

# VERDICTUM.IN

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE K. BABU

TUESDAY, THE 23<sup>RD</sup> DAY OF MAY 2023 / 2ND JYAISHTA, 1945

CRL.MC NO. 2579 OF 2021

AGAINST CC 1417/2017 OF JUDICIAL MAGISTRATE OF FIRST CLASS - IX,  
ERNAKULAM (TEMPORARY)

**PETITIONER/ACCUSED:**

UNNI MUKUNDAN,  
AGED 33 YEARS,  
S/O. MUKUNDAN, VRINDAVAN, NR KENDRIYA VIDHYALAYA,  
S R K NAGAR, OTTAPALAM-679 103.

BY ADVS.

SAIBY JOSE KIDANGOOR  
SRI.BENNY ANTONY PAREL  
SMT.S.SIBHA  
KUM.PARVATHY VIJAYAN

**RESPONDENTS/STATE & DEFACTO COMPLAINANT:**

- 1 STATE OF KERALA,  
REP. BY PUBLIC PROSECUTOR,  
HIGH COURT OF KERALA, ERNAKULAM 682 031.
- 2 PREETHI CHACKO,  
D/O. CHACKO DEVASIA, RESIDING AT HOUSE NO. 39/4525,  
K C ABRAHAM MASTER ROAD, PANAMPILLY NAGAR,  
NEAR FEDERAL BANK, KOCHI 682 036.
- 3 SUB INSPECTOR OF POLICE,  
CHERANELLOOR POLICE STATION,  
ERNAKULAM 682 034.  
BY ADVS.  
V.JOHN SEBASTIAN RALPH  
C.N.SREEKUMAR  
SABU P.JOSEPH  
MANJU PAUL  
ANIL PRASAD  
SANGEETHA RAJ , PUBLIC PROSECUTOR

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON  
23.05.2023, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

**“C.R.”**

**K.BABU, J.**

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**Criminal M.C No.2579 of 2021**  
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Dated this the 23<sup>rd</sup> day of May, 2023

**ORDER**

The order dated 21.05.2020 passed by the Sessions Court, Ernakulam dismissing the Criminal Revision Petition No.52/2019 and confirming the order of the Trial Court refusing to discharge the petitioner/accused is under challenge herein.

2. The petitioner is facing prosecution for the offences under Sections 354 and 354-B of the Indian Penal Code before the Judicial First Class Magistrate Court-IX, Ernakulam.

3. These charges are based on a complaint filed by respondent No.2.

4. In the said complaint, it was inter alia, alleged as follows:

The petitioner is a well-known cine actor in Malayalam, Tamil, and Kannada film industries. Respondent No.2 is an Austrian of Indian origin living in Vienna with her parents. She developed a

couple of scripts and storylines to create a value-adding message conveying commercial film in the Malayalam Film Industry. In May 2016, she came to Kerala and contacted the petitioner to brief him about the story and to check whether he was interested in taking up a lead role in the movie. She could not meet the petitioner then as he was in Hyderabad. Respondent No.2 returned to Austria and came back to Kerala in August 2017. On 23.08.2017, she made an appointment with the petitioner and went to his house to tell the story. She reached the home of the petitioner at 3.30 p.m. When she was about to tell the story, the petitioner was not interested to hear it and instead asked for a written script. Thereupon, there occurred some unfriendly exchange of words between them, and the petitioner suddenly caught hold of her, forcefully kissed her, and attempted to commit rape on her. After sometime she returned in a Uber taxi, which the petitioner arranged. On the way, she contacted PW2, met him, and conveyed everything that happened.

5. Respondent No.2 and two other witnesses gave evidence as PWs 1 to 3. They deposed in tune with the pleadings in the complaint. The Trial Court permitted the petitioner to cross-

examine the witnesses under Section 244 Cr.P.C. The petitioner filed CMP No.2497/2019 under Section 245(1) Cr.P.C seeking discharge. The Trial Court held that the materials made available disclose the existence of all the ingredients constituting the alleged offences. The Trial Court held that there are grounds to presume that the petitioner has committed the offences alleged. The Court below dismissed the application seeking discharge and decided to frame charges under Sections 354 and 354-B of IPC.

6. The petitioner challenged the abovesaid order in Criminal Revision Petition No.52/2019 before the Sessions Court, Ernakulam, which confirmed the findings of the Trial Court.

7. Heard the learned counsel for the petitioner, the learned counsel for respondent No.2, and the learned Public Prosecutor.

8. The learned counsel for the petitioner submitted that analysis of the prosecution evidence would reveal that no case against the petitioner has been made out which, if unrebutted, would warrant his conviction and, therefore, he is entitled to discharge. The learned counsel vehemently contended that there is no justification for the Trial Court to presume that the petitioner has

committed the offences alleged. The learned counsel for the petitioner further contended that the Trial Court has travelled beyond the presumption as provided in Section 246 Cr.P.C.

9. Per contra, the learned counsel for respondent No.2 submitted that there is ground for presuming that the petitioner has committed the offences. The learned counsel further submitted that the test of *prima facie* case alone has to be applied before framing of charge.

10. The scheme of trial in the case of a warrant-case instituted otherwise than on a police report is dealt with in Sections 244 to 250 of Cr.P.C. Sections 244 to 246 are the relevant provisions in the present context. In a warrant trial instituted other than on a police report, when the accused appears or is brought before the Magistrate under Section 244(1) Cr.P.C, the Magistrate has to hear the prosecution and take all such evidence as may be produced in support of the prosecution. In this, the Magistrate may permit the prosecution to summon and examine the witnesses. The evidence, so collected, is evidence before the charge. After all the evidence is taken, the Magistrate has to consider under Section 245(1) of Cr.P.C

whether any case against the accused is made out, which, if unrebutted, would warrant his conviction, and if the Magistrate comes to the conclusion that there is no such case made out against the accused, the Magistrate proceeds to discharge. On the other hand, if he is satisfied about the prima facie case against the accused, the Magistrate would frame a charge under Section 246(1) Cr.P.C. The complainant then gets a second opportunity to lead evidence in support of the charge. The accused also gets an opportunity to cross-examine any witnesses. The incriminating material and evidence will be put to the accused in terms of Section 313 Cr.P.C, and then the accused is provided an opportunity to lead evidence, if any. Only upon completing all these steps does the trial come to a conclusion, with the Court forming a final opinion.

11. The proceeding in the Trial Court is now at the stage where the Magistrate has formed an opinion under sub-section (1) of Section 246 Cr.P.C. For convenience of analysis, Section 246 of Cr.PC is extracted below:

**“246. Procedure where accused is not discharged.-**(1) If, when such evidence has been taken, or at any previous stage of the case, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable

under this Chapter, which such Magistrate is competent to try and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused.

(2) The charge shall then be read and explained to the accused, and he shall be asked whether he pleads guilty or has any defence to make.

(3) If the accused pleads guilty, the Magistrate shall record the plea, and may, in his discretion, convict him thereon.

(4) If the accused refuses to plead, or does not plead or claims to be tried or if the accused is not convicted under sub- section (3), he shall be required to state, at the commencement of the next hearing of the case, or, if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith, whether he wishes to cross- examine any, and, if so, which, of the witnesses for the prosecution whose evidence has been taken.

(5) If he says he does so wish, the witnesses named by him shall be recalled and, after cross- examination and re- examination (if any), they shall be discharged.

(6) The evidence of any remaining witnesses for the prosecution shall next be taken, and after cross- examination and re- examination (if any), they shall also be discharged.”

12. In Section 246 of Cr.PC, the legislature has created an inbuilt element of presumption. On the meaning of the word “presume” the Supreme Court in **Amit Kapoor v. Ramesh Chander [(2012) 9 SCC 460]** observed thus:

“30.We have already noticed that the legislature in its wisdom has used the expression “there is ground for presuming that the accused has committed an offence”. This has an inbuilt element of presumption once the ingredients of an offence with reference to the allegations made are satisfied, the Court would not doubt the case of the prosecution unduly and extend its jurisdiction to quash the charge in haste. A Bench of this Court in *State of Maharashtra v.Som Nath Thapa [(1996) 4 SCC 659 : 1996 SCC (Cri) 820]* referred to the meaning of the word “presume” while relying upon *Black's Law Dictionary*. It was defined to mean “to believe or accept upon probable

evidence”; “to take as proved until evidence to the contrary is forthcoming”. In other words, the truth of the matter has to come out when the prosecution evidence is led, the witnesses are cross-examined by the defence, the incriminating material and evidence is put to the accused in terms of Section 313 of the Code and then the accused is provided an opportunity to lead defence, if any. It is only upon completion of such steps that the trial concludes with the court forming its final opinion and delivering its judgment. Merely because there was a civil transaction between the parties would not by itself alter the status of the allegations constituting the criminal offence.”

13. In **State of Rajasthan v. Fatehkaran Mehdu [(2017) 3 SCC 198]** the Apex Court held that at the stage of framing of a charge, the Court is concerned not with the proof of the allegation rather it has to focus on the material and form an opinion whether there is strong suspicion that the accused has committed an offence, which if put to trial, could prove his guilt.

14. Now, I turn to consider the facts of the present case on the touchstone of the principles discussed above. Respondent No.2/complainant gave evidence as PW1 in tune with the pleadings in the complaint. PW1 deposed that the petitioner outraged her modesty at his residence. When she went there to tell the story to him, there was nobody in the residence. PW1 categorically stated that the petitioner caught hold of her, kissed her against her wish, and made an attempt to rape her. She strongly felt that her



modesty was outraged by the acts of the petitioner. The presence of the petitioner and the complainant at the scene of occurrence is not disputed. PWs 2 and 3 stated the prior and subsequent circumstances after the alleged incident. The materials placed by the prosecution *prima facie* disclosed the existence of all the ingredients constituting the alleged offences.

15. As I have already discussed above, a test of *prima facie* case has to be applied before framing of charge. At the stage of framing charge, the probative value of the material on record cannot be gone in; the material brought on the record by the prosecution is accepted as true at that stage. The Court need not look into the delay in preferring the complaint at this stage. The Apex Court has considered the scope of jurisdiction of the High Court while exercising power under Section 482 Cr.P.C to quash the proceedings at the stage prior to the commencement of the actual trial in a plethora of decisions. The Apex Court in **Amit Kapoor** (supra) has enunciated a set of principles that the High Courts must keep in mind while exercising their jurisdiction under the provision:

**"27**.....At best and upon objective analysis of various judgments of this Court, we are able to cull out some

of the principles to be considered for proper exercise of jurisdiction, particularly, with regard to quashing of charge either in exercise of jurisdiction under Section 397 or Section 482 of the Code or together, as the case may be:

**27.1.** xx xx xx

**27.2.** The Court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith prima facie establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic ingredients of a criminal offence are not satisfied then the Court may interfere.

**27.3.** The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge.

**27.4.** Where the exercise of such power is absolutely essential to prevent patent miscarriage of justice and for correcting some grave error that might be committed by the subordinate courts even in such cases, the High Court should be loath to interfere, at the threshold, to throttle the prosecution in exercise of its inherent powers.

**27.5.** xx xx xx

**27.6.** xx xx xx

**27.7.** xx xx xx

**27.8.** xx xx xx

**27.9.** Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction; the court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.

**27.10.** It is neither necessary nor is the court called upon to hold a full-fledged enquiry or to appreciate evidence collected by the investigating agencies to find out whether it is a case of acquittal or conviction.

**27.11.** xx xx xx

**27.12.** xx xx xx

**27.13.** Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the Court should be more inclined to permit

continuation of prosecution rather than its quashing at that initial stage. The Court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie.”

**16. In *Rajiv Thapar v. Madan Lal Kapoor* [(2013) 3 SCC 330]**

while considering the jurisdiction under Section 482 Cr.P.C, the Apex

Court held thus:

“28. The High Court, in exercise of its jurisdiction under Section 482 CrPC, must make a just and rightful choice. This is not a stage of evaluating the truthfulness or otherwise of the allegations levelled by the prosecution/complainant against the accused. Likewise, it is not a stage for determining how weighty the defences raised on behalf of the accused are. Even if the accused is successful in showing some suspicion or doubt, in the allegations levelled by the prosecution/complainant, it would be impermissible to discharge the accused before trial. This is so because it would result in giving finality to the accusations levelled by the prosecution/complainant, without allowing the prosecution or the complainant to adduce evidence to substantiate the same. The converse is, however, not true, because even if trial is proceeded with, the accused is not subjected to any irreparable consequences. The accused would still be in a position to succeed by establishing his defences by producing evidence in accordance with law. There is an endless list of judgments rendered by this Court declaring the legal position that in a case where the prosecution/complainant has levelled allegations bringing out all ingredients of the charge(s) levelled, and have placed material before the Court, prima facie evidencing the truthfulness of the allegations levelled, trial must be held.”

17. I have carefully gone through the materials placed before the Court. The petitioner failed to show that there was any patent miscarriage of justice in the proceedings in the Court below. This

Court is not inclined to terminate the proceedings at this stage.

The Criminal M.C lacks merits, and it stands dismissed. The Trial Court shall proceed with the trial of the case and dispose of the same as expeditiously as possible, at any rate, within three months from this day. In the event the petitioner makes an application under Section 205 Cr.P.C, the Court below shall consider the same in accordance with law.

**Sd/-  
K.BABU,  
JUDGE**

KAS

**APPENDIX OF CRL.MC 2579/2021**

PETITIONER ANNEXURES

- ANNEXURE A TRUE COPY OF THE DISCHARGE PETITION  
FILED BY THE PETITIONER DATED  
17.05.2019.
- ANNEXURE B TRUE COPY OF THE ORDER OF THE JUDICIAL  
FIRST CLASS MAGISTRATE IX, ERNAKULAM  
DATED 18.07.2019 IN CMP 2497/19.
- ANNEXURE C TRUE COPY OF THE ORDER OF THE COURT OF  
SESSION, ERNAKULAM DIVISION DATED  
21.05.2020 IN CRL R P 52/2019.
- ANNEXURE D TRUE COPY OF THE FIR NO. 1481/2017 DATED  
10.12.2017.
- ANNEXURE E TRUE COPY OF THE PROCEEDINGS OF THE  
DISTRICT POLICE CHIEF, KOCHI DATED  
15.02.2019.