

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.HARILAL

TUESDAY, THE 18TH DAY OF AUGUST 2015/27TH SRAVANA, 1937

Crl.Rev.Pet.No. 665 of 2015 ()

AGAINST THE ORDER DATED 30.5.2015 IN CRL.M.P.2148/2014 IN
S.C.112/2014 OF VI ADDITIONAL SESSIONS COURT, ERNAKULAM.

REVISION PETITIONER(S)/5TH ACCUSED:-:

THAMPI P.S., AGED 46 YEARS,
S/O.SREEDHARAN, RESIDING AT PUTHUVALSALATH VEEDU,
KUNDANOOR, MARADU, PIN - 682 040,
ERNAKULAM DISTRICT.

BY ADV. SRI.PEEYUS A.KOTTAM

RESPONDENT(S)/COMPLAINANT:-:

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

BY PUBLIC PROSECUTOR SRI.JUSTINE JACOB

THIS CRIMINAL REVISION PETITION HAVING COME UP FOR
ADMISSION ON 18-08-2015, THE COURT ON THE SAME DAY PASSED
THE FOLLOWING:

OKB

“C.R.”

K.HARILAL, J.

Cr1.R.P. No.665 of 2015

Dated this the 18th day of August, 2015.

O R D E R

The revision petitioner is the fifth accused in Cr1.M.P.No.2148/14 in S.C.No.112/14 pending before the VI Additional Sessions Court, Ernakulam. Now, he stands charge sheeted for the offence punishable under Section 4 of the Explosive Substances Act, 1908, (for short, 'the Act'), pursuant to the Final Report filed by the police. In that context, he filed Cr1.M.P.No.2148/14 in the above Sessions Case , seeking discharge, under Section 227 of the Cr.P.C. on the ground that the charge filed against him by the police is groundless. On the above application, earlier, the learned Sessions Judge passed the order dated

27.7.2015 dismissing the said application by a cryptic order. Aggrieved by the said order, the petitioner preferred Crl.R.P.No.612/15 before this Court and, this Court, after considering the contentions raised in the revision petition, set aside the impugned order therein and remitted the case to the trial court, for fresh consideration, with specific directions to consider the police report and the documents sent along with it under Section 173(2) of the Cr.P.C. in compliance with the statutory mandate under Section 227 of the Cr.P.C. On receipt of the aforesaid order, the learned Sessions Judge heard the matter afresh and dismissed the petition again mainly on the ground that since the District Collector has granted sanction to prosecute the petitioner, the Sessions Court cannot sit in appeal over the order passed by the District Collector. The legality and propriety of the above findings are under challenge in this revision petition.

2. Heard Sri. Peeyus.A.Kottam, the learned counsel for the revision petitioner and Sri. Justine Jacob, the learned Public Prosecutor. The learned

counsel submits that the learned Sessions Judge failed to comply with the specific directions issued to him, in the earlier order passed in revision. It is also contended that the learned Sessions Judge has passed the impugned order disregarding the statutory mandate provided under Section 227 of the Cr.P.C. According to the petitioner, twelve witnesses are seen cited by the prosecution to prove the prosecution case. But, none of the witnesses had given statement under Sec.161 of the Cr.P.C., implicating the petitioner either directly or indirectly in the alleged commission of the offence. But the learned Sessions Judge was very much obstinate in not to look into the statements given by the witnesses under Section 161 of the Cr.P.C., and also the documents therewith, which were sent along with the report under Section 173(2) of the Cr.P.C. The sum and substance of the arguments is that absolutely there is no iota of evidence to presume that the accused has committed the offence alleged against him.

3. Per contra, the learned Public Prosecutor

advanced arguments to justify the findings in the impugned order. According to the learned Public Prosecutor, there is no statutory requirement to pass a reasoned order, when the application seeking discharge was dismissed. So, in the absence of statutory requirements, the learned Sessions Judge is justified in dismissing the application adopting the reasons stated in the order granting sanction for prosecution, passed by the District Magistrate.

4. Going by the impugned order, it is seen that the learned Sessions Judge has dismissed the application on the sole ground that the District Collector has granted sanction to prosecute the petitioner for the offences alleged against him and it is not fair or proper to act as an Appellate Authority of the District Collector at this stage.

5. Considering the curiousness of the reasoning by which the learned Sessions Judge refused to exercise jurisdiction under Section 227 of the Cr.P.C., I deem it appropriate to have a look at the manner in which the learned Sessions Judge dealt with the

application for discharge filed by the petitioner from the very beginning.

6. The first order dismissing the application reads as follows:—

“Heard both sides. This is a petition for discharge of A5 u/s. 227 Cr.P.C. I do not see any reason to discharge the accused who is charge sheeted under Section 4 of the Explosive Substances Act. Framing of charge is necessary. Hence this Crl.M.P. is dismissed.”

7. The reasoning by which the learned Sessions Judge again dismissed the application, after remand, reads as follows:—

District Collector gave sanction to prosecute all accused – in his capacity as the District Magistrate vide order No.M4-2825/2012 dated 24.4.2012. It is stated in the order that he examined all the facts and circumstances of the case and he was fully satisfied that all the accused committed an offence u/s.4 of the Explosive Substances Act.

In my views, it is not proper to take a different view, at this juncture since evidence has to be adduced by the prosecution. That stage has not yet reached. The reasoning adopted by the District Magistrate should be considered very cautiously. It is not fair, or proper to act as the Appellate Authority of the District Magistrate, at this stage; – without giving an opportunity to the prosecution to adduce evidence, especially CW1, and without analysing the entirety of the circumstances.

8. At this juncture, it is very interesting to note the findings of the District Collector on which the

learned Sessions Judge reposed his confidence. The order reads as follows:-

The relevant portion of the proceedings of the District Collector and District Magistrate, Ernakulam, reads as follows:

Whereas, it has been disclosed from the records of investigation in Crime No.295/2009 of Panangad Police Station that the accused persons No.1 to 7 had illegally possessed explosive items like country bombs. Hence the accused persons have committed offences punishable under section 4 of Explosive Substance Act, 1908 and whereas, on examination of the facts and documents it is fully satisfied that the above said accused persons have committed offences punishable under section 4 of Explosive Substance Act, 1908, for which they should be prosecuted.

9. What is discernible from the order passed by the learned Sessions Judge, after remand, is that the learned Sessions Judge simply reposed his confidence on the opinion of the sanctioning authority and wriggled out of jurisdiction and power vested in him under Sec.227 of the Cr.P.C . In short, it appears that the Sessions Judge has swallowed the opinion of the sanctioning authority, instead of applying his own mind over the records of the case and documents submitted therewith under Sec.173(2) of the Cr.P.C. and forming his own opinion. When going by the order

granting sanction passed by the District Magistrate, it is seen that none of the materials or incriminating substance or circumstance are seen referred to in the said order, except the mere assertion that he has examined the facts and documents and got satisfied. Be that as it may, as legality of that order is not a question to be considered in this revision and I leave it there.

10. In fact, I am afraid of the reasoning under which the learned Sessions Judge wriggled out of jurisdiction and power vested in him under Sec.227 of the Cr.P.C. What is legally and reasonably expected from a Sessions Judge, who sits in judgment under Section 227 of the Cr.P.C. on a petition seeking for discharge is the question to be considered in this revision. Can the Sessions Judge be justified in subscribing the opinion of the sanctioning authority, while exercising jurisdiction and power under Section 227 of the Cr.P.C. on a petition seeking discharge filed by the accused. Here, the learned Sessions Judge declined jurisdiction vested in him to the petitioner/

accused, on a misconception that he cannot form a different opinion other than that of the District Magistrate, despite a specific direction in the earlier order to observe the statutory mandate under Section 227 of the Cr.P.C.

11. In the above context, it will also be apposite as well as profitable to refer to various judicial precedents which specified nature and extent of the jurisdiction and the test to be applied while exercising jurisdiction under Section 227 of the Cr.P.C.

12. Relying on the earlier decisions of the Supreme Court in *State of Bihar v. Ramesh Singh* [1977 (4) SCC 39] and *Almohan Das v. State of West Bench* [AIR 1970 SC 863], the Supreme Court, in *Union of India v. Prafullakumar Samal and another* [1979 (3) SCC 4], held as follows:

“10. Thus, on a consideration of the authorities mentioned above, the following principles emerge:

(1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.

(2) Where the materials placed before the Court disclose grave suspicion against the

accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced court cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."

As regards 'prima facie case' in *Dilawar Babu Kurane v. State of Maharashtra* [AIR 2002 SC 564], the Supreme Court held thus:

"12. Now the next question is whether a prima facie case has been made out against the appellant. In exercising powers under Section 227 of the Code of Criminal Procedure, the settled position of law is that the Judge while considering the question of framing the charges under the said section has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused

has been made out; where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained the court will be fully justified in framing a charge and proceeding with the trial; by and large if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully justified to discharge the accused, and in exercising jurisdiction under Section 227 of the Code of Criminal Procedure, the Judge cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court but should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.”

In State of Karnataka v. Khawali @ Baburajan [ILR 1988 Karnataka 1754], it is held that Court has to frame charge if material collected by investigating agency creates grave, serious and strong suspicion about complicity of accused in crime; else court may discharge accused.

In Satish Mehar v. Delhi Administration and Anr. [1996 (3) Crimes 85 (SC)], it is held that the object of providing such an opportunity as

is envisaged in Section 227 of the Code is to enable the court to decide whether it is necessary to proceed to conduct the trial. If Sessions Judge is almost certain that the trial would only be an exercise of futility or a sheer waste of time it is advisable to truncate or ship the proceedings at the stage of Section 227 of the Code itself.

In Yogesh @ Sachin Jagdish Joshi v. State of Maharashtra [AIR 2008 SC 2991], it is held that words “no sufficient ground for proceeding against the accused” in Section 227 postulate exercise of judicial mind by Judge. At this Stage, he is not required to see as to whether trial will end in conviction or not.

13. The principle that can be culled out from the law well settled by a catena of judicial precedents is that, “where the Sessions Court, exercising jurisdiction under Section 227 of the Cr.P.C., if evidence, which the prosecution proposed to adduce, prove guilt of the accused, even if fully accepted, before it is challenged in cross-examination or rebutted by defence evidence, if any, cannot show that the accused has committed the offence, then there will be no sufficient ground for proceeding with the trial.”

14. So, in the instant case, it was incumbent upon

the learned Sessions Judge to examine the statement given by C.Ws.1 to 12 under Section 161 of the Cr.P.C. and other materials submitted along with the final report, with a view to find out whether a prima facie case was made out against the petitioner. If the Sessions Judge finds that none of the witnesses had spoken to anything incriminating the accused in any act constituting the offence alleged against him and nothing on record submitted along with the Final Report would disclose the involvement of the accused or the entire evidence on record, even if fully accepted, cannot disclose or constitute offence alleged against the accused, certainly, he is entitled to get discharge.

15. The Sessions Judge exercising power under Section 227 of the Cr.P.C. is absolutely independent, unflinching and is free to pass an order, upon consideration of records of the case and the documents submitted therewith, either discharging the accused, or proceeding against the accused, by framing charge, regardless of the opinion of the executive authority

who had accorded sanction for prosecution. The matters which require to be considered by the sanctioning authority for granting sanction and by the Sessions Court for determining the entitlement of discharge under Section 227 of the Cr.P.C. are entirely different and distinct. Similarly, the scope and extent of considerations are also different and distinct. The Sessions Court, exercising jurisdiction under Section 227 of the Cr.P.C., is neither a post office nor a mouthpiece of the Authority, who had granted sanction for prosecution and a Sessions Judge can never be subservient to or subscriber of the opinion by which sanction for prosecution has been granted. In short, the power of the Sessions Court to discharge the accused under Section 227 of the Cr.P.C. shall not be trammelled by the opinion of the sanctioning authority. It is incumbent upon the Sessions Judge to form his own opinion as to whether there is ground for presuming that the accused has committed the offence, which is triable before him.

16. Here, the Sessions Judge, instead of

discharging the duty cast on him under Section 227 of the Cr.P.C., subscribed the opinion of the sanctioning authority, on a misconception that it is not fair to sit in appeal over the opinion of the sanctioning authority. This Court further finds that despite the specific direction in the earlier order, the learned Sessions Judge failed to observe the statutory mandate provided under Section 227 of the Cr.P.C. Obviously, the learned Sessions Judge declined jurisdiction vested in him to the petitioner. Therefore, the impugned order is liable to be set aside as the same is per se illegal and unsustainable. Needless to say, the application seeking discharge requires reconsideration in accordance with law.

17. Here arises a general question, which also requires to be addressed, in this revision, in view of the increasing trend of dismissing the petition seeking discharge under Secs.227 and 239 of the Cr.P.C. by passing one line or two lines non-speaking cryptic order. Can the inferior courts be justified in dismissing the petition seeking discharge under

Secs.227 and 239 of the Cr.P.C. by passing a non-speaking cryptic order?

18. It is true that Sec.227 of the Cr.P.C. mandates a reasoned order, where the Judge considers that there is no sufficient ground for proceeding against the accused and there is no such a statutory insistence under Sec.228 of the Cr.P.C., where the Judge proceeds further by framing charge, after dismissing the petition for discharge. But, Sec.228 of the Cr.P.C. mandates that after consideration and hearing as aforesaid, if the Judge is of the opinion that there is ground for presuming that the accused has committed an offence which is triable under the said Chapter, the Sessions Judge may frame charge and proceed against the accused. Thus, it is incumbent upon the Judge/Magistrate to form an opinion that there is ground for presuming that the accused has committed the offence which is triable before that court. At this juncture, the observations made by the Supreme Court in the decisions in Kanti Bhadra Shah v. State of West Bengal [2000 KHC 154] and Lalu Prasad @ Lalu Prasad

Yadav v. State of Bihar [(2007) 1 SCC 49] have to be kept in mind while passing order under Sec.228 of the Cr.P.C.

19. In my view, the statutory mandates under Sec.227 of the Cr.P.C. and the observations made in the decisions referred above cannot be misinterpreted to mean to the extent that the Sessions Judge/Magistrate is permitted to dismiss the petition seeking discharge by a non-speaking cryptic order confining to two or three lines, without making any reference to the materials on record submitted along with the report under Sec.173(2) of the Cr.P.C.

20. What is intended in the above decision is that in the case of order dismissing the petition seeking discharge, the trial Judge/Magistrate is not required to record the reasons for presuming from the records and documents that the accused has committed the offence, as such a reasoning at this stage would cause a prejudice to the case of the accused put on trial. But, either the mandate under Sec.227 or 239 or the decisions referred above will not stand in the way of passing a speaking order with a reference to the

materials or documents from which the trial Judge formed the 'opinion' that there are grounds for presuming that there is a prima facie case which is triable before that court. A mere reference to the materials on record will not cause any prejudice to the accused because, at this stage, the same are only inputs, which make a prima facie case and the trial imperative. But, in view of the difference between 'opinion', and 'reasoning', well distinguished in the above decisions, the trial Judge/Magistrate must be very cautious and careful to see that the expressions or opinion in the order will not be in the form of reasoning for presuming that the accused has committed the offence. However, the dismissal of a petition by passing a non-speaking order can never be justified or encouraged under the cover of the above decisions or the absence of a statutory requirement under the Section. "Justice must not only merely be done; but it must also be seen to be done." The application of mind of the Judge over the material must be reflected in the order, within its limited

sphere, cautioned by the Supreme Court in the above decisions.

21. That apart, if the materials from which the inferior court formed the opinion are not referred to in the order dismissing the application for discharge, the revisional court will be burdened with laborious task of examining police reports and documents sent along with the report filed under Sec.173(2) of the Cr.P.C. invariably in all cases. Needless to say, revisionary jurisdiction is confined to examination of legality, propriety and correctness of the judgment/order passed by the inferior court only.

22. In the above context, the proposition laid down by the Bench comprised of three Judges of the Supreme Court in *State of Karnataka v. L. Muniswamy and others* [AIR 1977 SC 1489] assumes significance and relevancy. The Supreme Court in this decision, held as follows:

“The object of the provision which requires the Sessions Judge to record his reasons is to enable the superior court to examine the correctness of the reasons for which the Sessions Judge has held that there is or is not sufficient ground for proceeding against the accused. The High Court therefore is entitled

to go into the reasons given by the Sessions Judge in support of his order and to determine for itself whether the order is justified by the facts and circumstances of the case.”

In my view, this judgment covers both orders allowing and dismissing the petition seeking discharge. But there is some subtle difference in the way of passing the orders. The expressions or opinions in the order dismissing the petition seeking discharge shall not be in the form of reasoning for presuming that the accused has committed the offence, as insisted in the decisions referred above.

23. At last, the learned counsel for the petitioner drew my attention to the curiousness of the reasoning by which the learned Sessions Judge dealt with the observations in the earlier order remitting the application for fresh consideration and expressed his apprehension as to whether the revision petitioner would get justice from the Additional Sessions Judge in the third round of consideration, in case, the matter is again remanded back.

24. Having regard to the strange reasoning by which the learned Sessions Judge wriggled out of

jurisdiction and power vested in him under the law, despite the specific direction in the earlier order passed by this court, the apprehension expressed by the learned counsel appears to be reasonable, and it cannot be brushed aside. In this view, I am inclined to transfer the above Sessions Case to the Principal Sessions Court, Ernakulam and I do so.

25. In the above analysis, the impugned order passed by the learned Sessions Judge is set aside and the matter is remitted back to the Principal Sessions Court, Ernakulam, for fresh consideration, in accordance with the above observations and directions thereunder. It is also made clear that the learned Principal Sessions Judge is at liberty to make over the case to any other Additional Sessions Court in accordance with pendency status. Registry is directed to forward a copy of this order to the Principal District & Sessions Court and VI Additional Sessions Court, Ernakulam, forthwith.

K. HARILAL, JUDGE

okb.