

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K. BABU

MONDAY, THE 13TH DAY OF FEBRUARY 2023 / 24TH MAGHA, 1944

CRL.MC NO. 1034 OF 2023

(AGAINST THE ORDER DATED 31.01.2023 IN CRL.M.P.53/2023 IN
S.C.694/2021 OF FAST TRACK SPECIAL COURT, HARIPAD)

PETITIONER/3RD ACCUSED:

MANU DEV, AGED 24 YEARS
S/O.MANOJ, PULIMOOTTIL KIZHAKKETHIL, PALLANA,
THRIKKUNNAPPUZHA, ALAPPUZHA DISTRICT., PIN -
690515.

BY ADVS.SRI.M.P.MADHAVANKUTTY
MATHEW DEVASSI
ANANTHAKRISHNAN A. KARTHA
REMYA M. MENON

RESPONDENT/VICTIM AND STATE:

- 1 XXXX
- 2 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF
KERALA, ERNAKULAM. PIN - 682031.

R2 BY PUBLIC PROSECUTOR SRI.G SUDHEER

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION
ON 13.02.2023, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

“C.R.”

ORDER

In this Crl.M.C., filed under Section 482 Cr.P.C., the petitioner challenges the order dated 31.01.2023 in Crl.M.P.No.53 of 2023 in S.C.No.694/2021 (Annexure-II) passed by the Fast Track Special Judge, Haripad.

2. The petitioner is accused No.3 in the Sessions Case. He faces charges under Sections 450 and 376 of the Indian Penal Code, Sections 4, 3, 6, 5(i), 6, and 5(q) of the Protection of Children from Sexual Offences Act, 2012 (for short `the POCSO Act') and Section 75 of the Juvenile Justice (Care and Protection) Act, 2015.

3. The Court below has been proceeding with the trial of the case. The lawyer appearing for accused Nos.4 and 5 had also been appearing for the petitioner/accused No.3. The role of the petitioner is stated to be different from that of accused Nos.4 and 5. When the examination of PW1, the victim, and her mother (PW2) was completed, the petitioner engaged a new lawyer, who informed him that certain contradictions in the evidence of PW1 were not brought on record for which an application under Section 311 Cr.P.C. is to be filed.

4. The petitioner filed application under Section 311 Cr.P.C. and prayed for recalling PW1, the victim.

5. The Court below rejected the application on the ground that:

- (1) Recalling PW1 to testify repeatedly about the incident is in violation of Section 33(5) of the POCSO Act.
- (2) The petitioner/accused No.3 had sufficient opportunity to cross-examine PW1.
- (3) The victim had gone into a swoon during the cross-examination.

6. Heard both sides.

7. The learned counsel for the petitioner contended that as the victim is aged 22 years, the bar under Section 33(5) of the POCSO Act is not applicable. The learned counsel further contended that an error committed by the previous lawyer of the petitioner should not cause prejudice to the petitioner/accused No.3.

8. The learned Public Prosecutor, per contra, submitted that the attempt of the petitioner is to prolong the trial as he was given enough opportunity to cross-examine PW1.

9. The Court below, relying on Section 33(5) of the POCSO Act, held that recalling the victim to testify repeatedly about the incident cannot be permitted.

10. Admittedly, the victim is aged 22 years, though at the time of the alleged commission of the offence she was aged below 18

years.

11. Section 33(5) of the POCSO Act reads thus:-

“33. Procedure and powers of Special Court.-(1)

.....
(5) The Special Court shall ensure that the child is not called repeatedly to testify in the Court.”

12. Section 2(d) of the POCSO Act defines “child” as any person below the age of eighteen years. For the purpose of Section 33(5) of the Act, the relevant age is the age at the time of examination of the witness. Section 33(5) has no relevance in the present case. Therefore, the finding of the trial Court that recalling PW1 would lead to violation of Section 33(5) of POCSO Act cannot be sustained.

13. Coming to the scope of Section 311 Cr.P.C.. The section provides that any Court may, at any stage of inquiry, trial, or other proceedings under the Cr.P.C., summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the matter.

14. The aid of Section 311 Cr.P.C. should be invoked with the object of discovering relevant facts or obtaining proper proof of such

facts for a just decision of the case, and it must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undesirable results. It is trite that due care should be taken by the Court while exercising power under the section, and it should not be used for filling up the lacuna by the prosecution or by the defence or to the disadvantage of the accused or to cause serious prejudice to the defence or the accused or to give an unfair advantage to the rival side and further, the additional evidence should not be received as a disguise for a retrial or to change the nature of the case against either of the parties. The Court has very wide power to examine any witness it likes for a just decision in the case. The wide discretionary power upon the Court in this respect is to be exercised judicially and not arbitrarily. The Court shall suggest, by itself that it was in fact, essential to examine a witness or to recall him for further examination in order to arrive at a just decision on the case. The provision is to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts. The Section essentially is intended to ensure that every necessary and appropriate measure is taken by the Court to keep the record straight and to clear any ambiguity insofar as the evidence is concerned as also to ensure that no prejudice is caused to anyone. (Vide: [Vide: Mohanlal

Shamji Soni v. Union of India (1991 Supp(1) SCC 271:1991 SCC (Cri) 595), Zahira Habibulla H. Sheikh v. State of Gujarat [(2004) 4 SCC 158 : 2004 SCC (Cri) 999], Mina Lalita Baruwa v. State of Orissa [(2013) 16 SCC 173 : (2014) 6 SCC (Cri) 218], Rajaram Prasad Yadav v. State of Bihar [(2013) 14 SCC 461 : (2014) 4 SCC (Cri) 256] and Natasha Singh v. CBI [(2013) 5 SCC 741 : (2013) 4 SCC (Cri) 828].

15. The concept of “fair trial”, which is an inseparable facet of Article 21 of the Constitution, is highly relevant while adverting to the scope of Section 311 Cr.P.C. In **Rattiram v. State of M.P.**

[(2012) 4 SCC 516], on ‘fair trial’, the Apex Court held thus:-

“39. The question posed by us fundamentally relates to the non-compliance with such interdict. The crux of the matter is whether it is such a substantial interdict which impinges upon the fate of the trial beyond any redemption or, for that matter it is such an omission or it is such an act that defeats the basic conception of fair trial. Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracise injustice, prejudice, dishonesty and favouritism.”

16. Fair trial is the main object of criminal procedure, and such fairness should not be hampered or threatened in any manner as it entails the interest of the accused, the victim, and of society.

17. On the touchstone of the principles discussed above, I shall turn to the challenge posed by the petitioner to the impugned order. The case of the petitioner is that the relevance of his distinctive

role alleged by the prosecution was not properly taken care of by the lawyer engaged by him, who was also appearing for the other two accused. His specific case is that certain vital contradictions were omitted to be brought on record.

18. The learned public prosecutor submitted that the attempt of the petitioner/accused is to fill up the lacuna in the defense case.

19. The lacuna in a case need not be confused with the error that occurred due to an oversight committed by a lawyer during the trial in eliciting relevant answers from the witnesses. Such an error or an omission cannot be understood as "lacuna", which a Court is not expected to allow the parties to fill up. The lacuna can only be interpreted as an intrinsic weakness of the case of a party. The principle of fair trial demands that no party in a trial can be denied the opportunity to correct errors. The Court should be magnanimous in allowing such mistakes to be corrected. The function of a criminal Court is the administration of criminal justice and not to concentrate on omissions and errors. This view gets support from the decision of the Apex Court in **Rajendra Prasad v. Narcotic Cell (AIR 1999 SC 2292)**.

20. In the present case, the reasoning of the trial Court that the petitioner was given sufficient opportunity to cross-examine the

witness and that the witness had gone into a swoon during the cross-examination shall not be grounds to deny a fair trial to the petitioner.

21. In view of the above discussion, the order impugned is liable to be set aside.

In the result, the Crl.M.C. is allowed. The order dated 31.01.2023 in Crl.M.P.No.53 of 2023 in S.C.No.694/2021 (Annexure-II) passed by the Fast Track Special Judge, Haripad is set aside. The Court below is directed to recall PW1 for facilitating further examination in accordance with law.

Sd/-
K.BABU
Judge

TKS

APPENDIX OF CRL.MC 1034/2023

PETITIONER'S ANNEXURES:

Annexure I A TRUE COPY OF THE FINAL REPORT BEARING CRIME NO.781/2018 SUBMITTED BY THE THRIKKUNNAPPUZHA POLICE.

Annexure II THE CERTIFIED COPY OF THE ORDER DATED 31.01.2023 IN CRL.M.P. NO.53/2023 IN S.C. NO. 694/2021 BEFORE THE FAST TRACK SPECIAL COURT, HARIPPAD.

TKS