"C.R."

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR

THURSDAY, THE 13TH DAY OF JUNE 2024 / 23RD JYAISHTA, 1946

CRL.APPEAL NO. 377 OF 2011

AGAINST THE JUDGMENT DATED 17.09.2010 IN CRA NO.472 OF 2003 OF ADDITIONAL SESSIONS COURT (ADHOC)-II, KOTTAYAM ARISING FROM THE JUDGMENT DATED 01.10.2003 IN CC 209 OF 1997 OF THE JUDICIAL MAGISTRATE OF THEF IRST CLASS-II (MOBILE), KOTTAYAM

APPELLANT/COMPLAINANT:

JOJI JOSEPH
KARATHASSERIL, PRAVITHANAM P.O.

BY ADVS.
SRI.SHAJI THOMAS PORKKATTIL
SRI.BINU PAUL
SRI.N.NAGARESH
SRI.T.V.VINU

RESPONDENTS/STATE & ACCUSED 1 & 4:

1 STATE OF KERALA,
REP. BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM-682 031.

2 AJAYAKUMAR
FORMERLY PROBATIONARY SUB INSPECTOR, PALA POLICE STATION, PIN-686 575.

3 HARIDAS,
FORMERLY C.I. OF POLICE, PALA-686 575.

R1 BY SMT.SHEEBA THOMAS, PUBLIC PROSECUTOR
R2 BY SRI.ALAN PAPALI
R2 BY SRI.SOJAN MICHEAL
R3 BY SRI.B.KRISHNA MANI

THIS CRIMINAL APPEAL HAVING COME UP FOR FINAL HEARING ON 29.05.2024, ALONG WITH CRL.A.378/2011, 380/2011, THE COURT ON 13.06.2024 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR

THURSDAY, THE 13TH DAY OF JUNE 2024 / 23RD JYAISHTA, 1946

CRL.APPEAL NO. 378 OF 2011

AGAINST THE JUDGMENT DATED 17.09.2010 IN CRA NO.474 OF 2003 OF ADDITIONAL SESSIONS COURT (ADHOC)-II, KOTTAYAM ARISING FROM THE JUDGMENT DATED 01.10.2003 IN CC 209 OF 1997 OF THE JUDICIAL MAGISTRATE OF FIRST CLASS-II (MOBILE), KOTTAYAM

APPELLANT/COMPLAINANT:

JOJI JOSEPH
KARATHASSERIL, PRAVITHANAM P.O.

BY ADVS.
SRI.SHAJI THOMAS PORKKATTIL
SRI.BINU PAUL
SRI.N.NAGARESH
SRI.T.V.VINU

RESPONDENTS/STATE & ACCUSED NO.3:

1 **STATE OF KERALA**
REP. BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,, ERNAKULAM-682 031.

2 **RAMACHANDRAN NAIR**
POLICE CONSTABLE, PALA POLICE STATION-686 575.

R1 BY SMT.SHEEBA THOMAS, PUBLIC PROSECUTOR
R2 BY SRI.SUNIL CYRIAC

THIS CRIMINAL APPEAL HAVING COME UP FOR FINAL HEARING ON 29.05.2024, ALONG WITH CRL.A.377/2011 AND CONNECTED CASES, THE COURT ON 13.06.2024 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR

THURSDAY, THE 13TH DAY OF JUNE 2024 / 23RD JYAISHTA, 1946

CRL.APPEAL NO. 380 OF 2011

AGAINST THE JUDGMENT DATED 17.09.2010 IN CRA NO.473 OF 2003 OF ADDITIONAL SESSIONS COURT (ADHOC)-II, KOTTAYAM ARISING FROM THE JUDGMENT DATED 01.10.2003 IN CC 209 OF 1997 OF THE JUDICIAL MAGISTRATE OF THE FIRST CLASS-II (MOBILE), KOTTAYAM

APPELLANT/COMPLAINANT:

JOJI JOSEPH
KARATHASSERIL, PRAVITHANAM P.O.

BY ADVS.
SRI.SHAJI THOMAS PORKKATTIL
SRI.BINU PAUL
SRI.N.NAGARESH
SRI.T.V.VINU

RESPONDENTS/ACCUSED NO.2:

1 **STATE OF KERALA AND ANOTHER**
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,,
ERNAKULAM-682 031.

2 **NAZEEM, SUB INSPECTOR OF POLICE**
NOW WORKING AS S.I OF POLICE, EDATHUA-689 573.

R1 BY SMT.SHEEBA THOMAS, PUBLIC PROSECUTOR
R2 BY SRI.S.SREEKUMAR (SR.)
R2 BY SRI.P.K.SOYUZ

THIS CRIMINAL APPEAL HAVING COME UP FOR FINAL HEARING ON 29.05.2024, ALONG WITH CRL.A.377/2011 AND CONNECTED CASES, THE COURT ON 13.06.2024 DELIVERED THE FOLLOWING:

P.G. AJITHKUMAR, J. "C.R."

Crl.Appeal Nos.377, 378 & 380 of 2011

Dated this the 13th day of June, 2024

JUDGMENT

These appeals are at the instance of the complainant in C.C.No.209 of 1997 on the files of the Judicial Magistrate of the First Class-II (Mobile), Kottayam. The learned Magistrate convicted accused Nos.1 to 4 for the offence under Sections 452, 341 and 323 read with Section 34 of the Indian Penal Code, 1860 (IPC). Accused Nos.1 and 4 preferred Crl.Appeal No.472 of 2003, accused No.2 preferred Crl.Appeal No.473 of 2003 and accused No.3 preferred Crl.Appeal 474 of 2003 before the Additional Sessions Court (Adhoc)-II, Kottayam. The appellate court as per the common judgment dated 17.09.2010 allowed the appeals and acquitted all the accused. Correctness and legality of the said judgment are under challenge in these appeals filed under Section 378(4) of the Code of Criminal Procedure, 1973 (Code).

2. Parties are referred to as they are positioned before the trial court.

3. The alleged incident occurred at 7.00 p.m. on 03.09.1996. The complainant alleged that while he was sitting in his house talking with his brother and a neighbour, accused Nos.1 to 3 and an unidentified police constable came there in a jeep and tried to take into custody the complainant. His wife requested not to arrest him and children interrupted the arrest. They were manhandled by the accused and the complainant was taken forcibly into the jeep. While taking to the jeep the 1st accused slapped the complainant on his left face thrice and on the way to the police station, he was physically tortured by others in the jeep. Only at 9.30 p.m. he was released. The accused thereby committed the aforementioned offences.

4. On the basis of the said allegations the trial was held and the accused were found guilty, convicted and sentenced. The appellate court, on accepting the contentions of the accused held that they were prosecuted without

obtaining sanction under Section 197 of the Code, and accordingly allowed the appeals and acquitted the accused.

5. Heard the learned counsel for the appellant, and the learned Senior Counsel for the accused No.2, the learned counsel appearing for accused Nos.1, 3 and 4 and the learned Public Prosecutor.

6. As stated, the incident occurred on 03.09.1996. The complainant was taken into custody and brought to the Pala Police Station. The case of the complainant is that at the instigation of one Jose he was illegally taken into custody, detained in the police station and manhandled. Only when Sri.Antony Plathottam, a local politician and Panchayat Member came to the Police Station, he was released, which was at about 9.30 p.m. Before that, he was subjected to medical examination on the pretext of ascertaining whether or not he was drunk. It is in evidence that accused Nos.1 and 2 were probationary Sub Inspectors attached to Pala Police Station. The 3rd accused was the Head Constable there and the 4th accused was the Circle Inspector of Police.

7. The complainant gave evidence as PW1 almost in terms of the allegations in the complaint. PW2 is a neighbour of PW1, to whom he was talking at the time of when was taken into custody. PW6 is the brother of PW1. Both PWs 2 and 6 testified about the incident. PW3 is the wife of PW1. She deposed that PW1 was taken into custody and in that course himself, PW3 and children were manhandled. PW4, Sri.Antony deposed that on getting information regarding apprehension of the complainant, he went to the police station. According to him, the complainant was taken for medical examination by that time and thereafter he was released by the Circle Inspector of Police on bail. PW5, who is a neighbour of the complainant deposed that at about 7.00 p.m. on 03.09.1996 he saw a few policemen taking to custody the complainant from his house. He, however, denied having seen the police manhandling the complainant. PW7 is the Doctor, who examined the complainant at the Co-operative Hospital, Thodupuzha. The examination was on 05.09.1996, two days after the incident and the certificate he issued is Ext.P3.

8. The appellate court did not consider the evidence in detail. But it was held that the complainant was taken into custody in connection with a case initiated against him and therefore the offence, if any, committed by the accused was while they were acting or purporting to act in discharge of their official duty. The appellate court, relying on the decisions in **Moosa Vallikkadan v. State of Kerala [2010 (3) KLT 437]** held that sanction from the Government was necessary for prosecuting the accused.

9. The learned counsel for the complainant would submit that the arrest of the complainant was without any legal sanction and even if he was involved in S.T.No.2059 of 1996, he could not have been arrested for, the offence involved was one punishable under Section 51A of the Kerala Police Act, 1960 (KP Act) alone. Further, himself, his wife and children were manhandled in public and he was detained in the police station illegally. Those acts did not have any connection with the official duties of the accused and therefore no sanction as enjoined in Section 197 of the Code

is required for the prosecution of the accused. It is also submitted that even removal of a person committing an offence under Section 51A of the KP Act is possible from the place of occurrence alone for preventing continuation of the offence, and never can such a person be taken into custody from his house. Therefore, the act of the accused is smacked by *mala fides* and apparently at the instance of one Jose, who is highly influential.

10. The learned Senior Counsel and other counsel appearing for the respective accused submitted that the complainant was not arrested, but his presence was required for the purpose of a medical examination in connection with S.T.No.2059 of 1996. Other than that, nothing was done by the accused and the alleged manhandling and detention are false stories created by the complainant in order to retaliate his taking to the police station for the purpose of medical examination. It is the further submission that the evidence tendered by the prosecution is totally contradictory and did not establish commission of any criminal offence, and even if

the commission of the alleged offences is taken as proved, the accused are entitled to get the protection under Section 197(2) of the Code.

11. Both sides placed reliance on various decisions in order to fortify their respective contentions in regard to the requirement of sanction. I shall consider that question first.

12. Sub-sections (1), (2) and (3) of Section 197 of the Code are extracted below:

> "197. Prosecution of Judges and public servants.- (1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction save as otherwise provided in the Lokpal and Lokayuktas Act, 2013-
>
> (a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;
>
> (b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government:

Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression "State Government" occurring therein, the expression "Central Government" were substituted.

Explanation.- For the removal of doubts it is hereby declared that no sanction shall be required in case of a public servant accused of any offence alleged to have been committed under section 166A, section 166B, section 354, section 354A, section 354B, section 354C, section 354D, section 370, section 375, section 376, section 376A, section 376AB, section 376C, section 376D, section 376DA, section 376DB or section 509 of the Indian Penal Code (45 of 1860).

(2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.

(3) The State Government may, by notification, direct that the provisions of sub-section (2) shall apply to such class or category of the members of the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub-section will apply as if for the expression "Central Government" occurring therein, the expression "State Government" were substituted.”

Section 197 of the Code affords protection from false, vexatious or *mala fide* prosecution to some categories of public servants by insisting on the requirement of previous sanction of the Government concerned. The members of the armed forces of the union are so protected under Section 197(2) of the Code. The State Government considered that members of the Kerala Police force who are charged with the maintenance of public order should also be provided with similar protection and therefore issued notification No.61135/ A2/77/Home dated 6.12.1977 invoking the provisions of Section 197(3) of the Code.

13. There was no judicial certitude on the question whether the protection under the aforesaid notification would be available to members of the Kerala Police Force when they were acting or purporting to act in discharge of their official duties by way of law and order. That question was set at rest by a Division Bench of this Court in **Sarojini v. Prasannan [1996 (2) KLT 859]**. Subsequently the Apex Court in **Rizwan Ahammed Javed Shaikh v. Jammal Pattel**

[(2001) 5 SCC 7] laid down a similar view as taken by the Division Bench. It is now well settled that by virtue of the aforesaid notification issued under Section 197(3) of the Code the protection under Section 197(2) of the Code would be available to a member of the Kerala Police force charged with the maintenance of law and order duty also. Thus, if a member of the Kerala Police committed an offence while acting or purporting to act in discharge of his official duty, the Court is precluded from taking cognizance of such offence except with the previous sanction of the State Government as enjoined by Section 197(2) read with Section 197(3) of the Code. The words 'Central Government' occurring in Section 197(2) of the Code stand substituted by 'State Government'.

14. This aspect was dilated by a learned Single Judge of this Court in **Moosa Vallikadan v. State of Kerala and another [2010 (3) KLT 437]**. It was explained that every police officer entitled to protection under Section 197(2) of the Code need not be removable from his office by or with the

sanction of the Government. Sub Inspectors and other members of the Kerala Police Force, though not persons removable only by the Government, are covered by the notification and are protected by Section 197(2) of the Code if the offending act was committed by him while acting or purporting to act in discharge of his official duty.

15. The question next arises is whether the accused were at the relevant time acting or purporting to act in discharge of their official duty. The interpretation placed on the words 'while acting or purporting to act in the discharge of his official duty' came up for scrutiny before this Court and the Apex Court in a long line of decisions. In **B.Saha and others v. M. S. Kochar [(1979) 4 SCC 177]** a three Judge Bench of the Apex Court observed as follows:

> "18. The words "any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty" employed in Section 197(1) of the Code, are capable of a narrow as well as a wide interpretation. If these words are construed too narrowly, the Section will be rendered altogether sterile, for it is no part of an official duty to commit an offence,

> and never can be. In the wider sense, these words will take under their umbrella every act constituting an offence, committed in the course of the same transaction in which the official duty is performed or purports to be performed. The right approach to the import of these words lies between these two extremes. While on the one hand, it is not every offence committed by a public servant while engaged in the performance of his official duty, which is entitled to the protection of Section 197(1), an act constituting an offence, directly and reasonably connected with his official duty will require sanction for prosecution under the said provision."

16. What was held in **Baijnath v. State of Madhya Pradesh [AIR 1966 SC 220]** is that the quality of the act that is important, and if it falls within the scope and range of his official duties, the protection contemplated by Section 197 of the Criminal Procedure Code will be attracted. The *sine qua non* for the applicability of the Section is that the offence charged, be it one of commission or omission, must be one which has been committed by the public servant either in his official capacity or under colour of the office held by him."

(emphasis supplied)

17. Therefore, the question whether an offence was committed in the course of official duty or under the colour of office, cannot be answered hypothetically, and depends on the facts of each case. In the matter of grant of sanction under Section 197 of the Code, the offence alleged to have been committed by the accused must have something to do, or must be related in some manner, with the discharge of official duty. There must be a reasonable connection between the act and the discharge of official duty, the act must bear such relation to the duty that the accused could lay a reasonable claim, but not a pretended or fanciful claim, that he did it in the course of the performance of his duty.

18. The legal position was succinctly explained in **Sankaran Moitra v. Sadhna Das and another [(2006) 4 SCC 584]**. It was held that it is the quality of the act that is important and if the act falls within the scope and range of his official duties, then the protection contemplated by Section 197 of the Code would be available to him. It is not every offence committed by a public servant that requires sanction

for prosecution under Section 197(1) of the Code; nor even every act done by him while he is actually engaged in the performance of his official duties; but if the act complained of is directly concerned with his official duties so that, if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary; and that would be so, irrespective of whether it was, in fact, a proper discharge of his duties, because that would really be a matter of defence on the merits, which would have to be investigated at the trial, and could not arise at the stage of the grant of sanction, which must precede the institution of the prosecution.

19. The Apex Court in **P.P.Unnikrishnan v. Puttiyottil Alikutty [(2000) 8 SCC 131]** laid down down as below:

> "If a police officer dealing with law and order duty uses force against unruly persons, either in his own defence or in defence of others and exceeds such right it may amount to an offence. But such offence might fall within the amplitude of Section 197 of the Code as well as Section 64(3) of the K.P. Act. But if a police officer

> assaults a prisoner inside a lock-up he cannot claim such 2023:KER:78019 6 Crl.R.P.No.588 of 2022 act to be connected with the discharge of his authority or exercise of his duty unless he establishes that he did such acts in his defence or in defence of others or any property. Similarly, if a police officer wrongfully confines a person in the lock-up beyond a period of 24 hours without the sanction of a magistrate or an order of a court it would be an offence for which he cannot claim any protection in the normal course, nor can he claim that such act was done in exercise of his official duty. A policeman keeping a person in the lock-up for more than 24 hours without authority is not merely abusing his duty but his act would be quite outside the contours of his duty or authority."

20. The learned counsel for the accused relied also on the decision of the Apex Court in **Devaraja D. v. Owais [(2020) 7 SCC 695]** in order to contend that from the nature of the allegations in the complaint, it could only be said that the alleged act has reasonable nexus with the discharge of their official duty and therefore sanction under Section 197(1) of the Code is required for their prosecution. The Apex Court in **Devaraja** (supra) observed regarding the purpose of sanction under Section 197(1) of the Code as follows:

> "68. Sanction of the Government, to prosecute a police officer, for any act related to the discharge of an official duty, is imperative to protect the police officer from facing harassive, retaliatory, revengeful and frivolous proceedings. The requirement of sanction from the government, to prosecute would give an upright police officer the confidence to discharge his official duties efficiently, without fear of vindictive retaliation by initiation of criminal action, from which he would be protected under Section 197 of the Code of Criminal Procedure, read with Section 170 of the Karnataka Police Act. At the same time, if the policeman has committed a wrong, which constitutes a criminal offence and renders him liable for prosecution, he can be prosecuted with sanction from the appropriate government."

In that case, the complainant was allegedly ill-treated after his arrest and manhandled during the period from 27.02.2013 till 04.03.2013. There were criminal cases registered against the complainant. On the complainant filing a private complaint, cognizance of the offences under Sections 120B, 220, 323, 330, 348 and 506 Part II, read with Section 34 of the IPC was taken against the appellant, who was a police officer of the rank of Superintendent of Police. In the said

factual scenario the Apex Court held that every offence committed by a police officer does not attract Section 197(1) of the Code. The protection given under Section 197(1) was available only when the alleged act done by the police officer was reasonably connected with the discharge of his official duty. It was further observed that an offence committed entirely outside the scope of the duty of the police officer would not require sanction. However, if the act is connected with the discharge of the official duty of investigation in a criminal case, the act is certainly under the colour of duty, no matter how illegal the act may be. The further observations are that to decide whether sanction is necessary, the test is whether the act is unconnected with official duty or whether there is a reasonable nexus with the official duty. Suppose the alleged act has reasonable nexus with the discharge of his official duty. In that case, it does not matter whether the policeman has exceeded the scope of his power and/or acted beyond the four corners of law. In such a case, it was held that sanction is required for the prosecution.

21. A similar view was taken by this Court in **Sunilkumar v. State of Kerala [2007 (3) KHC 765].** The accused were a Sub Inspector of Police and a Police Constable. They were chasing the complainant who was suspected of carrying contraband arrack in a jerry can in an autorickshaw. In an attempt to catch hold of the complainant after overpowering him, the Sub Inspector of Police used a towel around his neck and tightened the same. In the prosecution of the Sub Inspector by means of a private complaint, an offence punishable under Section 307 of the IPC was alleged. A learned Judge of this Court held that on the facts and circumstances of the case, it could not be held that the alleged conduct of the Police Officer was alien to the official act that he was performing to deprive him of the protection under Section 197 of the Code.

22. Reverting to the facts of this case, initiation of a prosecution as S.T.No.2059 of 1996 against the complainant is proven from Ext.P1. The date of commission of the said offence is 03.09.1996. The offence alleged in that case is

under Section 51A of the K.P.Act. The act that constitutes such an offence is disorderly behaviour in a public street or place, etc. If such a behaviour was after having drunk, the same may amount to an offence under Section 51(a) of the K.P.Act. When such a case was initiated against the complainant, the police cannot be found at fault for subjecting the complainant to a medical examination. The fact that the complainant was subjected to medical examination after bringing him to the police station is admitted by him. The stand taken by accused Nos.1 to 3, who reached the house of the complainant and took him to the police station in the police jeep, is that as instructed by the Circle Inspector of Police only they acted. That version is corroborated by the evidence of PWs.1 and 4 inasmuch as they conceded that the Circle Inspector told them about the case, and later, after the medical examination, the Circle Inspector released PW1.

23. True, the complainant has a case that S.T.No.2059 of 1996 was a foisted case. The evidence on record is, however, insufficient to hold that that case was a foisted one. What

emerges from the facts that the complainant after being brought to the police station was subjected to medical examination and he was arraigned as an accused in S.T.No.2059 of 1996, is that the act of taking him to the police station was as part of the official duty. No doubt, even in a case where a person is taken into custody as part of duty and strictly in accordance with law, police have no authority to manhandle or detain him illegally. If manhandled or detained illegally, the erring police personnel are liable for prosecution. That does not mean that if such an act is done as part of official duty, no sanction is required to prosecute the police personnel.

24. Here is such a case. Accused Nos.1 to 3 acted in the matter of taking the complainant to the police station on the instruction of the Circle Inspector. The same can be termed only as part of their official duty. In the light of the law laid down in the aforesaid decisions the accused are entitled to get protection enjoined in Section 197(2) of the Code. The view taken by the appellate court in that regard is correct and legal. In the view of that finding, I do not

propose to deliberate upon the evidence in order to decide whether the charge levelled against the accused has been proved or not.

These appeals therefore fail and are dismissed.

Sd/-

P.G. AJITHKUMAR, JUDGE

dkr