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IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT
THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN

MONDAY, THE 16TH DAY OF DECEMBER 2024/25TH AGRAHAYANA, 1946

CRL.MC NO.10527 OF 2024

SC NO.118 OF 2018 OF ADDITIONAL DISTRICT COURT & SESSIONS
COURT (VIOLENCE AGAINST WOMEN & CHILDREN), ERNAKULAM

PETITIONER/ACCUSED:

SUNIL N.S. @ PULSAR SUNI, AGED 31 YEARS,
S/O.SURENDRAN, NEDUVELIKKUDY HOUSE,
ELAMBAKKAPPILLY KARA, NETTANCITY BHAGOM,
VENGOOR WEST, ERNAKULAM, PIN - 683544.

BY ADVS.
V.V.PRATHEEKSH KURUP
DEV NANDAN A.
RAVI KRISHNAN
ANJU P.

RESPONDENTS/COMPLAINANT/STATE:

- 1 STATION HOUSE OFFICER,
NEDUMBASSERY POLICE STATION, NEDUMBASSERY,
ERNAKULAM DISTRICT, PIN - 683572.
- 2 STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, PIN - 682031.

BY ADVS.
C.N.PRABHAKARAN, SENIOR PUBLIC PROSECUTOR

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION
ON 16.12.2024, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:



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'C.R'

O R D E R

Dated, this the 16th day of December, 2024

Petitioner - the 1st accused in S.C.No.118/2018 of the Sessions Court, Ernakulam - seeks to recall Prosecution Witness Nos.112 and 183, who were examined as early as on 26.02.2021 and 10.09.2021 respectively. The application of the 1st accused in this regard under Section 311 Cr.P.C was dismissed by the learned Sessions Judge, vide Annexure-A2. Being aggrieved by the same, the petitioner seeks to set aside Annexure-A2 Order and to allow Annexure-A1 application under Section 311 Cr.P.C.

2. Heard the learned counsel for the petitioner and the learned Senior Public Prosecutor. Perused the records.

3. S.C.No.118/2018 is the infamous case, where an actress was allegedly abducted and sexually assaulted by the accused persons, in a moving car. The offences alleged are under Section 120B, 109, 342, 366, 354, 354B, 357, 376D, 201, 212, read with Section 34 of the Penal Code and also Sections 66E and 66A of the Information Technology Act. Altogether, 261



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witnesses were examined in the subject Sessions Case and Exts.P1 to P833 were marked on behalf of the prosecution. Exts.C1 to C68 were marked as Court Exhibits. MOs 1 to 142 were identified. Exts.D1 to D221 were marked on behalf of the defence. The prosecution evidence was closed on 13.09.2024. The accused were questioned under Section 313 Cr.P.C, whereafter, the case was posted for defence evidence. It is at that point of time, Annexure-A1 application was filed on 30.11.2024 by petitioner's counsel under Section 311 Cr.P.C seeking to recall PWs 112 and 183 of whom, the former was examined on 26.02.2021 and the latter, on 10.09.2021. Both PWs 112 and 183 are expert witnesses, the former being a doctor, who collected samples for forensic examination; and the latter, the Assistant Director of the Forensic Science Laboratory. The specific ground urged was that the petitioner/A1 was in judicial custody during the course of trial and he was released only on 20.09.2024, wherefore, the learned counsel for the petitioner could not take proper instructions for cross-examining the said witnesses.



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4. Before this Court, a legal point was raised to the effect that Section 233 Cr.P.C. clearly confers a right of the accused to recall and re-examine witnesses, who have already been examined. Learned counsel would emphasise on the expression "any witness" as employed in Section 233(3), which expression is not to be confined to witnesses, who are yet to be examined; but should extend to recalling witnesses already examined. According to the learned counsel, recalling PWs 112 and 183 is essentially to enable the petitioner to set up his defence effectively. This Court will first deal with the above contention based on Section 233 Cr.P.C. Section 233 Cr.P.C. is extracted here below:

"233. Entering upon defence.-

(1) Where the accused is not acquitted under section 232 he shall be called upon to enter on his defence and adduce any evidence he may have in support thereof.

(2) If the accused puts in any written statement, the Judge shall file it with the record.

(3) If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the



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purpose of vexation or delay or for defeating the ends of justice.”

5. It goes without saying that the entire prosecution evidence should have been adduced before the stage envisaged should under Section 233; and Section 233 will operate only if the court finds, based on the prosecution evidence, that the accused is not liable to be acquitted under Section 232 Cr.P.C. Section 233 enjoins the accused person to enter on his defence and adduce any evidence he may have in support of such defence. Section 233(3) affords discretion to the Judge in the matter of issuance of process to compel the attendance of any witness or the production of any document as sought for by the accused, provided the Court is convinced that such application is not made for the purpose of vexation or delay, or for defeating the ends of justice. If such application is rejected on any of the afore referred grounds, reasons will have to be recorded.

6. The crucial question, which surfaces is whether Section 233 Cr.P.C encompasses a situation, where a Prosecution



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Witness can be recalled. The immediate and obvious answer which comes to the mind of this Court is in the negative, in the sense that, the purpose of Section 233 is not to enable the accused to recall a Prosecution Witnesses, already examined. Section 231, which speaks of the prosecution evidence, contemplates recalling any witness for further cross-examination, by virtue of Sub Section (2). Coupled with the same, Section 311 Cr.P.C. contemplates recalling and re-examining any person already examined at any stage of the inquiry, trial or other proceedings under the Code. Section 311 is extracted here below:

"311. Power to summon material witness, or examine person present

Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, 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 case."

7. The above being the statutory provisions, it is too



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far-fetched to contemplate that Section 233 would take within its sweep a power to recall a Prosecution Witness already examined. Instead, it confers the accused a right to enter on his defence and to adduce evidence in support thereof. The Section is obviously referring to Defence Witnesses; and not Prosecution Witnesses already examined. It is to such witnesses that process for compelling the attendance will have to be issued under Section 233(3). Therefore, the argument that the law confers a clear right to the accused to recall and re-examine a prosecution witness at Section 233 stage, is completely misconceived. The proposition urged is contrary to the object and purpose of Section 233.

8. By holding as above, it is not to be misunderstood that during Section 233 stage, a Prosecution Witness cannot be recalled at all. All what this Court holds is that, Section 233 does not envisage and enable the same. However, when the power under Section 311 can be exercised at any stage of the enquiry trial or other proceedings, a witness, who has already been examined, can be recalled and re-examined during



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the stage of Section 233 as well, but not by invoking Section 233 Cr.P.C; instead, on the strength of Section 311 Cr.P.C. Therefore, the argument that the petitioner/A1 was precluded from recalling PWs 112 and 183 and their option/opportunity for the same comes only at Section 233 stage is wholly fallacious and hence repelled.

9. The legal position in this regard is not *res integra*. The learned Sessions Judge has rightly placed reliance upon the judgment of the Hon'ble Supreme Court in ***State of Madhya Pradesh v. Badri Yadav*** [2006 (3) KLT 205 (SC)]. The relevant findings in paragraph no.14 are extracted here below:

“14. S.233 itself deals with entering upon defence by the accused. The application for recalling and re-examining persons already examined, as provided under S.311 Cr.P.C., was already rejected. The power to summon any person as a witness or recall and re-examine any person already examined is the discretionary power of the Court in case such evidence appears to it to be essential for a just decision of the case. Under S.233 Cr.P.C. the accused can enter upon defence and he can apply for the issue of any process for compelling the attendance of any witness in his defence. The provisions of sub-s.(3) of S.233 cannot be understood as compelling



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the attendance of any prosecution witness examined, cross-examined and discharged to be juxtaposed as DWs. In the present case PW-8 and PW-9 were juxtaposed as DW-1 and DW-2. This situation is not one what was contemplated by sub- section 3 of S.233 Cr.P.C.”

10. It is noteworthy that the Hon'ble Supreme Court went on to hold that the Judge should not be powerless, when such frivolous or vexatious petitions are filed and that he should use his discretionary power to refuse relief in such situations.

11. In the light of the above discussion, it is concluded that a Prosecution Witness, who was examined already, cannot be recalled by exercising the powers under Section 233 Cr.P.C. However, such an exercise can be done under Section 311 Cr.P.C. at any stage, including that of Section 233, provided all the requirements and parameters of Section 311 are otherwise satisfied. A caveat to be added in this context is that the power under Section 311 vest with the court; and a party can only seek to trigger the power by filing appropriate application, the outcome of which, would depend upon the



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court's call as to whether the evidence sought to be adduced is essential for a just decision of the case.

12. Coming to the facts, the following aspects were taken stock of by the learned Sessions Judge to refuse the relief sought for under Section 311 Cr.P.C:

- i. PWs 112 and 183, both were examined as early as on 2021, the former having been examined on 26.02.2021 and the latter on 10.09.2021. The petitioner/A1 was represented by a counsel all throughout.
- ii. The petitioner/A1 was present at the time when PW 183 was examined on 10.09.2021, as per the direction of this Court in Cr1.M.C.No.1516/2023. The petitioner/A1 could not be produced when PW 112 was examined, only due to the special circumstances, which prevailed then due to the spread of Covid-19 pandemic.
- iii. Both witnesses sought to be recalled are expert witnesses, wherefore, the petitioner's presence or



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otherwise in the Court could be of little assistance in cross-examining the witnesses.

iv. As regards PW 112, the then Counsel submitted no cross-examination, which was recorded; and as regards PW 183, the new counsel cross-examined him on 10.09.2021. At no point of time, any of the counsel - former or latter - made any complaint that they could not cross-examine the witnesses due to lack of instructions, until the instant application under Section 311 was filed, that too, 3½ years after their examination.

v. The accused and his counsel participated in the trial through out and the prosecution evidence was closed on 13.09.2024. The accused persons were examined under Section 313 Cr.P.C. On 27.09.2024, wherefore, the petitioner/A1 has ample opportunity to consult his lawyer, atleast from 23.02.2023, from which date onwards the accused was continuously present before



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the Court. Thus, the accused attended the trial throughout without any failure for the past two years, wherefore, the present contention that the counsel could not cross-examine the two witnesses for want of instructions is completely bereft of any bonafides.

vi. An application under Section 311 Cr.P.C., that too preferred by the counsel for the petitioner/A1 in November, 2024, in respect of a trial which commenced on 30.01.2020, after closure of prosecution evidence and 313 examination, is nothing but a dilatory tactics adopted by the petitioner/A1.

vii. A memo has been filed by the 1st accused on 27.09.2024, expressing that he does not intend to cross-examine any witness as per Cr1.M.P.No.4022/2024, at which point of time, the petitioner/A1 had no grievance that he could not cross-examine PWs112 and PW183.

13. This Court endorses all the reasons afore referred,



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except the last one, which memo was preferred in the context of filing the supplementary final report and recalling certain witnesses, and also, in the context of re-opening the prosecution evidence for compliance with the requirement under Section 217 Cr.P.C. The said exception, however, cannot have any impact or effect on the ultimate outcome of Annexure-A1 petition.

14. Learned Public Prosecutor would submit that the matter now stands posted for final hearing. It is noticed that the instant Sessions Case is of the year 2018 and the trial commenced on 30.01.2020. The time limit fixed for disposal of this case by the Hon'ble Supreme Court was extended on several occasions. The present application appears to be a frivolous one, filed with an eye fixed on delaying the disposal of the case. That apart, a person, who had enough opportunity to do a thing, which he did not avail, cannot turn round later and complain of want of opportunity. The requirements of Section 311 Cr.P.C. are not at all satisfied. The impugned Annexure-A2 Order would demonstrate that the new evidence sought to be



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adduced by recalling PW 112 and PW 183 is not essential for a just decision of the case.

In the afore referred circumstances, this Criminal Miscellaneous Case will stand dismissed.

Sd/-

C.JAYACHANDRAN, JUDGE

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APPENDIX OF CRL.MC 10527/2024

PETITIONER'S ANNEXURES:

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| ANNEXURE A1 | TRUE COPY OF THE APPLICATION FILED BY THE PETITIONER/1ST ACCUSED DATED 30.11.2024 IN CRL.M.P NO:5168/2024 IN IN S.C NO.118/2018 ON THE FILES OF PRINCIPAL DISTRICT AND SESSIONS COURT, ERNAKULAM. |
| ANNEXURE A2 | CERTIFIED COPY OF THE ORDER DATED 3.12.2024 IN CRL.M.P NO:5168/2024 IN S.C NO.118/2018 ON THE FILES OF PRINCIPAL DISTRICT AND SESSIONS COURT, ERNAKULAM. |
| ANNEXURE A3 | TRUE COPY OF THE APPLICATION FILED BY THE PETITIONER IN CRL.M.P NO:5260/2024 IN S.C NO.118/2018 ON THE FILES OF PRINCIPAL DISTRICT AND SESSIONS COURT, ERNAKULAM. |