

Rajeeb vs State of Kerala

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Court : Kerala Orders

Decided On : Nov-29-2021

Judge : Honourable Mrs. Justice M.R.Anitha

Appeal No. : Crl.MC/5142/2021

Appellant : Rajeeb

Respondent : State of Kerala

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MRS. JUSTICE M.R.ANITHA
MONDAY, THE 29TH DAY OF NOVEMBER 2021 / 8TH AGRAHAYANA,
1943 CRL.MC NO. 5142 OF 2021 (AGAINST THE ORDER IN CRL.M.P
NO.255/2021 DATED 26.10.2021 IN S.C. NO.6/2017 ON THE FILES
PENDING BEFORE THE HON'BLE SPECIAL JUDGE FAST TRACK
(FOR POCSO ACT CASES), PERINTHALMANNA (MANJERI DIVISION)
IN CRIME NO.333/2016 OF PERINTHALMANNA POLICE STATION)
PETITIONER/SOLE ACCUSED: RAJEEB, AGED 37 YEARS OCC-
BUSINESS, S/O. HASSAN, RESIDING AT KIZHAKKEKAA HOUSE,
KAKOOTH, PERINTHALMANNA, MALAPPURAM DISTRICT, PIN 679
322

BY ADVS. BIJU ANTONY ALOOR K.P.PRASANTH SHAFIN AHAMMED
ARCHANA SURESH RESPONDENTS/COMPLAINANT: 1 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM 682 031 2 X(VICTIM) XXX PP SRI.RENJITH GEORGE, SR GP
THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON
29.11.2021, ALONG WITH CrI.MC.5169/2021, THE COURT ON THE SAME DAY
PASSED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MRS. JUSTICE M.R.ANITHA MONDAY, THE
29TH DAY OF NOVEMBER 2021 / 8TH AGRAHAYANA, 1943 CRL.MC NO. 5169
OF 2021 (AGAINST THE ORDER IN CRMP 257/2021 DATED 26.10.2021 IN SC
59/2017 ON THE FILES PENDING BEFORE THE HON'BLE SPECIAL JUDGE
FAST TRACK (FOR POCSO ACT CASES), PERINTHALMANNA (MANJERI
DIVISION) IN CRIME NO.334/2016 OF PERINTHALMANNA POLICE STATION)
PETITIONER/SOLE ACCUSED: RAJEEB, AGED 37 YEARS OCC:-
BUSINESS,S/O.HASSAN, RESIDING AT KIZHAKKEKARA HOUSE, KAKKOOOTH,
PERINTHALMANNA, MALAPPURAM DISTRICT, PIN-679322.

BY ADVS. BIJU ANTONY ALOOR K.P.PRASANTH SHAFIN AHAMMED
ARCHANA SURESH RESPONDENT/COMPLAINANT: STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM-682031. PP SANGEETHARAJ N.R. THIS CRIMINAL MISC. CASE
HAVING COME UP FOR ADMISSION ON 29.11.2021, ALONG WITH
CrI.MC.5142/2021, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

ORDER

Dated this the 29th day of November, 2021

CrI.M.C. No.5142/2021 has been filed against the order

in Crl.M.P. No.255/2021 in S.C. No.06/2017 and Crl.M.C. No.5169/2021 has been filed against the order in Crl.M.P. No.257/2021 in S.C. No.59/2017, dated 26.10.2021 on the file of Special Judge Fast Track (for POCSO Act cases), Perinthalmanna (Manjeri Division).

2. Crl.M.P. No.255/2021 has been filed under Section

311 Cr.P.C. for recalling PW2 and PW3 the victim and mother in S.C. No.06/2017. Crl.M.P. No.257/2021 alleged to have been filed for recalling PW1, PW5 and PW6. Sessions Cases No.06/2017 as well as 59/2017 were charged under Section 376(2)(i)(n) of IPC and Section 3 r/w 4, 5(l) r/w 6 of POCSO Act (in short Act).

3. Petitioner is the sole accused in the above cases.

4. According to the learned counsel for the petitioner

in order to prove the date of birth of the victim PW14 was examined after the examination of PWs2 and 3 in S.C. examination of PWs 5 and 6. PW11 and PW14 were examined as additional witnesses and Ext.P9 and P10 date of birth certificates were marked. Hence the petitioner prayed to re-call PWs 2 and 3 in S.C. 6/2017 PW1 Doctor, PW5 and 6 victim and mother in S.C. No.59/2017.

5. The learned Public Prosecutor contended that the

date of birth of the victim was proved through school admission register already. It is also contended that at the time of examination of the victim and her mother, there was no challenge with regard to the age. It is further contended that recalling of the victims amounts to victimisation and it is not permissible in view of Sec. 33(5) of the Protection of Children from Sexual Offences Act, 2012.

6. Heard both sides.

7. In this context it is relevant to note that as far as

recalling victim there is bar under Section 33(5) of the Act. Section 31 of the Act starts with a non obstante clause and provides that the provisions of Code of Criminal Procedure, 1973, shall apply to the proceedings before a special court

and the special court shall be deemed to be a court of sessions for the purpose of the said procedures. Section 33(5) provides that special court shall ensure that the child is not called repeatedly to testify in the court. Since Section 31 of the Act starts with a non obstante clause, no doubt, application of the provisions of the Code, would be subject to Section 33(5) of the Act, which guard the special court from repeatedly calling the child to testify in the court.

8. In RajaRam Prasad Yadav V.State of Bihar

and Another [2014 (4) SCC (CRL) 256] a two judge Bench of the Apex court dealt with the nature and scope of Section 311 Cr.P.C. Paragraph 17 of the said decision provides the principles to be borne in mind by the courts which dealing with application under Section 311 Cr.P.C which is relevant in this context to be extracted which reads thus:-

17. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr PC read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the courts:
17.1. Whether the court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the court for a just decision of a case? 17.2. The exercise of the widest discretionary power under Section 311 Cr PC should ensure that the

judgment should not be rendered on inchoate,

inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated. 17.3. If evidence of any witness appears to the court to be essential to the just decision of the case, it is the power of the court to summon and examine or recall and re-examine any such person. 17.4. The exercise of power under Section 311 Cr PC should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case. 17.5. The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused, resulting in miscarriage

of justice.

17.6. The wide discretionary power should be exercised judiciously and not arbitrarily. 17.7 The court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case. 17.8. The object of Section 311 Cr PC simultaneously imposes a duty on the court to determine the truth and to render a just decision.

17.9. The court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

17.10. Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified.

17.11. The court should be conscious of the position that after all the trial is basically for the prisoners and the court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

17.12. The additional evidence must not be received as a disguise or to change the nature of the case against any of the party. 17.13. The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that

an opportunity of rebuttal is given to the other party. 17.14. The power under Section 311 Cr PC must therefore, be invoked by the court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right.

9. Rajendra Prasad V.Narcotic Cell [1999 (6) SCC 110] also deals with Section 311 Cr.P.C and when the witnesses can be called or resummoned. Paragraphs 8 and 10 are relevant in this extract which reads thus:-

8. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.

10. Dealing with the corresponding section in the old Code (Section 540) Hidayatullah, J. (as the learned Chief Justice then was) speaking for a three-Judge Bench of this Court had said in Jamatraj Kewalji Govani v. State of Maharashtra as follows:

"It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in court or to recall a witness

already examined, and makes this the duty and obligation of the court provided the just decision of the case demands it. In other words, where the court exercises the power under the second part, the enquiry cannot be

whether the accused has brought anything suddenly or unexpectedly but whether the court is right in thinking that the new evidence is needed by it for a just decision of the case."

10. From the above settled principles it can be

concluded that power under Section 311 Cr.P.C. could be exercised by the court, if the court finds that the evidence of the witness sought to be examined is essential for the just decision of the case. It is also clear that the wide discretionary power under Section 311 should be exercised only judiciously and not arbitrarily.

11. In this case since it has come out that PW11 and

PW14 were examined and Ext.P9 was marked and Ext.P10 marked (subject to objection) subsequent to the examination of all the witnesses except the Investigating Officer, this Court asked to produce copy of the deposition of the victim and her mother. The prosecution has got a specific contention that during the examination of the victim and her mother, there was no challenge regarding date of birth. Petitioner produced copy of deposition of PWs2, 3 and PW14 in S.C. No.06/2017 and copy of deposition of PW1, PW5, PW6 and PW11 in S.C. No.59/2017. On going through the deposition of the victim as well as her mother, it could be seen that during the examination of PWs 2 and 3 in S.C. 6/2017 and PWs 5 and 6 in S.C. No.59/2017 that no question were put to them challenging the date of birth spoken by them during chief examination. Trial court has also found that in regard to the age of the victim there was no challenge during the cross examination of victim and the mother. Hence, subsequent examination of PW11 and PW14 additionally from the side of prosecution is not a reason for recalling PW2 and PW3 in S.C. No.6/2017 and PW5 and PW6 in S.C. No.59/2017.

12. So, I am of the considered view that recalling of

the witnesses PWs 2 and 3 and PWs 5 and 6 in S.C. No.06/2017 and 59/2017 respectively in the above cases are not necessary for the just disposal of S.C. No.6/2017 and S.C. No.59/2017 now pending before the Special Court Fast Track (for POCSO Act Cases) Perinthalmanna.

13. Petitioners also sought for recalling PW1 the

Doctor in S.C. No.59/2017. But it is seen from the records that C.M.P. No.124/2021 was filed by the petitioners for the said purpose, the learned Sessions Judge was not inclined to allow the prayer and cross examination was permitted to be conducted through video conferencing after consulting Senior counsel. On going through deposition of PW1 in S.C. No.59/2017 recorded on 18.2.2021, it would go to show that an effective cross examination with regard to material particulars in chief examination is not seen to have been carried out. Order in C.M.P No.124/2021 also would go to show that Junior Advocate sought time for cross examination of PW1 since the Senior Advocate was on quarantine in Pune.

14. But in Crl.M.C. No.5169/2021 it has been alleged

by the petitioner that Crl.M.P. No.257/2021 was filed for recalling PW1, PW5 and PW6. That is not seems to be correct. Crl.M.P. No.257/2021 has been filed for recalling PW5 and

PW6 alone. However, taking into account the fact that order

in Crl.M.P. No.124/2021 has also been enclosed with the file, omission to quote C.M.P. No.124/2021 also by itself is not a reason to refuse the relief of the petitioner seeking to recall PW1 in S.C. No.59/2017. Hence, for securing the ends of justice PW1 in the said case is permitted to be recalled. In the result, Crl.M.C. No.5169/2017 is allowed in part permitting the petitioner to recall PW1, Doctor on condition that petitioner would pay cost of Rs.2000/- to PW1 Doctor. Crl.M.C No.5142/2021 stands dismissed. Sd/- M.R.ANITHA JUDGE SMF APPENDIX OF CRL.MC 5142/2021 PETITIONER ANNEXURE Annexure 1 CERTIFIED COPY OF THE ORDER IN CRL.M.P NO SPCL. JUDGE FAST TRACK COURT,

PERINTHALMANNA (MANJERI DIVISION) Annexure A2 TRUE COPY OF THE ORDER IN CRL.M.P NO. 33/2021 DATED 03-03-2021 PASSED BY LD. SPCL. JUDGE FAST TRACK COURT, PERINTHALMANNA (MANJERI DIVISION) Annexure A3 TRUE COPY OF THE ORDER IN CRL.M.C NO. APPENDIX OF CRL.MC 5169/2021 PETITIONER ANNEXURE Annexure 1 TRUE COPY OF THE ORDER IN CRL.M.P.NO.257/2021 DATED 26/10/2021 PASSED BY LD.SPCL.JUDGE FAST TRACK COURT, PERINTHALMANNA(MANJERI DIVISION). Annexure A2 CERTIFIED COPY OF THE ORDER IN

CRL.M.P.NO.124/2021 DATED 11/08/2021 PASSED BY LD.SPCL.JUDGE FAST TRACK COURT, PERINTHALMANNA(MANJERI DIVISION).

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