

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

WEDNESDAY, THE 16TH DAY OF SEPTEMBER 2015/25TH BHADRA, 1937

Crl.MC.No. 3131 of 2015 ()

**C.MP. NO.1015/2015 IN L.P. NO.2/2013 OF JUDICIAL FIRST CLASS MAGISTRATE
COURT-II, THAMARASSERY.**

CRIME NO. 401/2011 OF MUKKAM POLICE STATION, KOZHIKODE DISTRICT.
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PETITIONER/ACCUSED:

**FAYIS, AGED 25 YEARS,
S/O. ABDUL RAHMAN, CHATHAPARAMBIL HOUSE,
KODIYATHOOR VILLAGE, KODIYATHOOR P.O.,
KOZHIKODE DISTRICT.**

BY ADV. SRI.P.VKUNHIKRISHNAN.

RESPONDENTS/COMPLAINANT & STATE:

- 1. THE ASSISTANT POLICE COMMISSIONER,
CONTROL ROOM, KOZHIKODE CITY - 673 001.**
- 2. S.I. OF POLICE,
MUKKAM POLICE STATION,
KOZHIKODE - 673 602.**
- 3. STAT OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM, KOCHI - 682 031.**

BY SRI.K.I.ABDUL RASHEED, ADDL. D.G.P.

**THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION
ON 16-09-2015, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:**

rs.

APPENDIX

PETITIONER'S ANNEXURES:-

- ANNEXURE A** **COPY OF THE FINAL REPORT IN CRIME NO.401/2011 OF MUKKAM POLICE STATION.**
- ANNEXURE B** **COPY OF THE PETITION DATED FEBRUARY 2015 FILED BY THE PETITIONER UNDER SECTION 317 CR.PC. WHICH IS NUMBERED AS CR.MP. 1015/2015 IN LP.NO.2/2013 ON THE FILE OF JUDICIAL FIRST CLASS MAGISTRATE-II, THAMARASSERY.**
- ANNEXURE C** **COPY OF THE ORDER DATED 20/03/2015 CMP. NO.1015/2015 IN L.P. NO.2/2013 ON THE FILE OF THE JUDICIAL FIRST CLASS MAGISTRATE COURT-II, THAMARASSERY.**
- ANNEXURE D** **CERTIFIED COPY OF THE FIR IN CRIME NO.401/2011 ON THE FILE OF THE MUKKAM POLICE STATION.**
- ANNEXURE E** **COPY OF THE RELEVANT PORTION OF THE PASSPORT OF THE PETITIONER.**

RESPONDENT'S ANNEXURES:- **NIL.**

//TRUE COPY//

PA. TO JUDGE

rs.

ALEXANDER THOMAS, J.

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Crl.M.C.No.3131 of 2015

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Dated this the 16th day of September, 2015

O R D E R

The petitioner is implicated as accused No.15 in Crime No.401/2011 of Mukkom Police Station, Kozhikode Rual District, which is now pending in the long pending case list as L.P.No.2/13 on the file of Judicial First Class Magistrate Court-II, Thamarassery. The case is one involving the murder of one Sri.Shaheed bava, who is a native of Cheruvadi in Kozhikode District. The prosecution case is as follows:

2. Charge Witness No.2 (Ramla) is residing very near to Kodyathoor Village and the deceased Shaheed Bava was employed in Gulf Countries for some time and after his return from Gulf he used to visit the house of Ramla which annoyed the local people including the accused. On 22/10/2011 night, while Shaheed Bava was returning from the house of Ramla in his car, some persons

attempted to obstruct his car and that thereupon Shaheed Bava tried to hit them with the car. Accused Nos.2, 5 to 12 and 14 chased Shaheed Bava to his house and from there the relatives of Shaheed Bava threatened them. That thereafter accused were allegedly waiting for an opportunity for retaliation. While so, on 9.11.2011, at night, Shaheed Bava came to the house of Ramla along with accused No.4 in the autorickshaw driven by A4. At about 11.30 p.m., deceased Shaheed Bava made a call to accused No.4 and while he was returning from the house of Ramla and when he reached near the house of one Sri. Muhammed Basheer, all the accused formed themselves into unlawful assembly and committed riot with deadly weapons and they attacked deceased Shaheed Bava with sticks and iron rods and dragged him upto an electric post situated near the road side and tied him with a plastic rope to that electric post. Thereafter someone had telephoned the police and CW14, Assistant SI and a police constable came to the spot to save the deceased Shaheed Bava. But the accused obstructed the police stating that only the dead body will be allowed to be taken. Hence, CW14 contacted the SI of Police who came with the police jeep and took the deceased Shaheed Bava to KMCT Hospital at Mukkom and

since he sustained serious injuries he was referred to Baby Memorial Hospital, Kozhikode. There he underwent surgery but he succumbed to the injuries on 13/11/2011, about four days after the initial incident of the attack which took place on 9/11/2011. It is alleged that the accused had common object to kill the deceased Shaheed Bava and with that common object, they committed the riot with deadly weapons and attacked deceased Shaheed Bava etc.

3. The initial incident of attack took place on 09/11/2011 night and the FIR in relation to that incident was registered as Annexure-D which led to the initiation of Crime No.401/2011 of Mukkom Police Station, Kozhikode District for offences under Sections 143, 147, 148, 323, 324, 308 read with Section 149 of the IPC. In Annexue-D Crime No.401/2011, the names of three persons (accused 1,2,3) and unnamed but identifiable 12 persons are implicated as accused therein. The death of Shaheed Bava took place on 13/11/2011. It is to be noted that at the time of registration of crime the name of the petitioner is not included as accused in Annexure-D FIR. But CW2 (Ramla) gave a statement to the police on 15/11/2011, in which for the first time the name of the petitioner is also implicated therein. The police after

investigation submitted a additional report before the jurisdictional Magistrate concerned on 15/12/2011 wherein the petitioner has been implicated as accused No.15 in the aforestated crime. It is stated that petitioner had earlier applied for visa for seeking employment in Gulf Country and that he secured visa on 22/11/2011 and that he had left India on 24/11/2011 and has not come back to India till date. After the death of Shaheed Bava, the Investigating Officer had also included the offence under Section 302 of the IPC in the aforestated Crime on 13/11/2011. It is stated that it is only after the petitioner had left India on 24/11/2011, that the name of the petitioner was arrayed as an accused (A15), for the first time in the additional report given by the Investigating Officer on 15/12/2011.

4. Since the petitioner (A15) did not participate in the trial as he was abroad the case against him has been split up and has been included in the long pending case list as L.P.No.2/2013 on the file of the Judicial First Class Magistrate Court-II, Thamarassery. Accused Nos.1 to 14 in the crime faced trial and as per judgment dated 08/10/2014 in S.C.No.210/2012, the Special Additional Sessions Judge (Marad Cases), Kozhikode acquitted accused Nos.2,

7, 12, 13 and 14 and had convicted the other accused for the offences including the one under Section 302 of the IPC.

5. The main case set up in this Criminal Miscellaneous case is that even if the entire allegations in the Annexure-A charge are accepted in toto there is no prima facie case made out against the petitioner and that he is now working abroad and that the said job is only the livelihood of the petitioner that if he came back and faced the trial, it will take a long time to dispose of the matter because the case as against the other accused took about 2 ½ long years for disposal after the committal to the Sessions Court. That the petitioner wanted to pray for discharge before the trial court through his authorised counsel, for which it is stated that his case should be committed to the Sessions Court that therefore the petitioner submitted Annexure-B petition for dispensing the appearance of the petitioner in the committal proceedings and allow him to appear through his pleader and to complete the procedures in connection with the committal. The learned Magistrate as per the impugned Annexure-C order dated 20/03/2015 in Crl.M.P.No.1015/2015 in L.P.No.2/2013 on the file of the JFMC-II, Thamarassery had dismissed the said Annexure-B application. The

main prayer in this Crl.M.C. is to set aside the impugned Annexure–C order dated 20/03/2015 and for direction to allow the prayers in Annexure–B petition or in the alternative to allow the petitioner to surrender before the Sessions Court, Kozhikode in the light of the judgment of the Apex Court in the case Sundeep Kumar Bafna v. State of Maharashtra reported in 2014(2) KLT 809(SC) and keep in abeyance the warrant of arrest issued by the committal court against the petitioner till the bail application is considered by the Sessions Court. A further direction for time bound disposal of the matter by the Sessions Court concerned is also prayed.

6. Heard Sri.P.V.Kunhikrishnan, learned counsel appearing for the petitioner and Sri.K.I.Abdul Rasheed, learned Additional State Prosecutor appearing for the respondent State of Kerala.

7. After elaborate consideration of the rival pleas in this regard, this Court during the course of the submissions had made it clear that this Court is not inclined to grant the main prayer in this petition to quash the impugned Annexure–C order and to allow Annexure–B application etc. Faced with this situation Sri.P.V.Kunhikrishnan, learned counsel appearing for the petitioner submitted that then this Court may consider the alternate plea put

up by the petitioner for orders of this Court to enable him to surrender before the Sessions Court, Kozhikode in the light of the legal principles laid down by the Apex Court in the judgment in Sundeep Kumar Bafna's case (supra) and to consequently keep in abeyance the arrest warrant issued by the committal court against the petitioner till for a period of one month till the bail application is considered by the Sessions Court etc.

8. The learned counsel for the petitioner has taken attention of this Court to paragraphs 21, 23 and 27 of the judgment of the Apex Court in Sundeep Kumar Bafna's case (supra) which reads as follows:

" 21. We have already noted in para 8 the creation by the Cr.P.C. of a hiatus between the cognizance of an offence by the Magistrate and the committal by him of that offence to the Court of Session. S.190 contemplates the cognizance of an offence by a Magistrate in any of the following four circumstances: (i) upon receiving a complaint of facts; or (ii) upon a police report of such facts; or (iii) upon information received from any person other than a police officer, or (iv) upon the Magistrate's own knowledge. Thereafter, S.193 proscribes the Court of Session from taking cognizance of any offence, as a Court of original jurisdiction, unless the case has been committed to it by a Magistrate; its Appellate jurisdiction is left untouched. Chapter XVI makes it amply clear that a substantial period may inevitably intervene between a Magistrate taking cognizance of an offence triable by Sessions and its committal to the Court of Session. S.204 casts the duty on a Magistrate to issue process; S.205 empowers him to dispense with personal attendance of accused; S.206 permits Special summons in cases of petty offence; Ss.207 and 208 obligate the Magistrate to furnish to the accused, free of cost, copies of sundry documents mentioned therein; and, thereafter, under S.209 to commit the case to Sessions. What

is to happen to the accused in this interregnum; can his liberty be jeopardized! The only permissible restriction to personal freedom, as a universal legal norm, is the arrest or detention of an accused for a reasonable period of 24 hours. Thereafter, the accused would be entitled to seek before a Court his enlargement on bail. In connection with serious offences, S.167 Cr.P.C. contemplates that an accused may be incarcerated, either in police or judicial custody, for a maximum of 90 days if the Charge Sheet has not been filed. An accused can and very often does remain bereft of his personal liberty for as long as three months and law must enable him to seek enlargement on bail in this period. Since severe restrictions have been placed on the powers of a Magistrate to grant bail, in the case of an offence punishable by death or for imprisonment for life, an accused should be in a position to move the Courts meaningfully empowered to grant him succour. It is inevitable that the personal freedom of an individual would be curtailed even before he can invoke the appellate jurisdiction of Sessions Judge. The Constitution therefore requires that a pragmatic, positive and facilitative interpretation be given to the Cr.P.C. especially with regard to the exercise of its original jurisdiction by the Sessions Court. We are unable to locate any provision in the Cr.P.C. which prohibits an accused from moving the Court of Session for such a relief except, theoretically, S.193 which also only prohibits it from taking cognizance of an offence as a Court of original jurisdiction. This embargo does not prohibit the Court of Session from adjudicating upon a plea for bail. It appears to us that till the committal of case to the Court of Session, S.439 can be invoked for the purpose of pleading for bail. If administrative difficulties are encountered, such as, where there are several Additional Session Judges, they can be overcome by enabling the accused to move the Sessions Judge, or by further empowering the Additional Sessions Judge hearing other Bail Applications whether post committal or as the Appellate Court, to also entertain Bail Applications at the pre-committal stage. Since the Magistrate is completely barred from granting bail to a person accused even of an offence punishable by death or imprisonment for life, a superior Court such as Court of Session, should not be incapacitated from considering a bail application especially keeping in perspective that its powers are comparatively unfettered under S.439 of the Cr.P.C.

23. On behalf of the State, the submission is that the prosecution should be afforded a free and fair opportunity of subjecting the accused to custody for interrogation as provided under S.167 Cr.P.C. This power rests with the Magistrate and not with the High Court, which is the Court of

Revision and Appeal; therefore, the High Court under S.482 Cr.P.C. can only correct or rectify an order passed without jurisdiction by a subordinate Court. Learned State counsel submits that the High Court in exercise of powers under S.482 can convert the nature of custody from police custody to judicial custody and vice versa, but cannot pass an Order of first remanding to custody. Therefore, the only avenue open to the accused is to appear before the Magistrate who is empowered under S.167 Cr.P.C. Thereupon, the Magistrate can order for police custody or judicial custody or enlarge him on bail. On behalf of the State, it is contended that if accused persons are permitted to surrender to the High Court, it is capable of having, if not a disastrous, certainly a deleterious effect on investigations and shall open up the flood gates for accused persons to make strategies by keeping themselves away from the investigating agencies for months on end. The argument continues that in this manner absconding accused in several sensitive cases, affecting the security of the nation or the economy of the country, would take advantage of such an interpretation of law and get away from the clutches of the investigating officer. We are not impressed by the arguments articulated by learned Senior Counsel for the Complainant or informant because it is axiomatic that any infraction or inroad to the freedom of an individual is possible only by some clear unequivocal and unambiguous procedure known to law.

27. The impugned Order is, accordingly, set aside. The Learned Single Judge shall consider the Appellant's plea for surrendering to the Court and dependent on that decision, the Learned Single Judge shall, thereafter, consider the Appellant's plea for his being granted bail. The Appellant shall not be arrested for a period of two weeks or till the final disposal of the said application, whichever is later. We expect that the learned Single Judge shall remain impervious to any pressure that may be brought to bear upon him either from the public or from the media as this is the fundamental and onerous duty cast on every Judge. "

9. In the light of the above said judgment, the learned counsel appearing for the petitioner contends that this Court may pass appropriate orders enabling him to surrender before the Principal Sessions Court, Kozhikode and seek the bail in the light of

principles contained in Sundeep Kumar Bafna's Case (supra) rendered by the Apex Court and keep in abeyance the proceedings till the consideration of bail application in that regard.

10. It is pointed out by the learned counsel appearing for the petitioner that the offences involved in the case considered by the Apex Court in Sundeep Kumar Bafna's case (supra) were for offences under Sections 288, 304, 308, 336, 388 r/w Section 34 and Section 120B of the IPC and that the punishment for the offence under Section 388 of the IPC could be for imprisonment with life. As evident from paragraph No.3 of the said judgment it was contended therein that the jurisdictional Magistrate concerned is not empowered to grant bail to the appellant therein, since he can be punished with imprisonment for life, as statutorily stipulated in Section 437(1) of Cr.P.C. It is therefore pointed out by the petitioner in view of this crucial aspect that the Apex Court in paragraph 21 of Sundeep Kumar Bafna's case (supra) has held that since the Magistrate is completely barred from granting bail to a person accused for an offence punishable by death or imprisonment for life, a court which is superior to the jurisdictional Magistrate, such as the Court of Sessions, should not be incapacitated from

considering a bail application especially keeping in perspective that its powers are comparatively unfettered under Section 439 of the Cr.P.C. It is also observed by the Apex Court in paragraph 21 of the judgment that till the committal of the case to the court of Sessions, Section 439 can be invoked for the purpose of pleading for bail and if administrative difficulties are encountered, such as where there are several Additional Session Judges, they can be overcome by enabling the accused to move the Sessions Judge concerned or by empowering the Additional Sessions Judge etc.

11. Since the major offence involved in this case is one under Section 302 of the IPC, this Court wanted to get instructions from the prosecution agency in order to ascertain whether this Court should issue any such directions in the light of the aforestated Apex Court's judgment in Sundeep Kumar Bafna's case (supra). This Court specifically wanted the Additional Director General of Prosecutions to get instructions to ascertain about the role of the accused in this case and as to whether he had left India before he was implicated as an accused in the crime etc. Thereupon the Additional Director General of Prosecutions has secured instructions and submitted that the incident of initial attack had taken place on

09/11/2011 and Annexure-D crime was registered on 10/11/2011 for offences including those under Section 308 of the IPC as against three named accused and 12 other unnamed but identifiable persons and that the petitioner was not then implicated as an accused. Later the death of the victim had taken place on 13/11/2011 and on the same day report was duly submitted before the Jurisdictional Magistrate Court concerned for incorporating the offence under Section 302 of the IPC. The statement of CW2 (Ramla) was recorded by the police on 15/11/2011 in which the name of the petitioner was implicated for the first time and based on the said statement, the police had conducted due investigation and had submitted an additional report before the jurisdictional Magistrate Court concerned on 15/12/2011 implicating the name of the petitioner as an accused (accused No.15) in the said crime for the aforesaid offences including the one under Section 302 of the IPC. It is also pointed out by the learned Additional Director General of Prosecutions that the petitioner herein had left India on 24/11/2011. In this regard it is to be noted that the petitioner has produced Annexure-E which is the true copy of the passport of the petitioner in which it is seen endorsed that the petitioner had

secured visa on 22/11/2011 and that he had left India on 24/11/2011. It is also to be noted that the basic facts as stated in this Crl.M.C. as regards the genesis of the crime is not in any way disputed by the prosecution. The indisputable facts projected in the prosecution case is that the dispute occurred because the deceased Shaheed Bava used to maintain an alleged illicit relationship with CW2 (Ramla) who is said to be a divorced lady and that this was objected to by some of the persons in the locality including some of the accused and that the first incident relating to quarrel that took place on account of the deceased Shaheed Bava visiting Ramla's house in the night on 22/10/2011. Thereafter the main incident of attack was taken place on 09/11/2011 which is said to be a retaliation on account of the first incident. Therefore the basic incidents are projected in the prosecution case itself as on account of the objections that were raised by some of the persons in the locality including the accused about the alleged illicit relationship that has been maintained frequently by the deceased Shaheed Bava with CW2 (Ramla) and the attack had taken place on the back ground of these factual aspects. These aspects are projected in the prosecution case are being assessed by this Court only to aid this

Court to come to a conclusion as to whether or not directions as the one issued in Sundeep Kumar Bafna's case (supra) by the Apex Court, need be issued in the facts and circumstances of this case.

12. Sri.K.I. Abdul Rasheed learned Additional DG of prosecutions also submitted that since the major offence in this case is one under Section 302 of the IPC, this Court need not exercise discretion in the facts and circumstances of this case. However, alternatively it is submitted by learned Additional DG of Prosecutions that if at all this Court is issuing any directions in that regard, then this court may leave the matter entirely within the discretionary powers of the Principal Sessions Court concerned, instead of issuing any directions after consideration of the merits of the matter. In this regard, the learned Additional DG of Prosecutions point out that it is clearly held by the Apex Court in paragraph No.26 of the Sundeep Kumar Bafna's case (supra) that “ The Sessions Court..... would then have to venture to the merits of the matter so as to decide whether the applicant/Appellant had shown sufficient reasons or grounds for being enlarged on bail.”

13. After hearing on both sides this Court is of the considered opinion that taking into account over all facts and circumstances of

the case as aforestated, this matter could be disposed of with a direction that it will be open to the petitioner to voluntarily appear and surrender before the Principal Sessions Court, Kozhikode within one month from today and move an appropriate application for grant of bail and application for recall of warrant and the learned Principal Sessions Court, Kozhikode will consider those applications on merits and should pointedly consider the relevant aspects as to whether the legal principles laid down by the Apex Court in Sundeep Kumar Bafna's case (supra) could be applied in the facts and circumstances of this case and consequently in this process the Principal Sessions Court so holds that the legal principles could be applied to the facts of this case, then the Sessions Court should then pointedly venture to consider the merits of the matter and pointedly decide as to whether the petitioner has shown sufficient reasons or grounds for being enlarged on bail and decision on the application may be taken by the Sessions Court preferably on the same day. It is made clear that the matter as to whether the legal principles laid down by the Apex court in Sundeep Kumar Bafnas' case (supra) could be applied to the facts and circumstances of this case should be decided by the Principal

Sessions Court and those aspects are fully left within the exclusive discretionary domain of the Principal Sessions Court, untrammelled and uninfluenced by any of the observations in this Order. It is further ordered that the petitioner through his counsel if any, should give advance notice to the prosecutor concerned attached to the Principal Sessions Court at least 48 hours prior to the proposed surrender intimating the exact date and time on which he would personally appear and surrender before the Principal Sessions' Court so as to enable the Prosecutor to be fully appraised about the facts and circumstances of this case and to enable the Prosecutor to make necessary submissions before the Sessions Court concerned on the aforestated applications of the petitioner. It is pointed out that the petitioner is now said to be in a Gulf Country and it is for this purpose that this Court has granted one month time from today to voluntarily surrender before the Sessions Court. It is also to be noted that in paragraph No.27 of Sundeep Kumar Bafna's case (supra) the Apex Court had also issued a further consequential direction that the appellant therein shall not be arrested for a period of two weeks or till the disposal of the bail application, whichever is later. Therefore in the light of that aspect it is ordered that further

coercive steps that may be taken in pursuance of the impugned non bailable warrant pending against the petitioner shall be kept in abeyance for the aforestated period of one month or till the disposal of the application as aforestated by the Principal Sessions Court, Kozikode, whichever is later. It is further made clear that in case petitioner does not voluntarily appear and surrender before the Sessions Court within the aforestated period of one month, then the benefit of this direction will stand automatically vacated without any further orders from this Court. It is further made clear and reiterated that the entire issues as to whether the legal principles laid down by the Apex Court in Sundeep Kumar Bafna's case (supra) could be applied to the facts and circumstances of this case is a matter which is left exclusively within the discretionary province of the Principal Sessions Court concerned.

14. Further it is to be made clear for the removal of any doubts that the consequential issue as to whether the petitioner has shown sufficient reasons or grounds for being enlarged on bail is also a matter exclusively within the discretionary domain of the Principal Sessions Court concerned. Moreover, as directed earlier, these matters have to be decided independently by the

Principal Sessions Court untrammelled and uninfluenced by the observations made in this order.

With these observations and directions this Crl.M.C.stands finally disposed of.

Sd/- ALEXANDER THOMAS, JUDGE

MJL

