

**(2005) 08 KL CK 0002**

**High Court Of Kerala**

**Case No:** Criminal M.C.No. 5604 of 2003-A

Kannappan P.

APPELLANT

Vs

State of Kerala

RESPONDENT

**Date of Decision:** Aug. 3, 2005

**Acts Referred:**

- Constitution of India, 1950 - Article 227
- Criminal Procedure Code, 1973 (CrPC) - Section 156, 156(3), 161, 190, 190(1)(a)
- Penal Code, 1860 (IPC) - Section 120, 120B, 121, 122, 123

**Citation:** (2005) 3 KLJ 161 : (2006) 1 RCR(Criminal) 165

**Hon'ble Judges:** K. Padmanabhan Nair, J

**Bench:** Single Bench

**Advocate:** S. Sreekumar, for the Appellant; M.K. Damodaran (Sr.), P. Sanjay, for the Respondent

**Judgement**

@JUDGMENTTAG-ORDER

K. Padmanabhan Nair

1. The accused in Crime No. 534 of 2003 on the file of the Judicial First Class Magistrate Court-No. 1, Ernakulam have filed this Criminal Miscellaneous Case for quashing Annexure No. XX Complaint filed by the second respondent and also Annexure XXI First Information Report registered by the Sub Inspector of Police, Ernakulam Town North Police Station in pursuance of that complaint. In the Criminal Miscellaneous Case it was averred that the second respondent is the second accused in Crime No. RC 3(S)/1994, CBI Kerala registered u/s 120B read with sections 302, 201 and 34 I.P.C. relating to the death of Sri. K.G. Munna, whose charred body was bound in a partially burnt Ambassador Car at Thuvassery Kunnu on MLA Road, Kottapuram on 11-4-1992. The case was initially investigated by the local police and then by the Crime Branch of Kerala Police. The father of the deceased filed O.P. No. 15974 of 1992 before this Court and this Court directed the C.B.I. to conduct

investigation. In pursuance of the direction, the C.B.I. took over the investigation and re-registered the case under the caption "suspicious death". It is further averred that the investigation revealed that Munna was murdered and his dead body was transported to Thuvasserry Kunnu near the house of the second respondent in the dicky of his Ambassador Car and thereafter the dead body of K.G. Munna was kept on the left side of the front seat of the car and the car was burnt using spirit and palmolien. There are 17 accused in the case. The first accused is Sri. P. Vijayan. He is the younger brother of accused No. 6 Sri. P. Kumaran, an Ex-M.L.A. who represented Mannarkkad Assembly. It is averred that they are abkari contractors.

2. It is averred that the second respondent filed Crl.M.C.No.8554 of 2002 before this Court for anticipatory bail. The same was dismissed. He filed S.L.P.No. 194 of 2002 before the Supreme Court. That was also dismissed on 25-1-2002. The second respondent was arrested on 8-7-2003 and produced before the Doctor at General Hospital, Ernakulam who issued Annexure III Medical Certificate. He was produced before the Chief Judicial Magistrate on 9-7-2003. He was remanded to police custody till 14-7-2003. It is averred that when the second respondent was produced before the learned Chief Judicial Magistrate, he did not make any complaint about the investigating officers. It is also averred that while the second respondent was in police custody, he was examined by Doctors and medical reports issued on 9-7-2003, 10-7-2003, 12-7-2003 and 14-7-2003. The second respondent never made any complaint of harassment or torture by any of the petitioners to the doctors who examined him. The second respondent was again produced before the Chief Judicial Magistrate on 14-7-2003 with a prayer for extension of the period of police custody. At that time also he did not make any complaint about the investigating officers. The police custody was extended for two more days and in that remand order, the learned Magistrate had specifically recorded that the second respondent had no complaint about the investigating officers. It is averred that on 15-7-2003 and remanded to judicial custody. He did not make any complaint about the investigating officers about any harassment or torture on that date also. He was released on statutory bail on 6-10-2003. It is averred that the second respondent never made any complaint of ill-treatment or torture before the Chief Judicial Magistrate or before the doctors who examined him on seven occasions while in police custody. It is contended that he had filed one bail application before the Chief Judicial Magistrate, three bail applications before the Sessions Court, Ernakulam and two bail applications before the High Court. It is averred that he has never pressed the contention of ill-treatment; or torture by petitioners 1 to 4 in those applications. It is averred that the second respondent had filed a false complaint on 17-11-2003 before the Judicial First Class Magistrate No. II Ernakulam. The learned Magistrate forwarded the complaint to the Sub Inspector of Police Ernakulam Town North Police Station. It is averred that the case was registered with a mala fide intention to tarnish the image of the officers of the C.B.I. It is averred that if the investigation of that case is allowed to continue, it will adversely affect the investigation of the case

investigated by the petitioners resulting in miscarriage of justice. Hence the petition to quash the complaint and the F.I.R.

3. The second respondent filed a counter affidavit raising the following contentions: The Criminal Miscellaneous Case is not maintainable. The averment that the second respondent was absconding is denied. On 23-11-2001, the second respondent was called to the C.B.I. office and when he appeared he was told that his uncle Vijayan was arrested for murder of one Munna. He was wrongfully confined in custody till 28th November, 2001. He told the petitioners that he had no knowledge about the incident. The first petitioner beat him on his cheek and started third degree methods and kept him under illegal custody for two days. He was allowed to go back with a direction to come back after three days. On 8-7-2003, he was again summoned to appear before the Investigating Officer and when he appeared he was told that he was under arrest. He was taken to a room, slapped, kicked and was caned in the underneath of his feet. On the next day he complained to the Magistrate that he was brutally beaten. But the learned Magistrate did not take any action. He was asked to fold himself in a truck tyre and the petitioners started rolling the tyre keeping him inside. He was given a pamphlet with a direction to study the same by heart. He was told that he would be taken to different places and when asked to recite, he should recite what he studied. He was also told that all his actions will be recorded in video for the purpose of satisfying superior officers of the petitioners. According to the second respondent, since he was brutally tortured he agreed to do whatever "the petitioners asked him to do" fearing danger to his life. The petitioners had recorded everything in video. After the expiry of the period of police custody, the second respondent was produced before the court. At that time he was warned not to speak anything about the torture. He was also warned that if he acts otherwise, they would get the remand extended. He kept quiet in the court due to fear of danger. The averment that he did not make any complaint is denied. He told the Magistrate about the ill treatment when extension of remand was over. The learned Magistrate asked him to file a written complaint and he had filed a complaint before the Magistrate. A copy of that complaint was produced along with the counter. Though the second respondent was produced before the Doctors, he did not make any complaint to any of the doctors about the physical harassment. The certificates were issued by the doctors without examining the second respondent properly. The doctors never asked the second respondent whether he was tortured. They only checked whether his blood pressure was normal. The C.B.I. as part of their fabrication of documents, managed to get medical certificates to convince the court that they are not ill-treating the second respondent while in their custody. The doctors miserably failed in their duty to ascertain whether the second respondent was actually tortured or not. Since the C.B.I. officers are elite class of investigators, the doctors would issue certificate to the needs of the CBI officials, fearing danger and dire consequences to their future. The investigation was fair and free until the present investigating was fair and free until the present investigating

officer book charge. The present officer fabricated the evidence and falsely implicated the second respondent and others as accused in the case. The C.B.I. officials wanted to implicate five high police officers and since the second respondent did not cooperate with the C.B.I., he was terribly beaten and till treated while he was in custody. He was forced to say that the officers of the local police are involved in the case. It is done by the investigating officer with a mala fide intention to create false evidence. It is also contended that in the CrI.M.C. filed before this court on 8-8-2003 he had stated that he was severely ill treated and humiliated. Hence he prayed for a dismissal of the Criminal Miscellaneous Case.

4. The second respondent filed the complaint before the Judicial First Class Magistrate No. II, Ernakulam, alleging that the first petitioner, who is working as Superintendent of Police, Central Bureau of Investigation and other petitioners who are working as Inspectors of Police of the same establishment had committed the offences punishable under Sections 192, 194, 196, 211 and also the offences u/s 323, 330, 348, 503, 506(ii) read with section 34 of the Indian Penal Code. The material averments in the complaint were the following: On 8-7-2003, the second respondent was taken to the office of the C.B.I. He was taken to a room and was slapped and kicked in the groin by the second and third petitioners. On 9-7-2003, he was produced before the Chief Judicial Magistrate, Ernakulam. At that time, the complaint-second respondent orally submitted before the Magistrate that he was beaten up by the officers of the C.B.I. The learned Magistrate did not take any action on the complaint, but his custody has given to the officers of the C.B.I. It was alleged that during police custody, he was subjected to different types of torture. According to the second respondent, he was intimidated and tortured by the petitioners in furtherance of the common intention of extorting a confession implicating Sri. Somarajan, D.I.G. of Police, Sri. Chandran, Superintendent of Police, and other Police Officers. When the second respondent was produced before the Magistrate, he told the Magistrate what had actually happened and the learned Magistrate asked him to put it in writing. He filed a complaint but no action was taken by the Magistrate. It was averred that on previous occasions also the second respondent was called to the office of the C.B.I. Ernakulam and subjected to torture.

5. The only prayer in Annexure XX complaint was to forward the same to the Sub Inspector of Police, Ernakulam Town North u/s 156(3) of the Code of Criminal Procedure. The learned Magistrate forwarded the complaint to the Sub Inspector of Police, Ernakulam Town North Police Station u/s 156(3) of the CrI. Procedure Code. The Sub Inspector on receipt of the complaint, registered Crime No. 534 of 2003 on 21-11-2003 and forwarded the F.I.R. to the Judicial First Class Magistrate Court No. II, Ernakulam.

6. Sri. Sreekumar, learned counsel appearing for the petitioners, raised the following points: The entire allegations levelled against the petitioners are false, frivolous and vexatious and made with an intention to fabricate false evidence using local police

to be used as defence evidence in R.C.3(S)/1994 registered against the second respondent and others. The complaint was filed as an after thought and at the instigation of high police officials who are also arranged as accused in that case. The second respondent was produced before competent doctors on seven occasions while he was in police custody. The medical officers who examined the second respondent had certified that he was in good health and physically fit. The second respondent never raised a complaint before any of the doctors about any kind of ill treatment or torture. Immediately after arrest he was produced before the Magistrate. While he was in custody he was produced before the Magistrate on ten occasions. Neither the second respondent nor his Advocate had raised any complaint of harassment or torture against the petitioners before the Magistrate. A reading of the orders passed by the Chief Judicial Magistrate, Sessions Judge and this Court rejecting the bail applications filed by the 2nd respondent will show that the second respondent had not raised a contention of custodial torture any of the Courts.

7. It is argued that the complaint as framed is not maintainable. It is argued that there are allegations; in the complaint to the effect that the petitioners committed offences punishable under Sections 120 to 198 of the I.P.C. The cognizance of such an offence can be taken only on a written complaint filed by the public servant or the court concerned as provided u/s 195 of the Code of Criminal Procedure. It is argued that since it was alleged that the petitioners committed the offences punishable under sections 120 to 198, the second respondent ought to have filed a petition before the very same Magistrate, who gave custody of the second respondent to the petitioners. It is argued that the petitioners cannot be prosecuted unless the complainant obtains sanction from the competent authority. It is argued that the learned Magistrate committed an illegality in referring the matter to the Sub Inspector of Police in view of the statutory prohibition contained in Rule 26 of the Criminal Rules of Practice.

8. Sri M.K. Damodaran, learned Senior Counsel appearing for the second respondent has argued that this Court while exercising the power u/s 482 of the Code of Criminal Procedure can only look into the complaint and the documents filed along with the complaint. It is argued that after considering the materials, if this court finds that no offence is made out, the court can quash the complaint. It is submitted that the entire arguments put forward by the petitioners are based on materials which they intend to adduce as defence evidence. It is argued that whether sanction is required u/s 197(2) and whether the complainant ought to have filed a petition in the case pending against him etc. are matters to be raised at the time of trial and the Criminal Miscellaneous Case is premature. It is argued that if the averments in the complaint disclose an offence, this Court shall not interfere with the investigation at the threshold and must allow the law to take its own course.

9. The first petitioner is the Superintendent of Police, Central Bureau of Investigation. The other petitioners are working as Inspector of Police in the same establishment. They are the investigating officers of Crime No. R.C.3(S)/94/SPE/CBI/KER registered under sections 120B, 302, 365, 301, 217 and 218 of the Indian Penal Code against the second respondent and others. The Central Bureau of Investigation has filed a statement detailing the names of the accused/suspects as on today as per the directions issued by this Court. It is stated that these names are only in the realm of recommendation by the investigating officer and a draft final report along with the statements u/s 161 of the Code of Criminal Procedure are forwarded to the higher authorities and a final decision on the accused who are to be sent up for trial will be taken up by the Director of Central Bureau of Investigation. It is submitted that the recommendations of the Investigating Officer on the conclusion of the investigation are only preliminary in nature and may undergo substantive changes.

10. A perusal of the statement shown that the Investigating Officer has arraigned 21 persons as the accused. It includes an Abkari Contractor, a prominent Politician and Ex-M.L.A., two doctors and police officers. The following police officers are arraigned as accused in the draft final report:

1. Sri. K.P. Somarajan, IPS, Additional Director General of Police, Kerala.
2. Sri. T. Chandran, Superintendent of Police, Kerala.
3. Sri. N.K. Sasi, Dy. S.P.(Retd.) Kerala.

The offences alleged against the police officers are u/s 120B read with sections 201, 217 and 218 I.P.C.

11. The second respondent was arrested on 8-7-2003. He was granted statutory bail on 6-10-2003. On 17-11-2003, that is to say, after the lapse of nearly one and a half month after the second respondent was released on bail, he filed the criminal complaint before the Judicial First Class Magistrate with the only prayer to forward the same to the Sub Inspector or Police u/s 156(3) for detailed investigation.

12. When a complaint is filed before the Magistrate, he has got two options. The Magistrate may without taking cognizance forward the complaint to the Police u/s 156(3) of the Code of Criminal Procedure with a direction to the S.H.O. to investigate and file a report. He may take cognizance and proceed u/s 202 of the Code of Criminal Procedure. The power to order police investigation u/s 156(3) of the Code is different from the power to direct investigation during the course of enquiry u/s 202(1) of the Code. The two operate in two distance spheres. The first is exercisable at the pre-cognizance stage, the second at the post-cognizance stage. If the Magistrate takes cognizance, he can adopt any of the following methods: (i) He may peruse the complaint and if satisfied that there are sufficient grounds, he can straightaway issue process to the accused. (ii) He can postpone the issue of process

and direct an enquiry by himself. (iii) He can postpone the issue of process and direct an enquiry by any other person or an investigation by the police.

13. The fact that the Magistrate has got a discretion to forward a complaint u/s 156(3) does not mean that the complainant has a right or privilege to make a demand to refer the case to the police. The option to refer the complaint to the police for investigation u/s 156(3) before cognizance or u/s 202(1) after cognizance, is to be exercised by the Magistrate. But that discretion has to be exercised in a judicious manner and not mechanically.

14. A person who is able to exert influence on the police may file a complaint falsely implicating innocent persons with a solitary prayer to forward the same to the police. In such cases the only intention of the complainant will be to harass the opponent using police. It is the duty of the Court to punish a person who is guilty of a criminal offence. So, the prayer in the complaint must be to try the accused and to punish him in case he is found guilty of any offence. So when the sole prayer in the complaint is to refer the same to police, the Magistrate shall approach the matter with care and caution and insist for materials to show a prima facie case. There is also a possibility that a person who is involved in a criminal case may misuse the opportunity to fabricate evidence to be used as defence evidence in the case in which he is an accused. The Magistrate shall not allow an unscrupulous criminal to use the court as a tool for harassing innocent persons or for fabricating false evidence.

15. In [V.K. Sreenivasan Vs. D.G. Nair and Others](#), this Court had considered the right of a complainant to ask the Magistrate to refer the matter to police u/s 156(3) of the Code of Criminal Procedure. This Court relying on a decision reported in *Morarji Jivraj v. Emperor* (AIR 1935 Bom 76) held that the complainant has no right or privilege to require the court to refer the case to the police. The Magistrate shall not act mechanically; merely because a complainant makes a request to refer the case to the Police. In this case the learned Magistrate had not applied his mind before forwarding the complaint to the police and mechanically passed an order forwarding the same to the Sub Inspector of Police.

16. Sri. Sreekumar, learned counsel appearing for the petitioners argued that in view of the provisions contained in Rule 26 of the Criminal Rules of Practice, the learned Magistrate erred in forwarding the complaint to the Sub Inspector. The learned counsel appearing for the second respondent argued that Rule 26 deals only with cases in which the Magistrate decides the proceedings u/s 202 and not cases he refers to the police u/s 156(3). Rule 26 of Criminal Rules of Practice reads as follows:-

"Complaints against Police Officers not to be referred to the Police.- A complaint against a Police Officer shall not be referred to by a Magistrate u/s 202 of the Code to any person other than a Magistrate subordinate to him."

It is true that at the first blush, it would appear that Rule 26 applied only in cases where the Magistrate proceeds u/s 202 of the Code of Criminal Procedure. In *Jessy Jacob v. State of Kerala* (1998(2) KLT 554) this Court had occasion to consider the scope of Rule 26 of the Criminal Rules of Practice. This Court held that the Magistrate could not refer a complaint against a police officer to another Police Officer in view of Rule 26 of the Criminal Rules of Practice.

17. If the Magistrate takes cognizance and proceeds to conduct an enquiry, he has to follow the procedure provided under Chapter XV and he is not competent to switch back to the pre-cognizance stage. In [Devarapalli Lakshminarayana Reddy and Others Vs. V. Narayana Reddy and Others](#), the Supreme Court had considered this aspect and held that the expression "taking cognizance of an offence" by the Magistrate has not been defined. It was held as follows:-

"Broadly speaking, when on receiving a complaint, the Magistrate applies his mind for the purposes of proceeding u/s 200 and the succeeding sections in Chapter XV of the Code of 1973, he is said to have taken cognizance of the offence within the meaning of Section 190(1)(a). If instead of proceeding under Chapter IX, he has in the judicial exercise of his discretion, taken action of some other kind, such as issuing a search warrant for the purpose of investigation, or ordering investigation by the police u/s 156(3), he cannot be said to have taken cognizance of any offence."

In [Madhu Bala Vs. Suresh Kumar and others](#), the Apex Court found that when a complaint is forwarded, the police has to investigate the same. In *Suresh Chand Jain v. State of M.P.* (2001) 2 SCC 628 the Supreme Court considered the difference between investigation envisaged under sections 156 and 202. It was found that the investigation conducted by the Police Officer u/s 202 is only to help the Magistrate to decide whether or not there is sufficient ground for him to proceed further. In *Tula Ram v. Kishore Singh* (1997) 4 SCC 459 the Supreme Court held that a Magistrate on receiving a complaint u/s 190 may not take cognizance and order investigation u/s 156(3) of the Code even if offence charged is exclusively triable by Court for Session.

18. There is nothing in the above stated decisions to hold that the principles contained in Rule 26 of the Criminal Rules of Practice can have no application at the pre-cognizance stage. The Rule is enacted with a specific purpose. It is enacted to see that a free or fair enquiry into the allegation levelled against a police officer is conducted. If a complaint filed against a police officer is investigated by another officer, the possibility of the investigating officer favouring the accused cannot be ruled out. The same principle is applicable to a complaint forwarded to the police u/s 156(3) of the Code of Criminal Procedure at pre-cognizance stage.

19. Sri. Damodaran, learned Senior Counsel appearing for the second respondent argued that the petitioners who are working as officers under the Central Bureau of



Investigation cannot be considered as police officers who will come within the purview of Rule 26 of the Criminal Rules of Practice.

20. The word police officer is not defined in the Criminal Rules of Practice. Rule 3(e) of the Criminal Rules of Practice reads as follows:-

"(e) words and expressions used in these rules shall have the same meaning as assigned to them in the Code."

21. The officers of the Central Bureau of Investigation, which is constituted under the provisions of Delhi Special Police Establishment Act, are police officers under the provisions of the Code of Criminal Rules of Practice to show that the application of the Rules are excluded in respect of cases investigated by the officer of the C.B.I.

22. Section 2(iv) of the Kerala Police Act, 1960 defines police. It reads as follows:-

"police" shall include all persons by whatever name known who exercise any police functions in any part of the State of Kerala and "police officer" means any member of the police force;"

Section 2(x) defines superior police. It reads as follows:-

"superior police shall mean all police officers below the rank of an Inspector."

In this connection the provision contained in section 5 of the Delhi Special Police Establishment Act is also very relevant. Section 5(1) reads as follows:-

"The Central Government may by order extend to any area (including Railway areas) in a State, not being a Union Territory the powers and jurisdiction of members of the Delhi Police Establishment for the investigation of any offences or classes of offences specified in a notification u/s 3."

So it is evidently clear that the Central Government can extend the powers of Delhi Police Establishment to any area in a State provided the Government of that State gives consent.

23. In this case, the investigation was handed over to the Central Bureau of Investigation as per the orders of this Court. So by virtue of the provisions contained in sub-section (2) of Section 5, the Police Officer under the Delhi Special Police Establishment Act is entitled to discharge the functions of the police in that area and he will be deemed to be a member of police officer of that area, which means he is to be treated as a police officer governed by the provisions of the Kerala Police Act and also the provisions of the Criminal Rules of Practice. So there is no merit in the contention raised by the counsel for the respondent that petitioners are not police officers. I am of the considered opinion that the principles contained in Rule 26 of the Criminal Rules of Practice can be applied at pre-cognizance stage also and in appropriate cases the private complaint filed against a police officer may be enquired into by the Magistrate as provided u/s 202 of the Code of Criminal

Procedure.

24. The mere fact that this Court directed the C.B.I. to investigate a criminal case does not confer a free hand to the officers of the Central Bureau of Investigation to torture any person. But at the same time a criminal court shall not allow itself to be used as an instrument to blackmail honest police officers. The Sub Inspector of Police who is investigating the present case is working under the two accused in the former case. So, the possibility of using the local police to fabricate false evidence to be used as defence evidence in the case in which the second respondent and three other police officers are arraigned as accused cannot be ruled out in a case of this nature.

25. In the complaint it was averred that on 9-7-2003 the second respondent was produced before the Learned Chief Judicial Magistrate, Ernakulam and he orally made a complaint to the Magistrate that he was beaten up by the officers of the C.B.I. It was further averred that the learned Magistrate did not take any action on the said complaint but his custody was given to the petitioners. The second respondent has produced the copy of the petition stated to have been filed before the Chief Judicial Magistrate which is marked as Annexure R2(b). In Annexure R2(b) there is no averment to the effect that when he was arrested and produced before the Chief Judicial Magistrate, he had raised any complaint or torture or ill-treatment by the officers of C.B.I. On the other hand, it is specifically stated that apprehending physical as well as mental torture, he did not say anything to the Magistrate. It was also stated that when he was produced before the Magistrate on the second occasion, one of the investigating officers told his lawyer that in case the second respondent co-operates with the investigating officers, they will not oppose the bail application. It is further stated that contrary to the assurance given to the lawyer, the C.B.I. opposes the bail application. So the averments contained in Annexure R2(b) petition are against the averments in the complaint.

In Annexure R2(b) it was also averred that the officers of C.B.I. tried to struck some deal with the Advocate of the 2nd respondent which indicates that whenever the second respondent was produced before the Magistrate his Advocate was also present. In view of the very serious allegation levelled against the Chief Judicial Magistrate that in spite of the second respondent making a complaint before the Chief Judicial Magistrate, he refused to record it or take any action, it is necessary to examine the Chief Judicial Magistrate in this case. In the Criminal Miscellaneous Case it is averred that the second respondent was produced before the Magistrate on ten occasions while he was under custody and the 2nd respondent had not raised any complaint of ill-treatment on any of such occasion. It is also averred that after arrest, the second respondent was taken to General Hospital, Ernakulam and the Doctor on duty in casualty examined him and issued a certificate. Thereafter the second respondent was produced before the Doctors on seven occasions, 9-7-2003, 10-7-2003, 12-7-2003, 14-7-2003, 14-7-2003, 15-7-2003 and 16-7-2003. In the counter

affidavit filed by the second respondent, he has come forward with a new case stating that the doctors did not examine him properly because of the presence of the Police Officers and since the C.B.I. officers are elite class of investigation, the doctors would issue certificates to the needs of the C.B.I. officials fearing danger and dire consequences in future.

26. In [D.K. Basu Vs. State of West Bengal](#), the Supreme Court has held that the arrestee should, where he so requests, be also examined at the time of his arrest and major injuries, if any, present on his/her body must be recorded at that time. It was further held as follows :-

"The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory Director, Health Services should prepared such a panel for all Tehsils and Districts as well".

It is also well settled position of law that whenever a person is arrested and produced before the Magistrate he has got the right to tell the Magistrate in case of torture. In this case, the second respondent was arrested on 8-7-2003. Before handing over the second respondent to police custody and after the expiry of the period of police custody, he was produced before the Magistrate. The Magistrate might have recorded the physical condition of the second respondent as and when he was produced before him before handing over the custody to the police.

27. In the complaint the fact that the second respondent was examined by different doctors is conspicuously absent. Whether he made any representation before the Magistrate when he was produced after the expiry of the period of police custody is not stated in the complaint. It is also pertinent to note that in the complaint there is absolutely no mention of any witness. All that is stated is that the second respondent has witnesses to prove his case, viz, persons present in the C.B.I. Office, Police Guards posted there, staff of the Hotels where the second respondent was taken by C.B.I. the local residents of the area where C.B.I. took the complainant. Since no names are given as witnesses in the complaint, the Sub Inspector of Police who is investigation the case will get a free hand to name by person as a person who had witnessed the incident. According to the petitioners, the Sub Inspector of Police working under the accused in the former case is investigating the present case. It is argued that it is only to blackmail them and compel them so as to send a favourable report deleting the names of the police officers who are arranged as accused in the other case. I find considerable force in the apprehension of the petitioners that the investigation of this case by the local police may not be free and fair.

28. In view of the peculiar facts and circumstances of the case, I am of the view that the learned Magistrate went wrong in forwarding the complaint u/s 156(3) of the

Code of Criminal Procedure mechanically. I have already found that the learned Chief Judicial Magistrate/Magistrates before whom the 2nd respondent was produced is to be examined. I am told, the Chief Judicial Magistrate, before whom the second respondent was produced, was subsequently promoted and now working as a Sessions Judge. I am of the view that instead of allowing a Sub Inspector of Police to question and record the statement of the Sessions Judge, it is only just and proper that the learned Magistrate himself conduct an enquiry, summon the then Chief Judicial Magistrate and record his statement. It is also necessary to examine the various doctors before whom the second respondent was produced on different occasions. Even according to the second respondent, when he was produced before the Magistrate, his lawyer was also present and the officers of the C.B.I. tried to struck a deal with the lawyer. So it may be necessary to examine that lawyer also. Very senior Police Officers including a Deputy General of Police are arraigned as accused in the case investigated by the petitioners. The petitioners have got a case that this false complaint is filed by the second respondent who is the second accused in the other case at the instigation of the police officers who are arraigned as accused in the other case. They have also got a case that the intention of the 2nd respondent is to fabricate false evidence using a subordinate officer working under the accused in the other case to be used as defence evidence in that case. In view of the peculiar facts and circumstances of the case it is only just and proper that the Magistrate himself conducts an enquiry u/s 202 of the Code of Criminal Procedure.

29. The next question to be considered is whether the Magistrate is competent to summon documents and witnesses whose names and addresses were not furnished by the complainant while conducting the enquiry. It is well settled position of law that the enquiry contemplated u/s 202 Cr.P.C. does not necessarily mean an enquiry by examining witnesses produced by the complainant. The enquiry is not limited to any particular form. The Magistrate is competent to look into even the police records, if necessary. The enquiry is not to be so detailed as to anticipate a full-fledged trial. It is also well settled position of law that when the Magistrate issues summons and examined the witnesses, neither the complainant nor the accused has a statutory right to examine in chief or cross-examine them because the purpose of recording the statement is solely to find out whether a prima facie case is made out or not. It is also settled position of law that the provisions contained in Section 202 Cr.P.C. do not confine the evidence adduced by the complainant, but leave it to the discretion of the Magistrate to examine such witnesses and make such inquiry as he thinks fit. In *Thilakan v. Sukumaran* (1981 KLT 170), a learned Single Judge of this Court took a view that the Magistrate has power to take evidence of witnesses on oath, irrespective of the fact whether these witnesses are persons present in court or produced in court by complainant or summoned by the Magistrate. It was further held that if the Magistrate in his discretion finds that it is necessary for the purpose of inquiry witnesses should be

summoned, he can certainly summon the witnesses and examined them. In [S. Nihal Singh and others Vs. Arjan Das, New Delhi,](#), a learned Single Judge of the Delhi High Court while considering the scope of inquiry u/s 202 held that the Magistrate need not confine himself to evidence produced by complainant and he is free to hold any kind of enquiry which he deems fit. It is also held that the Magistrate has power to call for any documents or witnesses other than those sought to be produced by the complainant himself. The sole attempt of the Magistrate shall be to find out whether the averments in the complaint are devoid of any substance or a prima facie case is made out. There cannot be a straight-jacket formula in conducting that inquiry. But the scope of inquiry is limited and the petitioners, who are the accused, have no right to participate in the inquiry. In 2004 (3) ACR 2600 (SC) it was held as follows :-

"The scope of inquiry u/s 202 Cr.P.C. is a very limited one and that is to find out whether there are sufficient grounds for proceeding against the accused who has no right to participate there in much less a right to cross examine any witness examined by the prosecution, but he may remain present only with a view to be informed what is going on".

So, in view of the facts and circumstances of this case, the learned Magistrate ought to have conducted an inquiry u/s 202 and considered whether any prima facie case has been made out instead mechanically forwarding the same to the police u/s 156(3) of the Code of Criminal Procedure. He ought to have considered whether the complaint as framed is maintainable and whether the complainant can prosecute the case without obtaining sanction from the competent authority. So, the order passed by the learned Magistrate forwarding the complaint u/s 156(3) of the Code of Criminal Procedure to the Police is to be set aside in exercise of the powers conferred on this Court u/s 482 of the Code of Criminal Procedure. Even assuming that the order passed by the Magistrate forwarding the complaint cannot be quashed in exercise of the powers conferred u/s 482 of the Code of Criminal Procedure, in view of the facts narrated above I am of the view that this is a fit case in which the powers conferred on this Court under Article 227 of the Constitution of India is to be invoked and the order passed by the Magistrate is to be quashed. In view of the fact that the statement of the Sessions Judge may have to be recorded, I am of the view that it is only just and proper that the inquiry u/s 202 is conducted by a senior judicial officer. Since the Chief Judicial Magistrate, before whom the second respondent was produced, was promoted and transferred, I am of the view that the enquiry u/s 202 of the Code of Criminal Procedure is to be conducted by the present Chief Judicial Magistrate. For that purpose, the complaint now pending before the Judicial First Class Magistrate is to be transferred to the Court of Chief Judicial Magistrate in exercise of the powers conferred on this Court u/s 407 of the Code of Criminal Procedure.

In the result, the Criminal Miscellaneous case is allowed in part. The prayer to quash Annexure XX complaint is rejected. But, the order passed by the Judicial First Class

Magistrate - II forwarding Annexure XX complaint to the Sub Inspector of Police, Ernakulam Town North Police Station u/s 156(3) of the Code of Criminal Procedure is hereby set aside. Annexure XXI F.I.R. registered by the Sub Inspector of Police, Town North Police Station, Ernakulam as Crime No. 534 of 2003 and all further proceedings taken by the Police in pursuance to that F.I.R. are quashed. There will be a direction to the Judicial First Class Magistrate - II, Ernakulam to transfer M.P. 13527 of 2003 to the Court of Chief Judicial Magistrate. The learned Chief Judicial Magistrate shall conduct inquiry u/s 202 Cr.P.C. into the allegations levelled against the petitioners and find out whether a prima facie case is made out. It is open to the Chief Judicial Magistrate to summon various documents which are in the custody of Courts or officers in accordance with law. It is also open to the Chief Judicial Magistrate to summon the then Chief Judicial Magistrate/Magistrates before whom the 2nd respondent was produced and the doctors who examined the second respondent and call for the medical certificates issued by them. Copies of the Criminal Miscellaneous case, the counter affidavit filed by the second respondent and copies of the documents filed by both sides shall also be forwarded to the transferee court for reference.