

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH

WEDNESDAY, THE 22ND DAY OF JUNE 2022 / 1ST ASHADHA, 1944

CRL.MC NO. 2184 OF 2021

AGAINST THE ORDER IN CRL.MP 10/2021 OF DISTRICT & SESSIONS
COURT, KAVARATTI

PETITIONER/ACCUSED:

JIBIN JOSEPH K.A.AGED 39 YEARS
S/O.K.O.ANTONY, KANNANKERIL HOUSE, SHASTRI ROAD,
KUMBALANGI P.O., KOCHI.

BY ADVS.

S.RAJEEV, SRI.K.K.DHEERENDRAKRISHNAN
SRI.V.VINAY
SRI.K.ANAND (A-1921)
SRI.M.S.ANEER

RESPONDENTS/STATE/DEFACTO COMPLAINANT:

- 1 UNION TERRITORY OF LAKSHADWEEP
REP. BY STANDING COUNSEL FOR LAKSHADWEEP, HIGH
COURT OF KERALA, ERNAKULAM - 682 031.

- 2 C.N.NOORUL HIDAYA, AGED 37 YEARS
D/O.C.P.MULLKKOYA, CHERINALLAL HOUSE, KALPENI
ISLAND, LAKSHADWEEP - 682 557.

BY ADVS. SHRI.SAJITH KUMAR V., SC, LAKSHADWEEP
ADMINISTRATION, SRI.E.VIJIN KARTHIK

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION
ON 16.06.2022, THE COURT ON 22.06.2022 PASSED THE FOLLOWING:

O R D E R

Dated this the 22nd day of June, 2022

This Cr1.M.C has been filed to quash Annexure V order dated 27/3/2021 passed by the Court of Sessions, Kozhikode (in-charge of District and Sessions Court, Kavaratti) (for short, the court below).

2. The petitioner is working as Additional Public Prosecutor and Additional Government Pleader at the District and Sessions Court, Kavaratti, Lakshadweep. The 2nd respondent is a practising lawyer at Kavaratti, Lakshadweep.

3. The 2nd respondent is representing the accused in SC No. 13/2019 on the file of the Special Court for Trial of POCSO cases, Kavaratti. The allegation in the said case is that the victim girl therein aged 16 years was kidnapped and sexually assaulted by the accused therein.

4. Several other crimes were also registered on the allegation that the very same girl was subjected to sexual assault by different persons.

5. As per the direction of the Special Court for the trial of POCSO cases, Kavaratti, the victim was accommodated in a Working Women's Hostel. The victim was found missing one day from the said hostel. The police intervened and took her back to the hostel. Thereafter, the 2nd respondent published a Facebook post alleging that the petitioner is constantly contacting the victim and had a role in the missing incident of the victim girl. As the contents of the said Facebook post revealed the identity of the victim girl, a case was registered against the 2nd respondent as Crime No.35/2020 by Androth police station u/s 23(4) r/w 23(1) & 23(2) of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act') and u/s 228A of the Indian Penal Code, 1860. Annexure II is the FIR. Thereafter, the 2nd respondent filed a complaint to the Station House Officer as well as the Superintendent of Police, Lakshadweep on 1/12/2020 without mentioning any names of the persons who are frequently contacting the victim through phone and regarding the missing incident of the victim girl. Thereafter on 25/1/2021, the 2nd respondent filed another complaint to the Station House Officer,

Kavaratti Police Station alleging that the petitioner is constantly contacting the victim and hence committed the offence punishable u/s 11(iv) of the POCSO Act and u/s 75 of the Juvenile Justice (Care and Protection of Children) Act, 2015 (for short 'JJ Act'). However, the Station House Officer did not register the case. Annexure IV is the said complaint. Thereafter the 2nd respondent filed a private complaint at the Court of Sessions, Kavaratti raising the very same allegations. Since there was no sitting at the Court of Sessions, Kavaratti, the Court of Sessions, Kozhikode which was in charge of the Court of Sessions, Kavaratti forwarded the complaint to the Station House Officer, Kavaratti for investigation u/s 156 (3) of Cr. P.C as per the order dated 27/03/2021. Annexure V is the copy of the private complaint. The order forms part of Annexure V. The said order is under challenge in this CrI. M.C.

6. I have heard Sri.S.Rajeev, the learned counsel for the petitioner, Sri.V.Sajith Kumar, the learned standing counsel for the Union Territory of Lakshadweep and Sri.Vijin Karthik, the learned counsel appearing for the 2nd respondent.

7. The learned counsel for the petitioner Sri.S.Rajeev submitted that Annexure V complaint filed by the 2nd respondent who is none other than the counsel appearing for the accused in SC No.13/2019 against the Public Prosecutor representing the victim therein is attended with *malafides* and has been maliciously instituted with an ulterior motive to wreak personal vengeance on the petitioner. The counsel further submitted that the court below mechanically forwarded the complaint to the police for investigation u/s 156(3) of Cr. P.C without applying its mind. The counsel also submitted that even if the entire allegations in Annexure V complaint are believed, no offence u/s 11(iv) of the POCSO Act or S.75 of the JJ Act are attracted and as such, the court below ought not to have forwarded the complaint to the police for investigation. If the crime is registered based on Annexure V order, it would cause serious prejudice to the petitioner, argued the counsel. The counsel also relied on the decision of the Apex Court in In **Maksud Saiyed v. State of Gujarat and Others** (2007 KHC 4052), to argue that even at the stage of passing the order under Section 156(3) of Cr.P.C., the

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Magistrate/court needs to apply mind and form an opinion to direct investigation by the police against any accused. Thus, the learned counsel for the petitioner sought to set aside the impugned order and quash the proceedings initiated against the petitioner.

8. The learned standing counsel for the Union Territory of Lakshadweep Sri.V. Sajith Kumar supported the arguments of the learned counsel for the petitioner. He submitted that the court below ought to have rejected the complaint at the threshold rather than forwarding the same for investigation under Section 156(3) of Cr.P.C. The learned counsel for the 2nd respondent Sri.Vijin Karthik however seriously disputed the contentions urged by the learned counsel for the petitioner and the learned standing counsel for the Union Territory of Lakshadweep and submitted that the Magistrate/court is not expected to conduct a roving enquiry as to the allegations in the complaint at the time of forwarding the same to the police for investigation u/s 156(3) of Cr.P.C. The complaint *prima facie* disclosed ingredients of the offences alleged and hence no interference is called for on

Annexure V order, submitted the Counsel.

9. As stated already, the 2nd respondent represents the accused and the petitioner, in his capacity as Additional Public Prosecutor, represents the prosecution/victim in SC No.13/2019.

A reading of Annexure V complaint would show that the 2nd respondent suppressed the fact that she is representing the accused in the above case. The allegation against the petitioner is that he frequently contacted the victim girl residing in the Working Women's Hostel over the phone and that amounts to an offence punishable u/s 11(iv) of the POCSO Act. It is further alleged that the petitioner who is an officer of the court has the duty to ensure the safety of the victim, but by frequently contacting the child over the phone, he has committed the offence punishable u/s 75 of the JJ Act as well.

10. It is clear from Section 11 of the POCSO Act that only when a person does any act mentioned in sub-clauses (i) to (vi) with sexual intent, the same will constitute an offence. Similarly, to attract the offence u/s 75 of the JJ Act, the accused must have actual control or charge over the child. Without ascertaining

whether there is an allegation anywhere in the complaint that the petitioner had any sexual intent to attract S.11(iv) of the POCSO Act or whether the petitioner had actual control or charge over the child, the court below simply forwarded the complaint to the police without a speaking order. The impugned order reads as follows:

“Heard complainant. Complaint is referred to SHO, Kavaratti P.S., u/s 156(3) Cr. P.C to register and investigate the case and report to this court”.

11. Section 156(3) of Cr.P.C. which operates at the pre-cognizance stage confers powers on the Magistrate/Court, who is empowered to take cognizance of the offence under S.190, to order investigation into any cognizable case. It is settled that the powers under S.156(3) of the Cr.PC cannot be exercised casually or mechanically but are required to be exercised judiciously. True, at that stage, the Magistrate/Court is not required to embark upon an in-depth roving enquiry as to the reliability or genuineness of the allegations in the complaint. However, the Magistrate/Court should not adopt the easy way of forwarding the complaint unmindful of the consequences of forwarding such complaints. The Magistrate/Court is not merely functioning as a

“post office” in forwarding anything and everything filed in the form of a complaint. The Magistrate/Judge should certainly scrutinize the allegations in the complaint to satisfy himself that it discloses the necessary ingredients of the offence for which investigation is intended to be ordered and to find out whether it is a matter to be forwarded to the police to collect materials for a successful prosecution against the accused. The Magistrate/Court should ensure that the complaint is supported by an affidavit duly sworn in by the complainant as held by the Apex Court in ***Priyanka Srivastava and Another v. State of U.P. and Others*** (2015 KHC 4242). The Magistrate/Court has a duty to protect the interest of the accused also since, at the time of conducting inquiry or forwarding of the complaint to the police under S.156(3) Cr.P.C, the accused does not get any right of hearing.

12. The scope of Section 156(3) of Cr.P.C came up for consideration before the Apex Court in several cases. In ***Maksud Saiyed*** (supra), the Apex Court examined the requirement of the application of mind by the Magistrate before exercising

jurisdiction under Section 156(3) and held that where jurisdiction is exercised on a complaint filed in terms of Section 156(3) or Section 200 Cr. P.C, the Magistrate is required to apply his mind. In **Ramdev Food Products Pvt. Ltd. v. State of Gujarat** (2015 KHC 4199) and in **Priyanka Srivastava** (supra), the Apex Court reiterated that power under S.156(3) warrants application of judicial mind. In **Anil Kumar and Others v. M.K. Aiyappa and Others** [(2013) 10 SCC 705], it was held that the application of mind by the Magistrate should be reflected in the order. It was further held that the mere statement that he has gone through the complaint, and documents and heard the complainant, as such, as reflected in the order, will not be sufficient. After going through the complaint, documents and hearing the complainant, what weighed with the Magistrate to order investigation under S.156(3) Cr.P.C., should be reflected in the order, though a detailed expression of his views is neither required nor warranted.

13. A reading of Annexure V order would show that it was passed mechanically without examining the facts of the case, nature of allegations and without ascertaining whether the

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information revealed any cognizable offence or not. The order does not reflect the reason to order investigation u/s 156(3) of Cr.P.C. As stated already, the offences alleged against the petitioner are u/s 11(iv) of the POCSO Act and S.75 of the JJ Act. The allegation is that the petitioner who was the Additional Prosecutor in charge of the conduct of the case of the victim frequently contacted the victim girl residing in the Working Women's Hostel over phone. As per S.11 of the POCSO Act, the alleged act should be committed with sexual intent. There is absolutely no allegation in Annexure IV complaint addressed to the police that the petitioner had any sexual intent. In Annexure V private complaint filed at the court below also, there are no materials to show that the said act was done by the petitioner with sexual intent. To attract S.75 of the JJ Act, the accused must have actual control over the victim child. There is no such allegation either in Annexure IV or in Annexure V complaints. Law is well settled that before directing the police to investigate under sub-section (3) of S.156 of Cr.P.C., the Magistrate/court should form an opinion that the complaint discloses a cognizable

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offence. When the allegation made in the complaint does not disclose a cognizable offence, the Magistrate/Court has no jurisdiction to order police investigation under sub-section (3) of S.156 of Cr.P.C. As stated already, the allegations made in the complaint and the documents produced in support thereof do not *prima facie* disclose the ingredients of S.11(iv) of the POCSO Act and S.75 of the JJ Act.

14. The Station House Officer, Kavaratti conducted a thorough enquiry on the complaint preferred by the 2nd respondent and submitted a report at the court below. Annexure III is the said report. The report discloses that the allegation in the complaint of the 2nd respondent that the petitioner had been contacting the victim over the phone continuously was factually verified by taking the call detail report of the mobile phone number used by the victim as well as the petitioner. It was found that there was absolutely no phone call contact between the victim girl and the petitioner. It is further reported that the statement of the victim, warden of Working Women's Hostel, Kavaratti and roommates of the victim girl were recorded and

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none of them stated that the petitioner made any attempt to contact the victim. The victim girl clearly stated that she was never contacted by the petitioner. The report further state that the security lapse at Working Women's Hostel, Kavaratti is the main reason for the missing of the victim child. The learned standing counsel for the Union Territory of Lakshadweep has submitted before me that the complaint preferred by the 2nd respondent against the petitioner is false, frivolous ill-motivated and there is no substance in it.

For the reasons stated above, I am of the view that proceeding further with Annexure V order would be a sheer abuse of the process of law. Hence, Annexure V order and all further proceedings thereto stand hereby quashed. Cr1. M.C. is allowed.

Sd/-

DR. KAUSER EDAPPAGATH

JUDGE

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APPENDIX OF CRL.MC 2184/2021

PETITIONER ANNEXURES

- ANNEXURE I A TRUE COPY OF THE VAKALATH OF THE 2ND RESPONDENT FILED FOR THE ACCUSED IN SC NO.13/2019 PENDING ON THE FILE OF DISTRICT AND SESSIONS COURT, KAVARATTI (SPECIAL COURT FOR POCSO OFFENCES) DTD. 12/11/2020.
- ANNEXURE II A TRUE COPY OF THE FIR IN CRIME NO.35/2020 OF ANDROTH POLICE STATION, LAKSHADWEEP.
- ANNEXURE III A COPY OF REPORT FROM THE STATION UNDER THE RIGHT TO INFORMATION ACT.
- ANNEXURE IV A COPY OF THE COMPLAINT FILED BY THE 2ND RESPONDENT BEFORE THE STATION HOUSE OFFICER AS EARLY AS 25/01/2021.
- ANNEXURE V THE TRUE COPY OF THE COMPLAINT FILED BY THE 2ND RESPONDENT ALONG WITH ORDERS PASSED BY THE COURT OF SESSIONS, KOZHIKODE (COURT-IN-CHARGE) OBTAINED THROUGH RIGHT TO INFORMATION ACT DT. 2/3/2021.