

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

FRIDAY, THE 5TH DAY OF JUNE 2015/15TH JYAISHTA, 1937

OP(Crl.).No. 142 of 2015 (Q)

**(SC.NO. 421/2009 OF ADDL. SESSIONS COURT - IV, THALASSERY
DATED 19-02-2015)**

PETITIONER(S):

- 1. BALAKRISHNAN.T., S/O.KUNHIRAMAN,AGED 58 YEARS,
CHOTHAYI HOUSE, 'NEHA NIVAS',MOORIYAD P.O.,
KOOHUPARAMBA-670 643.**
- 2. MANOHARAN.K, S/O.ACHUTHAN,AGED 50 YEARS,
MANHAMPARAMBIL, MOORIYAD P.O.,
KOOHUPARAMBA-670 643.**

**BY ADVS.SRI.K.S.MADHUSOODANAN
SRI.THOMAS CHAZHUKKARAN
SRI.M.M.VINOD KUMAR
SMT.K.M.RAMYA
SRI.P.K.RAKESH KUMAR
SRI.K.S.MIZVER**

RESPONDENT(S):

- 1. STATE OF KERALA TO BE
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNKULAM.**
- 2. CIRCLE INSPECTOR OF POLICE,
KOOHUPARAMBA, PIN-670 643.**
- 3. ALAKKADAN PRAKASAN,AGED 48 YEARS,
S/O.ANANDAN, SAJINA NIVAS, KOOHUPARAMBA AMSOM,
NARAVOOR DESOM, KANNUR.**

**R1 & R2 BY PUBLIC PROSECUTOR SMT. S.HYMA
R3 BY ADVS. SRI.S.RAJEEV
SRI.V.VINAY**

**THIS OP (CRIMINAL) HAVING BEEN FINALLY HEARD
ON 05-06-2015, ALONG WITH WPC.NO. 12975/2015, THE COURT
ON THE SAME DAY DELIVERED THE FOLLOWING:**

sts

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APPENDIX

PETITIONER(S)' EXHIBITS

- EXT.P1. PHOTOCOPY OF THE PETITION IN CRL.MP NO.708/2015 DATED
18/2/2015 FILED BEFORE THE IVTH ADDL. SESSIONS COURT,
THALASSERY.
- EXT.P2. PHOTOCOPY OF THE PETITION IN CRL.M.P NO.708/2015
DATED 19/2/2015.
- EXT.P3. PHOTOCOPY OF THE PETITION DATED 21/2/2015 OF THE 3RD
RESPONDENT TO HOME SECRETARY, STATE OF KERALA
- EXT.P4. PHOTOCOPY OF THE PETITION DATED 29/4/2015 OF THE 3RD
RESPONDENT FOR STOPPING THE TRIAL BEFORE THE IVTH
ADDL.SSESSIONS COURT, THALASSERY.
- EXT.P5. PHOTOCOPY OF THE MEDICAL CERTIFICATE OF THE 1ST PETITIONER
ISSUED ON 4.5.2015 BY KOOTHUPARAMBA CO-OPERATIVE HOSPITAL.

RESPONDENT(S)' EXHIBITS:

NIL

/TRUE COPY/

P.A.TO JUDGE

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ALEXANDER THOMAS, J.

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Dated this the 5th day of June, 2015

J U D G M E N T

This writ petition is filed by the CW2 (injured) in SC No.421/2009 on the file of Additional Sessions Court-IV, Thalassery. The prayer in WP(C) 12975/ 2015 is for mandamus to direct the official respondents (state authorities concerned) to appoint a special Prosecutor to conduct the prosecution in SC No.421/2009 on the file of the Additional Sessions Court-IV, Thalassery as expeditiously as possible and for mandamus to direct the said respondents to dispose of the Ext.P3 application submitted by the petitioner in that regard and stay further proceedings in SC No.421/2009 pending on the file of Additional Sessions Court-IV, Thalassery, till the disposal of the writ petition etc.

2. Today when the matter came up for consideration, the

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Director General of Prosecution and State Public Prosecutor submitted on instruction to the respondent Government of Kerala that Government had given anxious consideration to the application made by the writ petitioner for in the matter of appointment of a Special Prosecutor as aforestated and decided that the appointment of the special Public Prosecutor in the facts of the case is not warranted keeping in view of the relevant guidelines and norms in that regard. It is further submitted that accordingly the State Government issued letter No.19522/C4/2015/Home dated 27.05.2015 conveying to the writ petitioner that the said request cannot be acceded to and that the writ petitioner has the liberty to engage a counsel of his own choice to assist the prosecution as per Cr.P.C. The copy of the Government letter dated 27.05.2015 sent by the Government of Kerala, Home (C)Department addressed to the writ petitioner reads as follows:

"I am to invite your attention to the reference cited and to inform that Government have examined the matter in detail and found that the offence alleged herein is an ordinary murder without any public ramification. After verifying the facts and circumstances of the case and a thoughtful consideration of the entire gamut of issues involved in which the offence was committed by the accused, it is seen that there is no larger public interest involved in the case and the public justice does not

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demand the appointment of a Special Public Prosecutor in this case. Either the provisions of Code of Criminal Procedure or the guidelines formulated by the Government in this regard do not permit the appointment of a Special Public Prosecutor in the case. Regular Public Prosecutor in charge of the case is understood to be very capable enough to conduct the case and there is no complaint against him on his capacity and competency. An application for appointment of Special Public Prosecutor at a belated stage that too at the time of commencement of trial lacks bonafide.

In the above circumstances the request of appointment of Special Public Prosecutor in Crime No.94/07 of Kannavam Police Station cannot be considered and is hereby rejected. You are at liberty to engage a Counsel of your own choice to assist prosecution as per proviso 24 (8) of Cr.Pc.”

3. In view of this submission of the State Government, there is no ground to invoke judicial review or supervisory jurisdiction as matters relating to appointment of Special Prosecutor, more so in a Sessions case is eminently within the province of the State Government concerned. Therefore this Court is not inclined to entertain this matter any further and accordingly this Court is inclined to close WP(C) No.12975/2015.

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The prayer in O.P(Crl.) No.142/2015 has been filed seeking invocation of this Court's powers of visitorial Superintendence conferred under Article 227 of the Constitution India with prayers to

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call for the records connecting Exts. P-1 to P-4 from the respondent concerned and to direct Additional Sessions Court-IV, Thalassery dealing with Sessions Case No.421/2009 to dispose of the said Sessions Case without any further delay.

2. The petitioners in this O.P.(Crl.) are the 1st and 2nd accused in the above said Sessions Case. It is pointed out that the 1st petitioner T.Balakrishnan has died on 13/05/2015 and that the cause of action in this matter now survives only in respect of the 2nd petitioner. Sri.K.Madhusoodanan, learned counsel for the petitioner in this O.P.(Crl.) relies on the classic decisions of the Apex Court in cases as in Kartar Singh v. State of Punjab reported in (1994) 3 SCC 569 and Hussainara Khatoon And Others v. Home Secretary, State of Bihar reported in (1980) 1 SCC 81 and Abdul Rehman Antulay And Others v. R.S. Nayak and Another reported in (1992) 1 SCC 225. In Karthar Singh v. State of Punjab reported in (1994) 3 SCC 569, the Apex Court held therein that “ the concept of 'speedy trial' which is read into Article 21 as an essential part of the fundamental right to life and liberty guaranteed and preserved under our Constitution”. In Hussainara Khatoon And Others v. Home

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Secretary, State of Bihar reported in (1980) 1 SCC 81 Supreme Court held: "No procedure which does not ensure a reasonably quick trial can be regarded as 'reasonable, fair or just' and it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, meaning thereby reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21." Further the Constitution of Apex Court in the celebrated case Abdul Rehman Antulay v. R.S. Nayak, reported in (1992) 1 SCC 225 laid down 11 propositions which are almost the Magnacarta in the matter of fair and expeditious conduct of criminal trial. The said 11 propositions laid down by the Constitution Bench of the Apex Court are :

"(1) Fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily. Right to speedy trial is the right of the accused. The fact that a speedy trial is also in public interest or that it serves the social interest also, does not make it any the less the right of the accused. It is in the interest of all concerned that the guilt or innocence of the accused is determined as quickly as possible in the circumstances.

(2) Right to speedy trial flowing from Article 21 encompasses all the stages, namely the stage of investigation, inquiry, trial, appeal, revision and re-trial. That is how, this Court has understood this right and there is no reason to take a restricted view.

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(3) The concerns underlying the right to speedy trial from the point of view of the accused are:

(a) the period of remand and pre-conviction detention should be as short as possible. In other words, the accused should not be subjected to unnecessary or unduly long incarceration prior to his conviction;

(b) the worry, anxiety, expense and disturbance to his vocation and peace, resulting from an unduly prolonged investigation, inquiry or trial should be minimal; and

(c) undue delay may well result in impairment of the ability of the accused to defend himself, whether on account of .death, disappearance or non-availability of witnesses or otherwise.

(4) At the same time, one cannot ignore the fact that it is usually the accused who is interested in delaying the proceedings. As is often pointed out, "delay is a known defence tactic". Since the burden of proving the guilt of the accused lies upon the prosecution, delay ordinarily prejudices the prosecution. Non-availability of witnesses, disappearance of evidence by lapse of time really work against the interest of the prosecution. Of course, there may be cases where the prosecution, for whatever reason, also delays the proceedings. Therefore, in every case, where the right to speedy trial is alleged to have been infringed, the first question to be put and answered is — who is responsible for the delay? Proceedings taken by either party in good faith, to vindicate their rights and interest, as perceived by them, cannot be treated as delaying tactics nor can the time taken in pursuing such proceedings be counted towards delay. It goes without saying that frivolous proceedings or proceedings taken merely for delaying the day of reckoning cannot be treated as proceedings taken in good faith. The mere fact that an application/petition is admitted and an order of stay granted by a superior court is by itself no proof that the proceeding is not frivolous. Very often these stays are obtained on ex parte representation.

(5) While determining whether undue delay has occurred (resulting in violation of Right to Speedy Trial) one must

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have regard to all the attendant circumstances, including nature of offence, number of accused and witnesses, the workload of the court concerned, prevailing local conditions and so on — what is called, the systemic delays. It is true that it is the obligation of the State to ensure a speedy trial and State includes judiciary as well, but a realistic and practical approach should be adopted in such matters instead of a pedantic one.

(6) Each and every delay does not necessarily prejudice the accused. Some delays may indeed work to his advantage. As has been observed by Powell, J. in *Barker*²² “it cannot be said how long a delay is too long in a system where justice is supposed to be swift but deliberate”. The same idea has been stated by White, J. in *U.S. v. Ewell*³⁸ in the following words:

‘... the Sixth Amendment right to a speedy trial is necessarily relative, is consistent with delays, and has orderly expedition, rather than mere speed, as its essential ingredients; and whether delay in completing a prosecution amounts to an unconstitutional deprivation of rights depends upon all the circumstances.’

However, inordinately long delay may be taken as presumptive proof of prejudice. In this context, the fact of incarceration of accused will also be a relevant fact. The prosecution should not be allowed to become a persecution. But when does the prosecution become persecution, again depends upon the facts of a given case.

(7) We cannot recognize or give effect to, what is called the ‘demand’ rule. An accused cannot try himself; he is tried by the court at the behest of the prosecution. Hence, an accused’s plea of denial of speedy trial cannot be defeated by saying that the accused did at no time demand a speedy trial. If in a given case, he did make such a demand and yet he was not tried speedily, it would be a plus point in his favour, but the mere non-asking for a speedy trial cannot be put against the accused. Even in USA, the relevance of demand rule has been substantially watered down in *Barker*²² and other succeeding cases.

(8) Ultimately, the court has to balance and weigh the several relevant factors — ‘balancing test’ or ‘balancing

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process' — and determine in each case whether the right to speedy trial has been denied in a given case.

(9) Ordinarily speaking, where the court comes to the conclusion that right to speedy trial of an accused has been infringed the charges or the conviction, as the case may be, shall be quashed. But this is not the only course open. The nature of the offence and other circumstances in a given case may be such that quashing of proceedings may not be in the interest of justice. In such a case, it is open to the court to make such other appropriate order — including an order to conclude the trial within a fixed time where the trial is not concluded or reducing the sentence where the trial has concluded — as may be deemed just and equitable in the circumstances of the case.

(10) It is neither advisable nor practicable to fix any time-limit for trial of offences. Any such rule is bound to be qualified one. Such rule cannot also be evolved merely to shift the burden of proving justification on to the shoulders of the prosecution. In every case of complaint of denial of right to speedy trial, it is primarily for the prosecution to justify and explain the delay. At the same time, it is the duty of the court to weigh all the circumstances of a given case before pronouncing upon the complaint. The Supreme Court of USA too has repeatedly refused to fix any such outer time-limit in spite of the Sixth Amendment. Nor do we think that not fixing any such outer limit ineffectuates the guarantee of right to speedy trial.

(11) An objection based on denial of right to speedy trial and for relief on that account, should first be addressed to the High Court. Even if the High Court entertains such a plea, ordinarily it should not stay the proceedings, except in a case of grave and exceptional nature. Such proceedings in High Court must, however, be disposed of on a priority basis."

3. Based on this legal frame work, Sri.K.S.Madhusoodanan in his usual persuasive manner submitted before this Court that

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though the petitioner herein, is an accused, he is entitled to seek the invocation of this Court's extraordinary powers to ensure that the trial is completed without any further delay. Sri.K.S.Madhusoodanan learned counsel for the petitioner further submits that this submission has been made by him in the context of the factual situation of this case where the trial that was scheduled in February 2015 as well as May 2015 it was adjourned at the request of the CW2, (petitioner in WP(C) 12975/2015), on his plea that further conduct of the trial be deferred till the decision is taken by the State Government on the appointment of the Special Public Prosecutor.

4. Now that the Government has taken a well considered decision in the matter and has decided that the appointment of the Special Prosecutor in the facts of the cases is not warranted, the point of dispute raised by the petitioners in OP(Crl.) 142/2015 need not be decided on merits. As this Court can now even otherwise issue directions for expeditious completion of the trial without any further delay as it was already scheduled in February 2015 and May 2015.

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5. This Court had earlier requested the Registry of this Court to call for a report from the Sessions Court concerned and later the Sessions Court concerned by a letter dated 18/05/2015 has reported to the Registry of this Court and the said report reads as follows:

.....

"2. This is the case charge sheeted by the Circle Inspector of Police, Kuthuparamba in Crime No.94/2007 of Kannavam Police Station for offenses punishable u/ss 120B, 143,147,148,341,326,307,302 r/w 149 of Indian Penal Code. Altogether there are 11 accused in this case.

3. After framing charge, the case had been scheduled for trial from 16-2-2015 to 28-2-2015. As the Judge was on leave on 16-2-2015, the case was reposted to 18-2-2015. CWs 1 to 7 should have been present before the court on 18-2-2015. But no witnesses other than CW1 was present on that day. CW1 is not an occurrence witness. He is a police officer who suo motu registered the F.I.R. That on 18-2-2015, when the case was called in the open court, a petition was filed as Crl.M.P 708/15 on behalf of CW2 to stop the trial to enable him to file an application before the Government of Kerala for the appointment of the Special Public Prosecutor. The said petition was dismissed on 19-2-2015. since the witnesses were absent on that day, the trial was rescheduled with a direction to issue summons to the witnesses to examine them during the period from 4-5-2015 to 14-5-2015. That on 2-5-2015, an application was filed as Crl.M.P.2020/2015 on behalf of CW2 to stop the trial stating that an application for appointing a Special Public Prosecutor was filed before the Hon'ble High Court of Kerala as WP(C)12975/15. Since the matter was pending before the Hon'ble High Court of Kerala, Crl.M.P.2020/15 was allowed by this court on 2-5-2015 and trial was again stopped. The case now stands posted to 29-5-2015.

4. I may respectfully submit that altogether 33 witnesses have

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been cited on behalf of the prosecution. If the witnesses are available, two weeks time would be required for the examination of those witnesses. I may further submit that the above case could be disposed of within three months from 29-5-2015 provided that the witnesses are available."

In this view of the matter, this Court is of the considered opinion that the discretion available to this Court by invoking visitorial powers of superintendence conferred under Article 227 should be exercised and accordingly it is directed that the Sessions Court concerned will endeavour to take all possible reasonable measures under the circumstances to ensure that the trial is conducted and concluded without any further delay. It is hoped and expected that the Sessions Court will take into consideration the aforementioned golden legal principles laid down by the Apex Court in the aforementioned classic rulings of the Supreme Court as aforestated and will make a concerted effort to ensure that the Sessions Case is concluded at least within the time limit suggested by the court below itself as stated above. At this stage, Sri.S.Rajeev learned counsel for the R-3 herein who is petitioner in WP(C) 12975/2015, submits that this Court may direct the Sessions Court concerned to ensure that decision may be taken to facilitate

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the compliance of the order of the Government and aforementioned Government letter dated 27/05/2015 permitting the said writ petitioner to engage the counsel of his own choice to assist prosecution as per Section 301(2) of the Code of Criminal Procedure. It is open for the writ petitioner to make an appropriate application to the Sessions Court to bring in to the notice of that court about the directions of the Government in the aforementioned letter dated 27/05/2015 and seek permission of that court to engage the Counsel of his choice to assist the prosecution as per Section 301(2) of Cr.P.C., upon which it is for the Sessions Court to take appropriate decision in that regard keeping in view of the decision of the Government as stated above.

Accordingly the O.P.(CrI) stands finally disposed of.

Sd/- ALEXANDER THOMAS, JUDGE

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