

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V

FRIDAY, THE 26TH DAY OF JUNE 2015/5TH ASHADHA, 1937

Crl.MC.No. 3603 of 2013 ()

**(CRL.M.P.NO.235/2013 IN C.C.NO.1042/2006 OF JUDICIAL FIRST CLASS MAGISTRATE
COURT-1, ADOOR)**

PETITIONER/ACCUSED 3:

**RAGEESH RAJ @ KUTTAN, S/O.RAJAN,
PALLITHEKKETHIL HOUSE, KOORAMPALA SOUTH,
KOORAMPALA VILLAGE.**

BY ADV. SRI.UNNI. K.K. (EZHUMATTOOR)

RESPONDENT(S)/COMPLAINANT/ACCUSED NO.2/DEFACTO COMPLAINANT:

- 1. STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA-682 031.**
- 2. SAJI, S/O.PODIYAN,
KOCHUTHUNDIL HOUSE, KOORAMPALA SOUTH,
KOORAMPALA VILLAGE-691 523.**
- 3. RAJAN,S/O.THIRUVANCHAN,
PALLITHEKKETHIL HOUSE,
KOORAMPALA SOUTH, KOORAMPALAMURI,
KOORAMPALA VILLAGE-691 523.**
- 4. ANIL KUMAR,S/O.ANPAYYAN,
CHARUVILA MELETHIL HOUSE,
KOORAMPALA SOUTH VILLAGE, ADOOR TALUK-691 523.**

R1 BY PUBLIC PROSECUTOR SRI.GITHESH

R4 BY ADVS. SRI.T.P.PRADEEP

SRI.P.K.SATHEES KUMAR

**THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD
ON 26-06-2015, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:**

sts

APPENDIX

PETITIONER'S ANNEXURES:

- ANNEX 1 COPY OF THE FIR IN CRIME NO.498/2006 OF PANDALAM POLICE
- ANNEX 2 COPY OF THE FIR IN CRIME NO.499/2006 OF PANDALAM POLICE
- ANNEX 3 COPY OF THE FINAL REPORT IN CRIME NO.498/2006
- ANNEX 4 COPY OF THE FINAL REPORT IN CRIME NO.499/2006
- ANNEX 5 COPY OF THE FINAL REPORT SUBMITTED BY THE CIRCLE INSPECTOR OF POLICE, PANDALAM IN C.C.NO.1042/2006
- ANNEX 6 COPY OF THE APPLICATION SUBMITTED BY THE 4TH RESPONDENT
- ANNEX 7 COPY OF THE ORDER IN CRL.M.P.NO.2603/2009 IN C.C.NO.1042/2006 DATED 31/1/2012
- ANNEX 8 COPY OF THE DEPOSITION OF THE PW1
- ANNEX 9 COPY OF THE DEPOSITION OF THE PW2
- ANNEX 10 COPY OF THE DEPOSITION OF THE PW3
- ANNEX 11 COPY OF THE DEPOSITION OF THE PW5
- ANNEX 12 COPY OF THE CRL.M.P.NO.235/2013 SUBMITTED BY THE PROSECUTION
- ANNEX 13 COPY OF THE OBJECTION FILED BY THE 2ND AND THE 3RD RESPONDENT
- ANNEX 14 COPY OF THE ORDER DATED 10/4/2013 IN CRL.M.P.NO.235/2013 IN C.C.NO.1042/2006

RESPONDENT'S ANNEXURES:

- ANNEX R4(A) COPY OF THE ORDER DATED 04/09/2012 OF THE HOME DEPARTMENT
- ANNEX R4(B) COPY OF THE COMPLAINT DATED 09/07/2008 ON THE FILES OF JFCM-1, ADOOR.

/TRUE COPY/

P.S.TO JUDGE

sts

RAJA VIJAYARAGHAVAN.V. J

Crl.M.C.3603 of 2013

Dated 26th June, 2015

ORDER

1. Invoking powers under S 319 of the Code of Criminal Procedure , the learned Judicial First Class Magistrate Court-I, Adoor , as per order dated 10.4.2013 in Crl.M.P.35 of 2013 in C.C.1042 of 2006 has arraigned the petitioner as the 3rd accused . The said order is under challenge.

2. The case was charge sheeted originally by the Sub Inspector of Police, Pandalam against accused Nos.1 and 2 alleging the commission of offence punishable under Sections 326, 324, 323 r/w Section 34 of the IPC.

3. The 4th respondent herein is the first informant and the 2nd and 3rd respondents are accused No 1 and 2 in

C.C.1042 of 2006 . The petitioner herein is the son of the 1st accused and the nephew of the 2nd accused.

4. The gist of the charge is that owing to the animosity that the accused 1 and 2 had towards the injured/first informant, they had assaulted him with a brick resulting in grave injuries.

5. Initially the charge was laid on 11.11.06 in C.C.1042 of 2006 which arose out of Crime No 498 of 2006 of the Pathanamthitta Police Station .A counter case was also registered as crime No 499 of 2006 and the charge in that case was also submitted on the same day.

6. The grievance of the 4th respondent was that the petitioner was also involved in the commission of the crime. At his request further investigation was ordered which resulted in filing of a fresh report under S. 173 on 27.9.2007. the name of the petitioner did not figure in the said report as well.

7. Trial commenced and while, PW1 and 2 who are the de facto complainant and his wife respectively, gave evidence , they deposed that apart from the persons who are presently arrayed as accused, the son of the 2nd accused one Rageesh Raj @ Kuttan/the petitioner herein, was also involved in the commission of the offense. They specifically stated in evidence that the petitioner had come to the scene of occurrence along with the 2nd accused, that he had caught hold of the defacto complainant, wrongfully confined him and the 1st accused hit the de facto complainant, with a brick on his face whereby the de facto complainant sustained grievous injuries. It was also deposed by PW1 in his evidence that the said Rageesh Raj @ Kuttan along with the other accused hit on several parts of his body.

8. After the examination in chief of PW1 and 2 concluded , an application was preferred by the de facto complainant seeking to implead the petitioner herein as

additional accused under Section 319 of the Code. In the said petition , it was stated that the role played by the petitioner though brought to the specific notice of the Investigating officer , he was omitted from the array of the accused. The learned Magistrate was not impressed at that stage, and as per order dated 31.1.2012 in Crl.M.P.No.2603 of 2009 dismissed the said application on various grounds holding that the same was one without merit. But the rights of the 4th respondent to seek remedy against the petitioner herein in accordance with law by filing a fresh application was reserved.

9.After the dismissal of the petition as aforesaid, PW1 and 2 were cross examined and three other witnesses were also examined as PW3 to 5.

10. After the examination of the witnesses were over, the learned Assistant Public Prosecutor filed a petition under Section 319 of the Code seeking invocation of the powers under S 319 of the Code and to proceed against

the petitioner herein as an accused.

11. The learned Magistrate as per order dated 10.4.2013 held that there is evidence indicating the involvement of the said Rageesh Raj @ Kuttan in the commission of the offence. Since it appeared to the learned Magistrate that the petitioner has also committed an offence, it was ordered that the petitioner herein be tried together along with the remaining accused who are already before Court and facing the trial.

12. It is this order which is challenged by the petitioner herein.

13. I have heard the learned counsel for the petitioner as well as the learned counsel appearing for the 4th respondent.

14. The learned counsel for the petitioner assailing the trial court order would submit that the learned Magistrate

has misdirected himself and the invocation of powers under Section 319 of the Code was not justified. It was submitted that the Magistrate would be justified in invoking the powers only if the court was satisfied that the accused summoned will in all likelihood be convicted. This satisfaction was not arrived at by the learned Magistrate is the primary contention. It was submitted that being an extra ordinary power conferred on the Court, the same should be sparingly used and on compelling reasons. The earlier dismissal of the petition filed by the 4th respondent was highlighted and it was submitted that the magistrate was bereft of powers to invoke the same provision at a later stage .According to the learned counsel there was no intervening circumstance as the witnesses later examined as PW 3 to 5 had not spoken about the presence of the petitioner. It was also pointed out that based on the application filed by the 4th respondent, further investigation was conducted in Crime No.498 of 2006 and a final report was thereafter submitted on 27.9.2007. In the said final

report as well, no role is attributed to the petitioner herein which makes it clear that the implication of the petitioner is without any merit. It was finally submitted that the evidence let in by PW1 and 2, being witnesses who were interested in the success of the prosecution case , could not have been relied upon to invoke the powers under S. 319 of the Code.

15. Per contra, the learned counsel for the 4th respondent supported the finding entered into by the learned Magistrate and submitted that in view of the Apex Court decision reported in **(Hardeep Singh v. State of Punjab (2014 (1) KLT 336 [SC])**, the degree of satisfaction to be entertained by the learned Magistrate for summoning a person under S 319 of the Code would be same as for framing a charge but short of satisfaction to an extent that the evidence , if goes unrebutted, would lead to conviction. It was submitted that the evidence let in by PW1 and 2 were considered by the learned Magistrate to invoke its powers under Section 319 and

the court was satisfied that there was evidence indicating the involvement of the petitioner the commission of the offense .

16. I have gone through the order passed by the learned Magistrate, the deposition of witnesses and also the final report submitted before Court. I have also thoughtfully assimilated the arguments of the respective counsels.

17. S.319 of the Code of Criminal Procedure confers power to the Court to proceed against other persons. when it appears from the evidence that the said persons , not being an accused, has committed any offense and they are also liable to be proceeded against .

319. Power to proceed against other persons appearing 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 person 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 person 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 person 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.

18. On a perusal of the records it is evident that PW1 and 2 while being examined in Court had specifically mentioned about the involvement of the petitioner herein

in the commission of the offence. It is of course, true that PW3 to 5 have not supported the case of the prosecution and they have not spoken about the presence of the petitioner herein. It has also to be appreciated at this stage that the respondent No 4 has been highlighting this fact from the initial stage that one of the persons who have participated in the act was left out by the investigating agency. It is the duty of the trial magistrate to do justice and to invoke powers at his disposal after satisfying itself that the exercise of such powers are warranted from the materials before him.

19. It is true that an application was filed by the 4th respondent at an earlier stage invoking the same provision but a perusal of the order dated 31.1.2012 would reveal that the said application was filed based on the statements given by him before the investigating officer. Further , the learned magistrate was also not impressed with the 4th respondent at that stage because he had resiled from his first information statement . The

case of the 4th respondent has always been that the investigating agency has not placed the actual facts before court and that was exactly the reason why further investigation was later conducted. The learned Magistrate also did not give much credit to the evidence let in by PW 1 and PW 2 probably because their evidence in court was untested by cross examination. Even then the learned Magistrate had left the doors open, if situation warrants, to invoke the powers at a later stage .

20. In **(Hardeep Singh V State of Punjab (2014 (1) KLT 336)** the Apex Court has held as follows : -

“Thus we hold that though only a prima facie case is to be established from the evidence led before the court , not necessarily tested on the anvil of cross examination, it requires more stronger evidence than mere probability of his complicity . The test that has to be applied is one which is more than prima facie case as exercised at the stage of framing charge, but short of satisfaction to an extent that the evidence , if goes un rebutted , would lead to conviction . In absence of such satisfaction , the court should refrain from exercising power under S 319 of the Code . In S 319 Cr.P.C, the

purpose of providing if *'it appears from the evidence that any person not being the accused has committed any offense'* is clear from the words **"for which such person could be tried together with the accused"** . The words used are not *'for which such person should be convicted'*. There is therefore, no scope for the Court acting under S 319 Cr.P.C. to form any opinion as to the guilt of the accused".

21. The learned Magistrate has appreciated the evidence of the witnesses and was satisfied that there is evidence indicating the involvement of the said Rageesh Raj @ Kuttan in the commission of offence. It is on the basis of the said finding that the learned Magistrate has passed the impugned order arraigning the petitioner as third accused along with the remaining accused.

22. Invocation of powers under S 319 of the Code by the trial court will be justified when it appears to the court from the evidence adduced at the stage of trial that a person, who ought to be an accused has been erroneously omitted from being arraigned or has been deliberately excluded by the prosecuting agencies . At

this stage to arrive at the requisite satisfaction, apart from the evidence recorded during the trial, any material that has been received by the court after cognizance has been taken and before trial commences, can be utilized for corroboration, and to support the evidence recorded by the court. The power under S. 319 of the Code can be exercised at the stage of completion of the chief examination and the court need not wait till the said evidence is tested in cross examination, for, that is the satisfaction of the court which can be gathered from the reasons recorded by the court, in respect of complicity of some other person not facing the trial for the offense. The test that has to be applied is one which is more than *prima facie* case as exercised at the stage of framing charge, but short of satisfaction to an extent that the evidence, if goes un rebutted, would lead to conviction. In absence of such satisfaction, the court should refrain from exercising power under S 319 of the Code. Such power will have to be exercised by the court to ensure that any person guilty of having committed an offence is

not given the shield of protection by the investigating agency. If such power is not exercised in such exceptional cases, it will result in the general public losing faith in the criminal justice system. When the complainant, for the reasons best known to them alone, is circumspect in proceeding against several persons, but the Court concludes from the materials before it that, there appears to be evidence pointing towards the complicity of other persons as well, S. 319 will act as an empowering provision enabling the trial court to initiate proceedings against those persons as well.

23. After carefully analyzing the facts and law and also the impugned order, it appears to me, that the learned Magistrate has exercised its powers in accordance with law and in tune with the settled principles. The contentions raised by the counsel impugning the order are found merit less. I do not think that this is a fit case to invoke extraordinary powers under Section 482 of the Code to interfere with the orders passed by the learned

Magistrate. I do not find any perversity or errors of law in the order passed.

The Crl.M.C is dismissed.

Sd/-

RAJA VIJAYARAGHAVAN.V.
Judge

MrCs

//True Copy//