

"CR"

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE BECHU KURIAN THOMAS

WEDNESDAY, THE 8TH DAY OF FEBRUARY 2023 / 19TH MAGHA, 1944

CRL.MC NO. 5189 OF 2022

SC 637/2016 OF ASSISTANT SESSIONS COURT, THALASSERY

PETITIONER/ ACCUSED :

MUHAMMED RAFI KUNNULPURAYIL,
AGED 35 YEARS,
S/O RASHEED M., 'RASEENAS', AADIKADALAYI,
NOW RESIDING AT 'PAVITHRAM',
KURUVA, DINESH MUKKU, KANNUR,
PIN - 670 007

BY ADVS.
M.K.SUMOD
ABDUL RAOOF PALLIPATH
K.R.AVINASH (KUNNATH)
VIDYA M.K.
RAJ CAROLIN V.
THUSHARA.K

RESPONDENTS/ COMPLAINANT & STATE :

- 1 THE SUB INSPECTOR OF POLICE,
KANNUR CITY POLICE STATION,
KANNUR, PIN - 670 001
- 2 STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM,
PIN - 682 031

BY SRI.VIPIN NARAYAN, PUBLIC PROSECUTOR

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON
08.02.2023, THE COURT ON THE SAME DAY PASSED THE FOLLOWING :

CR

BECHU KURIAN THOMAS, J.

Crl.M.C.No.5189 of 2022

Dated this the 8th day of February, 2023

ORDER

The mode in which an accused must request the Court for adducing the defence evidence arises for determination. Petitioner's request for examining defence witnesses filed in the form of a memo was rejected on the ground that an application as contemplated under section 233(3) of the Code of Criminal Procedure, 1973 had not been filed. Petitioner challenges the said dismissal contending that a memo is sufficient compliance with the legal requirement.

2. Petitioner is the accused in S.C.No.637/2016 on the files of the Assistant Sessions Court, Kannur. The proceeding in the sessions court is initiated alleging offences punishable under Sections 452, 341, 323, 506(1) and 308 of the Indian Penal Code, 1860.

3. After conclusion of the prosecution evidence, the accused was called upon to enter his defence. Four documents were produced by the petitioner, along with a list of witnesses styling it as a 'memo'. The memo mentioned the details of the witnesses as (i) Station House Officer, Kannur City Police Station, and (ii) Deputy Superintendent of District

Hospital, Kannur. The memo also mentioned that the first witness is required to produce the records in Crime No. 1210/2015 of Kannur City Police Station and to give evidence while the second witness was cited to produce the accident cum wound certificate of two persons mentioned therein and to give evidence. It was also mentioned that the witnesses were required to be summoned and examined to prove the case of the accused.

4. The learned Sessions Judge, by the impugned order, rejected the request of the petitioner on the technical ground that an application under Section 233(3) Cr.P.C. had not been filed and a memo without filing any application is liable to be dismissed.

5. Sri. M. K Sumod, the learned counsel for the petitioner, submitted that the Code of Criminal Procedure, 1973 do not specify any specific form or mode in which an application is to be filed and that even an oral application itself would suffice the request to issue summons to the defence witnesses. It was also submitted that when viewed in the light of the right of the accused to adduce defence evidence as stipulated in Section 233(3) Cr.P.C.; the memo filed by the petitioner ought to have been treated as an application. Despite the above, the learned Counsel submitted that petitioner is willing to file a written application itself under Section 233(3) Cr.P.C. seeking to adduce defence evidence and for compelling attendance of the witnesses specified in the witness list.

6. Sri. Vipin Narayan the learned Public Prosecutor submitted in all fairness that no specific form has been prescribed for an application for examination of a defence witness and in many courts throughout the State, applications are filed in the form of a memo.

7. On an appreciation of the contentions, it is discernible that an opportunity for adducing defence evidence is a part of the right to a fair trial. Section 233(1) of the Code, in unmistakable terms, mandates that when the accused is not acquitted under section 232, he shall be called upon to enter on his defence and adduce any evidence he may have in support thereof. Section 233(3) provides that if the accused applies for the issue of any process for compelling the presence of any witness or the production of any document or thing, the judge shall issue such process, unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice.

8. It is trite that an accused cannot be debarred from producing evidence in defence and that section 233(1) is mandatory. Reference to the decision in **Bhadran v. State of Kerala** (1993) 1 K.L.J 971 and the Full Bench decision in **K. Moidu v. State of Kerala** (2009) 3 KLT 369 are apposite in this context. Thus the accused has to be mandatorily given an opportunity to adduce his evidence in support of his defence.

9. Section 233(3) of the Cr.P.C employ the words "if the accused

applies" "the Judge shall". The word 'applies' is indicative of the need to make a request. The said term undoubtedly indicates an application. An application means a request or a petition. In legal parlance an application means a prayer made to an authority for some relief. Therefore, the action of making a prayer or a request is the meaning to be ascribed to the word 'applies' as occurring in section 233 Cr.P.C.

10. Generally applications can be of two types - oral or written. In this context, reference to Rule 27 of the Criminal Rules of Practise, Kerala, 1982, is relevant and is extracted as below;

R. 27. Presentation and form of proceedings, petitions, documents and docketing, etc.–

(1) All petitions, applications, affidavits, memoranda of appeal, revision petitions and other proceedings presented to a court shall be in English or in the language of the Court and shall be written legibly in ink or typewritten or printed legibly on white foolscap folio paper with an outer margin of about 4 cms, and an inner margin of about 1.5 cms. Separate sheets shall be stitched together book wise. Numbers shall be expressed in figures. Except in the case of main proceedings, the writing or typewriting or printing may be on both sides of the paper; provided however that the last sheet shall in all cases be written, typewritten or printed on the inner page only.

(2) All proceedings and other documents filed in court shall be docketed on the reverse of the final page endorsing the name of the court, the number and year of the proceedings to which it relates, the names of the person presenting the same and the date of presentation in court.

11. From a reading of the above provision it can be understood that every petition or application must be in writing though no particular format is prescribed. Thus it can be concluded that in the context of the procedure in criminal courts, an application has to be in writing. However,

no prescribed form is provided. In the absence of any prescribed format, the parties are free to choose any form. All that is required in the petition or application is a request or a prayer. If the said requirement is satisfied, irrespective of the nomenclature used as the title of the application, whether as a petition or as an application or as a memo, the court is bound to permit such evidence to be adduced, unless, of course, it is of the view that the application is made for the purpose of vexation or delay or for defeating the ends of justice.

12. In the instant case, a perusal of Annexure 5- witness list submitted by the petitioner reveals that except for mentioning the list of witnesses and specifying the purpose of their examination there is no request or prayer to issue summons to them. Therefore there is no proper application or petition as per the rules of practice prevalent in Kerala. Without a request, the memo filed on behalf of the accused cannot be treated as an application. Therefore the learned Sessions Judge was justified in dismissing the memo.

13. However, since on the ground of technicalities, the accused cannot be denied from adducing his evidence, an opportunity should be granted afresh for filing a proper application to adduce the defence evidence. The learned counsel for the petitioner also fairly conceded that an application under Section 233(3) Cr.P.C. in writing would be filed.

Accordingly, while upholding the impugned order, it is directed that if an application in writing under Section 233(3) of the Cr.P.C. is filed by

the petitioner without unnecessary delay, necessarily the learned Sessions Judge shall initiate appropriate steps to summon the witnesses and complete the trial, without further delay.

Crl.M.C.is disposed of with the above observations.

Sd/-

BECHU KURIAN THOMAS, JUDGE

RKM

APPENDIX OF CRL.MC 5189/2022

PETITIONER'S ANNEXURES :

- Annexure1 THE TRUE COPY OF THE FIR IN CRIME NUMBER
1210/2015 WITH THE FI STATEMENT TAKEN
AND REGISTERED BY THE FIRST RESPONDENT
HEREIN
- Annexure2 THE TRUE COPY OF THE WOUND CERTIFICATE
OF SMT. FATHIBI
- Annexure3 TRUE COPY OF THE ACCIDENT REGISTER CUM
WOUND CERTIFICATE WITH REGARD TO THE
ABOVE AND MAINTAINED BY THE DISTRICT
HOSPITAL, KANNUR
- Annexure4 TRUE COPY OF THE DOCUMENT LIST SUBMITTED
BY THE PETITIONERS COUNSEL ON 21.07.2022
BEFORE THE ASSISTANT SESSIONS JUDGE,
KANNUR IN SC 637/2016
- Annexure5 TRUE COPY OF THE WITNESS LIST SUBMITTED
BY THE PETITIONER'S COUNSEL ON 21/07/22
BEFORE THE ASST. SESSIONS JUDGE, KANNUR
IN SC 637/2016
- Annexure6 TRUE COPY OF THE ORDER OF THE ASST.
SESSIONS JUDGE, KANNUR IN MEMO IN
SESSIONS CASE NO. 637/2016 DATED
21.7.2022