IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

TUESDAY, THE 4TH DAY OF APRIL 2023 / 14TH CHAITHRA, 1945

BAIL APPL. NO. 556 OF 2023

CRIME NO.1062/2022 OF KORATTY POLICE STATION, THRISSUR

PETITIONER/ACCUSED:

SUNI @ SUNIL
AGED 46 YEARS
S/O NARAYANAN, MADILKUTTAM HOUSE,
WEST CHALAKUDY DESOM AND VILLAGE,
THRISSUR, PIN - 680307

BY ADVS.
VINAY RAMDAS
K.B.ANAMIKA
ULLAS KUMAR T.G.

RESPONDENTS/STATE/DEFACTO COMPLAINANT:

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

SRI.P G MANU, SR.PUBLIC PROSECUTOR

THIS BAIL APPLICATION HAVING BEEN FINALLY HEARD ON 31.03.2023 AND THE COURT ON 04.04.2023 DELIVERED THE FOLLOWING:

CR

ORDER

Dated this the 4th day of April, 2023

This is an application for regular bail filed under Section 439 of the Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C.' for short) by the sole accused in crime No.1062/2022 of Koratty police station.

2. Heard the learned counsel for the petitioner as well as the learned Public Prosecutor.

3. I have perused the relevant documents form part of the case diary placed by the learned Public Prosecutor.

4. The prosecution allegation is that at about 15.10 hours on 05.12.2022, the defacto complainant, who is an approver in a murder case, vide crime No.1229/2017, where charge has been filed for offences punishable under Sections 302, 384, 364 and 120(B) r/w. Section 34 of IPC, was

threatened by the accused herein, who is the accused in crime No.1229/2017, by calling the defacto complainant in his mobile No.7034632173 from the mobile No.8129417993 belonged to the wife of the accused. The specific allegation is that the accused threatened the defacto complainant stating that the defacto complainant transposed to be a man of the police by styling himself as an approver and therefore, separate quotation would be given against him. Recording the First Information Statement given by the defacto complainant, the police registered the instant crime, alleging commission of offences punishable under Sections 195 A of IPC and under Section 120(O) of the Kerala Police Act.

5. While canvassing regular bail to the petitioner, who has been in custody from 11.12.2022 onwards, the learned counsel for the petitioner raised a pertinent legal question. According to the learned counsel for the petitioner, the police could not register a crime alleging commission of offence

under Section 195 A of IPC since the said offence would come under the category of offences, which are non-cognizable and for which, the procedure provided under Section 340 of Cr.P.C. r/w. Section 195 of Cr.P.C. should be followed. In this connection, the learned counsel for the petitioner placed decision of the Apex Court reported in **1953 KHC 356 SC [Basir-ul-Hug v. State of W.B**.] and also decision of this Court reported in **2021 (3) KHC 125 [Radhakrishnan P. v. State of Kerala and Others]** and also an unreported decision of this Court in Crl.M.C. No.7162/2015 dated 26.02.2019.

6. Whereas the learned Public Prosecutor would submit that Section 195 A of IPC was incorporated in the Statute with effect from 16.04.2006 by Act 2 of 2006 and the said offence is classified as ‘cognizable, non-bailable, non-compoundable and triable by the Court by which offence of giving false evidence is triable'. The learned Public Prosecutor also relied on the decision reported in **Radhakrishnan P.**

(*Supra)* to contend that in the said case also, this Court read offence under Sections 167 and 195 A IPC in segregation, excluding the bar under Section 195 IPC, though it was held that even though the other offences alleged are under Section 167 and 195 A of IPC, they are undoubtedly interwoven with and inseparable from the offence under Section 193 and therefore susceptible to the prohibition under Section 195(1)(b)(i) of Cr.PC.

7. While allaying the dispute, the relevant question is; whether the bar under Section 195(1)(b)(i) of Cr.P.C. would apply in so far as offence under Section 195 A IPC introduced with effect from 16.04.2006, is concerned?

8. In this connection, the decision of **Basir-ul-Hug** *(supra)* pointed out by the learned counsel for the petitioner has no relevance, since, at the time when **Basir-ul-Hug** was delivered by the Apex Court, Section 195 A of IPC was not in the Statute book.

9. In the decision in **Radhakrishnan P**'s case *(Supra),* this Court found that since offence under Section 167 and 195 A of IPC are undoubtedly interwoven with and inseparable from the offence under Section 193 and therefore susceptible to the prohibition under Section 195(1)(b)(i) of Cr.PC., the bar under Section 195(1)(b) of Cr.P.C. would apply. In the unreported decision in Crl.M.C.No.7162/2015 in paragraph No.12, this Court held that no court shall take cognizance of any offence punishable under Section 195 A IPC, when such offence is alleged to have been committed in, or in relation to, any proceeding in any court, except on the complaint in writing of that court or by such Officer of the court as that court may authorise in writing in this behalf, or of some other court to which that court is subordinate. It is also held that the court cannot take cognizance of the offences referred to therein on the basis of the report filed by the police under Section 173(2) Cr.P.C. In this case, it is argued by the learned

counsel for the petitioner that the allegations in the FIS would suggest only a threat at the instance of the defacto complainant and therefore, the offence would fall under Section 506 of IPC and not under Section 195 A of IPC. If at all, any offence under Section 195 A IPC is made out, the same shall be one subject to the restrictions provided under Section 195(1)(b)(i) of Cr.P.C and therefore, registration of the instant crime by the police alleging commission of offence under Sections 195 A of IPC is without authority and is bad in law.

10. Whereas the learned Public Prosecutor given heavy reliance on classification and schedule describing offence under Section 195 A of IPC as “cognizable, non-bailable, non-compoundable and triable by the Court by which offence of giving false evidence is triable” to contend that in relation to offence under Section 195 A of IPC, the police officer can take cognizance since the offence is classified as

'cognizable'.

11. In this connection, it is argued by the learned counsel for the petitioner that when conflict arose in between the statue and the schedule, statutory wordings would have precedence over the schedule.

12. In order to proceed with further discussion on this legal question, it is apposite to refer the relevant provisions as under;

13. Section 195(1)(a)(i) of Cr.P.C. is as follows:

> "**195. Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence**
>
> (1) No court shall take cognizance -
>
> (a)(i) of any offence punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code, 1860 (45 of 1860); or
>
> (ii) of any abetment of, or attempt to commit, such offence; or
>
> (iii) of any criminal conspiracy to commit such offence,
>
> except on the complaint in writing of the public servant concerned or of some other public servant

to whom he is administratively subordinate;

14. Similarly, Section 195(1)(b)(i) provides as under:

> (1) No court shall take cognizance -
>
> (b)(i) of any offence punishable under any of the following sections of the Indian Penal Code, 1860 (45 of 1860), namely, sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any court; or
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> (ii) of any offence described in section 463, or punishable under Section 471, section 475 or section 476 of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any court; or
>
> (iii) of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in sub-clause (i) or sub-clause (ii),
>
> except on the complaint in writing of the that court or by such officer of the court as that court may authorise in writing in this behalf, or of some other court to which that court is subordinate.

15. Section 340 Cr.P.C. deals with the procedure in cases mentioned in Section 195 and the same is as under:

> "**340. Procedure in cases mentioned in Section 195**.-
>
> (1) When, upon an application made to it in this behalf or otherwise, any Court is of opinion

that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in clause (b) of sub-section (1) of section 195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that court, such court may, after such preliminary inquiry, if any, as it thinks necessary,-

(a) record a finding to that effect;

(b) make a complaint thereof in writing;

(c) send it to a Magistrate of the first class having jurisdiction;

(d) take sufficient security for the appearance of the accused before such Magistrate, or if the alleged offence is non-bailable and the court thinks it necessary so to do, send the accused in custody to such Magistrate; and

(e) bind over any person to appear and give evidence before such Magistrate.

(2) The power conferred on a court by sub-section (1) in respect to an offence may, in any case where that court has neither made a complaint, under sub-section (1) in respect of that offence nor rejected an application for the making of such complaint, be exercised by the court to which such former court is subordinate within the meaning of sub-section (4) of section 195.

(3) A complaint made under this section shall be signed -

(a) where the court making the complaint in a High Court, by such officer of the court as the court may appoint.

(b) in any other case, by the presiding

officer of the Court or by such officer of the Court as the Court may authorise in writing in this behalf.

(4) In this section, "court" has the same meaning as in section 195.

16. Section 195A of IPC provides as under:

> "**195 A. Threatening any person to give false evidence.-** Whoever threatens another with any injury to his person, reputation or property or to the person or reputation of any one in whom that person is interested, with intent to cause that person to give false evidence shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both;
>
> and if innocent person is convicted and sentenced in consequence of such false evidence, with death or imprisonment for more than seven years, the person who threatens shall be punished with the same punishment and sentence in the same manner and to the same extent as such innocent person is punished and sentence."

17. It is relevant in this context to refer Section 195 A of Cr.P.C. introduced, after the introduction of Section 195 A of IPC. Section 195 A of Cr.P.C. provides the procedure for witnesses in case of threatening etc. It is provided that a witness or any other person may file a complaint in relation to

an offence under Section 195 A of the Indian Penal Code. In this connection, it is pointed out by the learned counsel for the petitioner that a 'complaint' is defined under Section 2(d) of Cr.P.C. and the same is as follows:

> 2(d) “complaint” means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.”

18. Therefore, the learned counsel for the petitioner candidly argued that the police cannot register crime alleging commission of offence under Section 195 A of IPC and the Court alone can proceed against a person, who committed offence under Section 195 A of IPC, as provided under Section 195 read with Section 340 Cr.P.C.

19. In this connection, it is relevant to refer the definition under Section 2(c) regarding the cognizable offence.

> 2.c) “cognizable offence” means an offence for which, and “cognizable case” means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being

in force, arrest without warrant;

20. Since Section 2(c) provides that “cognizable offence” means an offence for which, and “cognizable case” means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant.

21. It is discernible that Section 195 A IPC is a cognizable one as per the schedule of Criminal Procedure Code, 1973. When a cognizable offence is reported to the police, the police have got the power to investigate into the case as contemplated under Section 156 Cr.P.C. The learned counsel for the petitioner would contend that the word 'complaint' used under Section 195 A of Cr.P.C would indicate that the 'aggrieved party has to file the complaint before the Magistrate', Section 195 A of Cr.P.C. provides that “a witness or any other person may file a complaint in relation to an offence", under Section 195-A of the Indian Penal Code.

22. As per Section 2(d) of Cr.P.C., the word 'complaint' is defined. Accordingly, any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report". Explanation reads that a report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant.

23. The learned counsel for the petitioner submitted that a Schedule as an Act of parliament is a mere question of drafting and the legislative intent that is material. In this connection, the learned counsel highlighted decision of the Apex Court reported in **1989 KHC 996** [**M/s.Aphali Pharmaceuticals Ltd v. State of Maharashtra and other],** where the Apex Court held in paragraphs 30 and 31 as under:

“30. A Schedule as an Act of Parliament is a mere question of drafting. It is the legislative intent that is material. An Explanation to the Schedule amounts to an Explanation in the Act itself. As we read in Halsbury's Laws of England, Third Edition, Vol.36, para 551: “To simplify the presentation of statutes, it is the practice for their subject matter to be divided, where appropriate, between sections and schedules, the former setting out matters of principle, and introducing the latter, and the latter containing all matters of detail. This is purely a matter of arrangement, and a schedule is as much a part of the statute, and as much an enactment, as is the section by which it is Introduced." The schedule may be used in construing provisions in the body of the Act. It is as much an act of Legislature as the Act itself and it must be read together with the Act for all purposes of construction. Expressions in the Schedule cannot control or prevail against the express enactment and in case of any inconsistency between the schedule and the enactment the enactment is to prevail and if any part of the schedule cannot be made to correspond it must yield to the Act. Lord Sterndale, in Inland Revenue Commissioners v Gittus, [1920] 1 K.B. 563 said:

"It seems to me there are two principles of rules of interpretation which ought to be applied to the combination of Act and Schedule. If the Act says that the Schedule is to be used for a certain purpose and the heading of the part of the Schedule in question shows that it is prima facie at any rate devoted to that purpose, then you must read the Act and the Schedule as though the Schedule were operating for the purpose, and if you can satisfy the language of the section without extending it beyond that purpose you ought to do it. But if in spite of that you find in the language of the Schedule words and terms that go clearly outside that purpose, then you must give effect to them and you must not consider them as limited by

> the heading of that part of the Schedule or by the purpose mentioned in the Act for which the Schedule is prima facie to be used. You cannot refuse to give effect to clear words simply because prima facie they seem to be limited by the heading of the Schedule and the definition of the purpose of the Schedule contained in the Act."
> 31. The above observation was not disapproved in appeal (1921) 2 A.C. 81. However, **the basic principle is that in case of a conflict between the body of the Act and the Schedule, the former prevails**. In the instant case we do not find any such conflict."

24. Another decision reported in **2011 KHC 4599 [Jagdish Parsad v State of Rajasthan]** also pointed out by the learned counsel for the petitioner, where the Apex Court held as follows:

> "It is a settled principle of law that the Schedule of the 1979 Rules has to be in conformity with, and is required to advance the object of the primary statutory provision. Thus, a schedule cannot in any way wipe out the statutory provisions of the Act in effect and spirit".

25. The decision of this Court reported in Crl.M.C.No.7162/2015 [**Abdul Razzack v.s State of Kerala]** has been placed to contend that this Court set aside FIR for the offence under Section 195A of IPC on the ground that the

procedure contemplated under Section 340 of Cr.P.C. has not been followed. Similarly, another unreported decision of the Calcutta High Court in **C.R.R 2968 of 2014 [Namitha Mahanta Sarkar v. State of West Bengal]** is placed by the learned counsel for the petitioner, where it was held as follows:

> "action of investigation receiving information from witness and registering offence u/s 195A of IPC does not satisfy the requirement of Section 195 of Cr.P.C."

26. According to the learned counsel for the petitioner, Section 195A of IPC deals with offence with intent to cause a person to give false evidence. Therefore, 'false evidence' is a matter to be decided by the Court and in such cases, police cannot take cognizance and the same shall be relegated to the Court itself, by following the procedure provide under Section 195 read with 340 of Cr.P.C. and not otherwise.

27. The conundrum as regards to the competence of the police to register a crime when offence under Section 195

A of IPC is alleged sprang up for consideration only on the ground that the offence is classified as 'cognizable'. It is relevant to note that, as I have already pointed out, Section 195 A of IPC was introduced with effect from 16.04.2006 in between Section 195 and Section 196. It is pertinent to note further that all other offences dealt under Section 195 of Cr.P.C. are 'non-cognizable'. It is to be noted further that when the threat dealt in Section 195 of IPC is giving false evidence, that is a matter to be considered by the court and in view of the matter, it has to be held that a police officer cannot register a crime in relation to an offence under Section 195 A of IPC and for which procedure under Section 195 read with 340 of Cr.P.C. should have been followed. Therefore, the cognizance of the offence under Section 195 A of IPC by the police is held to be bad in law. However, the police registered crime under Section 120(O) of the Kerala Police Act also and therefore, investigation in this regard can go on.

28. To be on the facts of this case, the petitioner herein was arrested on 11.12.2022. The allegation against him is that he had threatened the defacto complainant through telephone with dire consequence since the defacto complainant offered himself as an approver in crime No.1229/2017 involving offence under Section 302 of IPC. It is submitted by the learned Public Prosecutor that the trial in the said case not started so far and if so, the petitioner would be released on bail, he would repeat the same and he would threaten the witnesses in deposing truth before the trial court. Therefore, the bail application at the instance of the petitioner cannot be considered.

29. Although the allegations against the petitioner are very serious, since cognizance of the offence under Section 195 A of IPC is found to be bad in law, the petitioner can be enlarged on bail, by imposing stringent conditions, taking note of the fact that he has been in custody from 11.12.2022. One

among the conditions is that the petitioner shall not disturb the defacto complainant or the witnesses in crime No.1229/2017 in any manner so as to pressurize or threaten them from disclosing truth before the court.

In the result, this petition stands allowed. The petitioner is enlarged on bail on conditions:

i. The petitioner shall be released on bail on his executing bond for Rs.50,000/- (Rupees Fifty Thousand Only) with two solvent sureties, each for the like amount to the satisfaction of the Jurisdictional court concerned.

ii. The petitioner shall not intimidate the witnesses or tamper with evidence. He shall co-operate with the investigation and shall be available for trial.

iii. The petitioner shall appear before the Investigating Officer as and when directed, apart from appearing before the Investigating Officer on all Mondays between 9 am and 10 am, for a period of two months.

iv. The petitioner shall not, directly or indirectly, make any inducement, threat or promise to any

person acquainted with the facts of this case, so as to dissuade him from disclosing such facts to the court or to any police officer.

v. The petitioner shall not disturb the defacto complainant or the witnesses in crime No.1229/2017 in any manner so as to pressurize or threaten them from disclosing truth before the court. If any such event, either reported or came to the notice of this Court, or to the jurisdictional court, appropriate legal action will be taken without fail to arrest the said menace.

It is specifically ordered that the right of the approver to move before the jurisdictional court by filing petition under Section 195 A of Cr.P.C. is left open. Similarly, it is specifically made clear that the right of the prosecution to seek cancellation of bail for violation of bail conditions in crime No.1229/2017 also left open.

Sd/-

A. BADHARUDEEN

JUDGE

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