

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.T.RAVIKUMAR

TUESDAY, THE 27TH DAY OF JANUARY 2015/7TH MAGHA, 1936

Crl.Rev.Pet.No. 2050 of 2014 ()

AGAINST THE ORDER IN CMP.3328/14 IN CC 617/2001 of J.M.F.C.-I,
NEYYATINKARA DATED 28-08-2014

REVISION PETITIONER(S)/DEFACTO COMPLAINANT:

ANIL KUMAR
S/O.VELAYUDHAN PILLAI, THIRUMANGALAM VEEDU
KADAVATTARAM DESOM, NEYYATTINKARA, THIRUVANANTHAPURAM.

BY ADV. SRI.T.K.ANANDA KRISHNAN

RESPONDENT(S)/STATE/ACCUSED NO.1 AND 2:

1. STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM.
2. RADHAKRISHNAN,
S/O.MADHAVAN PILLAI, VALIYAMEDAYIL VEEDU
NEAR KRISHNANCOIL, KADAVATTAROM DESOM, NEYYATTINKARA
THIRUVANANTHAPURAM.
3. VIJAYALEKSHMI,
D/O.BHAGEERATHI AMMA, VALIYAMEDAYIL VEEDU
NEAR KRISHNANCOIL, KADAVATTAROM DESOM, NEYYATTINKARA
THIRUVANANTHAPURAM.

R2&3 BY ADV. SRI.T.G.RAJENDRAN
R1 BY PUBLIC PROSECUTOR SRI.N.SURESH

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON
27-01-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

C.T. RAVIKUMAR, J.

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Crl.R.P. No.2050 OF 2014

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Dated this the 27th day of January, 2015

ORDER

This revision petition has been filed by the defacto complainant in C.C.No.617 of 2001 on the files of the Court of Judicial First Class Magistrate-I, Neyyattinkara challenging the order passed by the learned Magistrate in C.M.P.No.3328 of 2014. That petition was filed by the revision petitioner under section 302 of the Code of Criminal Procedure for permission to conduct the prosecution by Advocate N.Radhakrishnan Nair. Respondents 2 and 3 herein who are the accused in the said C.C who are facing trial for the accusation of commission of offences under sections 420, 409 read with 34 IPC raised objection to the said prayer in the said petition. They contended that, the said application was moved with a view to harass them and no circumstances was brought out for the grant of such

permission and therefore, it is liable to be dismissed. It was after hearing the rival submissions that the learned Magistrate considered the application with reference to the provisions under section 302 Cr.P.C and also in the light of the decision of this Court in **Babu v. State of Kerala [1984 KLT 164]**. The trial court found that in view of the decision in **Babu's** case (supra), only under very exceptional circumstances permission could be granted to conduct prosecution by any person other than Assistant Public Prosecutor under section 302, Cr.P.C. The learned Magistrate found that the revision petitioner had failed to establish any such exceptional circumstances for invoking the provisions under section 302 Cr.P.C. Consequently, the petition was dismissed. The captioned revision petition has been filed mounting challenge against the said order.

2. I have heard the learned counsel for the revision petitioner, learned counsel for respondents 2 and 3 and also the

learned Public Prosecutor. In ground B, the revision petitioner has raised the following specific contention:-

“B.The discretion was used by the lower court not in a proper way. There was no attempt by the lower court to ascertain the efforts taken by the petitioner to see that the public justice survives.”

3. In Ground C, the revision petitioner has taken up a contention which admittedly was not raised before the learned Magistrate either through the petition which culminated in the impugned order or at the time of its hearing. The revision petitioner contends therein that the second respondent is a practising lawyer in the same court centre. Therefore, there is so much of acquaintance between the Assistant Public Prosecutor and the respondent and in such circumstances, conduct of the prosecution by the Assistant Public Prosecutor would adversely affect his case. According to the petitioner, this point was not at all discussed by the learned Magistrate. In ground D, it is contended that the learned Magistrate

did not consider the fact that the case was earlier conducted by a Special Public Prosecutor and since he retired from service, he could not continue and the revision petitioner seeks for permission only to conduct prosecution of the case by that person who retired from service. The learned counsel also relied on a decision of the Hon'ble Apex Court in **J.K.International v. State Government of N.C.T Delhi [2000 (1) KLT 870 SC]** to contend that in proper cases permission could be granted to appoint Special Prosecutors. Taking note of the contention raised by the revision petitioner, this court specifically asked for a copy of CMP.No.3328 of 2014 and the learned counsel handed over a copy of the petition moved before the learned Magistrate which culminated in the impugned order. A bare perusal of the same would reveal that a contention based on friendliness between the Assistant Public Prosecutor and the second respondent or even acquaintance between them was not specifically raised before the court below. The learned counsel would also fairly admit the said

position. The mere fact that there is acquaintance between them cannot be a reason for seeking such a prayer. When that be the position, I am at a loss to understand how the petitioner could attribute flaw on the part of the learned Magistrate in not considering such a question when admittedly no such contention was never raised before the learned Magistrate. For a proper consideration of the contentions, it is only profitable to refer to the provisions under section 302 Cr.P.C.

It reads thus:-

302. Permission to conduct prosecution-- (1)

Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than police officer below the rank of Inspector; but no person, other than the Advocate-General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission:

Provided that no police officer shall be permitted to conduct the prosecution if he has taken part in the investigation into the offence with respect to which the accused is being prosecuted.

(2) Any person conducting the prosecution may do so personally or by a

pleader.

4. A bare perusal of section 302 Cr.P.C would reveal that any person obtained permission thereunder could conduct the prosecution of the case concerned. Evidently, this provision is distinctly different from the provisions under section 301, Cr.P.C. Upon grant of permission under section 302, Cr.P.C the private counsel takes over the role of the Prosecutor whilst even after the permission under section 301(2), Cr.P.C the Public Prosecutor proceeds to conduct the prosecution and the private counsel so granted with permission could only act under the directions of the Public Prosecutor. In fact, it was the said difference between section 301 and 302 Cr.P.C and the nature of the duty of the Public Prosecutor which were considered by the Division Bench in **Babu's** case (supra). After considering those provisions, this Court observed that there is ocean of difference between assisting the Public Prosecutor under section 301 Cr.P.C and conducting the prosecution on the basis of the permission granted by

the learned Magistrate under section 302. Further this Court held:-

“The Public Prosecutors are really ministers of justice whose job is none other than assisting the State in the administration of justice. They are not representatives of any party. Their job is to assist the court by placing before the court all relevant aspects of the case. They are not there to see the innocents go to the gallows. They are also not there to see the culprits escape a conviction. But the Pleader engaged by a private person who is a de facto complainant cannot be expected to be so impartial. Not only that, it will be his endeavour to get a conviction even if a conviction may not be possible. So, the real assistance that a Public Prosecutor is expected to render will not be there if a Pleader engaged by a private person is allowed to take the role of a Public Prosecutor by granting permission under S. 302 Cr.P.C.”

5. It was held that permission could be granted under section 302 under very very exceptional circumstances otherwise only in case where the circumstances are such that a denial of permission under section 302 Cr.P.C would stand in the way of meting out justice. Most importantly, the Division Bench held that the mere apprehension

of a party that the Public Prosecutor would not be serious in conducting the prosecution simply because of conviction or an acquittal in the case would affect another case pending would not be sufficient to grant such permission. At the same time, if the apprehension of the party is going to materialise, the court can, pending trial, grant permission under section 302 even if a request for permission was rejected at the outset. Evidently, it is taking into consideration the exposition of law by this Court in **Babu's** case (supra) that the learned Magistrate considered the application and passed the impugned order. After considering the grounds raised in the application submitted by the revision petitioner seeking permission to appoint a Public Prosecutor of his choice to conduct the prosecution, I am of the view considered view that the petitioner had not made out a case to fall within the purview of the decision in **Babu's** case (supra). There cannot be any doubt with respect to the position that the duty of the Public Prosecutor is to act fairly and not

merely to obtain conviction by any means. It is taking into account the said position that while considering the application under section 302 Cr.P.C the courts would be loath to grant permission on the mere asking and at the same time would consider such application favourably in exceptional circumstances invoking the power under section 302 Cr.P.C. In short, while considering the application under section 302 Cr.P.C for the purpose of appointing a counsel of the choice by a private person the court always look for existence or otherwise of exceptional circumstances. In the case of an Assistant Public Prosecutor as observed by the Division Bench, his role is only to assist the court and he would not be interested in seeing the innocents getting conviction or culprits escaping the conviction. Such an impartial attempt could not be expected from a pleader engaged by a private person. Thus, after considering the provisions under section 302 and the decision of this Court in **Babu's** case (supra) and also the application, the learned Magistrate found that no

such exceptional circumstances exist in the case for granting permission to the petitioner to appoint a pleader of his choice. Having gone through the petition and having considered the impugned order, I do not find any such special circumstances existing for granting permission as sought for. Therefore, I do not find any illegality or impropriety in the order passed by the learned Magistrate warranting an interference by invoking the revisional jurisdiction. This revision petition is liable to fail and accordingly, it is dismissed.

**Sd/-
C.T. RAVIKUMAR
(JUDGE)**

spc/

C.T. RAVIKUMAR, J.

JUDGMENT

September, 2010

