IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

TUESDAY, THE 20TH DAY OF JUNE 2023 / 30TH JYAISHTA, 1945

CRL.MC NO. 3937 OF 2023

AGAINST THE ORDER/JUDGMENT SC 496/2020 OF ADDITIONAL DISTRICT COURT (SPECIAL COURT FOR TRIAL FOR MARADU CASES) KOZHIKODE

PETITIONER/ACCUSED NO.1:

JOLLYAMMA JOSEPH @ JOLLY
AGED 47 YEARS
W/O SHAJU ZACHARIAS, PONNAMATTAM-HOUSE, KOODATHAI BAZAR, THAMARASERRY-TALUK, KOZHIKODE-DISTRICT, PIN - 673573.

BY ADVS.
BIJU ANTONY ALOOR
K.P.PRASANTH
ARCHANA SURESH
HIJAS T.T.
HARITHA HARIHARAN
HASEEB HASSAN.M

RESPONDENT/COMPLAINANT:

1 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, PIN - 682031.

2 DEPUTY SUPERINTENDENT OF POLICE
DISTRICT CRIME BRANCH (DCB) KOZHIKODE RURAL ATTACHED TO KODANCHERY P.S., KOZHIKODE-DISTRICT., PIN - 673580.

BY ADVS.
ADDL.DIRECTOR GENERAL OF PROSECUTION(AG-11)
ADDL. STATE PUBLIC PROSECUTOR(AG-28)

SRI. VIPIN NARAYAN, SR. PP

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON 20.06.2023, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

RAJA VIJAYARAGHAVAN V, J. **"CR"**

Crl.M.C.No.3937 OF 2023

Dated this the 20th day of June, 2023

O R D E R

This petition is filed under Section 482 of the Code of Criminal Procedure challenging the order dated 8.5.2023 passed by the learned Sessions Judge, Kozhikode, rejecting the application filed by the 1st accused seeking to discharge Charge witness No.156 and not to permit the prosecution to examine him as a witness.

2. Short facts are as under:

a) The petitioner is the principal accused in SC 496/2020 on the file of the Court of Session. She is accused of having committed offenses punishable under Section 302,465,468, 471 r/w section 34 of the IPC.

b) The prosecution allegation as per the charge is that the petitioner, motivated by personal satisfaction and her objectives, administered cyanide to her mother-in-law through food and followed it up with the murder of her father-in-law. Subsequently, she provided her husband with poisonous food, leading to the demise of all three individuals. Before administering

poison to her father-in-law, the petitioner, with the assistance of accused Nos. 2 to 4, forged a Will in the name of Tom Thomas, the father-in-law, falsely bequeathing the Tharavad house and 38 ¾ cents of land to herself and her husband in equal shares. Several months later, the father-in-law met his demise through cyanide poisoning, and in 2011, the petitioner's own husband was allegedly murdered. The deaths of the mother-in-law and father-in-law were initially perceived as natural occurrences. However, later on, a young child and the child's mother were also killed with the intention of marrying CW5 Shaju Zacharias, a cousin of the petitioner's deceased husband and the second husband of the first accused. Due to mounting suspicions surrounding these deaths, an investigation was initiated, ultimately revealing that the first accused had orchestrated the entire sequence of events with the assistance of accused Nos. 2 and 3.

c) At the time of submission of the final report, the prosecution cited CW156, an advocate and notary, to prove that he had attested a photocopy of the Will allegedly executed by the late Tom Thomas, wherein 38 ¾ cents of land and a house were bequeathed to Roy Thomas and the first accused. He was cited to prove the offense under Sections 465, 468, and 471 of the IPC.

d) Later, a supplementary charge was laid by the prosecution, arraying CW156, as accused No 5.

e) The accused No.5 approached this Court and filed Crl.M.C. No 3927/2020 seeking to quash the proceedings against him, and a learned Single Judge of this Court, after considering the contentions, came to the conclusion that though the act of Notary in attesting a document without seeing the original or as per the advice of one of the accused is reprehensible, he could not have been clubbed along with the rest of the accused in a charge for murder. It was also held that the proceedings initiated against the petitioner were bad and barred under Section 13(1) of the Notaries Act. Holding so, the entire proceedings against the 5th accused were quashed by order dated 8.3.2022.

f) After CW156 had ceased to be an accused, based on the request made by the public prosecutor, a summons was issued to the witness to appear on 4.2.2023.

g) It is at this juncture that the application was filed by the petitioner to discharge the witness. The said request was rejected. This has led the petitioner to approach this Court.

3. Sri B.A. Aloor, the learned counsel, submitted that the order passed by the learned Sessions Judge is illegal. In the instant case, the prosecution had filed a supplementary charge arraying CW156 as the 5th accused. Though the proceeding was quashed on the petition filed by the Notary, the fact remains that this Court had made it clear that the order will not stand in the way of the Investigating officer filing a proper complaint against CW156 in tune with the mandate of Section 13(1) of the Notaries Act. It is submitted that further investigation against CW156 is pending, and there are reasonable prospects of him being made an accused. Furthermore, the prosecution has not filed any additional report against CW156 to cite him as an additional witness to prove their case. The prosecution has also not produced any supplementary statement after the proceedings against the said person were quashed by this Court. According to the learned counsel, the grant of permission to examine CW156 as an additional witness goes against the fundamental principles of criminal jurisprudence. As the prospect of him being arraying as an accused is still open, there was no justification in permitting the prosecution to examine the witness otherwise than by following the procedure prescribed under Sections 306 and 307 of the CrPC. It is

submitted that permitting accused No. 5 in the supplementary charge to be examined as a witness would result in serious prejudice to the accused. Much reliance is also placed on the judgment rendered by a Division Bench of this Court in **Abdul Razak @ Abu Ahmed Vs Union of India and Anr**[1] and certain observations in the judgment rendered by a learned Single Judge of the Bombay High Court in **Mahesh Balasaheb Thakoor v. State of Maharashtra and Another**[2] to advance the proposition argued by the learned counsel.

4. Sri.C.K. Suresh, the learned counsel, submitted that the status of the CW156 in the original final report is still the same. According to the learned Public Prosecutor, a close reading of the final report would reveal that the prosecution had no case that the Notary was a party to the criminal conspiracy to end the life of Tom Thomas or Roy Thomas. At any rate, the moment the proceedings against the 5th accused were terminated by this Court on his petition filed under Section 482 of the Code, he no longer being an accused, there is no bar in examining the said person as a witness. It is further submitted that the prosecution is not intending to prosecute CW156 for any act done by him. Relying on

---

1 (2021 ICO 1237)

2 [2010 ICO 3188]

Section 118 of the Indian Evidence Act, it is submitted that all persons are competent to testify unless there is any other embargo as provided in the said provision.

5. I have carefully considered the submissions advanced and have gone through the materials on record.

6. On going through the original charge, I find that CW 156, Adv. Sri. Vijayakumar was cited to prove that while functioning as an Advocate and Notary, he had a close connection with the 4th accused. As requested by the 4th accused, CW156 is alleged to have attested the Will of the father-in-law of the 1st accused without seeing the original Will. CW156 is also alleged to have certain entries in the notarial register. After the submission of the original charge, a supplementary charge was laid, transposing CW156 as accused No. 5. The accused No. 5 approached this Court, and by Annexure-5 order, this Court quashed the entire proceedings against him. While quashing the proceedings, this Court noted that even as per the prosecution case, there is no allegation that the supplementary 5th accused was a party to the conspiracy hatched by the 1st accused and others. However, this Court made it clear that the quashing of proceedings against the 5th accused would not stand in the

way of the investigating officer filing a proper complaint by complying with the mandate under Section 13(1) of the Notaries Act.

7. Now the question is whether there is any embargo in permitting the prosecution to examine CW 156 in the original charge. The contention of the learned counsel appearing for the petitioner is that as CW 156 was arrayed as an accused, the prosecution is legally barred from examining him as a witness against the other accused persons in the trial. There is an inherent fallacy in the argument advanced by the learned counsel. The argument is advanced, forgetting the fact that CW 156 is not an accused anymore nor an approver. The prohibition against the examination of a co-accused would, therefore, not be applicable to CW156.

8. The reliance placed by the learned counsel on the judgment rendered by the Division Bench of this Court in **Abdul Razak** (supra) is misplaced. In Abdul Razak, the facts would reveal that an application was filed by the investigating agency seeking permission to examine a certain Shajahan. V.K. as an additional witness. However, the additional witness who was sought to be examined was a co-accused who was tried and convicted by the NIA court in a split-up case. This Court perused the

chargesheet in the original case and the split-up case and came to the conclusion that the transactions, which were the subject matter of both cases, are one and the same. It was held that a co-accused in a split-up case cannot be permitted to be examined as a witness. The facts in the instant case are totally different.

9. The Apex Court in **Chandran @ Manichan @ Maniyan[3],** had occasion to consider whether the evidence of a witness ought to be eschewed from consideration because the witness, though was an accomplice,was neither granted a pardon under Section 306 of the Code nor was he prosecuted and the prosecution unfairly presented him as a witness for the prosecution. The said contention was repelled by holding as under:

> 78. The argument raised was that this evidence could not be taken into consideration and it would be inadmissible because this witness, though was an accomplice he was neither granted pardon under Section 306 CrPC nor was he prosecuted and the prosecution unfairly presented him as a witness for the prosecution. The contention is clearly incorrect in view of the decision of this Court in *Laxmipat Choraria* v. *State of Maharashtra* [AIR 1968 SC 938]. While commenting on this aspect, Hidayatullah, J. observed in AIR para 13 that there were a number of decisions in the High Courts in

[3] [(2011) 5 SCC 161]

which the examination of one of the suspects as the witness was not held to be legal and accomplice evidence was received subject to safeguards as admissible evidence in the case. The Court in *Laxmipat Choraria* [AIR 1968 SC 938] held:

> "*13*. On the side of the State many cases were cited from the High Courts in India in which the examination of one of the suspects as a witness was not held to be illegal and accomplice evidence was received subject to safeguards as admissible evidence in the case. In those cases, Section 342 of the Code and Section 5 of the Oaths Act were considered and the word 'accused' as used in those sections was held to denote a person actually on trial before a court and not a person who could have been so tried. The witness was, of course, treated as an accomplice. The evidence of such an accomplice was received with necessary caution in those cases. These cases have all been mentioned in *Kandaswami Gounder, In re* [AIR 1957 Mad 727], and it is not necessary to refer to them in detail here. The leading cases are: *Queen Empress* v. *Mona Puna* [ILR (1892) 16 Bom 661], *Banu Singh* v. *Emperor* [ILR (1906) 33 Cal 1353] , *Keshav Vasudeo Kortikar* v. *Emperor* [AIR 1935 Bom 186] , *Empress* v. *Durant* [ILR (1899) 23 Bom 213] , *Akhoy Kumar Mukerjee* v. *Emperor* [AIR 1919 Cal 1021] , *A.V. Joseph* v. *Emperor* [AIR 1925 Rang 122] , *Amdumiyan* v. *Emperor* [AIR 1937 Nag 17] , *Gallagher* v. *Emperor* [AIR 1927 Cal 307] and *Emperor* v. *Har Prasad Bhargava* [AIR 1923 All 91] . In these cases (and several others cited and relied upon in them) it has been consistently held that the evidence of an accomplice may be read although he could have been tried jointly with the accused. In some of these cases the evidence was received although the procedure of Section 337 of the Criminal Procedure Code was applicable but was not followed. It is not necessary to deal with this question any further

because the consensus of opinion in India is that the competency of an accomplice is not destroyed because he could have been tried jointly with the accused but was not and was instead made to give evidence in the case. Section 5 of the Oaths Act and Section 342 of the Code of Criminal Procedure do not stand in the way of such a procedure."

The Court finally observed: (*Laxmipat Choraria case* [AIR 1968 SC 938)

"*13*. … It is not necessary to deal with this question any further because the consensus of opinion in India is that the competency of an accomplice is not destroyed because he could have been tried jointly with the accused but was not and was instead made to give evidence in the case."

79. The Court has also observed in para 11:

"*11*. The position that emerges is this:

No pardon could be tendered to Ethyl Wong because the pertinent provisions did not apply. Nor could she be prevented from making a disclosure, if she was so minded. *The prosecution was not bound to prosecute her, if they thought that her evidence was necessary to break a smugglers' ring*. Ethyl Wong was protected by Section 132 (proviso) of the Evidence Act even if she gave evidence incriminating herself. She was a competent witness although her evidence could only be received with the caution necessary in all accomplice evidence. The expression 'criminal proceeding' in the exclusionary clause of Section 5 of the Oaths Act cannot be used to

widen the meaning of the word accused. The same expression is used in the proviso to Section 132 of the Evidence Act and there it means a criminal trial and not investigation. The same meaning must be given to the exclusionary clause of Section 5 of the Oaths Act to make it conform to the provisions in pari materia to be found in Sections 342, 342-A of the Code and Section 132 of the Evidence Act. The expression is also not rendered superfluous because if given the meaning accepted by us it limits the operation of the exclusionary clause to criminal prosecutions as opposed to investigations and civil proceedings. It is to be noticed that although the English Criminal Evidence Act, 1898, which (omitting the immaterial words) provides that 'every person charged with an offence … shall be a competent witness for the defence at every stage of the proceedings' was not interpreted as conferring a right on the prisoner of giving evidence on his own behalf before the grand jury or in other words, it received a limited meaning; see *R.* v. *Rhodes* [(1899) 1 QB 77]." (emphasis supplied)

80**.** This case would bring about the legal position that even if the prosecution did not prosecute PW 53 and used his evidence only as an accomplice, it was perfectly legal. The evidence of such witness subject to the usual caution was admissible evidence. The contention of Shri Radhakrishnan that his evidence would be inadmissible because he was not granted pardon or he was not made accused would, thus, be of no consequence and is rejected. In this backdrop, after considering the whole material and the findings of the trial court and the appellate court, we have no hesitation to hold that the trial court and the appellate court were right in convicting A-7.

10. The Apex Court in **Laxmipat Choraria v. State of Maharashtra**[4], has observed that under Section 118 of the Indian Evidence Act, all persons are competent to testify unless the court considers that they are prevented from understanding the questions put to them for reasons indicated in that section. Under Section 132, a witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any criminal proceeding (among others) upon the ground that the answer to such question will incriminate or may tend directly or indirectly to expose him to a penalty or forfeiture of any kind. The safeguard to this compulsion is that no such answer that the witness is compelled to give exposes him to any arrest or prosecution or can it be proved against him in any criminal proceeding except a prosecution for giving false evidence by such answer. In India, the privilege of refusing to answer has been removed so that temptation to tell a lie may be avoided, but it was necessary to give this protection. The protection is further fortified by Article 20(3), which says that no person accused of any offense shall be compelled to be a witness against himself. This article protects a person who is accused of an offense and not those questioned as witnesses. A person who voluntarily enters the dock by

4 [AIR 1968 SC 938]

filing an application under Section 315 of the Code and answers questions from the witness box waives the privilege, which is against being compelled to be a witness against himself because he is then not a witness against himself but against others.

11. As CW156 is no longer an accused, there is no embargo in the prosecution summoning and examining him. Furthermore, the Apex Court in **Varsha Garg v. State of Madhya Pradesh and Ors.**[5] while summing up the scope and ambit of the powers under Section 311 of the Cr.P.C. has held that the criminal court has ample power to summon any person as a witness or recall and re-examine any such person, even if the evidence on both sides is closed and the jurisdiction of the court must obviously be dictated by the exigency of the situation. Fair play and good sense appear to be the only safe guides, and only the requirements of justice command the examination of any person, which would depend on the facts and circumstances of each case.

12. In view of the above, I find no reason to interfere with the order passed by the learned Sessions Judge. This petition is dismissed.

---

5 [2022 SCC OnLine SC 986]

However, I find that the petitioner herein has not cross-examined the witness on the premise that she intends to file a petition challenging the order passed by the learned Sessions Judge before this Court. If an application is filed by the petitioner for recalling the said witness, the same shall be construed liberally.

Sd/-

RAJA VIJAYARAGHAVAN V.,
JUDGE

@S/19/6/2023

APPENDIX OF CRL.MC 3937/2023

PETITIONER'S ANNEXURES

Annexure1	TRUE COPY OF THE ORDER IN CRL.M.P NO. 294/2023 DATED 08/05/2023.
Annexure2	TRUE COPY OF THE CHARGE.
Annexure3	COPY OF RELEVANT PAGES AS PAGE NOS. 1 TO 3, 65 & 66 OF WITNESS LIST.
Annexure4	TRUE COPY OF THE SUPPLEMENTARY CHARGE SHEET.
Annexure5	TRUE COPY OF THE ORDER IN CRL.M.C NO. 3927/2022 DATED 08/03/2022.
Annexure6	TRUE PETITION U/VIDE. CRL. M P NO. 294/2023.
Annexure7	RUE COPY OF THE ORDER IN CRL.M.P NO. 295/2023 DATED 08/05/2023.
Annexure8	TRUE COPY OF THE DEPOSITION OF PW-49 DATED ON 08/05/2023.
Annexure9	TRUE COPY OF THE ORDER IN CRL.M.P NO. 298/2023 DATED 08/05/2023.