
(2015) 06 KL CK 0124

In the High Court Of Kerala

Case No : Criminal M.C. No. 6051 of 2014

Chandran and Others

APPELLANT

Vs

State of Kerala and Others

RESPONDENT

Date of Decision : 23-06-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 173, 173(2), 173(5), 229
Evidence Act, 1872 — Section 63(2), 65(c)
Penal Code, 1860 (IPC) — Section 302

Citation : (2015) 3 ILR Ker 1115

Hon'ble Judges : Alexander Thomas, J

Bench : Single Bench

**Advocate : Rajit, for the Appellant; Tom Jose Padinjarakara, Additional D.G.P.,
Advocates for the Respondent**

Judgement

Alexander Thomas, J.—The above captioned Criminal Miscellaneous Case has been instituted under Sec.482 of the Code of Criminal Procedure seeking this Court's invocation of its inherent powers conferred thereunder, with the prayer to quash the impugned Anx.B order dated 23.10.2014 rendered by the IVth Additional Sessions Judge, Thrissur, on CrI.M.P. No. 4329/2014 in S.C. No. 356/2007. By the said impugned order, the prayer made by the prosecution in this case involving capital offence under Sec.302 of the I.P.C. for producing additional documents to examine additional witness during the course of trial was allowed. The prosecution case is that due to previous enmity, on 18.1.2005, the accused 14 in number, who belonged to the BJP and RSS, caused the murder of one Shameer, who is said to be a member of Communist Party of India (Marxist) and thereby committed the offence punishable under Sec.302 IPC. The Sessions Court concerned framed the charge against the accused on 31.10.2013 and though witnesses were scheduled to be examined from 13.3.2014 to 28.3.2014, the case was posted to 23.4.2014 due to the inconvenience pleaded by the defence counsel. It is stated that till date PWs 1 to 47 are examined, Exts.P-1 to P-55 documents and MOs 1 to 52 are marked in evidence. Exts.D-1 to D-27 case

diary contradictions are also marked subject to proof.

2. CrI.M.P. No. 4329/2014 was filed on behalf of the prosecution in the above said Sessions Case by praying that the same may be allowed by virtue of the enabling provisions contained in Secs.242(2) and 311 of the Cr.P.C., stating therein that the investigating officer had in the course of the investigation on 20.1.2005 taken into custody xerox copies of two petitions dated 1.5.2004 filed by the deceased and the mother of the deceased to the Circle Inspector of Police, Chavakkad, alleging that some of the accused herein named in the petitions had attempted on the life of the deceased and accordingly, sought police protection therein. That those petitions were forwarded to the Station House Officer, Vadakkekad Police Station, which were received in the petitions register maintained in the station house office. That the said documents are essential to the prosecution evidence and it was only due to inadvertence of the investigating officer that same were not produced along the final report. The said documents were thus produced before the court below and the mother of the deceased is cited as additional witness in the list of witnesses produced and the photographer, who had taken photographs in the place of the incident is the other additional witness, etc. Accused 3 to 8 and 11 to 14 filed their objections/ counter contending that the prayer is not maintainable and should not be granted, etc.

3. The court below as per the impugned Anx. B order held that the quoting of the wrong provision of Sec.242 of the Cr.P.C. by itself will not entail rejection of the plea and that Sec.230 of the Cr.P.C. would come to the aid of the prosecution to apply for process for attendance of any witness or production of documents and Sec.231(1) of the Code makes it clear that the Judge shall proceed to take all such evidence as may be produced in support of the prosecution.

4. Further Sec.311 of the Code specifically empowers the court to summon any person or witness, if his evidence appears to be essential to the just decision of the case. The court below held in the impugned order that the defence had been made fully aware about the details of the additional witnesses cited and the additional documents sought to be produced in evidence and that they cannot be said to have been kept in dark about that. More crucially it was held that the additional witnesses are the mother of the deceased and the photographer, who had taken photos of the scene of the incident, in the course of the investigation. That the mother is cited to give evidence about the petition filed before the Police seeking police protection against the alleged attempt on the life of the deceased some time before the incidents in the case. That the documentary evidence proposed cannot be shut out on the objections of their genuineness and admissibility same being matter of fact and proof and the defence will have all the liberty to challenge the same in the course of evidence. The court below found that even from the contentions of the defence, it could be seen that the purpose for which the prosecution wants to tender additional evidence is not on a new fact altogether totally foreign to the prosecution case and accordingly, held

that the objections raised by the defence are not tenable and if such objections raised are sustained, it would tantamount to shutting out evidence available with prosecution. Accordingly, the court below allowed the plea of the prosecution. It is this order that is under challenge in the instant Criminal Miscellaneous Case.

5. Heard Sri.Rajit, learned counsel for the petitioners and Sri.Tom Jose Padinjarekkara, learned Addl. D.G. of Prosecutions and Addl. State Prosecutor appearing for the respondent State of Kerala.

6. Sri. Rajith, learned counsel for the petitioners has reiterated the submissions and contentions raised in the CrI.M.C. It is contended that the court below erred in holding that the provisions in Secs. 230 and 231 of the Cr.P.C. are attracted for allowing additional evidence in this case and that the said provisions are not attracted to the facts of this case. That the mandate of Sec.173(2) of the Cr.P.C. is that investigating officer has to complete the investigation in all respects and submit the final report containing the particulars and that the prosecution cannot file a piece meal charge sheet as held in various court rulings. That the submission of a final report and furnishing copies of the entire final report along with annexures and documents, is for the purpose of ensuring that the accused is given all materials which are relied against him and to facilitate his proper defence. That the present plea that the mother of the deceased had allegedly filed a complaint before Police regarding the threat caused to her son should have clearly come to the investigating officer in case such threat was actually made and that laches of the investigating officer cannot be rectified resorting to the present impugned application. Further that the documents relied on by the prosecution as per the present petition are photocopies and such documents are not reliable in evidence, etc.

7. Per contra, Sri. Tom Jose Padinjarekkara, learned Addl. D.G. of Prosecution and Addl. State Prosecutor supported the impugned order and submitted that Sec.230 of the Cr.P.C. would help the prosecution to apply for process or attendance of any witness or production of documents and that Sec.231(1) of the Code makes it clear that the judge shall proceed to take all such evidence that may be produced in support of the prosecution and it is well settled that the Public Prosecutor's office is statutory office. That the allegation of the accused that the attempt of the prosecution through the impugned application is only to fill up the lacuna in the prosecution case is absolutely incorrect and that there no lacune as alleged in the evidence of the prosecution. The occurrence witnesses PW3, Asokan, PW-12 Kumary, PW-23 Subramanian and PW-24 Devan have given direct evidence for having witnessed the incident. PWs 1 to 3, 22, 24 and 30 have given evidence regarding the prior enmity of the accused towards Shameer and that an important piece of evidence alleging apprehension on the life of Shameer from the hands of at least a few of the accused persons was omitted to be produced in the court along with the final report/charge sheet by the investigating officer. That the Public Prosecutor, who is holding a statutory office, is fully at liberty to produce such evidence in the court. Further, it is contended

by the learned State Prosecutor that the allegation of the accused that the documents in question are created and that photocopies cannot be accepted as evidence is incorrect and that xerox copies of the two complaints are secondary evidence as provided in Sec.63(2) of the Evidence Act. The secondary evidence of the two complaints will squarely come within the purview of Sec.65(c) of the Evidence Act and thus clearly admissible in evidence. The photographs and negatives are produced in original and therefore those documents are also admissible in evidence. The allegation that the accused are not given copies of the documents at the time of filing the final report is meaningless and irrelevant as the prosecution case itself is that the documents in question were omitted to be produced earlier, due to inadvertence. The accused have now been fully made aware about the additional documents mentioned in the application in question as well as the additional witnesses cited in the said application and that it is not as if they had been in any way prejudiced by keeping them in the dark about any such details. Further it was contended that the contention of the accused that the prosecution cannot file piecemeal charge sheet is absolutely misconceived in the facts of this case. An important piece of evidence that has come into the custody of the investigating officer during the course of the investigation and kept in the case diary file and not produced along with the final report/charge sheet was produced before examination of the investigating officer by the learned Special Public Prosecutor in the court in the petition. More importantly, it is strongly urged by the learned State Prosecutor that the allegation of the petitioners herein that the attempt of the prosecution by filing the impugned application is only to fill up the lacuna in the prosecution case, is absolutely incorrect and that there is no such lacuna as alleged in the evidence of the prosecution. The occurrence witnesses, viz., PW-3, Asokan, PW-2 Kumary, PW-23 Subramanian and PW-24 Devan have given direct evidence for having witnessed the incident. PWs 1 to 3, 22, 24 and 30 have given their evidence regarding the prior enmity of the accused towards Shameer. An important piece of evidence alleging apprehension on the life of Shameer from the hands of at least a few of the accused persons was omitted to be produced in the court along with the final report/charge sheet by the investigating officer. The Public Prosecutor is holding a high statutory position in the statutory scheme of things engrafted in the Code of Criminal Procedure. The learned Special Public Prosecutor, who was duly appointed for this trial, by the Government of Kerala in exercise of its statutory powers conferred under the plenary provisions of the Code of Criminal Procedure, has applied his mind in all its dimensions with respect to various issues that have emerged for the smooth conduct of the trial and it was by exercising his independent discretion that the application in question was filed, for which, the Special Public Prosecutor is duly empowered by the Code. After making detailed submissions as to the facts and circumstances, under which, the learned Special Public Prosecutor was constrained to file the impugned application, a copy of reference to which may not really be necessary for reference in this order, it was also pointed out by the learned State Prosecutor that the Special Public Prosecutor appointed for the trial had requested the investigating officer to verify

the originals of the petitions in question (referred to in the impugned application) from the Police Station concerned and also the petitions registers of the Police Station, wherein those petitions were registered. That accordingly enquiries were made with the Police Station concerned and it was brought to light that those petitions were registered as entry Nos. 39 and 39(A) in the petitions register of the Police Station concerned on 1.5.2004 and those petitions were closed by the Station House Officer concerned with two separate endorsements stating that the report dated 15.5.2004 is made to the Circle Inspector of Police concerned. The further enquiries made by the investigating officer concerned in the Police Station concerned revealed that the original complaints dated 1.5.2004 and copies of the report dated 15.5.2004 made to the Circle Inspector of Police are not traceable. The specific allegation projected in the said two complaints on 1.5.2004 made by the deceased Shameer and his mother, Kunjimole was that there had been attempt on the life of Shameer earlier and that they apprehend that Shameer will be killed, if no police protection is given to the person and life of Shameer. Since the deceased Shameer and his mother Kunjimol had made those two separate complaints/petitions to the police about 8 months back prior to the murder of the deceased and since two accused persons (A-4 and A-7) are specifically named in those complaints as the aggressors, the learned Special Public Prosecutor, after elaborate discussions with the investigating officer, produced xerox copies of those two complaints, the original petition register of Vadakkekad Police Station, seven original photographs with negatives of the scene of occurrence and the envelope of the studio as additional evidence and also a list of two additional witnesses, viz., photographer Subeesh and the deceased's mother, Kunjimole with the requisite application on 7.10.2014, which was numbered as Criminal Miscellaneous Petition No. 4329/2014. That copies of petitions, the documents and the schedule of additional witnesses were duly furnished to the defence side.

8. Sri. Tom Jose Padinjarakkara, learned Addl. D.G. of Prosecution and State Prosecutor further submitted that the provisions of Sec.230 Cr.P.C. could certainly aid the prosecution to apply for the process for attendance of any witness or production of documents and Section 231(1) makes it clear that the judge shall proceed to take all such evidence as may be produced in support of the prosecution. Various court rulings in this regard are also cited for consideration of this Court. Further, it was very strongly urged that the crucial provisions contained in Sec.311 of the Cr.P.C. empower the court to summon any person as witness, if his evidence appears to be essential to the just decision of the case and that if the Prosecutor/Special Prosecutor can convince the court that examination of any person as witness is essential, then summons could be sent by the trial court and that defence cannot object the same on the ground that the investigating officer had not questioned him. That the evidence of the prosecution is entitled to produce in support of its case under Sec.231 is not limited to that as provided to the final report under Sec.173 and the choice of examining the witnesses in their support lies with the prosecution and the judge

has to proceed to take that evidence. That the words, "to take all such evidence as may be produced in support of the prosecution" do not confine solely to production of only upto those persons whose statements have been recorded under Sec.161, but also such persons, who have not been named in the charge sheet or in the calendar or whose statements have not been recorded under Sec.161. That Sec.161 does not mandate that the police officer shall record or reduce into writing the statements made to him by persons orally examined by him. Further that Secs.161, 173 and 311 have different objects. That being the well settled position of law, the objections raised by the defence are untenable and that merely because the impugned application has cited some wrong provisions will not entail rejection of the petition on that ground and that it is for the court below to analyse the facts and circumstances emerging in the case and evaluate the same on the basis of the legal framework which governs the factual matrix. It is in the light of these aspects that the court below has passed the well considered impugned order and that it is urged by the learned State Prosecutor that it requires no interference by exercising the extra ordinary discretion conferred on this Court under Sec. 482. It is also urged that the functioning of the criminal court in the administration of justice is to harmonise and protect the interests and rights of the accused, prosecution and the victim in the larger perspective of the interest of the community at large and the criminal trial court is not to count errors committed by the parties and if it is considered that such applications be allowed, which is essential for just decision of the case, then the court below is certainly justified to allow such bonafide plea of the parties concerned contesting the trial. It was also specifically submitted by the learned Addl. State Prosecutor that the court below as per the impugned order has specifically noted in paragraph 9 on page 7 of the impugned Anx.B order that the defence will have all liberty to challenge the genuineness and admissibility of the evidence now sought to be let in the course of the evidence, etc. In this regard, Sri. Tom Jose Padinjarekara, the Addl.D.G. of Prosecution and Addl. State Prosecutor appearing for the respondent State of Kerala submitted that it will be open to the accused to raise all contentions even about the very admissibility of the new oral and documentary evidence that is sought to be let in by the prosecution on the basis of the impugned order, at the time of arguments in the trial and the accused will also be equally at liberty to raise all contentions against, not only about the acceptability but also the reliability and evidentiary value of such oral and documentary evidence. He would further submit that the prosecution evidence has not yet closed and thereafter, the accused would also be equally at liberty to let in any relevant defence evidence not only in aid of their main contentions in the defence but also in aid of the contentions that they may raise as against the proposed new oral and documentary evidence sought to be let in by the impugned order.

9. Heard both sides.

10. Sec.230 and Sec.231(1) of the Code of Criminal Procedure read as follows:

"230. Date for prosecution evidence. - If the accused refuses to plead, or does not plead, or claims to be tried or is not convicted under section 229, the Judge shall fix a date date for the examination of witnesses, and may, on the application of the prosecution, issue any process for compelling the attendance of any witness or the production of any document or other thing.

231. Evidence for prosecution. - (1) On the date so fixed, the Judge shall proceed to take all such evidence as may be produced in support of the prosecution."

11. It has been held in the case *Rajalakshimi v. State of Kerala* reported in 2007 KHC 3748 : 2007 (3) KLT 347, that it is by now trite that the expression, "all such evidence as may be produced in support of the prosecution" is not limited or circumscribe by the stipulation in Sec.173 Cr.P.C. and in an appropriate case, the Prosecutor is certainly justified in relying on the documents, which have not been seized by the Police in the course of the investigation and copies of which have not been furnished under Sec.173(5) of Cr.P.C. Further, it has been held by the Apex Court in the case, *Central Bureau of Investigation (CBI) Vs. R.S. Pai and Another*, AIR 2002 SC 1644 : (2002) CriLJ 2029 : (2002) 2 Crimes 159 : (2002) 3 JT 460 : (2002) 3 SCALE 262 : (2002) 5 SCC 82 : (2002) 2 SCR 889 : (2002) 1 UJ 672 : (2002) AIRSCW 1562 : (2002) 3 Supreme 73 that there is no bar to produce the additional documents are charge sheet is submitted and the word, "shall" in Sec.173(5) is only directory and not mandatory. Further it has also been held by the Supreme Court in the case, *Narayan Rao Vs. The State of Andhra Pradesh*, AIR 1957 SC 737 : (1957) CriLJ 1320 : (1958) 1 SCR 283 that the omission of the investigating officer should not allowed to affect the proceedings including the trial before the court of session. Sec.311 of the Code of Criminal Procedure reads as follows:

"Sec.311. Power to summon material witness, or examine person present.- Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person, if his evidence appears to it to be essential to the just decision of the case."

12. In Vol.4 of *Sohoni's* authoritative commentary on Code of Criminal Procedure (19th Edition-Butterworths) on pages 3453 to 3455, it is opined by the learned author as follows:

"2. Scope: Section 311 of the Cr.P.C. enables the Court at any stage of any inquiry, trial or other proceeding under the Code, to summon any person as a witness. The power is not confined to any particular class of persons as a witness. The power has been conferred to satisfy the quest of the Court in order to do justice between the parties. It is crystal clear that justice is not from the point of view of the prosecution or of the accused, but justice from the point of

view of an orderly society. Holding the balance of scales in its hands, the court keeps an open mind. Any party to the proceedings may point out to the Court under Section 311 the desirability of some evidence, but the decision and the discretion in that regard is that of the court. Therefore where the witness has already been examined in pursuance of directions of the High Court and the Trial Court is of the view that no further examination is required and the accused are trying to prolong the trial the re-summoning of the witness is refused.

This section is manifestly in two parts and the word used in the first part is "may"; the second part uses "shall". In consequence, the first part gives purely discretionary authority to the criminal court and enables it, at any stage of an enquiry, trial or other proceeding under the Code, (a) to summon anyone as a witness or (b) to examine any person present in Court, or (c) to recall and re-examine any person whose evidence has already been recorded; on the other hand, the second part is mandatory, and compels the Court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case. While doing criminal justice, the Court cannot stop just rest contented by merely finding fault with the prosecution agency. The role of Presiding Judge is something more than merely to be an umpire or a referee in games played. So far as the Court proceedings are concerned, the Court has got to be alert, active and positive to participate and cannot just afford to be a lone by-stander on platform watching the game declaring the points or runs.

The discretion given by the first part is very wide and its very width requires a corresponding caution on the part of the Court. But the second part does not allow for any discretion; it binds the Court to examine fresh evidence, and the only condition prescribed is that this evidence must be essential to the just decision of the case. Whether the new evidence is essential or not must of course depend on the facts of each case and has to be determined by the presiding Judge. Whenever the Court finds that any evidence which is essential for this has not been examined, the law enjoins it to call and examine it. If this results in what is sometimes thought to be to the "filling of loopholes", that is a purely subsidiary factor and cannot be taken into account. Where the records of the case disclose also that the investigation was not properly conducted and that the investigating officer did not attempt to determine the criminal liability of all those concerned in the case, Sessions Court should attempt to arrive at the truth by using all the powers, which are vested on Courts, under Sections 311, 319, etc. of the Code.

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The powers given to a court under this section are discretionary and it cannot be forced to exercise them at the bidding of any of the parties. The question whether certain witnesses must be examined in the interest of justice under this section is one in the discretion of the trying Magistrate, though this discretion must be exercised as an independent judicial discretion. Although the parties have no right to produce evidence for the prosecution, he will be well advised to

make a liberal use of his powers under the section and not shut out the evidence which the Public Prosecutor does not choose to produce and which may be necessary in the interest of justice."

13. After hearing both sides and on close scrutiny of the factual matrix of this case as emerging from the materials on record, adjudged in the aforesaid legal framework, this Court of the considered opinion that the impugned order does not call for any interdiction in exercise of the extraordinary discretion conferred on this Court under Sec.482 of the Code of Criminal Procedure for the main reason that it cannot be said to be vitiated by any illegality or perversity or basic jurisdictional infirmity.

14. Though both sides have elaborately argued on merits of each of their respective contentions, this Court is constrained to caution itself that the case is in the midst of the on-going trial and any opinion by this Court, even exercising jurisdiction under Sec.482 of the Cr.P.C., should not in any way, even remotely, prejudice the contentions on either side. Even the investigating officer is yet to be examined. Therefore, this Court is of the considered view that a detailed advertence and adjudication into the merits of the respective contentions is not really called for in this case, as the impugned order cannot be said to be vitiated by grave illegality or perversity or jurisdictional infirmity, on evaluation as aforesaid. This Court is all the more justified in restraining itself from expressing more into the merits of the rival contentions, because the court below as per para 9 on page 7 of the impugned Anx.B order has clearly stated that documentary evidence proposed cannot be shut out merely on account of objections to their genuineness and admissibility, as the same being matters of fact and proof and that the defence will have all the liberty to challenge the same, etc. Moreover, the learned Addl. D.G. of Prosecution has clearly submitted on behalf of the respondent prosecution that it will be open to the accused to raise all their contentions even about the very admissibility of the new oral and documentary evidence sought to be let in by the prosecution on the basis of the impugned order and that the accused will be at liberty to raise all their contentions not only against the acceptability but also reliability and evidentiary value of such oral and documentary evidence and that after the closure of the prosecution evidence, the defence will be able to let in their evidence even in aid of their contention as against the proposed oral and documentary evidence. Therefore, this Court is fully justified in restraining itself from expressing any detailed reasons and opinions on the merits of the various minute rival contentions raised before this Court, lest it may prejudice either side.

15. There is yet another crucial important aspect of the matter. The Deputy Superintendent of Police, SSB, Malappuram has filed statement dated 26.5.2015 in this matter. As can be seen from paragraph 12 of the statement dated 26.5.2015 filed by the Deputy Superintendent of Police, who is the investigating officer in this case, that after allowing the application as per the impugned Anx.B order on 23.10.2014, the Sessions Court had ordered to issue summons to the

additional witnesses and the case was posted to 27.10.2014 for examining additional witnesses. On 27.10.2014, the learned counsel appearing for accused Nos. 2 to 8, 13 and 14 filed a petition requesting for stopping examination of the additional witnesses pending an appeal/petition filed by them challenging the impugned Anx.B order dated 23.10.2014. That application was heard and dismissed on 27.10.2014 itself by the court below and thereafter, the additional witnesses were examined in chief as prosecution witnesses as PWs 46 and 47. The seven photographs with negatives were marked as Ext.P-51 series and Ext.P-52 series. The envelope of the studio was marked as Ext.P-53. Copies of the two complaints made by Kunjimole and Shameer were marked as Exts.P-54 and P-55. On another written application made by the counsel for A-2 to A-8 and A-11 to A-14, the cross examinations of these witnesses were deferred and the case was posted for cross examination of the witnesses as PWs. 46 and 47 to 29.10.2014.

16. This Criminal Miscellaneous Case was filed before this Court only on 27.10.2014 before the Registry. This Crl.M.C. came up for consideration before this Court on 28.10.2014 and it was only on that day (28.10.2014) interim stay was granted. Thus it can be seen that as on the day (28.10.2014) this Court had granted interim stay in this Crl.M.C. and impugned Anx.B order dated 23.10.2014 was substantially implemented and what remains is cross examination of these prosecution witnesses, etc. Though interim stay was granted on 28.10.2014, the same was in force only till 23.3.2015. Thereafter, the petitioners have not made any request or motion before this Court for extension of the said interim stay and the same has not been extended as the interim order has already expired on 23.5.2015. The matter was again listed and heard only as the Addl. State Prosecutor insisted for final disposal of the main matter. In view of the various aspects as aforestated, this Court is of the considered opinion that no interference in the impugned order is called for by invoking the extraordinary discretion conferred by way of inherent powers on this Court as per Sec.482 of the Code of Criminal Procedure. It is for the court below to proceed from the stage where it has stopped and the accused persons will have liberty as aforestated and the submissions in that regard by the learned D.G. of prosecution are also recorded. The Sessions Court will make all reasonable endeavours to ensure that the already delayed trial is completed without any further delay.

In the light of these aspects, the Criminal Miscellaneous Case stands dismissed.