



2023:KER:36955

IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT
THE HONOURABLE MR. JUSTICE RAJA VIJAYARAGHAVAN V
FRIDAY, THE 16TH DAY OF JUNE 2023 / 26TH JYAISHTA, 1945

CRL.MC NO. 1611 OF 2021
AGAINST THE ORDER/JUDGMENT IN CC 1806/2015 OF JMFC,
KALAMASSERY (TEMPORARY)

PETITIONER/S:

SMRITHY GEORGE
AGED 39 YEARS
D/O. K.O. GEORGE,
KATTUPURATH HOUSE, VYTILLA P.O., KOCHI,
ERNAKULAM, KERALA, INDIA-682019.

BY ADVS.
SHERRY J. THOMAS
SRI.JOEMON ANTONY

RESPONDENT/S:

- 1 STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, KOCHI-682031.
- 2 M/S. SAI SERVICE PVT. LTD.,
MARUTI TRUE VALUE,
REPRESENTED BY ITS POWER OF ATTORNEY HOLDER AND GENERAL
MANAGER, SUNIL
(AGE AND FATHER'S NAME OF THE 2ND RESPONDENT IS NOT KNOWN
TO THIS PETITIONER) NH-47, PATHADIPALAM,
EDAPPALLY, KOCHI-682024.
- 3 SHIJU K.C.,
AGED 35 YEARS
S/O. K.A.CHANDRAN,
KUNNUPARAMBIL HOUSE, OLINKADAVU PO,
MANGALAM DAM, PALAKKAD, KERALA-678706.

BY ADVS.
SRI.V.SANTHARAM
SMT.REVATHI A.K.



SRI. M.P.PRASANTH, PP

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON
16.06.2023, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

**"CR"****ORDER**

The petitioner is the first accused in CC No. 1806/2015 on the file of the Judicial Magistrate of the First Class, Kalamassery. She is facing prosecution for having committed offences punishable under Sections 408, 418, 427, 464, 477A, and 120B, read with Section 34 of the Indian Penal Code.

2. The above case arose from a complaint filed by M/s. Sai Service Pvt. Ltd. before the learned Magistrate, which was forwarded to the police under Section 156(3) of the Code of Criminal Procedure ("Code" for brevity). After completing the investigation, the final report was filed.

3. The prosecution alleges that the petitioner, while working as an employee in "Maruti True Value," a subsidiary unit under Sai Service Pvt. Ltd., of which the de facto complainant was the General Manager, entered into a criminal conspiracy during the period from November 2013 to October 2014 and thereafter manipulated and fabricated records to gain incentives.

4. The learned counsel appearing for the petitioner submits that the charge was framed, and summons was issued to CW1. While the



cross-examination of CW1 was going on, the private counsel engaged by the de facto complainant filed an application requesting permission from the learned Magistrate to produce certain documents. These documents were not seized by the police and were not produced along with the final report. Immediately thereafter, the Assistant Public Prosecutor filed Annexure A4 application wherein it was stated that the documents produced along with the application were not produced before the Investigating Officer at the time of investigation due to oversight, and its production is essential for the just decision of the case. To the said application, a detailed objection was filed by the counsel appearing for the accused. The learned Magistrate, by Annexure-A6 order, allowed the application holding that the veracity of the document or whether delayed production would be prejudicial to the accused is a matter of evidence, and by holding so, the application was allowed. The said order is under challenge.

5. Sri. Sherry J. Thomas, the learned counsel appearing for the petitioner, submitted that the learned Magistrate erred in allowing the application. According to the learned counsel, it is the admitted case of the prosecution that the documents proposed to be brought in evidence which includes incentive sheets, appointment letters, employment certificates, and



delivery registers, were neither produced nor seized by the Police during the course of the investigation. Those records are sought to be brought in after the commencement of the recording of the prosecution evidence. It is urged that those documents are concocted pieces of evidence brought in at a belated stage with a view to bringing in concocted evidence against the accused. To substantiate that the order is illegal, reliance is placed on the law laid down in **Anand Kumar V State of Madhya Pradesh**¹ and **Sharadbhai Jivanlal Vaniya v State of Gujarat**². It is submitted that Section 173(5) of the Code is clear and specific that the Investigating Officer is bound to forward along with the final report all documents or relevant extracts thereof on which the prosecution proposes to rely and documents which were not seized during the investigation and do not form part of the report cannot be produced in this fashion.

6. Sri. Lakshmeesh, the learned counsel appearing for the party respondent, submitted that though no specific provision was stated in the application filed before the learned Magistrate, there are various provisions in the Code enabling the Court to permit the same. It is submitted that an application could have been entertained under Section 294 of the Code by the

¹ (2009) 3 SCC 799

² [2011 (14) SCC 377]



learned Magistrate. It is also submitted that the learned Magistrate also could have allowed the request by invoking the powers under Section 242(2) of the Code and could have issued summons to any of the prosecution witnesses to produce any document or other thing. It is further submitted that the Criminal Court cannot remain a silent spectator and has been conferred with vast powers under Section 311 of the Code and Section 165 of the Evidence Act to arrive at a just decision. Powers under Section 91 of the Code also could have been invoked to get the documents in evidence. According to the learned counsel, the ultimate aim is to arrive at a just decision in the case. It is finally urged that no interference is warranted to the order passed by the learned Magistrate. Profuse reliance is placed on **Varsha Garg v State of Madhya Pradesh**³ to substantiate his assertions.

7. The learned Public Prosecutor fairly submitted that the application filed by the prosecutor and the procedure adopted is not in consonance with the concept of a fair trial. However, he would urge that the right of the prosecution to seek the production of public documents falling under Section 74 of the Evidence Act or documents of unimpeachable nature occurs in a different plane altogether. Nevertheless, the documents attempted to be

³ 2022 SCC Online SC 986



produced in the instant case are vital documents to substantiate the case of the prosecution, and he seeks liberty to file an appropriate application before the learned Magistrate for further investigation under Section 173(8) of the Code.

8. I have considered the submissions advanced and have gone through the entire records. I find that the documents proposed to be let in evidence are documents that were not seized by the Police as per procedure at the stage of the investigation. The contention of the accused is that those documents are concocted and fabricated as if the same were genuine, the production of which was imperative to prove the case of the prosecution, there is no reason why they were kept back. In that view of the matter, the vehement objection raised by the learned counsel against the order passed by the learned Magistrate cannot be ignored.

9. Now, I shall advert to the contention advanced by the learned counsel appearing for the party respondent that the order passed by the learned Magistrate could be sustained as there are ample provisions in the Code of Criminal Procedure enabling the court to accept materials, which do not form part of the final report, at any stage of the trial. In order to answer



the questions posed, it would be apposite at this juncture to refer to Section 173 of the Code. The same reads as under.

173. Report of police officer on completion of investigation.—(1) Every investigation under this Chapter shall be completed without unnecessary delay.

(1-A) The investigation in relation to 103[an offence under Sections 376, 376-A, 376-AB, 376-B, 376-C, 376-D, 376-DA, 376-DB or 376-E of the Indian Penal Code (45 of 1860) shall be completed within two months] from the date on which the information was recorded by the officer in charge of the police station.]

(2)(i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating—

- (a) the names of the parties;
- (b) the nature of the information;
- (c) the names of the persons who appear to be acquainted with the circumstances of the case;
- (d) whether any offence appears to have been committed and, if so, by whom;
- (e) whether the accused has been arrested;
- (f) whether he has been released on his bond and, if so, whether with or without sureties;
- (g) whether he has been forwarded in custody under Section 170;



- (h) whether the report of medical examination of the woman has been attached where investigation relates to an offence under [Sections 376, Section 376-A, Section 376-AB, Section 376-B, Section 376-C, Section 376-D, Section 376-DA, Section 376-DB] 106[or Section 376-E of the Indian Penal Code.
- (ii) The officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him to the person, if any, by whom the information relating to the commission of the offence was first given.
- (3) Where a superior officer of police has been appointed under Section 158, the report shall, in any case in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police station to make further investigation.
- (4) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.
- (5) When such report is in respect of a case to which Section 170 applies, the police officer shall forward to the Magistrate along with the report—
- (a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;
- (b) the statements recorded under Section 161 of all the persons whom the prosecution proposes to examine as its witnesses.
- (6) If the police officer is of opinion that any part of any such statement is not relevant to the subject-matter of the proceedings or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that



part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request.

(7) Where the police officer investigating the case finds it convenient so to do, he may furnish to the accused copies of all or any of the documents referred to in sub-section (5).

(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2).

10. A Police Officer is required to forward to the Magistrate all documents or relevant extracts that the prosecution proposes to rely upon, apart from those already sent during the investigation, along with the recorded statements under Section 161 of all people the prosecution intends to call as witnesses. If the officer believes any part of these statements is not relevant or not necessary to disclose or not advisable in the public interest, they are expected to indicate the same and request the Magistrate to exclude it from the copies given to the accused, providing reasons for this request. If convenient, the Investigating Officer may also provide copies of all or some of the documents mentioned in sub-section (5) to the accused. Under Section



207 of the Code, in a case initiated based on a Police Report, the Magistrate must provide the accused with free copies of the following documents mentioned therein, which include the Police Report, the First Information Report, Statements of all witnesses the prosecution intends to call, excluding any parts that the Police Officer has requested to be excluded, Confessions and Statements recorded under Section 164, any other documents or relevant extracts of documents that were forwarded to the Magistrate with the Police Report under Section 173. The Magistrate may, after reviewing any parts of a statement referred to in clause (iii) and considering the reasons given by the Police Officer for requesting its exclusion, direct that a copy of that part of the statement or such portion thereof as the Magistrate deems fit be provided to the accused. If the Magistrate is of the view that any document referred to in clause (v) is voluminous, he may direct that the accused be allowed to inspect it either personally or through their lawyer in court instead of providing them with a copy. In other words, the documents filed along with the chargesheet are the materials upon which the Public Prosecutor admittedly relies at the stage of the trial. Admittedly, in the instant case, the records sought to be produced were not placed before the Police, nor were they seized. In other words, their authenticity was not ascertained by the investigating agency at



any stage prior to the filing of the final report. Furthermore, the documents sought to be adduced are not public documents or documents of unimpeachable quality, in respect of which no objection could have been raised by either of the sides.

11. Now, it is necessary to advert to the contentions of the learned counsel with regard to the application of Section 242 of the Code. As the case is instituted on a Police Report, the procedure under Chapter XIX of the Code is to be followed. As per Section 238 of the Code, as and when the accused appears or is brought before a Magistrate at the commencement of the trial, the Magistrate is required to satisfy himself that he has complied with the provisions of Section 207 of the Code. Section 207 mandates that a copy of the Police Report and other documents accompanying the same are to be supplied to the accused. Section 242 of the Code deals with evidence of prosecution. Section 242 (2) of the Code provides that the Magistrate may, on the application of the prosecution, issue a summons to any of its witnesses directing him to produce any document or other thing. The condition precedent for invoking the powers under Section 242(2) of the Code is that the prosecution must apply to the Court for summoning any of the witnesses through the medium of the Court. If the said request has been allowed, it is



the duty of the learned Magistrate to use all coercive methods to secure the presence of the witness. Admittedly, in the instant case, no such application was filed. Instead, an application was filed by CW3 stating that the de facto complainant was not able to produce the documents sought to be produced at the time of investigation due to oversight and a prayer was made to accept those documents in evidence. In that view of the matter, Section 242 would have no application.

12. The next contention of the learned counsel that the documents could have been admitted in evidence with the aid of 294 of the Code. Section 294 of the Code says that there is no need for formal proof of certain documents. The said provision reads thus:

“294. No formal proof of certain documents.-

(1) Where any document is filed before any Court by the prosecution or the accused, the particulars of every such document shall be included in a list and the prosecution or the accused, as the case may be, or the pleader for the prosecution or the accused, if any, shall be called upon to admit or deny the genuineness of each such document.

(2) The list of documents shall be in such form as may be prescribed by the State Government.

(3) Where the genuineness of any document is not disputed, such document may be read in evidence in any inquiry, trial or other proceeding under this Code without proof of the signature of the person to whom it purports to be signed;



Provided that the Court may, in its discretion, require such signature to be proved.”

The above provision provides that when a document is filed before any court by the prosecution or the accused, the particulars of every such document shall be included in a list, and the prosecution or the accused, as the case may be, or the pleader for the prosecution or the accused, if any, shall be called upon to admit or deny the genuineness of each such document. The list of documents shall be in such form which has been prescribed by the State Government. Only where the genuineness of any document is not disputed, such document may be read in evidence in any inquiry or trial without the proof of the signature of the person to whom it purports to be signed.

13. The object of Section 294 of the Code is to accelerate the pace of the trial by avoiding the time being wasted by the parties in recording unnecessary evidence. Where the genuineness of any document is admitted or its formal proof is dispensed with, the same may be read in evidence. It is not necessary for the court to obtain admission or denial on a document under sub-section (1) to Section 294 of the Code personally from the accused or complainant or the witness. The endorsement of admission or



denial made by the counsel for defence on the document filed by the prosecution or on the application/report with which the same is filed is sufficient compliance of Section 294 of the Code. Similarly, on a document filed by the defence, endorsement of admission or denial by the Public Prosecutor is sufficient and defence will have to prove the document if not admitted by the prosecution. In case it is admitted, it need not be formally proved and can be read in evidence. In a complaint case, such an endorsement can be made by the counsel for the complainant in respect of the document filed by the defence. (see **Shamsher Singh Verma v. State of Haryana**⁴. In the case on hand, there is no case that any application under Section 294 of the Code was filed, and an endorsement was made by the counsel for the defence. Therefore, there is no applicability for the said provision either.

14. It would be profitable to note at this juncture that in **CBI v R.S. Pai**⁵, the Hon'ble Supreme Court had held that additional evidence gathered during the investigation and not produced before the learned Magistrate due to oversight could be produced subsequently. It was observed as follows in paragraph No. 7 of the judgment:

⁴ 2015 (4) KLT 1031

⁵ (2002 SCC Online SC 407)



“7. From the aforesaid sub-sections, it is apparent that normally, the investigating officer is required to produce all the relevant documents at the time of submitting the charge-sheet. At the same time, as there is no specific prohibition, it cannot be held that the additional documents cannot be produced subsequently. If some mistake is committed in not producing the relevant documents at the time of submitting the report or the charge-sheet, it is always open to the investigating officer to produce the same with the permission of the court. In our view, considering the preliminary stage of prosecution and the context in which the police officer is required to forward to the Magistrate all the documents or the relevant extracts thereof on which the prosecution proposes to rely, the word “shall” used in sub-section (5) cannot be interpreted as mandatory, but as directory. Normally, the documents gathered during the investigation upon which the prosecution wants to rely are required to be forwarded to the Magistrate, but if there is some omission, it would not mean that the remaining documents cannot be produced subsequently. Analogous provision under Section 173(4) of the Code of Criminal Procedure, 1898 was considered by this Court in *Narayan Rao v. State of A.P.* [AIR 1957 SC 737] and it was held that the word “shall” occurring in sub-section (4) of Section 173 and sub-section (3) of Section 207-A is not mandatory but only directory. Further, the scheme of sub-section (8) of Section 173 also makes it abundantly clear that even after the charge-sheet is submitted, further investigation, if called for, is not precluded. If further investigation is not precluded then there is no question of not permitting the prosecution to produce additional documents which were gathered prior to or subsequent to the investigation. In such cases, there cannot be any prejudice to the accused. Hence, the impugned order passed by the Special Court cannot be sustained.”

15. As held by the Apex Court, if some mistake is made by the Investigating Officer by not producing some document of relevance at the



time of submitting the report or the charge sheet, it is always open to the Investigating Officer to produce the same with the permission of the court. In the instant case, the above is not the case.

16. An argument was advanced by the learned counsel that in **Varsha Garg**, the Apex Court had observed that enough power is vested in the criminal court to summon any person as a witness and call for any document at any stage of the trial, the determinative factor is whether it is essential to the just decision of the case. In **Varsha Garg**, a CD was produced along with the supplementary chargesheet, which got corrupted. An application was filed to requisition the CD. Another application was filed under Section 311 of the Code on behalf of the prosecution for summoning the decoding register. Another application was filed seeking permission to summon the issuer of the certificate under Section 65B of the evidence, and the next application was filed to summon the Nodal Officer of the Internet Service Provider to produce the call records under Section 91 of the Code. It was in the said circumstances that this Court has held that Section 311 of the Code confers a very wide power on the Code on summoning witnesses, and the said discretion has to be exercised judiciously. It is further held that the criminal court has ample power to summon any person as a witness or



recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the court must obviously be dictated by the exigency of the situation, and fair play and good sense appear to be the only safe guides and that only the requirements of justice command the examination of any person which would depend on the facts and circumstances of each case. The principles laid therein have no application to the facts of the instant case. In the case on hand, the application has been filed to produce documents that do not form part of the record and which were not seized by the Police, the genuineness of which is seriously disputed.

In view of the discussion above, the petitioner is entitled to succeed. This petition will stand allowed. Annexure-A6 order will stand set aside. However, it is made clear that this order will not stand in the way of the Investigating Officer filing an application under Section 173(8) for further investigation, which shall be considered, and appropriate orders shall be passed.

Sd/-

**RAJA VIJAYARAGHAVAN V
JUDGE**



APPENDIX OF CRL.MC 1611/2021

PETITIONER ANNEXURES

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| ANNEXURE A1 | THE TRUE COPY OF THE FIR ALONG WITH THE PRIVATE COMPLAINT. |
| ANNEXURE A2 | THE TRUE COPY OF THE FINAL REPORT IN CC NO.1806/2015. |
| ANNEXURE A3 | THE TRUE COPY OF THE PETITION DATED 11.6.2019. |
| ANNEXURE A4 | THE TRUE COPY OF THE PETITION DATED 14.8.2019. |
| ANNEXURE A5 | THE TRUE COPY OF THE OBJECTION FILED BY THE COUNSEL FOR PETITIONER/1ST ACCUSED DATED 21.11.2019. |
| ANNEXURE A6 | THE ORDER IN CMP NO.2372/2019 IN CC NO.1806/2015 DATED 3.9.2020. |