

"CR"

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

FRIDAY, THE 9TH DAY OF JANUARY 2015/19TH POUSHA, 1936

Crl.MC.No. 3189 of 2014 ()

AGAINST THE COMMON ORDER IN CRL.M.P.NO.58/2014 IN SC.NO.916/2012 AND
CRL.M.P.NO.59/2014 IN SC.NO.917/2012 DATED 12.5.2014 PASSED BY THE
SPECIAL JUDGE (SPE/CBI, THIRUVANANTHAPURAM)

PETITIONER/NEWLY ADDED AS 3RD ACCUSED IN SC.NO.916/2012:

K.SOMAN,
S/O.KOCHAPPY, THOTTIVILA VEEDU, ADAYAMAN,
KILIMANOOR, THIRUVANANTHAPURAM,
NOW RESIDING AT POLICE QUARTERS NO.G5
CANTONMENT HOUSE, VIKAS BHAVAN PO, THIRUVANANTHAPURAM.

BY ADVS.SRI.K.RAMAKUMAR (SR.)
SRI.S.M.PRASANATH
SMT.ASHA BABU
SMT.AMMU CHARLES
SRI.M.MANOJKUMAR (CHELAKKADAN)

RESPONDENTS/STATE & COMPLAINANT:

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

2. THE CENTRAL BUREAU OF INVESTIGATION,
ERNAKULAM, REPRESENTED BY THE SPECIAL PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM-682031.

R2 BY ADV. SRI.P.CHANDRASEKHARA PILLAI, C.B.I.

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON
27.10.2014 ALONG WITH CRL.MC. 3083/2014, THE COURT ON 09.01.2015
PASSED THE FOLLOWING:

APPENDIX

PETITIONER'S ANNEXURES:

ANNEXURE-A: TRUE COPY OF THE CLARIFICATION REPORT FILED BY THE
INVESTIGATING OFFICER BEFORE THE COURT OF SPECIAL JUDGE (SPE/CBI) ,
THIRUVANANTHAPURAM.

ANNEXURE-B: TRUE COPY OF COMMON ORDER DATED 12.5.2014 PASSED BY THE
COURT OF THE SPECIAL JUDGE (SPE/CBI) , THIRUVANANTHAPURAM.

RESPONDENTS' ANNEXURES: NIL

/TRUE COPY/

P.S TO JUDGE

“CR”

K. RAMAKRISHNAN, J.

.....
Crl.M.C.No.3189 of 2014

&

Crl.M.C.No. 3083 of 2014
.....

Dated this the 9th day of January, 2015.

O R D E R

The third accused in SC.No.917/2012 and the newly added 7th accused in SC.No.917/2012 and the original fifth accused in SC.No.916/2012 both on the file of the Special Judge (SPE/CBI), Thiruvananthapuram have filed these Criminal Miscellaneous Cases respectively to quash the common order passed by the Special Judge in Crl.M.P.No.58/2014 in SC.No.916/2012 and in Crl.M.P.No.59/2014 in SC.No.917/2012 under Section 482 of the Code of Criminal Procedure (hereinafter referred to as 'the Code').

2. The accused in SC.Nos.916/2012 and 917/2012 of Special Judge (SPE/CBI), Thiruvananthapuram were working as police officers in Fort Police Station, Thiruvananthapuram. On 27.9.2005, the deceased Udayakumar and one Suresh Kumar were illegally taken into custody from Sreekandeswaram Park at Thiruvananthapuram by accused No.1, Jitha Kumar and second accused, Sreekumar and they were taken to Fort police

station and they were interrogated by accused 1 and 2 using third degree methods. The third accused Soman, who is the petitioner in Crl.M.C.No.3189/2014, also joined in the interrogation and inflicted injuries on deceased Udayakumar and the witness Sureshkumar. Later, Udayakumar succumbed to injuries sustained by him during the custodial interrogation. He was taken to Medical College Hospital, Thiruvananthapuram from where he was declared dead. After the death of Udayakumar, accused 1 to 3 in SC.No.917/2012 along with the other accused in both the cases, entered into a criminal conspiracy for disappearance of material evidence of the offence and for fabrication of the records of Fort police station, in order to cover up the custodial death, registered a false case as Crime No.703/2005 against Suresh Kumar and Udayakumar after his death. Another case was registered as Crime No.704/2005 of the same police station under Section 174 of the Code consequent to the death of Udayakumar and caused disappearance of articles used such as cane, iron rod, thorth etc. Investigation was earlier conducted by the Narcotic Cell and thereafter by the CBCID,

Thiruvananthapuram. CBCID completed the investigation of both the cases and filed final report in Crime No.704/2005 against accused 1 to 3 alone originally alleging offences under Sections 323, 331, 348 and 302 read with Section 34 of the Indian Penal Code as having revealed during investigation that deceased Udayakumar died on account of the injury sustained by him and inflicted by accused 1 to 3 while he was in custody and they also caused injury to the witness Sureshkumar. After committal, the case was taken on file as SC.No.1542/2006 on the file of the Sessions Court, Thiruvananthapuram and that was later made over to Third Additional Sessions Court (Fast Track-I), Thiruvananthapuram for disposal. While the case was pending before the Additional Sessions Court, (Fast Track Court-I), Thiruvananthapuram, 34 witnesses were examined after framing charges against accused 1 to 3. Thereafter since most of the witnesses turned hostile and it was revealed that the official witnesses were trying to help the accused police officials, the Special Public Prosecutor filed Crl.M.P.No.1964/2007 before the Additional Sessions Court seeking permission to conduct further

investigation under section 173(8) of the Code and the learned Additional Sessions Judge allowed the application and further investigation was ordered. The mother of the deceased filed W.P.(C).No.24258/2007 before this Court for transferring the investigation to Central Bureau of Investigation (hereinafter referred to as 'the C.B.I' for short) and this Court allowed the writ petition and directed further investigation to be conducted by the C.B.I and thereafter the C.B.I re-registered Crime No.704/2005 as RC.10/S/2007/CBI/SCB/CHE. After completing the investigation, they filed final report against six accused persons including the original three accused persons namely Jitha Kumar (A1), Sreekuamr (A2), Soman (A3), Mohanan (A4), Ajith Kumar (A5) and E.K. Sabu (A6) alleging offences under Sections 323, 331, 348 and 302 read with Section 34 of the Indian Penal Code and Section 120 B read with Sections 201, 160 and 193 of the Indian Penal Code. The six accused persons arrayed in the case apart from the present accused arrayed were tendered pardon by the Chief Judicial Magistrate, Ernakulam and they were shown as approvers.

3. The CBCID had referred Crime No.703/2005

registered against Udayakuamr and Suresh Kumar by the Fort police as false case. The mother of the deceased Udayakumar filed W.P.(C)No.12365/2008 before this Court for handing over investigation of Crime No.703/2005 of Fort police station also to the CBI and the same was allowed as per order dated 8.7.2008 and the CBI has undertaken the investigation of that case also and they re-registered the case as RC.05/S/2008/CBI/SCB/CHE and after completing the investigation, they filed final report against five accused persons namely Jitha Kuamr (A1), Sreekumar (A2), Ajith Kumar (A3), E.K. Sabu (A4) and T.K. Haridas (A5), who is the petitioner in Crl.M.C.No.3083/2014 for the offence under Section 120 B read with Sections 466, 474, 193, 167 and 201 of the Indian Penal Code and that was committed to the Sessions Court and taken on file as SC.No.916/2012 and both the cases were made over to Special Court(SPE/CBI),Thiruvananthapuram for disposal. The case of the prosecution was that after the death of Udayakumar, in continuation of the conspiracy hatched between all the accused persons in both the cases including persons shown as approvers, manipulation of documents were

done so as to make it appear that a case was registered against Udayakumar and Sree Kumar and certain manipulations were made showing their arrest in the records maintained in the police station so as to appear that they were registered and prepared prior to the death of Udayakumar, though that was done after the death of Udayakumar.

4. When these cases were pending, the Public Prosecutor filed Crl.M.P.No.58/2014 in SC.No.916/2012 and Crl.M.P.No.59/2014 in SC.No.917/2012 for joint trial of these cases as, according to the Public Prosecutor, the conspiracy hatched in both the cases are same and the act of disappearance of evidence and creation of false documents to cover up the criminal act of accused 1 to 3 were done in the course of the same transaction and most of the evidence is common and as such, conducting separate trial will cause prejudice and it is necessary in the interest of justice to conduct a joint trial of both the cases.

5. While those petitions were filed, the Special Judge issued a questionnaire to the investigating officer seeking certain clarification regarding the nature of allegation made in

the petitions filed by the Public Prosecutor for seeking joint trial and also to ascertain whether the two cases are interconnected and happened on the basis of the single conspiracy and in the course of the same transaction and the investigating officer had filed a statement answering the queries raised by the Special Judge. After hearing both sides and also considering the allegations made in both the applications and the clarification given by the investigating officer, the learned Special Judge by the impugned common order allowed the applications and ordered joint trial of the two cases and the 5th accused in SC.No.916/2012, who is the petitioner in Crl.M.C.No.3083/2014, was added as 7th accused in S.C.No.917/2012 invoking the power under Section 319 of the Code and relying on the decision reported in **Hardeep Singh v. State of Punjab** (2014 (1) KLT 336) and decided to frame charge against accused 1 to 3 for the offence under Sections 323, 331, 348 and 302 read with Section 34 of the Indian Penal Code and against all the accused in SC.No.917/2012 and 5th accused in SC.No.916/2012, who was newly added as 7th accused in SC.No.917/2012, for the offence

under Section 120 B read with Sections 201, 167, 466 and 474 of the Indian Penal Code and the question as to whether the accused are liable to be proceeded under Section 120 B read with Section 193 and 116 of the Indian Penal Code will be considered after the disposal of SC.No.917/2012. That common order is being challenged by the third accused in SC.No.917/2012 and the original 5th accused in SC.No.916/2012 and newly added 7th accused in SC.No.917/2012 by filing the above applications.

6. Heard both sides.

7. The learned Senior Counsel Sri. K. Ramakumar appearing for the petitioner in Crl.M.C.No.3189/2014 submitted that after the final report is filed and taking cognizance of the case, there is no provision for adding a new party under Section 319 of the Code as has been done by the learned Special Judge. Further, the power of the court to add a new accused has been now settled by the Hon'ble Supreme Court in the decision reported in **Hardeep Sing v. State of Punjab** (AIR 2014 SC 1400) and it has been observed in that decision that the power can be exercised by the court either at the

time of taking cognizance of the case if the court is satisfied that the person other than the persons shown as accused have involved in the commission of the crime, the person so omitted can be implicated as additional accused and summons can be issued to him or during the course of trial on the basis of the evidence if the court is satisfied that some other person or persons other than the accused already arrayed have committed the offence, then invoking the power under Section 319 of the Code they also can be arrayed as accused. The present stage is not covered by those two situations mentioned in the case. So the Special Judge was not justified in invoking the power under Section 319 of the Code to implicate the accused persons in SC.No.916/2012 as accused in SC.No.917/2012 of the same court and clubbing of the case is also not possible under the Code. Further this will cause prejudice to the accused and the procedure adopted by the court below for calling clarification from the investigating officer etc is also unknown to criminal law. No such procedure has been provided under the Code as well. So, according to the learned Senior Counsel, it is bad in law and the same is

liable to be set aside.

8. Sri.S. Rajeev, learned counsel appearing for the petitioner in Crl.M.C.No.3083/2014 submitted that there is no provision for clubbing of both the cases and further some of the offences mentioned in SC.No.916/2012 were omitted to be tried at this stage and it was relegated to a later stage after disposal of the case in SC.No.917/2012 which is unknown to criminal jurisprudence. Further, court can try persons under Section 220 of the Code on the basis of the application filed by the parties, if no prejudice will be caused to the party on account of clubbing of the cases. In this case, that aspect has not been considered by the court below and the learned counsel also submitted that the procedure adopted is not proper. When the question as to whether this can be brought under Section 223 (d) of the Code was put to them by this Court, both the counsel submitted that in the absence of any evidence to show that it was happened in the course of the same transaction, that is not possible and it cannot be said that these acts were committed in the course of the same transaction and the prosecution also had no such case and accused persons are

different as well.

9. Sri. Chandrasekharan Pillai, Standing Counsel for the CBI submitted that after the death of Udayakumar during custody on account of the injuries inflicted by accused 1 to 3 in S.C.No.917/2012, other accused persons have conspired together and made disappearance of evidence by destroying cane, thorth and iron rod used for inflicting injuries on Udayakumar and Suresh Kumar and they have also created documents by registering a false case and manipulating the records kept in the police station so as to cover up the act of accused 1 to 3 in S.C.No.917/2012 and helped them to escape from the consequences of their act of causing death of Udayakumar while he was in custody and it can be treated as things happened in the course of the same transaction and all the persons involved in the commission of the crime on account of the single conspiracy hatched can be tried together so as to avoid multiplicity of proceedings. He had relied on the decision reported in **Swamirathnam v. State of Madras** (AIR 1957 SC 340) in support of his case.

10. It is an admitted fact that on 27.9.2005 at about

2.15 p.m accused 1 and 2 in SC.Nos.916/2012 and 917/2012 of Special Court (SPE/CBI), Thiruvananthapuram took one Udayakumar and Suresh Kumar from Sreekandeswaram Park at Thiruvananthapuram and brought them to Fort police station and confined them illegally in the office of the Circle Inspector of Police, Fort Police Station and shared the common intention to extract a confession from Udayakumar, he was assaulted by accused 1 and 2 first and thereafter the third accused Soman also joined along with them and assaulted Udayakumar and also Suresh Kumar by using cane and GI pipe and also used thorth for tying him and on account of the injury sustained, Udayakumar died and he was taken to Medical College Hospital, from where he was declared dead. It is also an admitted fact that originally Crime No.704/2005 of Fort police station was registered under Section 174 of the Code under the caption unnatural death of deceased Udayakumar and another crime was registered as Crime No.703/2005 of the same police station against Udayakumar and Suresh Kumar under section 41(1)(d) and 102 of the Code and earlier investigation was conducted by the local police and thereafter

investigation was entrusted to CBCID and they found that accused Nos.1 to 3 in S.C.No.917/2012 have committed the offences under Sections 323, 331, 348 and 302 read with Section 34 of the Indian Penal Code and Section 174 of the Code was deleted in Crime No.704/2005 of Fort police station and the above offences were added and accused 1 to 3 in S.C.No.917/2012 namely Jitha Kumar, Sreekumar and Soman were implicated as accused 1 to 3 in that case and final report was filed and it was originally taken on file after committal as SC.No.1542/2006 on the file of the Sessions Court, Thiruvananthapuram and the same was made over to Third Additional Sessions Court (Fast Tract-I), Thiruvannathapuram for disposal and after framing charges, 34 witnesses were examined in that case. Crime No.703/2005 was referred by the CBCID as a false case. Since most of the material witnesses have turned hostile and they have even denied participation of the accused in the case, Sri. K.K. Vijayan, the Special Public Prosecutor appointed in that case filed Crl.M.P.No.1964/2007 for permission to conduct further investigation in Crime Nos.703/2005 and 704/2005 and the

learned Additional Sessions Judge had allowed the application. Before that, PW11 Raveendran Nair, who was arrayed as CW13 in the charge sheet, was arrayed as 4th accused by the Additional Sessions Judge invoking the power under Section 319 of the Code. Crl.M.P.No.1969/2007 was also filed by the Special Public Prosecutor along with the report of the investigating officer seeking permission to conduct further investigation and that was allowed by the Additional Session Judge. That was challenged before this Court by the accused by filing Crl.R.P.No.2902/2007 and the mother of the deceased filed W.P.(C).No.24258/2007 to hand over the investigation to CBI and this Court allowed the writ petition handing over further investigation to be conducted by the CBI in Crime No.704/2005 of Fort police station and dismissed the revision petition filed by the accused. The mother of deceased Udayakumar also filed WP(C).No.12365/2008 for entrusting the investigation of Crime No.703/2005 also to CBI and the learned Single Judge of this Court allowed the application and entrusted the investigation to be conducted by the CBI.

11. It is also an admitted fact that after the cases were

transferred to CBI, they have re-registered Crime No.704/2005 as RC 10/S/2007/CBI/SCB/CHE and after completing the investigation, they filed final report against six accused persons namely Jitha Kumar (A1), Sreekumar (A2), Soman (A3), Mohanan (A4), Ajith Kumar (A5) and E.K.Sabu (A6) for the offences under Sections 323,331, 348 and 302 read with Section 34 of Indian Penal Code and Section 120 B read with Sections 201, 116 and 193 of the Indian Penal Code. They also re-registered Crime No.703/2005 as RC.5/S/2008/CBI/SCB/CHE and after investigation they filed final report against five accused persons namely Jitha Kumar (A1), Sreekumar (A2), Ajith Kumar (A3), E.K. Sabu (A4) and T.K. Haridas (A5) alleging offences under Sections 120B read with Sections 463, 474, 193, 163 and 201 of the Indian Penal Code. It is also an admitted fact that after investigation final report was filed in RC 10/S/2007/CBI/SCB/CHE against six accused persons and that was later committed to Special Court where it was taken on file as SC.No.917/2012 and RC.5/S/2008/CBI/SCB/CHE was filed against five accused persons and after committal to the Special Court it was taken

on file as SC.No.916/2012 and both the cases were pending before the same court. It is also in a way admitted that some of the common accused in both the case who were originally shown as accused, became approvers and they were deleted from the array of accused and shown as approver witnesses to prove the case of the prosecution. It is also an admitted fact that the Public Prosecutor filed Crl.M.P.No.58/2014 in SC.No.916/2012 and Crl.M.P.No.59/2014 in S.C.No.917/2012 under Sections 223 and Section 319 of the Code and the learned Special Judge served a query to the investigating officer seeking certain clarification as to whether the incident in both the case occurred in the course of the same transaction and the conspiracy hatched was a single conspiracy or separate conspiracy and obtained clarification from the investigating officer and thereafter, after hearing both sides, passed the impugned common order whereby the Special Judge had invoked the power under Section 319 of the Code, clubbed both the case and arrayed 5th accused in S.C.No.916/2012 as additional 7th accused in S.C.No.917/2012 of the same court

and decided to frame charge against accused 1 to 3 in SC.No.917/2012 for the offences under Sections 323, 331, 348, 302 read with section 34 of the Indian Penal Code and other accused in that case and the newly added 7th accused, who was original 5th accused in SC.No.916/2012 for the offences under Section 120 B read with sections 201, 167, 466 and 474 of the Indian Penal Code and it was further observed that the question as to whether the accused are liable to be proceeded against under section 120 B read with sections 193 and 116 of the Indian Penal Code and substantive sentences will be considered after disposal of SC.No.917/2012. This order is being challenged by the petitioners in the above cases.

12. Section 223 of the Code deals with persons who can be charged jointly which reads as follows:

“223. What persons may be charged jointly : The following persons may be charged and tried together, namely:-

- (a) persons accused of the same offence committed in the course of the same transaction;
- (b) persons accused of an offence and persons

accused of abetment of, or attempt to commit, such offence;

(c) persons accused of more than one offence of the same kind, within the meaning of section 219 committed by them jointly within the period of twelve months;

(d) persons accused of different offences committed in the course of the same transaction;

(e) persons accused of an offence which includes theft, extortion, cheating, or criminal misappropriation, and persons accused of receiving or retaining, or assisting in the disposal or concealment of, property possession of which is alleged to have been transferred by any such offence committed by the first-named persons, or of abetment of or attempting to commit any such last-named offence;

(f) persons accused of offences under sections 411 and 414 of the Indian Penal Code (45 of 1860) or either of those sections in respect of stolen property the possession of which has been transferred by one offence;

(g) persons accused of any offence under Chapter XII of the Indian Penal Code (45 of 1860) relating to counterfeit coin and persons accused of any other offence under the said Chapter relating to the same coin, or of abetment of or attempting to commit any such offence;

and the provisions contained in the former part of this Chapter shall, so far as may be, apply to all such charges:

Provided that where a number of persons are charged with separate offences and such persons do not fall within any of the categories specified in this section, the [Magistrate or Court of Session] may, if such persons by an application in writing, so desire, and [if he or it is satisfied] that such persons would not be prejudicially affected thereby, and it is expedient so to do, try all such persons together."

13. Section 223 (d) says that persons accused of different offences committed in the course of the same transaction can be tried jointly. Section 319 of the Code deals with power of the court to add new accused who, were not accused in the proceedings during the course of the trial or enquiry, if the court is satisfied that there are other persons also involved, which reads as follows:

"319. Power to proceed against other persons to be guilty of offence: (1) where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any persons not being the accused has committed any offence for which such person could be tried together with the accused, the Court may

proceed against such persons for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub-section (1), then-

(a) the proceedings in respect of such persons shall be commenced afresh, and witnesses re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced".

14. The Constitution Bench of the Supreme Court in the decision reported in **Dharam Pal v. State of Haryana** (AIR 2013 SC 3018) observed that the Magistrate or the Session Judge at the time of taking cognizance of the case is entitled to

issue process to a person who has not been made an accused in the final report submitted by the police, if on the basis of the materials available, the court is satisfied that persons other than the persons shown in the array of the accused in the final report have also committed the offence but once cognizance is taken and process is issued, then adding of new accused will arise only at the time of trial on the basis of evidence invoking the power under section 319 of the Code and during the interregnum period, this power cannot be invoked. The same view has been reiterated in the decision reported in **Hardeep Singh's case** (cited supra) by another Constitution Bench of the Apex Court. In that decision it has been observed that section 319 of the Code can be invoked either at the time of taking cognizance of the case or during trial of the case not under the stage of sections 207 or 208 and committal under the Code of Criminal Procedure. So, in this case, trial has not been started as it was posted for hearing on the question of framing charges and it was at that time that the applications have been filed by the Special Public Prosecutor and the investigating officer for clubbing the cases. So, at that stage, the question

of invoking the power under Section 319 of the Code does not arise in both the cases and so the court below was not justified in invoking the power under section 319 of the Code to add the original 5th accused in SC.No.916/2012 as additional 7th accused in SC.No.917/2012. But if the court is satisfied that all the accused persons have committed different offences in the course of the same transaction, then invoking the power under section 223 (d) of the Code the court can jointly try all the accused in the same case and for that purpose, clubbing of case can be allowed.

15. In the decision reported in **S. Swamirathnam v. State of Madras** (AIR1957 SC 340), the Hon'ble Supreme Court has held that:

“where the charge, as framed, discloses one single conspiracy, although spread over several years, there is only one object of the conspiracy, and that is to cheat members of the public, the fact that in the course of years others joined the conspiracy or that several incidents of cheating took place in pursuance of the conspiracy does not change the conspiracy and does not split up a single conspiracy into several conspiracies”.

16. In the decision reported in **Major E.G. Barsay v. State of Bombay** and **State of Bombay v. Harnam Singh Ram Singh Kochhar** (AIR 1961 SC 1762) it has been observed that :

“It is not an ingredient of the offence under section 120 A that all the parties who should agree to do a single illegal act. It may comprise the commission of a number of acts. Where the accused are charged with having conspired to do three categories of illegal acts, the mere fact that all of them could not be convicted separately in respect of each of the offences has no relevancy in considering the question whether the offence of conspiracy has been committed. They can all be held guilty of the offence conspiracy to do illegal acts, though the individual offences of them may not be liable”.

It is clear from the above decision that, if conspiracy was one and to do certain illegal actions and each of the accused persons were not part of the conspiracy for committing of the offence, but they have participated in the commission of some of the acts pursuant to the conspiracy, then they can be tried together though they may not be convicted and sentenced for the all the offences and they can be convicted for the offence

of conspiracy and also for the offences committed by them pursuant to that conspiracy separately and there is no misjoinder of charges in such cases.

17. In the decision reported in **Kadiri Kunhahammad v. The State of Madras** (AIR 1960 SC 661) while considering the question of conspiracy and offences committed pursuant to the conspiracy and joint trial of persons concerned when permissible, the Supreme Court has observed as follows:

“Whereas S.239 (d) allows a joinder of charges subject to the conditions mentioned respectively in the said two provisions. In other words, these provisions constitute an exception to the provisions of S.233 as well as those under S.234 (2). In a case of conspiracy, if specific offences are committed in pursuance of the said conspiracy, all persons who are parties to that conspiracy and are also concerned in the specific offences thus committed can be lawfully tried jointly at the same trial”.

18. Further in the decision reported in **Mohan Baitha v. State of Bihar** (AIR 2001 SC 1490), it has been observed that, though several acts have been committed, which resulted in commission of the offence at two different places, if it is

showed that there was continuity of action and incident constituting offence under S.304 B can be held to be part of the same transaction, then the court at which the trial has been started. where the original cause of action arose, will get jurisdiction to decide the offences which culminated in another place and the jurisdiction of the earlier court is not ousted for trying the offences culminated in latter place in continuity of the earlier offence, for which trial can be conducted in one of the courts within whose jurisdiction that part of the offence was committed. That was a case where the accused were charge sheeted for the offence under section 406 and 304 B of the Indian Penal Code and though the offences under section 340 B has taken place at a place J in another State outside the jurisdiction of the court B where offence under section 406 of the Indian Penal Code has been committed, the Hon'ble Supreme Court has held that if it is in continuity of the offence which culminated in the offence under section 304B in another place, then the court at B where the final report has been filed cannot said to have not having jurisdiction to try the offence under section 304 B of the Indian Penal Code which

had taken place outside its jurisdiction. But in the decision reported in **Balbir v. State of Haryana** (2000 Crl.L.J.169), the Hon'ble Supreme Court has held that:

“When two commitments are made before Court of Session pertaining to the same offence and pertaining to the same victim, one giving one version against one accused, and the other giving another against a different accused, in such cases the most appropriate procedure to be followed by a Sessions Judge should be the same as followed in the present case, i.e., the two trials were separately conducted one after the other by the same Judge and the judgments in both cases were separately pronounced on the same day. No doubt the Sessions Judge should take care that he would confine his judgment in one case only to the evidence adduced in that particular case. If more than one Public Prosecutor is available at the same station it is advisable that the Public Prosecutor who prosecuted one case who avoid prosecuting the other case”.

It is further observed in the decision that:

“As per S.223, all the persons falling under any one of the seven categories enumerated therein can be charged and tried together in both Cls.(a) and (d) of S.223 the primary condition is that persons should have

been accused either of the same offence or of different offences “committed in the course of the same transaction.” The expression is not akin to saying “in respect of the same subject-matter”. Where there is commonality of purpose or design, where there is continuity of action, then all those persons involved can be accused of the same or different offences “committed in the course of the same transaction.” But if in one case the accused is alleged to have killed a person without any junction with the accused in the other case, then it cannot be treated as the same offence or even different offences “committed in the course of the same transaction.” If such two diametrically opposite versions are put to joint trial the confusion which it can cause in the trial would be incalculable. It would then be a mess and then there would be no scope for a fair trial. Hence, the attempt to bring the two cases under the umbrella of S.233 of the Code has only to be foiled as untenable.”

19. But it will be seen from the allegations in these cases that accused 1 to 3 in S.C.No.917/2012 after taking deceased Udayakumar into custody with the common intention of causing injury to him with the knowledge that their act is

likely to cause his death inflicted injuries on him and ultimately he succumbed to the injuries and thereby they will be responsible for the illegal act of taking the deceased into custody and causing his death while he was in custody. After the death of Udayakumar, accused 1 to 3 in that case with other accused persons in both the cases have conspired together for the purpose of shielding accused 1 to 3 in the case and on account of the conspiracy hatched, they have committed several acts of disappearance of evidence, manipulation of documents maintained in the police station pursuant to the same conspiracy and with the common object of shielding accused 1 to 3, who committed murder of deceased Udayakumar while he was in custody in continuity of the same transaction of shielding accused 1 to 3 and in the course of such transaction they have committed different offences. So in these cases, from the allegations it is clear that the conspiracy hatched between all the accused persons arrayed in both the cases is for doing an illegal act for the purpose of shielding accused 1 to 3 from the consequences of their criminal action of killing Udayakuamr and as part of that

conspiracy, some of them have involved along with accused 1 to 3 for disappearance of evidence by destroying the material objects used namely cane, throth and iron rod and some of the accused persons with accused 1 to 3 in continuation of that act and for the same purpose created false documents and manipulated certain entries in the register maintained in the police station so as to cover up the acts of accused 1 to 3 to give a different colour for their act. So it is clear from this that there is commonality of the act among all the accused persons in committing different offences in the course of the same transaction as part of the same conspiracy hatched though all of them had not participated in doing the each individual act for the purpose of shielding accused 1 to 3. Further, it is seen from the allegations in the final report filed that the evidence collected in respect of conspiracy for the purpose of disappearance of evidence, manipulation of document and creation of false evidence and the persons involved would have made approvers were all same and common. Further it is seen from the judgment of this Court in W.P.(C). No.12365/2008 filed by the mother of the deceased for

conducting investigation in respect of Crime No.703/2005 of the Fort police station which culminated in SC.No.916/2012 by the CBI, this Court has observed that the investigation in the two crimes namely Crime Nos. 703/2005 and 704/2005 are so integrally connected and that was the reason why investigation was directed to be conducted by the same investigating agency, though separate cases were registered on different occasions by the CBI after it was transferred to them and separate final reports have been filed. The dictum laid down in the decision reported in **Ram Lal Narang v. State (Delhi Admn.)** (1979 KHC 546) is not applicable to the facts of these cases as in that case there were two conspiracies for the purpose of committing the offence in respect of the same subject matter of two different actions and the latter conspiracy covers the larger concept than the earlier conspiracy and in such circumstances, the Hon'ble Supreme Court has held that joint trial cannot be possible. But that was not a case here. Further conducting joint trial of these two cases by the one trial will not only save the judicial time but also not cause any prejudice to the accused as well. As far as the third accused in S.C.No.917/2012 is

concerned, who is the petitioner in Crl.M.C.No.3189/2014 actually no prejudice has been caused to him by adding the additional 7th accused in S.C.No.917/2012. As regards the petitioner in Crl.M.C.No.3083/2014, who is the newly added accused in SC.No.917/12 and old 5th accused in SC.No.916/2012 is concerned, the apprehension of the petitioner that he will be liable for larger offences under section 302 also has no substance in view of the manner in which charges intended to be framed as clear from the discussions in the impugned order of the court below. So there is no merit in the submission made by the counsel for the petitioners that the procedure for joint trial in the said circumstances is vitiated and it is without any substance and the learned Special Judge was perfectly justified in ordering clubbing of these two cases and making the 5th accused in SC.No.916/2012 as additional 7th accused in SC.No.917/2012 and deciding to proceed with the case in SC.No.917/2012 as a single case as against all the accused persons for the respective offences specifically said to have been committed by them as narrated in the order.

20. As regards the procedure adopted by the court below

for relegating trial of certain offences mentioned in SC.No.916/2012 namely Section 120 B read with Section 193 and 116 of the Indian Penal Code if the court feels that they could not be tried due to any reason under the Code, then the court will have to pass an order as to whether they can also be tried in the same trial and whether they are entitled to get discharge for these offences due to any technical reason. Even assuming that in the course of trial if a finding can be possible that they have committed the said offence, then court can invoke the power under Section 340 of the Code and proceed against them separately after the disposal of SC.No.917/2012 also even if they were discharged for these offences at the earlier stage. But the court cannot relegate the same to a later stage as has been done in this case. So, to that extent the order passed by the court below is unsustainable in law and the same is liable to be set aside. So this Court while confirming the order passed by the court below clubbing of cases, SC.Nos.916/2012 and 917/2012 and deciding to add the 5th accused in SC.No.916/2012 as additional 7th accused in SC.No.917/2012 and proceeding with the case SC.No.917/2012

for all the offences, the order relegating the trial of offences under Section 120 B read with Sections 193 and 116 of the Indian Penal Code after disposal of SC.No.917/2012 is set aside and the learned Special Judge is directed to hear both the parties and frame appropriate charges in respect of each accused for the offences committed by them and then proceed with the case in accordance with law.

With the above directions and observations, both the cases are allowed in part and disposed of accordingly.

Office is directed to communicate this order to the court below at the earliest.

Sd/-

K. RAMAKRISHNAN, JUDGE.

cl

/true copy/

P.S to Judge

Crl.M.C.No.3189 of 2014
&
Crl.M.C.No. 3083 of 2014

Crl.M.C.No.3189 of 2014
&
Crl.M.C.No. 3083 of 2014