

**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT**

**THE HONOURABLE MR.JUSTICE K. BABU**

**THURSDAY, THE 24<sup>TH</sup> DAY OF AUGUST 2023 / 2ND BHADRA, 1945**

**CRL.MC NO. 1790 OF 2023**

**AGAINST CC 438/2022 OF JUDICIAL MAGISTRATE OF FIRST CLASS - I,  
CHALAKUDY**

**PETITIONER:**

KARTHIK S NAIR,

**RESPONDENTS:**

- 1 STATE OF KERALA  
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF  
KERALA, PIN - 682031
- 2 STATION HOUSE OFFICER  
MALA POLICE STATION, MALA PO  
THRISSUR DISTRICT, PIN - 680732

BY SMT.M.K.PUSHPALATHA-PUBLIC PROSECUTOR

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON  
24.08.2023, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

**CR**

**K.BABU, J.**

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Crl.M.C.No.1790 of 2023  
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Dated this the 24<sup>th</sup> day of August, 2023

**O R D E R**

The challenge in this Crl.M.C is to the order dated 16.2.2023 in Crl.M.P.No.958/2023 in C.G.No.438/2019 on the file of the Judicial First Class Magistrate Court, Chalakudy.

2. The petitioner is accused No.2. He faces a charge under Section 392 r/w Section 34 of IPC.

3. The prosecution case is that on 12.1.2022 at 5 a.m at Vennur Padam, the petitioner and the other accused committed robbery and thereby snatched away a gold chain weighing 16 grams belonging to PW1. The petitioner was riding the two-wheeler on which accused No.1 was riding pillion.

4. PW1 is the defacto complainant. She is the only occurrence witness. The prosecution examined PWs 1 to 15 and proved Exts.P1 to P27.

5. The learned Assistant Public Prosecutor, thereafter, filed an application under Section 311 of Cr.P.C to recall PW1, stating the reason

that she omitted to identify accused No.2. The learned Assistant Public Prosecutor asserted that there was no evidence to identify accused No.2 and identification of the accused is very much essential for the just decision of the case.

6. The petitioner challenged the application contending, that while examining PW1, the learned Public Prosecutor had specifically asked about the identity of accused No.2/petitioner. However, the witness identified accused No.1 only. Though both the accused were present in the Court, PW1 failed to identify the petitioner/ accused No.2. The defence contended that recalling PW1, specifically for identification would cause prejudice to accused No.2, who was not identified in the box. The defence also contended that there is an inordinate delay in filing the application seeking the recalling of witness, which is also fatal.

7. After considering the rival contentions, the learned Magistrate recorded the finding that examination of PW1 is required to see whether there was any chance of identification which is essential for the just decision of the case.

8. Heard the learned counsel for the petitioner and the learned Public Prosecutor.

9. The learned counsel for the petitioner contended that giving a further opportunity to PW1 only for identification is filling a lacuna in the prosecution case, which is not mandated under Section 311 of Cr.P.C.

10. The learned counsel contended that the prosecution attempts to make up the case's inherent weakness and to give the prosecution an unfair advantage.

11. The learned Public Prosecutor contended that the Court has wide power in summoning any witness, and if the examination of the witness is found to be essential for the just decision, the Court has to exercise its power under Section 311 of Cr.P.C.

12. The prosecution allegation is that the petitioner and the other accused committed robbery on 12.1.2022 at 5 a.m. It is alleged that accused No.1, in this case, snatched away the gold chain that belonged to PW1, and at the relevant time, he was riding pillion on a motorbike ridden by the petitioner.

13. PW1 is the only witness to the incident proper. At the time of her examination, the learned Assistant Public Prosecutor asked her whether she could identify the accused. On the date of her examination,

the petitioner and accused No.1 were in the box. The witness identified accused No.1 alone. Even though a specific question was put to the witness regarding the identification of the accused, she failed to identify accused No.2.

14. Can the prosecution be permitted to summon PW1 specifically to identify accused No.2? If the witness is given one more chance to answer or to state the question of identity in the presence of two accused, she can naturally identify the accused.

15. Section 311 Cr.P.C 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.

16. 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: **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].

17. In **State (NCT of Delhi) v. Shiv Kumar Yadav & Another [(2016) 2 SCC 402]**, the Apex Court held thus:

".....Certainly, recall could be permitted if essential for the just decision, but not on such consideration as has been adopted in the present case. Mere observation that recall was necessary "for ensuring fair trial" is not enough unless there are tangible reasons to show how the fair trial suffered without recall. Recall is not a matter of course and the discretion given to the court has to be exercised judiciously to prevent failure of justice and not arbitrarily."

18. Recalling a witness for the just decision of the case is not a hollow procedure. A strong and valid reason should be recorded for the exercise of that power facilitating a just decision.

19. The prejudice to be caused to the accused is highly important in this regard. 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 the main object of the criminal procedure and such fairness should not be hampered or threatened in any manner as it

entails the interest of the accused.

20. This Court had an opportunity to consider a similar situation in **K.V.Vijyadas v. State of Kerala** (MANU/KE/1101/2017). In **Vijyadas** (Supra) this Court was considering a situation where evidence was reopened to recall a witness to identify the accused in Court. This Court held that serious prejudice would be caused to the accused by recalling a witness for the purpose of identification alone as it would lead to making up the inherent weakness of the case and unfair advantage to the prosecution.

21. Another aspect that requires consideration is the delay in filing the application seeking recall of the witness. The application under Section 311 of Cr.P.C was filed at the very fag end of the trial. The prosecution had enough opportunity earlier. The delay in filing the application is one of the most important factors that has to be explained in the application. The prosecution, in the application submitted on its part, has not explained the delay in filing the application. In **Umar Mohammad and Others v. State of Rajasthan [(2007) 14 SCC 711]**, the Apex Court on the question of delay held thus:

"Before parting, however, we may notice that a contention has been raised by the learned counsel for the appellants that PW-1 who was examined in Court on 5.7.1994 purported to have filed an application on



1.5.1995 stating that five accused persons named therein were innocent. An application filed by him purported to be under **Section 311** of the Code of Criminal Procedure was rejected by the learned Trial Judge by order dated 13.5.1995. A revision petition was filed there against and the High Court also rejected the said contention. It is not a case where *stricto sensu* the provisions of **Section 311** of the Code of Criminal Procedure could have been invoked. The very fact that such an application was got filed by PW-1 nine months after his deposition is itself pointer to the fact that he had been won over. It is absurd to contend that he, after a period of four years and that too after his examination-in-chief and cross-examination was complete, would file an application on his own will and volition. The said application was, therefore, rightly dismissed."

22. In view of the discussions made above, this Court is of the view that the learned Magistrate was not justified in allowing the application to recall the witness. Therefore, the order dated 16.2.2023 in Crl.M.P.No.958/2023 in C.C.No.438/2019 on the file of the Judicial First Class Magistrate Court, Chalakudy stands set aside. The application seeking the recalling of witness stands dismissed.

The Crl.M.C is allowed as above.

Sd/-

**K.BABU,  
JUDGE**

ab

**APPENDIX OF CRL.MC 1790/2023**

PETITIONER ANNEXURES

- Annexure A1 THE TRUE COPY OF THE PW1 STATEMENT DATED 08.08.2022
- Annexure2 THE TRUE COPY OF THE CASE DETAILS OF CC 438/2022 PENDING BEFORE THE JUDICIAL FIRST-CLASS MAGISTRATE COURT, CHALAKUDY RETRIEVED AS ON 21.02.2023
- Annexure A3 THE TRUE COPY OF THE ARGUMENT NOTES FILED BY THE ACCUSED IN CC 438/2022 DATED 06.02.2023
- Annexure A4 THE TRUE COPY OF THE SECTION 311 CRPC PETITION FILED BY THE PROSECUTION DATED NIL
- Annexure A5 THE TRUE COPY OF THE PROCEEDINGS OF JFCM, CHALAKUDY IN 438/2022 DATED 09.02.2023
- Annexure A6 THE TRUE COPY OF THE COUNTER FILED TO ANNEXURE A4 PETITION FILED BY THE 2ND ACCUSED
- Annexure A7 THE TRUE COPY OF THE PROCEEDINGS OF JFCM, CHALAKUDY IN 438/2022 DATED 16.02.2023
- Annexure A8 THE CERTIFIED COPY OF THE CR.P.C SECTION 311-APPLICATION FILED BY THE PROSECUTION SEEKING RE EXAMINATION OF THE PW1 DATED 09.02.2023
- Annexure A9 THE CERTIFIED COPY OF THE ORDER OF LEARN T JUDICIAL MAGISTRATE FIRST CLASS- CHALAKUDY IN CRL.MP NO. 958 OF 2023 DATED 16.02.2023

RESPONDENTS ANNEXURES: NIL