"C.R."

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE ASHOK MENON

TUESDAY, THE 30TH DAY OF JUNE 2020 / 9TH ASHADHA, 1942

Crl.MC.No.1797 OF 2017

AGAINST THE ORDER/JUDGMENT IN CRA 299/2015 DATED 29-08-2016 OF II ADDITIONAL DISTRICT COURT,TRIVANDRUM

AGAINST THE ORDER/JUDGMENT IN CC 1493/2013 OF JUDICIAL MAGISTRATE OF FIRST CLASS -I,NEDUMANGAD

CRIME NO.193/2013 OF Valiyamala Police Station, Thiruvananthapuram

PETITIONER/2ND ACCUSED:

SUNIL RAJ, CORRECTED AS SUSIL RAJ*
AGED 25 YEARS, S/O.PREMARAJAN,
MYLAMOODU HOUSE, KARIKKANAD, NEDUMANGAD,
TRIVANDRUM.

*THE NAME OF THE PETITIONER TYPED AS "SUNIL RAJ" IN THE CAUSE TITLE OF THE MEMORANDUM OF CRL.M.C., SYNOPSIS, INDEX AND PETITION FOR INTERIM DIRECTION AND ON THE DOCKET IS CORRECTED AS "SUSIL RAJ" AS PER ORDER DATED 12.11.2019 IN CRL.M.A.NO.1/2019 IN CRL.M.C.NO.1797/2017.

BY ADVS.
SRI.V.T.RAGHUNATH
SMT.C.V.RAJALAKSHMI

RESPONDENTS/STATE & COMPLAINANT:

1 GOPAN
S/O.MANUAL,
MYLAMOODU HOUSE, KARIKKANAD,
NEDUMANGAD, TRIVANDRUM.

2 STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA.

OTHER PRESENT:

SRI.C.S.HRITHWIK, SR PP

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 30.01.2020, THE COURT ON 30.06.2020 PASSED THE FOLLOWING:

"C.R."

O R D E R

Dated this the 30th day of June 2020

The petitioner is the 2nd accused in Crime No.193/2013 of Valiyamala Police Station (Annexure-2), a case which was registered on 16.04.2013. The petitioner's father was the 1st accused. After completing the investigation, Annexure-4 final report was filed as against the 1st accused alone, because the petitioner was at that time reported to be absconding. Judicial First Class Magistrate Court-I, Nedumangad took cognizance of the case against the 1st accused alone as C.C.No.1493/2013 for having allegedly committed the offences punishable under Sections 341, 323, 324 and 427 read with Section 34 of I.P.C. and under Section 27 of the Arms Act. In the above-mentioned final report, the investigating officer had mentioned that the 2nd accused was absconding with the weapon, which could not be recovered, a separate final report against him would be filed soon after he is apprehended. However, the petitioner was never

arrested and the final report against him is yet to be filed.

2. The trial against the 1st accused proceeded before the Judicial First Class Magistrate Court-I, Nedumangad and vide judgment dated 22.09.2015 at Annexure-7 the trial court found him guilty of committing the offences punishable under Sections 323, 324 and 341 of I.P.C.; while acquitting him for rest of the offence in the charge sheet.

3. The convicted 1st accused challenged Annexure-7 judgment by filing Crl.Appeal No.299/2015 before the Additional Sessions Court-II, Thiruvananthapuram. The appeal was allowed, the conviction and sentence was set aside and the appellant/1st accused was acquitted vide Annexure-8 judgment.

4. The petitioner has filed this Crl.M.C. under Section 482 of Cr.P.C. seeking to quash Crime No.193/2013 of Valiyamala Police Station as against him. He would contend that the 1st respondent/defacto complainant, who is his neighbour, pestered his mother often and when his father questioned him about the

indecent behaviour, an altercation ensued. The petitioner's father even gave a statement in this regard to the police as Annexure-1. In fact, it was the 1st respondent, who had assaulted the petitioner's father and not as alleged in the crime. The 1st respondent's brother-in-law was then working in the office of the District Police Chief and by exerting his influence, the petitioner and his father were falsely implicated in the crime accusing them of assaulting the defacto complainant. The falsity of the allegations is revealed by the fact that initially Section 326 of I.P.C. was incorporated, though Annexure-3 wound certificate did not reveal any grievous hurt. Because of this false allegation made initially, the 1st accused had to undergo the humiliation of being incarcerated in judicial custody. No sooner did the 1st accused get released on bail, the offence under Section 326 of I.P.C. was deleted by the investigating officer. This act would further substantiate the allegation that the crime was registered with ulterior motive. In the meanwhile, the petitioner had secured a job abroad.

The 1st respondent had deliberately implicated the petitioner with *mala fide* intention to spoil his chances of going abroad. Annexure-8 judgment of the appeal court has discussed about all these infirmities in the prosecution case in great detail. Annexures 5 & 6 are the copies of the depositions of the witnesses examined in the trial indicating that they had turned hostile. The conviction of the 1st accused by the learned Magistrate was based on the sole uncorroborated testimony of the 1st respondent. The appeal court has disbelieved the testimony of the 1st respondent and has also pointed out the infirmities in the investigation in its judgment.

5. It is the contention of the petitioner that subjecting the petitioner to trial afresh on the basis of the flawed F.I.R. and investigation is sheer wastage of judicial time and an exercise in futility. A repeat of the evidence that is adduced against the 1st accused would only lead to acquittal of the petitioner too.

6. Yet another contention raised by the petitioner is that the filing of the final report under Section

173(2) of Cr.P.C. in a crime would result in closing of the proceedings against all persons arrayed as accused and that can only be one final report in a criminal case. Despite the fact that the petitioner was absconding, he should have been arrayed as an accused in the final report, which the investigating officer failed to do. The investigating officer cannot reserve his right to further investigate a crime against the petitioner alone and file a second final report at a later stage. It is also contended that the appeal judgment at Annexure-8 has now become final and unchallenged and the findings therein would be applicable in the case against the petitioner as well.

7. It is submitted in the petition that the prosecution could have invoked the provisions under Section 319 of Cr.P.C. to proceed against the petitioner even when the trial was pending. Further investigation at this belated stage with deliberate intention to nullify the effect of the appeal judgment cannot be permitted; states the petitioner.

8. Under the circumstances, the petitioner seeks to quash the F.I.R. in Crime No.193/2013 of Veliyamala Police Station, as far as it pertains to him and requests this Court to declare that fresh investigation in the aforesaid crime is not permissible.

9. Heard Sri.V.T.Raghunath, the learned Counsel appearing for the petitioner and Sri.C.S.Hrithwik, Senior Public Prosecutor for the State.

10. The points that arise for consideration can be encapsulated as thus:

(1) Was the investigating officer justified in deferring the final report as against the 2nd accused ?

(2) Is there any embargo in proceeding with the investigation as against the petitioner, who was absconding when the final report was filed against the 1st accused ?

(3) Can the petitioner take the advantage of the acquittal of the 1st accused by the appellate court vide Annexure 8 judgment and get the F.I.R. against him quashed ?

11. Advocate Sri.V.T.Raghunath vehemently argued that the police officer investigating a case cannot take recourse to keep the investigation against the 2nd accused pending for the reason that he is absconding. According to the learned Counsel, the charge sheet can be filed even against absconding accused and in such cases procedure to be followed are under Sections 82 and 83 and Section 299 of Cr.P.C. The learned Counsel submits that during the trial against the 1st accused, if the evidence revealed the involvement of the petitioner also; the Court should have proceeded against him under Section 319 of Cr.P.C., which was not done in this case.

12. *Per contra*, Sri.C.S.Hrithwik, learned Senior Public Prosecutor submits that there is no embargo in filing a second final report against the absconding accused; because Section 173(8) of Cr.P.C. provides further investigation at any stage and in the instant case the weapon used by the 2nd accused/petitioner was yet to be recovered, without which the investigating officer could not have file a final report against him.

13. It is true that trial court is at liberty to exercise its power under Section 319 of Cr.P.C. and to proceed against the persons who are not arrayed as accused, but appear to be guilty for the offence for which the accused before the Court are being tried. However, the power of the Court under Section 319 of Cr.P.C. does not create an embargo on the powers of an investigating officer to invoke the provisions under Section 173(8) of Cr.P.C. to investigate further into the matter – See ***Periasamy P.G. v. Inspector of Police, Pennagaram Police Station, 1984 Crl.L.J 239***.

14. Section 173 of Cr.P.C. mandates the investigating officer to complete the investigation as early as possible. Section 167 of the Code also stipulates the time within which the investigation is to be completed by the investigating officer. Failing to do so would entail in the accused being released on statutory bail as provided under Section 167(2) of Cr.P.C. In case there are more than one accused and some of them are absconding, the investigating officer is not expected to wait till the absconding accused is

arrested so as to proceed with further investigation with regard to his involvement. With the available evidence on record, he is at liberty to file a final report against the accused, who have already been apprehended. As and when the absconding accused is available, a final report can be filed under Section 173(8) of Cr.P.C. as against him also. The case of the prosecution in the instant case is that weapon allegedly used by the 2nd accused was not recovered and it could not have been done so in his absence. It is only after the arrest of the 2nd accused that the provisions under Section 27 of the Evidence Act could come into play and on the basis of a statement that could be recorded whilst in custody the recovery could be made. The final report filed by the investigating officer against the 1st accused in this case makes it clear that the weapon involved in the commission of the offence was yet to be recovered from the 2nd accused, who was absconding with the weapon. Nothing precludes the investigating officer from reserving his right to arrest the 2nd accused as and when he is available and

then proceed to recover the weapon and file a final report as against him.

15. The basic emphasis of Sri.V.T.Raghunath was on the completion of investigation envisaged by sub-sections (1) and (2) of Section 173 of Cr.P.C. It is contended that completion of investigation and filing of final report even against one of the accused under the aforesaid provisions would mean closing of the said chapter of investigation and, therefore, further investigation envisaged under sub-section (8) of Section 173 of Cr.P.C. must necessarily be termed as a reopening of the same; permissible only upon altogether new and fresh materials, which were not earlier available, being discovered.

16. It is not possible to accede or subscribe to this extreme stand. Where there are more than one accused, it is perfectly possible that the investigation may be totally complete against one accused; whilst it is wholly in the embryo or incomplete against an absconding or unnamed or untraced accused. In such a situation, it is indeed the mandate

of law under Section 173, Cr.P.C. to complete the investigation without delay and as soon as it is complete, to file a police report before the Magistrate empowered to take cognizance. If latter investigation is completed against the absconding, unnamed or untraced accused and a police report is filed against him, it in no way involves any reopening of the investigation against the accused person or persons with regard to whom the police had already filed a report. To bring in the theory of reopening in this context is thus unwarranted. Yet again, the law does not envisage a police report once filed to be all and end all of the matter. There is no express and not even an implied provision to file a supplementary or additional police report to an earlier one. Indeed, the use of the terminology of "reopening of investigation" in the context of the expressed provisions under sub-section (8) of Section 173 of Cr.P.C. is some what unhappy. The Statute does not employ any such terminology of reopening investigation thereunder. It expressly talks about further investigation or of further

report/reports. Furtherance it is not reopening. Consequently, such police report under Section 173(8) of Cr.P.C. may be more aptly classified as further police reports/additional/supplemental or revised police reports. As mentioned earlier, they may not imply any semblance of any reopening of the completed investigation against some of the accused at all. However, even carrying the argument to the logical extreme, if Section 173(8) of Cr.P.C. may involve any reopening of the investigation, then the same is not only permissible; but is expressly sanctified to sub-section (8) of Section 173 of Cr.P.C. The law in terms permits reopening of investigation, if necessary. There is no inflexible conclusiveness or finality about the same – See ***Shankar Ram v. State, 1986 Crl.L.J. 707 (FB) Patna***.

17. In ***Dinesh Dalmia v. C.B.I, AIR 2008 SC 78,*** it was held thus:

> *"15. A charge sheet is a final report within the meaning of sub-section (2) of S.173 of the Code. It is filed so as to enable the Court concerned to apply its mind as to whether cognizance of the offence thereupon should be taken or not. The report is ordinarily filed in the form prescribed therefor. One of the requirements for submission of a police report is whether any offence appears to have been*

> *committed and, if so, by whom. In some cases, the accused having not been arrested, the investigation against him may not be complete. There may not be sufficient material for arriving at a decision that the absconding accused is also a person by whom the offence appears to have been committed. If the investigating officer finds sufficient evidence even against such an accused who had been absconding, in our opinion, law does not require that filing of the charge sheet must await the arrest of the accused.*
>
> *16. Indisputably, the power of the investigating officer to make a prayer for making further investigation in terms of sub-section (8) of S.173 is not taken away only because a charge sheet under sub-section (2) thereof has been filed. A further investigation is permissible even if order of cognizance of offence has been taken by the Magistrate."*

18. Viewed in the proper perspective, Section 173 of the Code creates no embargo at all in filing of more than one charge sheets or final reports on the basis of the same investigation. Neither is there any provisions empowering an investigating officer to file a revised charge sheet nor is there any prohibition in doing so on the basis of the same materials. What sub-section (2)(i) of Section 173 of Cr.P.C. states that soon after completion of the investigation, the officer-in-charge of the Police Station shall forward to the jurisdictional Magistrate, empowered to take cognizance of the offence, a report in the form prescribed by the State Government. Section 173(8) of Cr.P.C. was added

to the Code in order to clarify merely because an investigating officer has filed a police report before the Magistrate, he will not stand precluded from making further investigation in the case and submitting a final report or reports to the Magistrate regarding the additional evidence gathered by him in the further investigation. This power would include adding of witness, correcting of errors or to set right certain mistakes or omissions in the first report. Otherwise, the interests of the State, which in other words would mean the public interest, would suffer ***Periasamy*** (*supra*).

19. In view of the discussions made above, the arguments advanced by Sri.V.T.Raghunath, the learned Counsel appearing for the petitioner, cannot be accepted with regard to the point that no further report can be filed as regards the petitioner, once the final report has already been filed and cognizance was taken by the Magistrate against the 1st accused.

20. The next point urged by the learned Counsel for the petitioner is that due to the acquittal of the 1st

accused by the appellate Court vide Annexure-8 judgment, the substratum of the prosecution case has been lost and the prosecution cannot now proceed against the petitioner on the very same investigation made against the 1st accused. In ***Balakrishna Pillai v. State of Kerala, 1971 KLT SN 3,*** V.R.Krishna Iyer J., as he then was, held that the contention that as the Court had in a connected case evaluated the credibility of testimony of some witness and disbelieved the same, the view should have been taken by the Magistrate who tried the present case about the witnesses, cannot be sustained. It is found that out of the same facts and virtually the testimony of the same witnesses imputing the same criminal conduct of two persons, one should be acquitted and the other convicted. In ***Chellappan Pillai v. State of Kerala, 1992 (1) KLT 609***, a Division Bench of this Court held that in a case where the co-accused was acquitted in a prior trial, it does not mean that the absconding accused, who is subsequently tried, is also entitled to be acquitted. When the absconding accused is apprehended and tried later, the

Court has necessarily to consider legally available evidence and cannot adopt the easy course of acquittal on the premise that the co-accused was acquitted. As long as no inconsistencies or contradictions or infirmities were brought out to discredit the witnesses, merely because the co-accused was acquitted in a prior trial, the case against the absconding accused cannot be thrown out at the threshold. The case of the absconding accused should be tried and decided on its merits unless the evidence was specifically recorded under Section 299 of Cr.P.C. Merely because the co-accused was acquitted, the Court cannot ignore the evidence against the absconding accused and jump to the same conclusion as in the case of the co-accused.

21. In ***Megh Singh v. State of Punjab, (2004) SCC (Crl.) 58,*** the Apex Court held that the acquittal of the co-accused does not by itself entitle the other accused in the same case to acquittal as a single significant detail may alter the entire aspect. It may be noticed that the co-accused was acquitted in the

same trial still, it was held that that by itself is not a reason to acquit the other accused. In ***Gorle S.Naidu v. State of A.P., AIR 2004 SC 1169*** referring to Section 3 of the Evidence Act and credibility of evidence, it was held that mere acquittal of large number of co-accused does not *per se* entitle others to acquittal. The Court has the duty to separate grain from chaff.

22. A Full Bench of this Court, in ***Moosa v. Sub Inspector of Police, 2006 KHC 184: 2006(1) KLT 552***, after considering all the precedents referred to above concluded thus:

> *"In the light of the above discussions, we may summarise the legal position as follows:*
>
> *(i) The inherent powers of the High Court reserved and recognised under S.482 of the Code of Criminal Procedure are sweeping and awesome; but such powers can be invoked only (a) to give effect to any order passed under the Code of Criminal Procedure or (b) to prevent abuse of process of any court or (c) otherwise to secure the ends of justice. Such powers may have to be exercised in an appropriate case to render justice even beyond the law.*
>
> *(ii) Considering the nature, width and amplitude of the powers, it would be unnecessary, inexpedient and imprudent to prescribe or stipulate any straight jacket formula to identify cases where such powers can or need not be invoked.*
>
> *(iii) But such powers can be invoked only in exceptional and rare cases and cannot be invoked as a matter of course. Where the Code provides methods and*

procedures to deal with the given situation, in the absence of exceptional and compelling reasons, invocation of the powers under S.482 of the Code of Criminal Procedure is not necessary or permissible.

(iv) The fact that an accused can seek discharge/dropping of proceedings/acquittal under the relevant provisions of the Code in the normal course would certainly be a justifiable reason, in the absence of exceptional and compelling reasons, for the High Court not invoking its extraordinary powers under S.482 Cr.P.C.

(v) In a trial against the co accused the prosecution is not called upon, nor is it expected to adduce evidence against the absconding co accused. In such trial the prosecution cannot be held to have the opportunity or obligation to adduce all evidence against the absconding co accused. The fact that the testimony of a witness was not accepted or acted upon in the trial against the co accused is no reason to assume that he shall not tender incriminating evidence or that his evidence will not be accepted in such later trial.

(vi) On the basis of materials placed before the High Court in proceedings under S.482 of the Code of Criminal Procedure (which materials can be placed before the court in appropriate proceedings before the subordinate courts) such extraordinary inherent powers under S.482 of the Code of Criminal Procedure cannot normally be invoked, unless such materials are of an unimpeachable nature which can be translated into legal evidence in the course of trial.

(vii) The judgment of acquittal of a co accused in a criminal trial is not admissible under Ss.40 to 43 of the Evidence Act to bar the subsequent trial of the absconding co accused and cannot hence be reckoned as a relevant document while considering the prayer to quash the proceedings under S.482 Cr.P.C. Such judgments will be admissible only to show as to who were the parties in the earlier proceedings or the factum of acquittal.

(viii) While considering the prayer for invocation of the extraordinary inherent jurisdiction to serve the ends of justice, it is perfectly permissible for the court to consider the bona fides – the cleanliness of the hands of the seeker. If he is a fugitive from justice having absconded or jumped bail without sufficient reason or having waited for

manipulation of hostility of witnesses, such improper conduct would certainly be a justifiable reason for the court to refuse to invoke its powers under S.482 of the Code of Criminal Procedure.

(ix)The fact that the co accused have secured acquittal in the trial against them in the absence of absconding co accused cannot by itself be reckoned as a relevant circumstance while considering invocation of the powers under S.482 of the Code of Criminal Procedure.

(x) A judgment not inter parties cannot justify the invocation of the doctrine of issue estoppel under the Indian law at present.

(xi) Conscious of the above general principles, the High Court has to consider in each case whether the powers under S.482 of the Code of Criminal Procedure deserve to be invoked. Judicial wisdom, sagacity, sobriety and circumspection have to be pressed into service to identify that rare and exceptional case where invocation of the extraordinary inherent jurisdiction is warranted to bring about premature termination of proceedings subject of course to the general principles narrated above."

23. Coming to the facts of the present case, it is seen that the 1st accused to face a trial before the Court of the Judicial First Class Magistrate Court Nedumangad in C.C.No.1493/2013, was found guilty of committing offences punishable under Sections 341, 323 and 324 read with Section 34 I.P.C. He was sentenced to undergo rigorous imprisonment for three months and for one year respectively under Sections 323 and 324 of I.P.C; and to pay a fine of ₹ 500/- with a default sentence of 15 days simple imprisonment, vide judgment

at Annexure 7. The injured de facto complainant, as PW1, testified in support of the prosecution case. However, the two persons cited as eye-witnesses, turned hostile to the prosecution and did not support the testimony of PW1. The copies of the testimonies of those witnesses are at Annexures 5 and 6. Nevertheless, the learned Magistrate found that there was sufficient evidence to find the 1st accused guilty, and therefore, convicted him. In the appeal filed by the 1st accused as Crl.Appeal No.299/2015 to the learned Sessions Judge vide judgment at Annexure 8 reversed the finding of the Magistrate and acquitted the accused. In the appellant judgment, it was observed that the testimony of PW1 does not inspire confidence. Several discrepancies have been pointed out, and the lack of corroboration also was taken as infirmity in the prosecution case.

24. Relying on the precedent of the Full Bench of this Court in ***Moosa's case***, I find that the appreciation of evidence in the case against the 1st accused cannot be considered favourably to quash the proceedings against the petitioner, who is a 2nd

accused. It has to be borne in mind that the investigation is not yet complete against the petitioner and the final report has not yet been filed. There is possibility of further evidence being gathered against the petitioner. The absconding 2nd accused cannot take advantage of the acquittal of the 1st accused, who has faced a trial before the Court of the Magistrate and was also convicted in the first instance.

For the foregoing reasons, I find that the petitioner is not entitled to any relief in this Crl.M.C. and the petition is only to be dismissed.

Sd/-

dkr

ASHOK MENON

JUDGE

APPENDIX

PETITIONER'S/S ANNEXURES:

ANNEXURE-1	**COPY OF THE STATEMENT BY PREMRAJAN**
ANNEXURE-2	**COPY OF FIR DT. 16/4/13 IN CRIME NO.193/13 OF VALIYAMALA POLICE STATION**
ANNEXURE-3	**COPY OF THE WOUND CERTIFICATE**
ANNEXURE-4	**COPY OF FINAL REPORT IN CRIME NO.193/13 OF VALIYAMALA POLICE STATION**
ANNEXURE-5	**DEPOSITION OF SREEKUMAR (PW2) IN CC 1493/2013 OF JFCM-I, NEDUMANGAD**
ANNEXURE-6	**DEPOSITION OF T.JOHN (PW3)IN CC 1493/2013 OF JFCM-I NEDUMANGAD**
ANNEXURE-7	**COPY OF THE JUDGMENT IN CC 1493/2013 DT. 22/9/2015**
ANNEXURE-8	**COPY OF THE JUDGMENT IN CRL.APPEAL 299/2015 DT. 29/8/2016**