IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE V.G.ARUN

MONDAY, THE 18TH DAY OF JANUARY 2021 / 28TH POUSHA, 1942

Crl.MC.No.19 OF 2021(B)

AGAINST THE ORDER/JUDGMENT IN SC 330/2019 DATED 17-12-2020 OF ADDITIONAL DISTRICT COURT & SESSIONS COURT - VII, THIRUVANANTHAPURAM

PETITIONER/S:

1 **ANTONY ROSARIO FERNANDO**
AGED 39 YEARS
S/O.R.ANTONY SAAMY, RESIDING AT I/N/3, BOOPALAYAPURA VEEDU, 4TH STREET, THOOTHUKUDI TALUK, THOOTUKUDI, TAMIL NADU STATE.

2 **BINOY THOMAS,**
AGED 44 YEARS
S/O.THOMAS, RESIDING AT MANICHIRAKKAL VEEDU, PANDIPPARA P.O., THANKOMONY VILLAGE, IDUKKI DISTRICT.

3 **T.N.GOPI,**
AGED 68 YEARS
S/O.NEELAKANTAN, RESIDING AT MANICHIRAKKAL VEEDU, PANDIPARA, 8TH MILE, THONDYPARAMBA, KALVARY MOUNT P.O., THANKOMONY VILLAGE, IDUKKI TALUK, IDUKKI DISTRICT.

BY ADV. SRI.J.R.PREM NAVAZ

RESPONDENT/S:

STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM, PIN-682032.

R1 BY ADDL.DIRECTOR GENERAL OF PROSECUTION

OTHER PRESENT:

ADV.C.K.SURESH (SR) FOR ADGP SURESH BABU THOMAS

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 11.1.2021, THE COURT ON 18.01.2021 PASSED THE FOLLOWING:

'C.R'

V.G.ARUN, J.

CRL.M.C.No. 19 of 2021

Dated this the 18th day of January, 2021

O R D E R

Petitioners are accused 1 to 3 in S.C.No.330 of 2019 on the files of the Additional Sessions Judge-VII, Thiruvananthapuram. The prosecution allegation is of the petitioners were found to be in illegal possession of 6.36 kg of Hashish oil and currency worth Rs.6,72,500/- and thereby having committed the offences punishable under Sections 20(b)(ii)C and Section 29 of the NDPS Act. The trial of the case has commenced and the prosecution evidence is complete. The accused were questioned under Section 313(1)(b) Cr.P.C. Thereafter, the case was posted for defence evidence. At that juncture, Counsel for the petitioners filed Annexures A2 and A3 witness lists and sought issuance of summons to those witnesses. The Public Prosecutor filed objections stating that the attempt was to protract the proceedings and to cause annoyance to the witnesses. By Annexure A5 order, the court below allowed the applications in part. The prayer to issue summons to the sole witness in Annexure A2 and witness Nos.5, 7 and 8 in Annexure A3 was rejected. The prayer in this Crl.M.C is to quash Annexure A5 to the extent the order rejects the prayer for

issuance of process to the only witness in Annexure A2 and three of the witnesses in Annexure A3.

2. A perusal of the impugned order shows that the learned Sessions Judge found that the sole witness in Annexure A2 of being the wife of PW4, an independent witness, her testimony is not necessary to prove the defence plea. That, the attempt of the accused is not bona fide and the witness is cited for the purpose of causing annoyance to PW4. As far as witness Nos.5, 7 and 8 in Annexure A3 are concerned, it was found that the accused can get the CCTV footages sought to be produced through witness No.5, by summoning the person in charge of the establishment where the alleged video recording had taken place. The court also found that witness Nos.7 and 8 are unnecessary to prove the defence plea and their examination would only result in procrastination.

3. Heard Sri.J.R.Prem Navaz for the petitioners and Sri.C.K.Suresh for the respondents.

4. Learned counsel for the petitioners assailed Annexure A5 order on the ground that the order defeats the right of the accused to adduce evidence. It was contended that under Section 233(3) Cr.P.C it is obligatory for the Court to issue process to any witness cited by the accused, unless the court is satisfied that the application for issuance of process is filed for the purpose of vexation or delay or for defeating

the ends of justice. In support of this contention, reliance was placed on the decision in ***Ronald v. State of West Bengal*** [AIR 1954 SC 455]. It is submitted that the Judge cannot refuse to issue process to a defence witness on the premise that examination of such witness would cause annoyance to a prosecution witness. According to the learned counsel, no reason is stated for the refusal to issue process to witness Nos.7 and 8 in Annexure A3 and the reason stated for not summoning witnessNo.5 is unsustainable.

5. The learned Senior Public Prosecutor countered the submissions and submitted that adequate reasons are stated in the impugned order and that courts have to consider the gravity of the offences alleged against the accused and the purpose behind examining a particular witness. The attempt of the accused being only to protract the proceedings by summoning witnesses having no connection with the alleged incident or the investigation, the learned Sessions Judge was justified in issuing Annexure A3 order. Reliance is placed on the decisions in ***Arivazhagan v. State*** [2000 KHC 537/ (2000)3 SCC 328] and ***Santhosh Kumar v. State of Kerala*** [2016(5) KHC 709].

6. For answering the issue involved, it is necessary to have a look at Section 233(3) Cr.P.C, which reads as under;

*"**233. Entering upon defence**.*

(1) Where the accused is not acquitted under section 232, he shall be called upon to enter on his defence and adduce any evidence he may have in support thereof.

(2) If the accused puts in any written statement, the Judge shall file it with the record.

(3) If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice."

7. A careful reading of the Section shows that the court is bound to issue process for compelling the attendance of witnesses, unless the court is of the opinion that the application for summoning the witnesses ought to be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. The adversarial system confer the accused with the indefeasible right to cross examine the prosecution witnesses and to let in defence evidence. This indefeasible right cannot be denied lightly. The right to fair trial includes fair and proper opportunities allowed by law to prove the innocence of the accused. Adducing evidence in support of the defence is such an opportunity. Denial of that opportunity means denial of fair trial. It is essential that rules of procedure designed to ensure justice should be scrupulously followed.

8. The petitioners filed Annexures A2 and A3 for the purpose of letting in defence evidence. The request for summoning the witnesses was made by the accused immediately after their examination under Section 313 Cr.P.C. Therefore there was no delay on the part of the petitioners. It is submitted that the witness named in Annexure A2 is a crucial witness and is sought to be examined to disprove the version of PW4 that he was present at the site when seizure of the contraband and arrest took place. If that be so, the court cannot refuse to summon that witness on the premise that her examination would cause annoyance to PW4. Possibility of annoyance to the witness sought to be examined, or to prosecution witness already examined, is not a ground for refusing to summon that witness.

9. Witness No.5 in Annexure A2 is sought to be summoned for production of the CCTV footage recorded at an establishment named Capital Fuels and Jesus Fisheries, Kattapana. Whether the witness sought to be summoned is the custodian of the CCTV footage and competent to give evidence will come to light only on his examination. The trial court cannot pre-empt the examination of a witness on an assumption that the witness may not be in possession of the document sought to be summoned. As regards witness Nos.7 and 8, absolutely no reason is stated for terming them as unnecessary witnesses or the reason for finding that their examination will result in procrastination.

10. In this context it will be apposite to read the contextually relevant portion of the Apex Court's judgment in ***Ronald Wood Mathams v. State of W.B***. [AIR 1954 SC 455] extracted hereunder:

> *"10. It must be conceded that the evidence on record tends to establish a strong case against the appellants. But then, that is a case which they are entitled to rebut, and if, as was held by the Federal Court, Exhibit 27 series would furnish good material for rebutting that case, the Court, by declining to issue process for the examination of the witnesses connected with those documents, has deprived the appellants of an opportunity of rebutting it. Whatever one may think of the merits of the appellants' contention, they cannot be convicted without an opportunity being given to them to present their evidence, and that having been denied to them, there has been no fair trial, and the conviction of the appellant cannot stand. The result may be unfortunate. But it is essential that rules of procedure designed to ensure justice should be scrupulously followed, and Courts should be jealous in seeing that there is no breach of them. The appeals will be allowed, and the appellants acquitted."*

11. The decision in ***Arivazhagan*** was rendered in the context of the accused having submitted a list containing 267 defence witnesses. The trial court did not allow the accused to examine all the persons mentioned in the list and directed him to limit the number to the minimum necessary. Since the accused was not willing to reduce the number, he approached the High Court. Having failed to obtain the expected relief, the accused moved the Supreme Court. Dilating on

the right of an accused to examine myriad of witnesses and that of the court to prune down the list, the court held as follows:

> "***17.*** *The purpose of furnishing a list of witnesses and documents to the court before the accused is called upon to enter on his defence is to afford an occasion to the court to peruse the list. On such perusal, if the court feels that examination of at least some of the persons mentioned in the list is quite unnecessary to prove the defence plea and the time which would be needed for completing the examination of such witnesses would only result in procrastination, it is the duty of the court to shortlist such witnesses. We may also add that if the court feels that the list is intended only to delay the proceedings, the court is well within its powers to disallow even the whole of it."*

It is pertinent to note that the decision was rendered in the context of Section 7(a) of the Prevention of Corruption Act, which envisages early disposal of cases and Section 22 which prescribes the procedure for submission of list of witnesses by an accused facing trial for offences under the Act. Further, the following observation made by the Honourable Supreme Court, while refusing to interfere with the orders under challenge assumes relevance;

> "***20.*** *Nevertheless, we would add — after the appellant completes his evidence in accordance with the permission now granted as per the impugned orders, it is open to the appellant to convince the trial court that some more persons need to be examined in the interest of justice, if the appellant then thinks that such a course is necessary. The trial court will then decide whether it is essential for a just decision of the case to examine*

more witnesses on the defence side. If the Court is so satisfied, the Special Judge can permit the appellant to examine such additional witnesses the examination of whom he considers essential for a just decision of the case or he can exercise the powers envisaged in Section 311 of the Code in respect of such witnesses. We cannot, at present, oversee the situation as to how the trial court could then reach such a satisfaction. Hence we leave it to the trial court to do the needful at the appropriate stage."

12. In ***Santhosh Kumar***, this Court did observe that for the purpose of proving a report, Chief Editor of the newspaper need not be examined, but went on to hold that while the court has discretion to determine whether the application for examination of witnesses filed by the accused is for the purpose of vexation or delay or for defeating the ends of justice, in all other cases, the Judge is expected to issue process.

13. The above being the position, the decisions in ***Arivazhagan*** or ***Santhosh Kumar*** cannot be understood to have held that the trial Judges have absolute discretion to prune or reject the list of witnesses submitted by the accused.

14. Going by the plain meaning of the words in Section 233(3) and the settled legal position, the trial court is empowered to interfere with only when the court is convinced that the application seeking issuance of summons is submitted for the purpose of vexation or delay

or for defeating the ends of justice. In my considered opinion, the petitioner cannot be attributed with any such intention in having filed Annexures A2 and A3 and hence the interference with the list as per Annexure A5 order cannot be sustained.

In the result, the Crl.M.C is allowed. Annexure A5 order is quashed and the Additional Sessions Judge-VIII, Thiruvananthapuram is directed to issue process to the witnesses named in Annexures A2 and A3.

Sd/-

V.G.ARUN, JUDGE

vgs

APPENDIX

PETITIONER'S/S EXHIBITS:

ANNEXURE A1	**THE TRUE COPY OF THE STATEMENT FILED BY THE 3RD PETITIONER/3RD ACCUSED BEFORE THE SESSIONS JUDGE.**
ANNEXURE A2	**THE TRUE COPY OF THE APPLICATION FILED BY THE PETITIONERS 1 AND 2/ACCUSED 1 AND 2 UNDER SECTION 233(3) OF THE CODE ALONG WITH THE WITNESS LIST.**
ANNEXURE A3	**THE TRUE COPY OF THE APPLICATION FILED BY THE 3RD PETITIONER/3RD ACCUSED UNDER SECTION 233(3) OF THE CODE ALONG WITH THE WITNESS LIST.**
ANNEXURE A4	**THE TRUE COPY OF THE OBJECTION FILED BY THE LEARNED PUBLIC PROSECUTOR AGAINST ANNEXURE A2 AND A3.**
ANNEXURE A5	**THE TRUE COPY OF THE COMMON ORDER DATED 17.12.2020 IN CRL.M.P.NO.1559 OF 2020 AND 1560 OF 2020 IN S.C.NO.330 OF 2019.**