

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

MONDAY, THE 3RD DAY OF AUGUST 2015/12TH SRAVANA, 1937

Crl.MC.No. 4934 of 2015 ()

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IN CC 477/2014 of J.M.F.C.-II,ATTINGAL
CRIME NO. 1014/2013 OF KILIMANOOR POLICE STATION , THIRUVANANDAPURAM
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PETITIONER(S)/ACCUSED:

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- 1. RAJESH @ SHETTY RAJESH, AGED 33 YEARS
S/O.RATNAKARAN, RAJESH BHAVAN, PARROOR DESOM
VELLALLOOR VILLAGE, THIRUVANANTHAPURAM.**
 - 2. NAJEEM, AGED 25 YEARS
S/O.HAKKEEM, THASNIM MANZIL, PONGANADU DESOM
MUNDAYIL KONAM, KILIMANOOR VILLAGE.**
 - 3. GIRI KRISHNAN, AGED 25 YEARS
S/O.GOPALAKRISHNAN NAIR, KRISHNA LAYAM VEEDU
PONGANADU DESOM, KILIMANOOR VILLAGE
THIRUVANANTHAPURAM.**
 - 4. BENSHA, AGED 20 YEARS
S/O.BASHEER, CHARVILA PUTHEN VEEDU, PONGANADU DESOM
KILIMANOOR VILLAGE, THIRUVANANTHAPURAM.**
 - 5. AJI LAL, AGED 20 YEARS
S/O.AMEER, RINZA MANZIL, PONGANADU DESOM
KILIMANOOR VILLAGE, THIRUVANANTHAPURAM.**
 - 6. ANSAR, AGED 20 YEARS
S/O.AMEER, RINZY MANZIL, PONGANADU DESOM
KILIMANOOR VILLAGE, THIRUVANANTHAPURAM.**
 - 7. GANESH RAJENDRAN, AGED 22 YEARS
S/O.RAJENDRAN NAIR, R.G.BHAVAN, PAZHAYA CHANTHA
PONGANADU DESOM, KILIMANOOR VILLAGE
THIRUVANANTHAPURAM.**

8. ASIM, AGED 22 YEARS
S/O.THAHA, CHOORODU PUTHAN VEEDU, KATTUCHANTHA
PONGANADU DESOM, VELLALLOOR VILLAGE
THIRUVANANTHAPURAM.
9. VINEETH, AGED 24 YEARS
S/O.VIJAYAN, MULAVANA VEEDU, CHINTHRANELLOOR
VELLALLOOR VILLAGE, THIRUVANANTHAPURAM.
10. SARATH, AGED 21 YEARS
S/O.THULASIDHARAN, SARATH BHAVAN, PAZHAYA CHANTHA
PONGANADU DESOM, KILIMANNOOR VILLAGE
THIRUVANANTHAPURAM.
11. SHIBIN, AGED 20 YEARS
S/O.SHERIF, SARATH BHAVAN, PAZHAYA CHANTHA
PONGANADU DESOM, KILIMANNOOR VILLAGE
THIRUVANANTHAPURAM.
12. AL-AMEEN, AGED 21 YEARS
S/O.THAHA, AL-AMEEN VILLA, KATTU CHANTHA
PONGANADU DESOM, VELLALLOOR VILLAGE
THIRUVANANTHAPURAM.
13. NISHAD AGED 25 YEARS
S/O.ABDUL SALAM, KUZHIVILA VEEDU
PAZHAYA CHANTHAPONGANADU DESOM, KILIMANNOOR VILLAGE
THIRUVANANTHAPURAM.
14. JIHAD AGED 22 YEARS
S/O.MOOSA, MOOSA MANZIL, VANDITHADAM
KALLAMBALAM DESOM, THOTTAKADU VILLAGE
THIRUVANANTHAPURAM.

BY ADV. SRI.M.DINESH

RESPONDENT(S)/COMPLAINANT:

STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM, PIN - 682 031.

BY PUBLIC PROSECUTOR SRI.GITHESH R.

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON
03-08-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

Crl.MC.No. 4934 of 2015 ()

APPENDIX

PETITIONER(S)' EXHIBITS

- ANNEXURE-A1 :** CERTIFIED COPY OF THE F.I.R IN CRIME NO.1014/2013 OF KILIMANOOR POLICE STATION.
- ANNEXURE-A2 :** CERTIFIED COPY OF THE FINAL REPORT FILED BY THE INVESTIGATING OFFICER BEFORE THE JUDICIAL FIRST CLASS MAGISTRATE COURT-II, ATTINGAL IN CRIME NO.1014/2013 OF KILIMANOOR POLICE STATION.
- ANNEXURE-A3 :** TRUE COPY OF THE PETITION (C.M.P NO.351/15 IN C.C. NO.477/14) FILED BY ASSISTANT PUBLIC PROSECUTOR DATED 27.11.2015
- ANNEXURE-A4 :** CERTIFIED COPY OF THE ORDER IN C.M.P NO.351/15 IN C.C. NO.477/2014 ON THE FILE OF THE JUDICIAL FIRST CLASS MAGISTRATE COURT - II, ATTINGAL.

RESPONDENT(S)' EXHIBITS

NIL

/TRUE COPY/

PA TO JUDGE

VS

ALEXANDER THOMAS, J.

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Crl.M.C.No.4934 of 2015

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Dated this the 3rd day of August, 2015

ORDER

The order under challenge in this case is one at Annexure A4 dated 06.05.2015 rendered by the Judicial First Class Magistrate Court-II, Attingal on C.M.P.No.351/2015 in C.C.No.477/2014, whereby the application of the prosecutor submitted under Section 321 of the Code of Criminal Procedure (hereinafter referred to the 'Cr.P.C' for short), for permission to withdraw the prosecution in C.C.No.477/2014 was rejected by the court below. The main ground that actuated the court below to pass the impugned order are those projected in paragraph Nos.6 and 7 of the impugned Annexure A4 order which reads as follows.

“6. In the given case, the ground stated in the application is that political enmity was the cause of the incident and withdrawal from prosecution is necessary to bring out harmonious relationship between the parties and peaceful relationship in the locality.

7. I am not satisfied about the grounds stated by the prosecution. The stand of witness No.1 brings out that the dispute between the parties still subsist. In the said situation, it is not possible to conclude that withdrawal from prosecution will restore harmonious relationship between the parties. In my view, in the facts and circumstances of

the case, public interest demands continuance of the prosecution and not withdrawal from prosecution.”

2. Heard Sri.M.Dinesh, learned counsel for the petitioner and the learned Public Prosecutor appearing for the respondent State of Kerala.

3. After hearing Sri.M.Dinesh, learned counsel for the petitioner and the learned Public Prosecutor, this Court is of the considered opinion that the matter in issue arising out of the facts and circumstances of this case is substantially covered by the decision of this Court in the order dated 11.07.2015 rendered in Crl.M.C.No.3264/2015, which reads as follows :

“The order under challenge is Annexure A4 rendered on 6.5.2015 whereby the Judicial First Class Magistrate –II, Attingal has refused the plea of the Prosecutor to grant permission for withdrawal of the prosecution in C.C No. 818 of 2010, wherein the petitioner herein is the accused No. 1. The gist of the prosecution case in Annexure A1 final report/charge sheet in Crime No.409 of 2010 of the Pallickal Police Station (which led to the aforesaid C.C No.818/2010) is that the accused/petitioners in furtherance of their common intention committed criminal trespass into the property of the de-facto complainant and cut and destroyed the yielding rubber trees and thereby caused loss to the de-facto complainant. The Government as per Annexure A2 issued on 20.10.2014 had conveyed to the District Collector, Thiruvananthapuram that they had no objection to withdrawing the above prosecution. Pertaining to that the Prosecutor concerned had submitted Annexure A3

application in the above said Calender case, which led to the issuance of the impugned rejection order as per Annexure A4. The court below held that the plea of the Prosecutor is that the withdrawal is necessary for ensuring harmonious relationship between the accused and the de facto complainant cannot be accepted as relationship between the de facto complainant and the accused is still strained and that therefore it is not possible to conclude the withdrawal from prosecution will be in furtherance of public interest. This order is under challenge in this Crl.M.C.

2. Heard Sri. Dinesh M, learned counsel appearing for the petitioner and the learned Public Prosecutor appearing for the respondent, State of Kerala.

3. Sri. Dinesh M learned counsel appearing for the petitioner relied on the decision of the Supreme Court in the case *Rahul Agarwal v. Rakesh Jain* (2005(2) KLT SN 44 (C. No.55)]wherein it has held that the withdrawal of the prosecution can be allowed in the interest of justice, if case is likely to end in an acquittal and the continuance of the case is only causing severe harassment to the accused. The learned counsel has also relied on the decision of this Court in the case *State of Kerala v. Varkala Radhakrishnan, MP and Others* (2009 (1) KHC 971 (SN). Accordingly, he would contend on the basis of this Court rulings that jurisdiction available to the court in the matter of consideration of the withdrawal from prosecution, is only supervisory and is not either adjudicatory or appellate etc. The learned counsel would urge that though the impugned first information statement started with projecting the de-facto complainant's case that he had suffered a great loss of Rs.50,000/-, the police after investigation has clearly concluded in the impugned Annexure A1 final report/charge sheet that the loss hardly for the period is Rs.500/- (Page No.24 of this paper book). He also pointed out that, it is manifestly clear

from the mere perusal of the averments in the impugned Annexure A1 final report/ charge sheet that what is alleged is only a case that the accused No.1 along with his worker accused No. 2 had just cut and removed the certain rubber trees and scrolling over into their compound and it is clearly alleged that the loss caused on this account is Rs.500/-. Therefore, on the facts of the case as emerging even from the impugned final report/ charge sheet, serious disclosure of the offence under Sections 447 (Criminal Trespass) and 427 (Mischief) is not really made out and even otherwise, the chance of conviction is extremely removed. This crucial aspect of the matter has been lost sight of by the learned Magistrate. From the reading of the impugned order it can be seen that these crucial aspects has not been considered and adjudged by the learned Magistrate. In this view of the matter, the impugned Annexure A4 order is set aside and the matter is remitted back to the learned Magistrate who will take a decision afresh in the matter after hearing the learned Public Prosecutor and the learned Counsel for the petitioner/accused and take decision thereon within a period of two weeks from the date of receipt of the certified copy of this order. It is made clear that the jurisdiction available to the learned Magistrate is essentially supervisory nature and not adjudicatory and the focus should be in the light of the aforementioned legal principles as well as the court rulings. Special advertence should be made in the aforementioned specific plea of the petitioner that the chance of conviction in a case like this is remote and that continuance of the impugned prosecution will be harassment to the accused who is facing such charges as in the one referred to in the impugned final report/charge sheet. The appreciation may be made in the light of the aforementioned rulings of the Apex Court in *Rahul Agarwal v. Rakesh Jain* (Supra).

With these observations and directions, this Crl.M.C

stand disposed of.”

4. In the light of the aforestated aspects, this Court is of the considered opinion that the grounds for rejection stated in paragraph No.7 of the impugned order that the stand of CW1, that the disputes still persists, may not be the be it and end it of all for coming to the conclusion to decide on the question as to whether the permission should be accorded for the impugned prosecution as, in terms of Section 321 of Cr.P.C. This Court in *Rahul Agarwal v. Rakesh Jain* reported in [2005(2) KLT SN 44 (C. No.55)], has held that the withdrawal of the prosecution can be allowed in the interest of justice, if the case likely to end in an acquittal and the continuation of the case is only causing severe harassment to the accused. In *State of Kerala v. Varkala Radhakrishnan, MP and Others* reported in [2009 (1) KHC 971 (SN)], similar view was taken by the Court. The learned counsel for the petitioner would specifically pin point the crucial fact of the matter in this case that there is no proper evidence in this case to prove the alleged damage caused to the car involved in this crime, as not even a Mahazar has been prepared prior to the grant of interim custody of that vehicle to the owner and that the Assistant Motor Vehicle Inspector concerned has not assessed the

nature and value of the damages caused to the car involved in the crime and further that the car could not be in the condition as at the time of the occurrence of the crime. As interim custody was granted to the wife of the defacto complainant, as early as in the year 2013 itself, this Court is not concerned with the correctness of this submission but to suffice to say that this crucial aspect of the matter has not been adverted to the learned Magistrate. Accordingly, the impugned order at Annexure A4 is set aside and the C.M.P.No.315/15 in C.C.No.477/14 which is remitted back to the Judicial First Class Magistrate Court-II, Attingal for considering afresh and pass fresh orders and take a decision thereupon within two weeks from the date of production of the certified copy of this order. The learned Magistrate will give reasonable opportunity of being heard to learned counsel for the petitioner, if any, and to the learned Public Prosecutor concerned appearing for the investigating officer and shall also refer to the ruling of this Court as Rahul Agarwal' case(supra) and Varkala Radhakrishnan' case (supra) in Crl.M.C.No.3264/2015. The learned counsel for the petitioner is permitted to make an additional written submission before the learned Magistrate pin pointing the factual details regarding the aforestated aspects as

to the lack of evidence to show any damage to the car caused in the crime, etc. Those aspects should be pin pointedly adverted to and considered by the learned Magistrate and a well focus decision to be taken on the plea of the petitioner that the chance of success in the prosecution is also rather bleak given the lack of evidence regarding the damage caused to the car etc.

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

Sd/-
ALEXANDER THOMAS
JUDGE

VS

/TRUE COPY/

PA TO JUDGE