IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE GOPINATH P.

Saturday, the 29th day of January 2022 / 9th Magha, 1943

BAIL APPL. NO. 248 OF 2022

CRIME NO.6/2022 OF CRIME BRANCH POLICE STATION, ERNAKULAM.

PETITIONERS/ACCUSED 1 TO 3

1. **P.GOPALAKRISHNAN ALIAS DILEEP, AGED 53 YEARS, S/O. LATE G.PADMANABHA PILLAI, PADMASAROVARAM, KOTTARAKADAVIL ROAD, ALUVA, ERNAKULAM DISTRICT-683 101.**
2. **P.SIVAKUMAR @ ANOOP, AGED 46 YEARS, S/O. LATE G.PADMANABHA PILLAI, PADMASAROVARAM, VIP LANE, ALUVA -683 101**
3. **T.N.SURAJ, AGED 52 YEARS, S/O. LATE THANKAPPAN NAIR, APARTMENT NO.9E, TOWER 1, DD PLATINUM, KATHIKADAVU, ERNAKULAM-682 017**

RESPONDENT/STATE AND COMPLAINANT

1. **STATE OF KERALA REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM-682 031**
2. **THE DEPUTY SUPERINTENDENT OF POLICE, CRIME BRANCH, ERNAKULAM-683 104**

This Bail application again coming on for orders upon perusing the petition and this Court's order dated 27.01.2022 in BA No. 248/2022 and upon hearing the arguments of M/S B.RAMAN PILLAI (SR).along with SUJESH MENON V.B., PHILIP T.VARGHESE, THOMAS T.VARGHESE, ACHU SUBHA ABRAHAM, V.T.LITHA, K.R.MONISHA, NITYA R., Advocates for the petitioners and the PUBLIC PROSECUTOR for the respondents, the Court passed the following:

p.t.o

GOPINATH P., J.

B.A Nos. 248, 288 & 300 of 2022

Dated this the 29th day of January, 2022

ORDER

I had by order dated 22.1.2022 in the above bail applications granted an interim order, protecting the petitioners from arrest on a specific condition (among others) that the petitioners shall fully co-operate with the investigation. On 28.1.2022, an application numbered as Crl.M.A. No.2 of 2022 was filed in BA No. 248 of 2022, alleging that the petitioners were not cooperating with the investigation. Primarily, it is pointed out that despite demand, certain mobile phones which were being used by the petitioners were not handed over to the investigation team. The prayer in Crl.M.A. No.2 of 2022 is for a direction to the petitioners in these bail applications to forthwith produce the following mobile phones: -

(1) Mobile Phone bearing IMEI No.356723080949446 of Apple Company;

(2) Mobile Phone bearing IMEI No.356728111838724 of Apple Company;

(3) Mobile Phone bearing IMEI No.868409043310506 of VIVO Company;

(4) Mobile Phone bearing IMEI No.352544473256346;

(5) Mobile Phone bearing IMEI No.864644032210833 of Huawei-Honor;

(6) Mobile Phone bearing IMEI No. 868384058791806 of Redmi Company; and

(7) *Mobile Phone bearing IMEI No.863607031095365 of Huawei Company.*

When Crl.M.A. No.2 of 2022 was taken up for consideration yesterday, the learned counsel appearing for the petitioners sought time to place an objection and also for time to argue this matter. In view of the urgency pointed out by the learned Director General of Prosecutions, this matter was directed to be listed today.

2. I have heard Sri.T.A.Shaji, Senior Advocate and Director General of Prosecutions, assisted by Sri.P.Narayanan, Senior Public Prosecutor for the State and Sri.B. Raman Pillai, Senior Advocate appearing for the petitioners in BA Nos. 248/2022, 288/2022 & 300/2022, assisted by Sri.Philip T. Varghese.

3. The learned Senior Counsel for the petitioners would point out that a notice had been issued to the petitioners under Section 91 of the Code of Criminal Procedure (for short, "Cr.P.C."), calling upon them to produce the aforesaid mobile phones. It was submitted with reference to the decision of the Supreme Court in ***State of Gujarat*** *v.* ***Shyamlal Mohanlal Choksi & Another***; AIR 1965 SC 1251 and the decisions of this Court in ***Gopalakrishnan Nayanar & Another*** *v.* ***Sasidharan Nambiar & Another*** **(1996) 1 KLT 83** and ***Kurian*** *v.* ***Joseph & Others***, 2021 (2) KHC 124 that the notice under Section 91 of Cr.P.C. was illegal and unsustainable. It is also suggested that any direction to produce the mobile phones would amount to the violation of the right against self-incrimination guaranteed under Article 20(3) of the Constitution of India. It is submitted that some among the phones have been sent to a forensic expert by the petitioners themselves for analysis and data retrieval. It is submitted that the data so retrieved can be handed over for the purpose of investigation. It is also submitted that the petitioners are facing a mighty Police force in a case where the *de-facto* complainant is himself a part of the very agency which is investigating the alleged offence and that the petitioners have no faith in handing over the phones to the investigating agency. It is submitted that personal information (having no relation

to the case on hand) and privileged communications may also be revealed if the phones are directed to be handed over. It is submitted that the phones had been sent for data retrieval, in order to show the falsity of the allegations now raised against the petitioners and that the phones had been sent for data retrieval even before the present case was registered.

4. The learned Director General of Prosecutions vehemently submits that there is no question of violation of Article 20(3) of the Constitution of India as the direction to produce a document or a thing does not amount to self-incrimination. It is submitted that the investigating agency has every power to ask for the production of the mobile phones in question as the data contained in the same has to be verified for the purpose of investigation. It is further submitted that the Karnataka High Court had recently considered this issue with reference to all the earlier judgments of the Supreme Court in ***Virendra Khanna v. State of Karnataka and Others***, 2021 SCC Online Karnataka 5032.

5. Having considered the rival submissions, I am of the view that the issue raised is no longer *res integra* in the light of the law laid down in ***State of Bombay*** *v.* ***Kathi Kalu Oghad,*** AIR 1962 SC 1809. In that case two sets of appeals were considered by the Supreme Court. In one, namely Criminal Appeal 146 of 1958 the question was whether the obtaining of specimen handwritings from the accused to prove the case against him would amount to self-incrimination while in the other appeals namely Criminal Appeal Nos. 110 & 111 of 1958, the question was whether the taking of

impressions of palms and fingers of the accused for comparison with images of palms and fingers retrieved from a shop that was burgled would amount to self-incrimination. The issue was considered with reference to Article 20(3) of the Constitution of India. It would not be out of place to mention that ***Oghad (supra)*** was decided by a bench of 11 Judges, particularly to re-examine some of the propositions laid down in ***M.P Sharma v. Satish Chandra***, AIR 1954 SC 300. To the extent it is relevant, it was held: -

> *"(1) An accused person cannot be said to have been compelled to be a witness against himself simply because he made a statement while in police custody, without anything more. In other words, the mere fact of being in police custody at the time when the statement in question was made would not, by itself, as a proposition of law, lend itself to the inference that the accused was compelled to make the statement, though that fact, in conjunction with other circumstances disclosed in evidence in a particular case, would be a relevant consideration in an enquiry whether or not the accused person had been compelled to make the impugned statement.*
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> *(2) The mere questioning of an accused person by a police officer, resulting in a voluntary statement, which may ultimately turn out to be incriminatory, is not "compulsion".*
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> *(3) "To be a witness" is not equivalent to "furnishing evidence" in its widest significance; that is to say, as including not merely making of oral or written statements but also production of documents or giving materials which may be relevant at a trial to determine the guilt or innocence of the accused.*
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> *(4) Giving thumb impressions or impressions of foot or palm or fingers or specimen writings or showing parts of the body by way of identification are not included in the expression "to be a witness".*
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> *(5) "To be a witness" means imparting knowledge in respect of relevant facts by an oral statement or a statement in writing, made or given in court or otherwise.*
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> *(6) "To be a witness" in its ordinary grammatical sense means giving oral testimony in court. Case law has gone beyond this strict literal*

> *interpretation of the expression which may now bear a wider meaning, namely, bearing testimony in court or out of court by a person accused of an offence, orally or in writing.*
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> *(7) To bring the statement in question within the prohibition of Article 20(3), the person accused must have stood in the character of an accused person at the time he made the statement. It is not enough that he should become an accused, any time after the statement has been made."*

Oghad (supra) was considered and relied on by Ashok Bhushan J. in ***K.S. Puttaswamy (Aadhaar-5J.) v. Union of India*****, (2019) 1 SCC 1** to hold that Section 33 of the Aadhaar Act was constitutionally valid. It has also been relied upon and followed by a three-Judge Bench in ***Ritesh Sinha v. State of U.P.,*** **(2019) 8 SCC 1** in considering the question as to whether the giving of a voice sample would amount to self-incrimination under Article 20(3) of the Constitution.

6. The High Court of Karnataka in ***Virendra Khanna (supra)*** considered the issue both in the context of Article 20(3) of the Constitution and also in the context of the Right to Privacy and held:-

> ***"Would providing a password, passcode or Biometrics amount to self-incrimination or testimonial compulsion?***
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> *As regards the contention that providing of the password/pass code will amount to testimonial compulsion, I am of the considered opinion that there is no testimony which is given by the accused by providing the said password, passcode or biometrics by which the document is being accessed by the Investigating officer.*
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> *The XI Judge Bench of the Apex Court in Kathi Kalu Oghad's case has categorically held that providing of a thumb impression or impression of the palm or foot or fingers or specimen in writing or exposing a part of the body of an accused person for the purpose of identification would not amount to testimonial compulsion. Mere providing of an access of to*

smartphone or e-mail account would not amount to being a witness, the information that is accessed by the Investigating officer on the smartphone and or the e-mail account being only access; to the data and/or documents, it is for the Investigating officer to prove and establish the same in a Court of law by following the applicable Rules of evidence.

Merely because any document is present or available on the smartphone and or the e-mail account would not by itself establish the guilt or innocence of an accused. Both the prosecution, as also the accused/defence would be required to prove the said document or data by other evidence also.

If the submission of Mr. Hasmath Pasha, learned Senior counsel would be accepted, the same would result in a chaotic situation:

No blood samples can be taken;

no sample for DNA analysis could be taken;

no handwriting samples can be taken;

no other body sample for the purpose of DNA analysis could be taken

No search of a house or office could be undertaken.

The data of a laptop or computer or server cannot be accessed by the Investigating officer.

Offences like cyber crime could never be investigated.

Offences like pornography, child pornography which are more often than not, on the internet, could not be investigated.

A direction to provide a password, passcode, biometrics would not amount to testimonial compulsion. It is only in the nature of a direction to produce a document. Mere providing access to a smartphone or e-mail account would not amount to self-incrimination since it is for the investigating agency to prove its allegation by cogent material evidence.

The data available on a smartphone or e-mail account would also have to be proved by the investigating agency in accordance with Law. Mere providing of password, passcode or biometrics would not amount to answering any question put forward by the Investigating Officer, and as such, it would not amount to a violation of Section 151(2) of the Cr.P.C.

As contended by Sri. Veranna Tigadi, learned counsel providing of the password, passcode, pin biometrics is akin to finger printing and/or taking imprints of the shoes, soles and or taking sample of the clothes, biological samples, chemical samples, etc, same cannot amount to forced testimony on part of the accused. On the examination of the data in the telephone/mobile and or on the computer, etc, prosecution would have to prove the same by cogent evidence.

By providing of password, passcode or biometrics, there is no oral statement or a written statement being made by the accused like the Petitioner herein, therefore it can not be said to be testimonial compulsion.

Would providing of password, passcode or Biometrics violate the right to privacy of a person providing the said password, passcode or Biometrics?

Once the investigating agency has an access to a electronic equipment more particularly smart phones and/or laptops, the Investigating Officer has a free access to all data not only on the said equipment but also any cloud service that may be connected to the said equipment, which could include personal details, financial transactions, privileged communications and the like

The rules which are applicable to physical document where a particular document could be classified as a privileged communication and/or strictly private and confidential cannot apply to the data which is stored on a smartphone or any other electronic equipment since once an investigating officer has an access to the said smartphone, electronic equipment or e-mail account, he would have complete access to the data.

Such data though may not be incriminatory, may be very private or secret to the person or such data could incriminate the said person in any particular offence.

The use of such data during the course of the investigation would not amount to a violation of the right to privacy and would come within the exceptions carved out in Justice Puttaswamy's case supra, however, the disclosure, making public or otherwise in court proceedings would have to

> *be determined by the concerned judge by passing a judicial order. In no case could such details or data be provided by the investigating officer to any third party during the course of investigation without the written permission of the court seized of the matter. The responsibility of safeguarding the information or data which could impinge on the privacy of the person will always be that of the investigating officer, if the same is found to have been furnished to any third party the investigation officer would be proceeded against for dereliction of duty or such other delinquency as provided."*

7. In exercise of the power under Section 79-A, the Central Government has notified certain agencies as *'Examiner of Electronic Evidence'.* In my view, only such agencies can be allowed to conduct a forensic analysis of a mobile phone and the petitioners cannot entrust the phones to any person of their choice to examine or extract data from the phones in question. Following the introduction of Section 79-A, the **Indian Evidence Act, 1872** has also been amended and Section 45A has been inserted making the opinion of the '*Examiner of Electronic Evidence'* a relevant fact. Section 79-A of the **Information Technology Act, 2000** reads as follows:-

> *"Central Government to notify Examiner of Electronic Evidence. -The Central Government may, for the purposes of providing expert opinion on electronic form evidence before any court or other authority specify, by notification in the Official Gazette, any Department, body or agency of the Central Government or a State Government as an Examiner of Electronic Evidence.*
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> *Explanation. -For the purposes of this section, "electronic form evidence" means any information of probative value that is either stored or transmitted in electronic form and includes computer evidence, digital audio, digital video, cell phones, digital fax machines."*

8. Bound, as I am, by the law laid down on ***Oghad (supra)*** and being in respectful agreement with the view taken by *Suraj Govindraj.J* in ***Virendra Khanna***

(supra) and also having regard to the provisions of Section 45-A of the Evidence Act and Section 79A of the Information Technology Act (for short, "the IT Act"), I hold that the prosecution has every right to seek that the accused hand over the mobile phones in question for the purpose of forensic examination by an agency identified by the Central Government as '*Examiner of Electronic Evidence*' under Section 79-A of the Information Technology Act, 2000.

9. At this point, the learned counsel appearing for the petitioners would submit that in respect of the phone mentioned as Sl. No.(4) above, bearing IMEI No.352544473256346, the make of the phone in question is not indicated. It is submitted that the petitioners are unable to identify the phone with the aforesaid IMEI number alone.

10. Taking into account the submission of the learned counsel for the petitioners, there will be a direction that the mobile phones mentioned as Sl.Nos. (1), (2), (3), (5), (6) & (7) above shall be produced in a sealed box before the Registrar General of this Court by 10.15 am on 31.01.2022. The Learned Senior Public Prosecutor shall get instructions from the investigating officer regarding the phone with IMEI No.352544473256346.

Post these matters at 1.45 P.M on 31.01.2022.

Sd/-
GOPINATH P.
JUDGE

bka/29.01.2022