cross-examined by the defence and, according to them, there are prevaricative statements given by them and in order to expose the contradictions they wanted to examine the Enquiry Officer, the Dy.S.P., and also to prove the previous statements. Such a valuable right of the defence cannot be denied to the defence.

11. In fact, previous statements given by the prosecution witnesses in respect of the very same transaction are very relevant and important for the purpose of understanding the real facts. In this connection, referring to Section 145 of the Evidence Act the Hon'ble Supreme Court in **State of Kerala v. Babu and others**, quoted supra, held thus:

“5. A perusal of this Section shows that this Section permits the cross-examination of the witness in any trial, with reference to his previous statement, to establish a contradiction and the manner in which such contradictions can be established. Section 155 of the Evidence Act provides that the previous statement of a witness can be made use of during the cross-examination of that witness for the purpose of impeaching the credit of the witness. Thus, it is seen it is the right of a party in a trial to use the previous statements of a witness either for the purpose of establishing a contradiction in his evidence or for the purpose of impeaching the credit of the witness. This right given to a party in a trial under Section 145 of the Evidence Act is somewhat controlled in criminal trials by the provisions made in the Code.”

12. In other words, having regard to the fact that Section 162 of the Cr.P.C. highlights the object of Section 145 of the Evidence Act, it is the right of

every accused in a criminal trial to make use of the previous statements of a witness including the statements recorded by the investigating agency during the course of investigation for the purpose of establishing contradiction in evidence or to discredit the witness. Referring to the illustrious decision in **Tahsildar Singh and others v. State of U.P. [AIR 1959 SC 1012]** the Hon'ble Supreme Court held that the very object of enactment of Section 161 of the Cr.P.C. and Section 145 of the Evidence Act is to create a right in the accused to make use of the previous statements of the witnesses for the purpose of contradiction and also for impeaching the merit of the witnesses. This right has not been taken away by Section 172 of the Cr.P.C. In other words, such a right is an indefeasible one available to the defence.

13. To sum up, from the perusal of the records it is very patent that no further investigation was conducted. However, Dy.S.P. Sri.Rafeek had conducted an enquiry on the feasibility of conducting further investigation by the Crime Branch and during the course of such enquiry some of the witnesses were examined and their statements were reduced into writing. During the course of trial, the defence wanted to make use of the prevaricative statements given by the witnesses who were examined both by the Investigating Officer and the Enquiry Officer. In order to bring out the contradictions and to complete the process, that report of enquiry and also statements of witnesses are sought to be

produced.

14. I do not have any doubt in mind that both the petitions were filed by the petitioner with right direction and his legitimate right cannot be denied. In this connection, the fact that the Court had dismissed a similar petition filed by accused Nos.2 and 10 in 2018 has little relevance.

15. After all, paramount consideration of every trial is to find out the truth. A trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. A fair trial is the hall mark of a civilised society. While ensuring fair trial, interests of the accused also have to be protected. There are in built mechanisms in our statutes for protecting the interests of all. The attempt of the petitioner is to preserve his interest which is statutorily protected. The learned Additional Sessions Judge went wrong in dismissing the petitions. In order to secure the ends of justice, inherent jurisdiction of this Court under Section 482 of the Cr.P.C. is liable to be exercised.

In the result, both the criminal miscellaneous cases are allowed and the learned Additional Sessions Judge is directed to issue summons to DW1 as well and also issue summons for the production of documents under Section 91 of the Cr.P.C.

**Sd/- K. HARIPAL
JUDGE**

okb/15.9.

//True copy// P.S. to Judge

APPENDIX OF CRL.MC 3532/2021

PETITIONER ANNEXURE

- Annexure A-1 TRUE COPY OF THE PETITION DATED 26.07.2021 IN C.M.P NO.87/2021 IN S.C NO.368 OF 2014 ON THE FILES OF THE ADDL.SESIONS COURT, NEYYATTINKARA.
- Annexure A-2 CERTIFIED COPY OF THE ORDER DATED 30.07.2021 IN C.M.P NO. 87/2021 IN S.C. NO.368 OF 2014 ON THE FILES OF THE ADDL. SESSIONS COURT, NEYYATTINKARA.
- Annexure A-3 THE TRUE COPY OF PETITION DATED 26.07.2021 IN CRL.M.P NO.86/2021 IN S.C. NO. 368 OF 2014.
- Annexure A-4 TRUE COPY OF THE ORDER DATED 30.07.2021 IN C.M.P NO. 86/2021 IN S.C. NO. 368 OF 2014 ON THE FILES OF THE ADDL. SESSIONS COURT, NEYYATTINKARA.
- Annexure A-5 THE COPY OF THE ORDER IN FILE NO. 21/CB/HHW/RIACT/2015 DATED 17.08.2015.

APPENDIX OF CRL.MC 3535/2021

PETITIONER ANNEXURE

- Annexure A-1 TRUE COPY OF PETITION DATED 26.07.2021 IN C.M.P NO. 87/2021 IN S.C. NO.368 OF 2014 ON THE FILES OF THE ADDL. SESSIONS COURT, NEYYATTINKARA.
- Annexure A-2 THE TRUE COPY OF ORDER DATED 30.07.2021 IN C.M.P NO.87/2021 IN S.C. NO.368 OF 2014 ON THE FILES OF THE ADDL, SESSIONS COURT, NEYYATTINKARA.
- Annexure A-3 THE TRUE COPY OF PETITION DATED 26.07.2021 IN CRL.M.P NO.86/2021 IN S.C.NO.368 OF 2014.
- Annexure A-4 CERTIFIED COPY OF ORDER DATED 30.07.2021 IN C.M.P NO.86/2021 IN S.C.NO.368/2014 ON THE FILES OF THE ADDL. SESSIONS COURT, NEYYATTINKARA.
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