2024:KER:58353

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

THURSDAY, THE 1ST DAY OF AUGUST 2024 / 10TH SRAVANA, 1946

CRL.MC NO. 5412 OF 2020

CRIME NO.768/2019 OF Karunagapally Police Station, Kollam

FILED BEFORE JUDICIAL FIRST CLASS MAGISTRATE COURT, KARUNAGAPPALLY

PETITIONER/ACCUSED:

K.S.SIVARAJAN,
AGED 73 YEARS,
S/O. P.K.SHANMUGHAM,
PULLANTHARA HOUSE, ALUMKADAVU P.O.,
MARUTHOORKULANGARA SOUTH, AYANIVELIKULANGARA,
KARUNAGAPPALLY, KOLLAM DISTRICT.

BY ADVS.
A.N.RAJAN BABU
SRI.P.GOPALAKRISHNAN (MVA)

RESPONDENTS/COMPLAINANT & STATE:

1 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM-682031.

2 INSPECTOR S H.O.,
WOMEN CELL, KOLLAM CITY-691001.

3 XXXXX

4 THE DISTRICT POLICE CHIEF,
KOLLAM, PIN-691001.

BY ADV K.SHAJ
SENIOR PUBLIC PROSECUTOR SRI RENJIT GEORGE

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 22.07.2024, THE COURT ON 01.08.2024 PASSED THE FOLLOWING:

***"C.R"***

***A. BADHARUDEEN, J.***

==========

*Crl.M.C.No.5412 of 2020-F*

==========

*Dated this the 1st day of August, 2024*

***O R D E R***

This Criminal Miscellaneous Case has been filed by the sole accused in Crime No.768/2019 of Karunagappally Police Station, under Section 482 of the Code of Criminal Procedure, seeking the following reliefs:

> *"i) Call for the records leading to Annexure A1 Final Report,*
>
> *ii) Quash Annexure A1 Final Report in Crime No.768/2019 of Karunagappally Police Station filed before Judicial First Class Magistrate Court, Karunagappally,*
>
> *iii) Stay all further proceedings in Annexure A1 Final Report in Crime No.768/2019 of Karunagappally Police Station.*
>
> *iv) Grant such other reliefs which deem fit and proper in the nature and circumstances of the case."*

2. Heard the learned counsel for the petitioner, the learned counsel for the defacto complainant and the learned

Public Prosecutor, in detail.

3. I have perused the records.

4. In a nut shell, the prosecution allegation is that, on 31.01.2019, while the defacto complainant was staying at the house of the accused, at night and when she hardly slept after taking a tablet for fever, during mid night, the accused herein reached her bed room and subjected her to sexual intercourse. Accordingly, the prosecution alleges offences punishable under Section 376 of the Indian Penal Code (`IPC' for short).

5. While seeking quashment of the proceedings, the learned counsel for the petitioner mainly urged that the entire case is foisted without any *bona fides*. The learned counsel for the petitioner also pointed out the long delay in lodging the FIR and the attending circumstances. The learned counsel also took attention of this Court to various documents, including Annexures A1 to A10 produced. According to the learned counsel for the petitioner, the defacto complainant is a lady, who used to file complaints against persons with ulterior motives, and

in this connection, he took attention of this Court to Annexure A7 report dated 02.07.2019 filed by the Station House Officer, Anchalummoodu Police Station, before this Court in W.P(c).No.15956/2019, when she sought police protection in the said Writ Petition. The learned counsel for the accused/petitioner argued that going by Annexure A7 report, the tendency of the defacto complainant to implicate those who stand against her whip could be gathered. He also pointed out that even though this incident happened on 31.01.2019, FIS was registered only on 13.05.2019, after a long delay of about 3 ½ months. It is argued further that as on 04.05.2019 the defacto complainant filed a complaint before the Circle Inspector of Police, Anchalummoodu Police Station, arraying the petitioner and one Ambika, as respondents, raising certain allegations against them. But in Annexure A4 complaint, no overt acts disclosing the allegation of rape stated. Thereafter, Smt.Ambika, who was arrayed as the 2nd respondent in Annexure A4, filed a complaint before the Circle Inspector of Police, Kundara Police

Station and accordingly Annexure A5 Crime No.1114/2019 Kundara Police Station was registered against the defacto complainant. As a counter blast, the present crime was registered.

6. Per contra, the learned counsel for the defacto complainant pointed out Annexure-A8 report at the instance of the Council for Various Human Rights Organization raising unnecessary allegations against the petitioner and also submitted that the prosecution case is well made out, *prima facie,* and therefore, the quashment sought for is liable to fail and the matter would require trial.

7. The learned Public Prosecutor also supported the argument of the learned counsel for the defacto complainant, while opposing quashment of this proceedings..

8. I have gone through the FIS produced as Annexure A2 lodged on 13.05.2019. As per Annexure A2, occurrence of rape at the instance of the petitioner herein on 31.01.2019 at the residence of the petitioner is alleged. In the

FIS, containing 10 pages, the defacto complainant stated many things. The summary of the allegations is that the defacto complainant had been working as a social worker and while she was staying along with the relatives of her mother at Pallath House, Thrikkadavoor Neeravilcheri, one Edin, her relative, assaulted her and for which Crime N.2652/2017 of Kundara Police Station was registered. Pursuant to registration of this crime, she shifted her residence to Harileela Apartment, Thrikkadavoor, Kollam, on rent and started residing therein, from February, 2017 onwards. Later her relatives persuaded her to withdraw the case against Edin and threatened her. At this juncture, Ambika teacher, a Human Rights Member, reached her flat and made acquaintance with her and she compelled her to take membership in the Council for Various Human Rights Organisation to protect herself. Later, the accused herein, who is the President of the said Organisation, along with other members reached her flat and received Rs.500/- for providing membership along with a passport size photograph. Thereafter they requested

her to participate at a meeting of the District Human Rights Committee, Kollam, on 22.12.2018. *Inter alia*, the defacto complainant would state that she was invited to 2 programs on 31.12.2018 and 26.01.2019. Thereafter she was invited as a guest at a function in a Ganapathi temple at Thurayil Kunnu, near the house of the accused. Accordingly, she reached the house of the accused at about 10 p.m on 31.12.2018, as requested by the accused, where the accused arranged a bed room for her. In the said room, the almirah, in which money kept by the accused also was placed and as such the defacto complainant was advised not to lock the door. According to the defacto complainant, thereafter she had taken medicine for fever and went to sleep. While she was sleeping hardly, the accused subjected her to rape despite her resistance.

9. On perusal of Annexure A2, it is emphatically clear that this occurrence was in the night in between 31.12.2018 and 01.02.2019, but no complaint was raised by the defacto complainant from 01.02.2019 till 12.05.2019 though she lodged

Annexure A4 complaint against the accused/petitioner and one Ambika, alleging harassment as on 04.05.2019. Thereafter Ambika lodged Annexure A6 complaint before Kundara Police and accordingly Annexure A5 crime was registered against the defacto complainant. Annexure A6 complaint was lodged on 04.05.2019 and the present FIS was given on 13.05.2019, thereafter.

10. It is discernible that the defacto complainant approached this Court by W.P(C).No.15956/2019 and in response to the Writ Petition, the SHO, Anchalammoodu Police Station, filed a report detailing the crimes and attending circumstances relating to the defacto complainant. Paragraphs 2 to 6 of the above report assume significant and the same are extracted as under:

> *"2. The Petitioner is the complainant in Karunagapally Police Station Crime 768/2019 u/s 376 IPC afainst mr. Sivarajan, State President, Human Rights Justice Vigilance Commission (Global), Thiruvananthapuram and the complaint in Kundara Police Station Crime No. 2652/2017 u/s 376 & 34 IPC*

*against Catholic priest and Edvin Cleetus. Crime no. 768/2019 of Karunagapally Police Station is being investigated. In Crime No. 2652/2019 of Kundata Police Station investigation was completed and final report laid against the accused Edvin Cleetus, the cousin brother of the petitioner.*

*3. The petitioner had lodged complaint before the Hon'ble Chief Minister of Kerala on 01/10/2018 against Lokose and Reji hailing from Anchalumoodu and a acse was being registered in Anchanlummoodu Police Station as Crime No. 1504/2018 u/s 354, 451, 506(i), 509 & 34 IPC and 119(b) of Kerala Police Act. On investigation the case was referred as falsr and final report was submitted before the Hon'ble JFCM 1 Kollam. Later on 18.05.2019 she lodged a complaint before the District Police Chief Kollam. On enquiry it is revealed that monetary transaction existed between the petitioner and accused. The allegations were found false. It is submitted that on 18.05.2019 she lodged a complaint before the District Police Chief, Kollam, against the second and third respondents. The complaint was thoroughly enquired and found false.*

*4. The petitioner against filed two complaints on 06/06/2019 against Mr. Shaji Pillai, a mini lorry driver at Kadavoor and anther one against the Auto drivers at Kadavoor named Lalikuttan, Babu, and his wife Prajitha alleging that the petitioner sexually harassed by the above said petitioners. As part of the enquiry the*

*petitioner has submitted a written statement dated 16.06.2019 that she is not willing to proceed with the above said complaints and no further action is necessary against them. In the result the complaints were disposed at the police station.*

*5. The petitioner has filed complaint raised very same grievance before this respondent alleging that the respondents 2 and 3 forced her to have sexual intercourse with other persons and threatened the petitioner directly and the help of the above said auto drivers and goondas. On enquiry it is revealed that the petitioner wanted to have membership in the oeganisation of the 2nd respondents and the respondents 2 and 3 refused her to provide a membership. Due to this enmity the petitioner had raised these type of complaints against the 2nd and 3rd respondent. On the said findings the complaint was disposed at the police station.*

*6. The petitioner on 04.05.2019 filed a petition against Ambika and Sivarajan in Anchalummoodu Police Station alleged that the respondents forced to sexual intercourse with other people and threaten the petitioner directly and with the help of local auto rikshaw drivers and goondas. The enquiry of the above petition it is revealed that the petitioner want a membership in the human rights organization and the counter petitioner Sivarajan and Ambika refused to give it to the petitioner because of the character of petitioner is not good. Due to this enmity the petitioner falsely filed the above petition*

*against them. Thus the petition disposed."*

11. The pivotal question herein is whether the prosecution allegation as to commission of rape by the petitioner herein is *prima facie* believable? Section 375 of the I.P.C provides that in order to complete an offence of rape, the following sexual acts dealt in (a) to (d) shall be done: (a) penetrates his penis, to any extent, into the vagina, mouth urethra or anus of a woman or makes her to do so with him or any other person; or (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or (d) applies his moth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:-

First :- Against her will.

Secondly:- Without her consent.

Thirdly :- With her consent when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly:- With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly:- With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly:- With or without her consent, when she is under eighteen years of age.

Seventhly:- When she is unable to communicate consent.

12. Explanation 2 to Section 375 of IPC provides that, consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1:- A medical procedure or intervention shall not constitute rape.

Exception 2:- Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

13. Section 90 of IPC deals with consent known to be given under fear or misconception, and it has been stated that a consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing

the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception.

14. In this case it is discernible that the defacto complainant made acquaintance with the accused and Ambika teacher and accepted their offer to be a part of Human Rights Justice Vigilance Council, where the accused was the President. Later she being a part of the organisation, attended certain functions and also she was invited to 2 more functions. The alleged occurrence, according to the defacto complainant, was also when she voluntarily reached the house of the accused and stayed at his house. Even though the defacto complainant alleges sexual molestation at the hands of the accused in between 31.12.2018 and 01.02.2019, she did not disclose the same till 13.05.2019, as already stated. The contents of Annexure A7 extracted herein above would show that the defacto complainant filed complaints against various persons and some crimes also were registered, but the same itself is not a reason to disbelieve this case. However, the defacto complainant, being a social

worker, ought to have raised the complaint of sexual assault committed on her on 31.12.2019 on the very next day or without much delay, if such an occurrence happened or if happened without her consent.

15. In the decision in ***Vineet Kumar & Ors. v. State of U.P & anr.***, reported in [2017 KHC 6274 : AIR 2017 SC 1884 : 2017 (13) SCC 369], the Apex Court held in paragraph 39 that, *inherent power given to the High Court under Section 482 Cr.P.C. is with the purpose and object of advancement of justice. In case solemn process of Court is sought to be abused by a person with some oblique motive, the Court has to thwart the attempt at the very threshold. The Court cannot permit a prosecution to go on if the case falls in one of the Categories as illustratively enumerated by this Court in* ***State of Haryana*** *v.* ***Bhajan Lal,*** [AIR 1960 SC 866]**.** *Judicial process is a solemn proceeding which cannot be allowed to be converted into an instrument of operation or harassment. When there are material to indicate that a criminal proceeding is*

*manifestly attended with mala fide and proceeding is maliciously instituted with an ulterior motive, the High Court will not hesitate in exercise of its jurisdiction under Section 482 Cr.P.C. to quash the proceeding under Category 7 as enumerated in* ***State of Haryana*** *v.* ***Bhajan Lal*** *(supra), which is to the following effect:*

> *"(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."*

16. Similarly, in another decision in ***Mahmood Ali*** *v.* ***State of U.P.*** reported in [2023 KHC 7029 : 2023 KHC OnLine 7029 : 2023 LiveLaw (SC) 613 : 2023 KLT OnLine 1751 : AIR 2023 SC 3709 : AIR OnLine 2023 SC 602 : 2023 CriLJ 3896], the Apex Court while considering the power under Section 482 Cr.P.C, in paragraph 12 held that, '*whenever an accused comes before the Court invoking either the inherent powers under S.482 of the Code of Criminal Procedure or extraordinary*

*jurisdiction under Art.226 of the Constitution to get the FIR or the criminal proceedings quashed essentially on the ground that such proceedings are manifestly frivolous or vexatious or instituted with the ulterior motive for wreaking vengeance, then in such circumstances the Court owes a duty to look into the FIR with care and a little more closely. We say so because once the complainant decides to proceed against the accused with an ulterior motive for wreaking personal vengeance, etc., then he would ensure that the FIR/complaint is very well drafted with all the necessary pleadings. The complainant would ensure that the averments made in the FIR/complaint are such that they disclose the necessary ingredients to constitute the alleged offence. Therefore, it will not be just enough for the Court to look into the averments made in the FIR/complaint alone for the purpose of ascertaining whether the necessary ingredients to constitute the alleged offence are disclosed or not. In frivolous or vexatious proceedings, the Court owes a duty to look into many other attending circumstances emerging from the record of the case*

*over and above the averments and, if need be, with due care and circumspection try to read in between the lines. The Court while exercising its jurisdiction under S.482 of the Cr.P.C. or Art.226 of the Constitution need not restrict itself only to the stage of a case but is empowered to take into account the overall circumstances leading to the initiation / registration of the case as well as the materials collected in the course of investigation. Take for instance the case on hand. Multiple FIRs have been registered over a period of time. It is in the background of such circumstances the registration of multiple FIRs assumes importance, thereby attracting the issue of wreaking vengeance out of private or personal grudge as alleged.'*

17. Therefore, the legal position is clear that quashment of criminal proceedings can be resorted to when the prosecution materials do not constitute materials to attract the offence alleged to be committed. Similarly, the Court owes a duty to look into the other attending circumstances, over and above the averments, to see whether there are materials to indicate that a criminal

proceeding is manifestly attended with *mala fide* intention and instituted maliciously with ulterior motives. Once the said fact is established, the same is a good reason to quash the criminal proceedings.

18. Having gone through the prosecution allegations, it is discernible that the allegation of sexual assault, if any, is true, then the same is a consensual one. Therefore, the quashment prayed at the instance of the petitioner is liable to be allowed.

In the result, this Criminal Miscellaneous Case stands allowed. Annexure A1 and all further proceedings in Crime No.768/2019 of Karunagappally Police Station, shall stand quashed.

*Sd/-*

***A. BADHARUDEEN, JUDGE***

*rtr/*

**APPENDIX OF CRL.MC 5412/2020**

**PETITIONER'S ANNEXURES**

| | |
|---|---|
| **ANNEXURE A1** | **TRUE COPY OF THE FINAL REPORT IN CRIME NO.768/2019 OF KARUNAGAPPALLY POLICE STATION.** |
| **ANNEXURE A2** | **TRUE COPY OF THE F.I.STATEMENT DATED 13.5.2019.** |
| **ANNEXURE A3** | **TRUE COPY OF THE COMPLAINT DATED 29.9.2018 SUBMITTED BEFORE THE CHIEF MINISTER OF KERALA.** |
| **ANNEXURE A4** | **TRUE COPY OF THE COMPLAINT DATED 4.5.2019 SUBMITTED BY THE DEFACTO COMPLAINANT BEFORE THE CIRCLE INSPECTOR, ANCHALUMMOOD POLICE STATION.** |
| **ANNEXURE A5** | **TRUE COPY OF THE F.I.R. DATED 28.5.2019 OF KUNDRA POLICE STATION.** |
| **ANNEXURE A6** | **TRUE COPY OF THE COMPLAINT DATED 4.5.2019 SUBMITTED BY AMBIKA KUMARI BEFORE THE CIRCLE INSPECTOR, ANCHALUMMOOD POLICE STATION.** |
| **ANNEXURE A7** | **TRUE COPY OF THE STATEMENT FILED BY THE INSPECTOR, STATION HOUSE OFFICER, ANCHALUMMOOD POLICE STATION IN WP(C).NO.15956/2019 BEFORE THIS COURT.** |
| **ANNEXURE A8** | **TRUE COPY OF THE ENQUIRY REPORT SUBMITTED BEFORE STATE D.G.P. POLICE HEAD QUARTERS BY VARIOUS HUMAN RIGHT ORGANIZATIONS.** |
| **ANNEXURE A9** | **TRUE COPY OF THE COMPLAINT FILED BY ONE MINUMON NELSON BEFORE THE 2ND RESPONDENT.** |
| **ANNEXURE A10** | **TRUE COPY OF THE ORDER DATED 26.6.2019 GRANTING ANTICIPATORY BAIL TO THE PETITIONER IN B.A.NO.4174/2019 OF THIS COURT.** |