

Victim vs State of Kerala

Victim vs State of Kerala

SooperKanoon Citation : sooperkanoon.com/1602137

Court : Kerala

Decided On : Nov-12-2021

Judge : Honourable Mr.Justice Ziyad Rahman a.a.

Appeal No. : CRL.A/543/2018

Appellant : Victim

Respondent : State of Kerala

Judgement :

Crl.A.Nos.543, 546 of 2018 1

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE ZIYAD RAHMAN A.A.
FRIDAY, THE 12TH DAY OF NOVEMBER 2021 / 21ST KARTHIKA,
1943 CRL.A NO. 543 OF 2018 AGAINST THE ORDER/JUDGMENT IN
CRMP 1137/2018 OF DISTRICT COURT& SESSIONS
COURT,PATHANAMTHITTA, PATHANAMTHITTA
APPELLANT/PETITIONER/DEFACTO COMPLAINANT: SWAPNA,
AGED 30 YEARS, D/O.VASUDEVAN, ERICHIPARAYIL HOUSE,
BANGLAMKADAVU, VALIYAKULAM, VADASSERIKARA,
PATHANAMTHITTA. BY ADVS.SRI.B.DEEPAK SRI.KARTHIK

BHAVADASAN RESPONDENT/RESPONDENT/RESPONDENT: 1
STATE OF KERALA, REPRESENTED BY THE DY.SP OF POLICE,
RANNI POLICE STATION, REP. BY THE PUBLIC
PROSECUTOR,HIGH COURT OF KERALA, ERNAKULAM-682 031. 2
ANANTHAKRISHNAN, AGED 31 YEARS, S/O.VIJAYANANDAN,
CHIRAVAIL HOUSE, MOTHIRAVAYAL, KARIKULAM-689 673. R2 BY
SRI.MANU RAMACHANDRAN R1 BY SRI. ARAVIND MATHEW,
PUBLIC PROSECUTOR THIS CRIMINAL APPEAL HAVING COME UP
FOR ADMISSION ON 20.10.2021, THE COURT ON 12.11.2021
DELIVERED THE FOLLOWING: CrI.A.Nos.543, 546 of 2018 2

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE ZIYAD RAHMAN A.A.
WEDNESDAY, THE 20TH DAY OF OCTOBER 2021 / 28TH ASWINA,
1943 CRL.A NO. 546 OF 2018 AGAINST THE ORDER/JUDGMENT IN
SC 363/2014 OF DISTRICT COURT & SESSIONS
COURT,PATHANAMTHITTA, PATHANAMTHITTA
APPELLANT/PETITIONER/DEFACTO COMPLAINANT: SWAPNA,
AGED 30 YEARS, D/O.VASUDEVAN, ERICHIPARAYIL HOUSE,
BANGLAMKADAVU, VALIYAKULAM, VADASSERIKARA,
PATHANAMTHITTA. BY ADVS.SRI.B.DEEPAK SRI.KARTHIK
BHAVADASAN RESPONDENT/RESPONDENTS/RESPONDENTS:

1 STATE OF KERALA, REPRESENTED BY THE DY.SP OF POLICE,
RANNI POLICE STATION, REP. BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM-682 031. 2
ANANTHAKRISHNAN, AGED 31 YEARS, S/O.VIJAYANANDAN,
CHIRAVAIL HOUSE, MOTHIRAVAYAL, KARIKULAM-689 673. BY
ADVS. SMT.AMBIKA DEVI S, SPL.GP ATROCITIES AGAINST WOMEN
& CHILDREN & WELFARE OF W & C SRI.MANU RAMACHANDRAN
SRI.M.KIRANLAL SRI.T.S.SARATH SRI.R.RAJESH (VARKALA)
SHRI.SAMEER M NAIR THIS CRIMINAL APPEAL HAVING COME UP
FOR ADMISSION ON

20.10.2021, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: CrI.A.Nos.543, 546 of 2018 3

ORDER

Both the above Criminal Appeals are filed by the de facto

complainant in S.C.No.363 of 2014 on the file of the Sessions Court, Pathanamthitta, under section 14A of the Scheduled Castes and Scheduled Tribes(Prevention of Atrocities) Act, 1989. The 2 nd respondent herein is the sole accused in the said case, where the offence alleged against him are under Sections 376 and 420 IPC read with Section 3(1)(xii) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter refers to SC ST Act for short). Criminal Appeal No.543 of 2018 is filed challenging the order passed by the Sessions Court in

CrI.M.P.No.1137 of 2018, wherein prayer of the appellant for conducting DNA test of her child to establish that the accused is the biological father of the said child, was rejected by the Sessions Court. Criminal Appeal No.546 of 2018 is filed challenging the

order passed in the petition submitted by the prosecution

(CrI.M.P.No.196 of 2018), seeking permission for further investigation under Section 173(8) Cr.PC and to conduct potency CrI.A.Nos.543, 546 of 2018 4 test of the accused. As per the impugned order, the said prayer was rejected by the Sessions Court.

2. Brief facts of the case which is necessary for

adjudication of the issues involved in this case are as follows: Crime No.725 of 2010 was registered by the police against the 2 nd respondent herein for the offences mentioned above. The case of the prosecution is that; the 2nd respondent, by inducing the de facto complainant under the promise of marriage, had sexual intercourse with her and thereby impregnated her. Subsequently,

he had withdrawn from the promise. As the consent for sexual intercourse was obtained under a false promise of marriage, it was not a valid consent and hence the said acts of the accused attract the aforesaid offences. After investigation, charge sheet was submitted by the police for the offences mentioned above and cognizance was taken by the Sessions Court as SC.No.363 of 2014.

3. During the course of trial, the prosecution submitted

Crl.MP.No.196 of 2018 seeking further investigation under Section 173 (8) Cr.P.C by conducting potency test of the 2nd respondent. The said application was rejected as per order dated 23.02.2018. The de facto complainant filed Crl.M.P.No.1137 of 2018 seeking Crl.A.Nos.543, 546 of 2018 5 for a direction to conduct DNA test of her child, which was also dismissed as per separate order dated 22.03.2018. These orders are impugned in the above appeals.

4. Heard Sri.Karthik Bhavadasan, learned counsel for the appellants, Smt.S.Ambika Devi, learned Special Government Pleader for Prevention of Atrocities against Women and Children and Sri.Manu Ramachandran, learned counsel for the 2nd respondent.

5. The learned counsel for the appellant contends that the

orders passed by the Sessions Court rejecting the applications are improper as the same are against the statutory mandate as contained under Section 53A of Cr.P.C. Failure in conducting the potency test during the course of investigation was a serious lapse on the part of the investigating agency and it has seriously affected her right to get justice as a victim of the crime. Similarly, by placing reliance upon Section 53A, he contends that, there is a statutory mandate to conduct DNA test, in a case where Section 376 of IPC is involved. He places reliance upon decisions in Abdul Latheef & Ors. v. State of Kerala [2014(3) KLJ 819], Ramlal Narang and Ors. v. State (Delhi Administration) [AIR 1979

Crl.A.Nos.543, 546 of 2018 6 SC 1791], Krishan Kumar Malik v. State of Haryana [(2011) 7 SCC 130], Sathishkumar Nyalchand Shah v. State of Gujrat and Ors. [(2020) 4 SCC 22] and Sindhu Gopalakrishnan v. Sebastian and Ors.[ILR 2011 (1)

Kerala 231].

6. Learned Special Government Pleader would contend

that, the prosecution was compelled to submit the application for further investigation as they could not conduct the potency test during the course of investigation, due to the fact that the 2 nd

respondent accused was absconding at the relevant time. The learned counsel for the appellant brought the attention of this Court to the report submitted by the Deputy Superintendent of Police, Thiruvalla on 16.01.2018, wherein it was specifically stated that the potency test could not be conducted due to the reason mentioned above. The learned Special Government Pleader also submits that if potency test is not conducted, serious prejudice would cause to the prosecution as it is one of the crucial pieces of evidence for establishing the offence alleged against the 2 nd

respondent/accused. In such circumstances, the learned Government Pleader supports the contentions put forward by the learned counsel for the appellant. Crl.A.Nos.543, 546 of 2018 7

7. Per contra, the learned counsel appearing for the 2 nd

respondent would contend that the appeals are not maintainable. According to him Section 14A of SC ST Act does not contemplate an appeal against an order of interlocutory nature. In both the said appeals, the prayers sought for are to conduct potency test as well

as DNA test and any decision on such applications are interlocutory in nature. In such circumstances, the appeals itself are not maintainable, contends the learned counsel. It was further pointed out that the application was submitted by the prosecution as well as appellant herein much belatedly and by that time all the witnesses cited by the prosecution were examined and the matter was posted for questioning of the 2 nd respondent under Section

313 Cr.P.C. He submits that as his defense is already revealed during the course of examination of the prosecution witnesses, reopening of the investigation at this juncture would cause serious prejudice to him. In such circumstances, he seeks for dismissal of the above appeals.

8. As the learned counsel for the 2nd respondent raised the

question of maintainability of appeals, this Court should consider the said question first. Both the above appeals are filed by CrI.A.Nos.543, 546 of 2018⁸ invoking Section 14A of SC ST Act. Sub-section (1) Section 14A of the Act reads as follows: 14A. Appeals. - (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an appeal shall lie, from any judgment, sentence or order, not being an interlocutory order, of a Special Court or an Exclusive Special Court, to the High Court both on facts and on law."

9. It is true that the appeal contemplated as per the said provision is from any judgment, sentence or order not being an

interlocutory order. So the basic question that arises here is whether the orders under challenge are interlocutory orders so as to attract the prohibition contained in the above provision. When the nature of the prayers sought for by the prosecution as well as the de facto complainant is examined, it can be seen that, the outcome of the said petitions would be having substantial impact on the rights of the de facto complainant and also on the prosecution case. Since the potency test being one of the basic pieces of evidence to be adduced for establishing an offence of rape, failure in conducting the same could be fatal to the

prosecution case. In Sindhu Gopalakrishnans case (supra), this Court considered the question as to whether dismissal of an CrI.A.Nos.543, 546 of 2018⁹

application by the prosecution to conduct further investigation under Section 173(8) of Cr.P.C can be challenged before this Court invoking the powers of revision as contemplated under Section 397 (1) of Cr.P.C. The objection that was raised in the said case was as to the maintainability of the revision petition, in the light of specific prohibition contained in Section 397 (2) of Cr.P.C. It was

contended that, this Court cannot entertain the said revision petition, as the order impugned being an interlocutory order. This Court after referring to large number of decisions of the

Honourable Supreme Court, arrived at a conclusion that the order

passed on an application for further investigation under Section 173(8) is not an interlocutory order. In paragraph No.18 of the

judgment it was observed as follows:

18. On examination of the facts and circumstances involved in the present case, which led to the

impugned order, it can be seen that though the order

passed by the learned Magistrate is not final in nature or determining the right of the parties, the outcome of the order is likely to affect the right of the parties at the stage of final adjudication. As observed by justice Desai, in V.C.Shuklas case, the present

order arose out of a step taken by the de facto

complainant towards the effective final adjudication CrI.A.Nos.543, 546 of 2018 10

of the matter pending before the trial court and for assisting the parties in the prosecution of the matter pending before the trial court and for assisting the parties in the prosecution for their case in the pending proceedings. I am of the view that on a dismissal or allowing of petition filed under Section 173(8) of Code of Criminal Procedure, either by the investigating agency or at the instance of private complainant, the same cannot be characterized neither as a final order nor as an interlocutory order, but the same has vital consequence, at the stage of final adjudication of the main proceedings pending before the court connected with the inquiry or trial

commenced. So, according to me, the order

impugned in this revision petition is an order passed during the course of proceedings, but not final in the sense, determining the right or liabilities of the parties and the same is not an interlocutory order, but the order can be categorized as the one falling in between the final order and interlocutory order and the outcome of such order is likely to affect the interest of the parties in the trial and therefore, such

order is amenable to the revisional jurisdiction of the

High Court and the bar contained in Section 397(2) of the Code of Criminal Procedure is not attracted. No doubt, the proceedings which are the subject-matter of the decisions reported in State represented by Inspector of Police and Ors. v. N.M.T Joy Immaculate Manu/SC/0448/2004: (2004) 5 S.C.C 729, Rocky, V.A Crl.A.Nos.543, 546 of 2018 11

v. V.I.Vakkachan and Ors.2009 (4) K.H.C.422, Yadav Agencies Pvt.Ltd. v. Philomina 1985 K.L.T 560 and Vasu v. Unnikrishnan 1983 K.L.T.310, are purely interlocutory in nature and hence, the bar contemplated under Section 397(2) of the Code of Criminal Procedure is attracted and as such, the dictum laid down in those decisions is beyond any dispute and governs the filed. In the light of the decisions reported in Rajendra Kumar Sitaram Pande v. Uttam MANU/SC/0093/1999: (1999) 3 S.C.C 134, Dharmarajan v. State 2002(2) K.L.T.666 and Abdul Rasheed v. State of Kerala 2009(2) K.L.T

S.N.34(C.No.40), according to me, the order

impugned is revisable, notwithstanding the bar contained in Section 397(2) of the Code of Criminal Procedure because the test laid down in those decisions is squarely applicable in the present case also.

10. I am in full agreement with the principles laid down in

Sindhu Gopalakrishnans case (supra). As mentioned above, it was categorically observed by this Court that the order passed in that case was not interlocutory in nature, as the decision on the prayers sought for by the petitioner was likely to affect the rights and liabilities of the parties, at the final stage of proceedings. In such circumstances, the said order cannot not be treated as an interlocutory order, on the other hand, it would be an intermediary

Crl.A.Nos.543, 546 of 2018 12

order which is distinct from the interlocutory order but not a final

order. Section 14A (1) of SC ST Act is pari materia with Section 397 (2) of Cr.P.C and principles laid down in the said judgment are squarely applicable to these cases as well. As per Section 14A(1), what is prohibited is only an appeal against an interlocutory order. In this case decision of potency test is something which will have substantial impact upon the prosecution case or defense case as the case may be, at the final stage of the proceedings and therefore under no circumstances it can be treated as a mere interlocutory order. In such circumstances, I am of the view that the contention raised by the learned counsel for the 2 nd respondent against the maintainability of the appeals is without any merit and hence rejected.

11. The next aspect to be considered is as to whether the

prayer for conducting potency test and DNA test can be entertained, at a stage where the evidence of the prosecution was over. On examining the proceedings before the Sessions Court, it can be seen that the application for potency test was submitted on 20.01.2018 on which date PW11 was examined and the same was considered on 23.02.2018 by the Sessions Court and dismissed the

Crl.A.Nos.543, 546 of 2018 13

same. It is true that the said application was submitted during the advanced stage of the trial. The submission of the learned Government Pleader in this regard was that the potency test could not be conducted earlier, as there was no proper co-operation from the part of the 2nd respondent/accused. With an intention to avoid

the said test being conducted, he absconded and left the State. Despite all earnest efforts he could not be traced out while final report was filed. In this regard, statutory stipulation

contained in Section 53A of Cr.P.C is also relevant. The said provision reads as follows:

53A. Examination of person accused of rape by medical practitioner.-(1) When a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of sixteen kilometers from the place where the offence has been committed, by any other registered medical practitioner, acting at the request of a police officer not below the rank of a sub-inspector, and for any person acting in good faith in his aid and under his

Crl.A.Nos.543, 546 of 2018 14 direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.

12. As per the said provision, when a person is arrested on

a charge of committing offence of rape it shall be lawful for the prosecution to conduct tests of various nature as contemplated in the said provision. The potency test is capable of providing one of the most basic pieces of evidence to establish the guilt of the accused in this case. In the light of the statutory mandate as contained in the said provision, it is only proper that the court should have considered the said application by taking a liberal view. The aforesaid aspect gains importance when we consider the explanation offered by the prosecution that the failure in conducting the test was due to the non co-operation of the accused as he absconded after registration of the crime. In such circumstances,

denying an opportunity to the prosecution to conduct potency test would give an undue advantage to the defense. The defense cannot take any such advantage particularly when the non-cooperation of the 2 nd respondent has also contributed to such failure. Thus, the denial of such opportunity to CrI.A.Nos.543, 546 of 2018 15 the prosecution would amount to giving the 2 nd respondent an opportunity to encash his own fault.

13. While considering the question of sustainability of the

prayers sought for in the respective petitions, the purpose of incorporation of Section 173(8) is very much relevant. Earlier, the police was not vested with the power to investigate further, once a final report was submitted before the Magistrate. Subsequently as per the 41st report of Law Commission it was recommended as follows:

14.23. A report under Section 173 is normally the end of the investigation. Sometimes, however, the police officer after submitting, the report under Section 173 comes upon evidence bearing on the guilt or innocence of the accused. We should have thought that the police officer can collect that evidence and send it to the Magistrate concerned. It appears, however, that Courts have sometimes taken the narrow view that once a final report under Section 173 has been sent, the police cannot touch the case again and cannot re- open the investigation. This view places a hindrance in the way of the investigating agency, which can be very unfair to the prosecution and, for that matter, even to the accused. It should be made clear in Section 173 that the competent police officer can examine such

CrI.A.Nos.543, 546 of 2018 16 evidence and send a report to the Magistrate. Copies concerning the fresh material must of course be furnished to the accused.

14. Later, in the light of the above recommendations in

1973 Criminal Procedure Code, a new provision which was distinct from the provisions of the earlier Code, namely section 173(8), was incorporated. The said

provision enables the officer in charge of the police station to conduct further investigation in the matter. The aforesaid provision reads as follows:

173 (8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub- sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2). Thus, from the above, it is evident that, legislature wanted to

equip the police to investigate the matter even after filing of charge sheet, under certain circumstances. CrI.A.Nos.543, 546 of 2018 17

15. The contention of the learned counsel for the 2 nd

respondent is that the operation of Section 173(8) is confined to the situation where further evidence becomes available and it cannot be invoked for filling up the lacuna in the investigation. However, I am not inclined to accept the said contention, in the peculiar factual circumstances of this case. Here, failure in conducting potency test earlier cannot be treated as a lacuna by

itself. This is particularly because, the 2 nd respondent has also contributed to the same by not co-operating with the investigation and not making himself available for such test, despite the fact that as per Section 53A there was a mandate for conducting such tests. Even otherwise, potency test and the result thereof being one of the basic evidence to establish the guilt or the innocence of the accused, as the case may, it should have been conducted

during the course of investigation. When such failure has occasioned due to the reasons attributable to the accused also, it cannot be treated as a lacuna. In Abdul Latheefs case (supra) a Division Bench of this Court while considering the

question as to whether the prosecutor can submit an application for further investigation under Section 173(8), it was observed as follows:

Crl.A.Nos.543, 546 of 2018 18

34. From all the above, it can safely be concluded that when the court has the power to direct the investigating agency to conduct further investigation under Section 173(8) Cr.P.C. in a matter even after taking cognizance on the final report filed by the investigating agency before it under Section 173(2) Cr.P.C., either the de facto complainant, who is aggrieved on account of any lapse committed by the investigating agency in conducting the investigation or in not conducting the investigation in another line to which it ought to have been conducted, or the Public Prosecutor who notices serious lapse committed by the investigating agency in not conducting the investigation properly, can invite the attention of the court through an application for satisfying the court in respect of the necessity to invoke the power of the court under Section 173(8) Cr.P.C.. Even without any such wake up call, the court on its own can invoke its power under Section 173(8) Cr.P.C.

16. In the light of the above principles, there is nothing

wrong in permitting further investigation in this matter. While relying upon the principles in Abdul Latheefs case (supra), I am conscious of the fact that in Prakash v. State of Kerala and Others [2015(3) KLT 528], it was held that the observations made by the Division Bench in Abdul Latheefs case as regards Crl.A.Nos.543, 546 of 2018 19

to the power of the Magistrate to order further investigation suo motu, are against the judgments rendered by the Honourable Supreme Court. However, the reliance which I am placing on the observations in Abdul latheefs case, are with respect to the circumstances in which a further inquiry can be ordered under Section 173 (8) Cr.P.C alone. No judgments holding a contrary

view on that point was brought to my notice. As per the observations made therein, even after taking cognizance on the final report filed by the investigating agency, the de facto complainant who is aggrieved on account of any lapse committed by the investigating agency in conducting investigation or in not conducting investigation in another line to which it ought to have been conducted, or the Public Prosecutor who notices serious lapse committed by the investigating agency in not conducting the investigation properly can invite the attention of the court through an application for satisfying the Court, as to the necessity to invoke the power of this Court for further investigation. In this case, the above observation is clearly applicable because of more than one reason. Firstly, the section 53A contains a legal mandate to conduct the test as contemplated in the said provision. Even

Crl.A.Nos.543, 546 of 2018 20 though, the said provision does not specifically makes the conduct of such test mandatory, the said provision, clearly indicates the importance and necessity of a medical test, in the case of offence of rape. In this regard, the observations made by the Honourable Supreme Court in Krishan Kumar Maliks case (surpa) is very much relevant. In paragraph No.45 thereof, it was observed as follows:

Now, after the incorporation of Section 53 (A) in the Criminal Procedure Code, w.e.f. 23.06.2006, brought to our notice by learned counsel for the Respondent-State, it has become necessary for the prosecution to go in for DNA test in such type of cases, facilitating the prosecution to prove its case against the accused..... In the light of the above, the orders passed by the Sessions

Court in rejecting the prayers sought for by the prosecution as well as the police/victim to conduct potency test as well as DNA test are not sustainable.

17. It was further contended by the learned counsel for the 2nd respondent, that, order impugned in the Crl A.543/2018, i.e

order passed in Crl M.P 1137/2018 in S.C 363/2014, was

dismissed by the Sessions Court on the ground that, the appellant/ Crl.A.Nos.543, 546 of 2018 21

de facto complainant, does not have the locus standi to file such an application as per section 301 of Cr.P.C. However, I am of the view that the said finding is not sustainable in the light of the specific protection provided to the victim under SC & ST Act, by way of section 15A. Sub section 4 of Section 15A reads as follows:

A victim or his dependent shall have the right to apply to the Special Court or the exclusive Special Court, as the case may be, to summon parties for production of any documents or materials, witness or examine persons present.

18. The learned Counsel for the 2nd respondent vehemently contends that, the said provision is not applicable in this case. According to the learned counsel, the said provision would come into play only under those

circumstances where the documents, materials to be produced are already in existence, whereas, in this case, a test report can be obtained only after conducting a medical examination of the 2nd respondent. Thus, as the said document is not in existence as of now the said provision cannot be pressed into service. However, I do not find any merit in the said contention. Prayer sought for is to conduct a potency test

Crl.A.Nos.543, 546 of 2018 22

and DNA test. The aforesaid tests are intended to verify the physical condition of the 2nd respondent accused, which is already in existence and is a very relevant aspect in a case of rape and consequent impregnation. The test report is only a certificate showing such physical condition and therefore, it cannot be concluded that, conducting such test and obtaining a certificate would amount to introduction of new facts. In my view, the test report is a certification of existing facts only.

19. Section 15(A) of the SC ST Act provides special

privileges and rights to the persons under SC ST Act. The rights contemplated under the section is a special protection provided to the victims of offences under

SC ST Act which itself is an enactment for welfare of certain classes of

persons. The appellant herein is a person entitled for the benefits of the said provisions. In the light of such special protection, it cannot be held that the de facto complainant in this case, has to Act as a mute spectator of events that occur during the course of trial. She has every right to invoke her special rights and privileges as contemplated under Section

Crl.A.Nos.543, 546 of 2018 23

15A of SC ST Act, when the prosecution is not taking necessary care in prosecuting the matter and there are lapses on their part. Thus, in the light of the aforesaid special provision, I am of the view that the appellant has the locus standi to file the application which is dismissed by the Sessions Court and also to file appeal against the aforesaid orders. Thus, in the light of the special rights available to the victim of an offence under SC & ST Act, the finding of the Sessions Court, as to the lack of locus standi in raising such a prayer is not legally sustainable.

20. In State of Kerala v. Jayesh @ Jaabar @ Babu [ILR 2020 (2) Kerala 239] a Division Bench of this Court was pleased to observe as follows:

"A Judge does not preside over a criminal trial merely to see that no innocent man is punished, he also presides to see that a guilty man does not escape and one is as important as the other".

21. The aforesaid observation is very much relevant when considering the question of prejudice as highlighted by the learned counsel for the 2nd respondent. While protecting the rights of the Crl.A.Nos.543, 546 of 2018 24

accused, the court has also a duty to see that the interest of the victims are also protected. A balance has to be struck between the rights of both parties, during the course of trial by providing a fair opportunity to the parties concerned, to adduce evidence. As I have mentioned above, in this case, the 2nd respondent cannot advance a case of prejudice in conducting a test of potency and DNA test at this juncture for more than one reason. Firstly, as the same is his own making since he

did not make himself available for

conducting tests during the course of investigation. Secondly, conducting such a test would not cause any prejudice to the 2 nd respondent because of the fact that it is not intended to introduce

something new to the 2nd respondent. The fact of potency is a matter known to him and by conducting such test, there is no possibility of causing any prejudice to him. As far as the evidence of the witnesses already examined are concerned, the outcome of potency test would not have any impact, as the result of potency test is something intimate to the 2 nd respondent and his physical

condition/capacity. The question of opportunity being denied to cross examine the other witnesses on the aspect of potency also does not arise at all, because of this. In such circumstances, the CrI.A.Nos.543, 546 of 2018 25 fact that the witnesses already cited by the prosecution were already examined, is not a matter of concern for the purpose of considering the prayers sought for in this petition by the prosecution. In the above circumstances, I am of the view that the orders passed by the Sessions Court in CrI.M.P.No.196/2018 and Prayers sought for in the respective petitions are hereby allowed and the Sessions Court is directed to secure the presence of the 2nd respondent before the Court and to take further steps by issuing appropriate orders for conducting potency test and DNA test through proper agencies in this regard. CrI.Appeals are allowed with the above findings and directions. Sd/- ZIYAD RAHMAN A.A. JUDGE DG/25.10.21

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com