



2024/KER/33678

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

MONDAY, THE 20TH DAY OF MAY 2024 / 30TH VAISAKHA, 1946

CRL.MC NO. 3840 OF 2024

CRIME NO.329/2022 OF ENATH POLICE STATION, PATHANAMTHITTA

AGAINST THE ORDER DATED 17.04.2024 IN CMP NO.66 OF 2024 IN SC NO.63

OF 2023 OF FAST TRACK SPECIAL COURT, ADOOR

PETITIONER/1ST ACCUSED:

JERIN JOY
AGED 22 YEARS
S/O JOY, PANTHAPLAVIL THEKKARA HOUSE, EETTIVILA,
THALACHIRA P.O, VETTIKAVALA VILLAGE, KOTTARAKARA THALUK,
KOLLAM DISTRICT, PIN - 691538
BY ADVS.
ROSHEN.D.ALEXANDER
TINA ALEX THOMAS
HARIMOHAN
KAMAL ROY M.

RESPONDENTS/RESPONDENTS/STATE & DEFACTO COMPLAINANT:

- 1 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM - THROUGH THE INSPECTOR OF POLICE,
ENATHU POLICE STATION, PIN - 682031
- 2 XXXXX
AGED XXXXX YEARS
XXXXX
SR PP - RENJITH GEORGE

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON
20.05.2024, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

**“C.R”****ORDER****Dated this the 20th day of May, 2024**

This Criminal Miscellaneous Case has been filed under Section 482 of the Code of Criminal Procedure, 1973, to quash Annexure A6 order in Crl.M.P. No.66/2024 in S.C. No.63/2023 pending before the Fast Track Special Court for Protection of Children from Sexual Offences Act (hereinafter referred as ‘POCSO Act’ for short) Cases, Adoor.

2. Heard the learned counsel for the petitioner and the learned Public Prosecutor, in detail. Perused the order impugned and judgment placed by the learned counsel for the petitioner, viz; ***Vineeth v. State of Kerala*** [2022 KHC OnLine 8065 : 2022 KHC 8065 : 2022 KER 71422 : 2022 LiveLaw (Ker) 656 : 2023 (1) KLT 135 : 2022 (6) KLT OnLine 1052].

3. It is argued by the learned counsel for the petitioner that, few questions which were material, omitted to be asked during cross-examination of PW1 sought to be put to PW1 by recalling her. The prayer in Crl.M.P. No.66/2024 is that, those six questions permitted to be put



to PW1, by recalling PW1. The decision reported in **Vineeth's** case (supra) has been placed to contend that the bar under Section 33(5) of the POCSO Act is not absolute and in an appropriate case, if it is necessary for the just decision of the case, of course the child witness could be recalled. In paragraph No.6 of the above decision, this Court held as under:

"6. S.311 of CrPC gives wide power to the Magistrate to recall any witness already examined or to summon any additional witness at any stage of the proceedings for the just decision of the case. The bar under S.33(5) of POCSO Act is not absolute. In appropriate cases, if it is necessary for the just decision of the case, of course the child witness can be recalled. Admittedly when PW4 and PW6 were examined, the petitioner did not receive the 164 statement. The petitioner has every right to contradict the witness with the 164 statement. Hence, I am of the view that recalling of the witnesses is necessary for the just decision of the case. In the light of the above findings, Annexure - A2 stands hereby set aside. Crl.M.P.No.1392 of 2022 stands allowed. This Crl.M.C is disposed of."

4. The learned Public Prosecutor opposed the prayer to recall PW1 on the ground that the attempt of the petitioner is to fill up the lacuna in evidence after



completion of trial and the same is not legally permissible.

5. The legal position laid down in **Vineeth's** case (supra) is correct.

6. In this connection, it is worthwhile to note that as per Section 33(5) of the POCSO Act, it has been provided that the Special Court shall ensure that the child is not recalled repeatedly to testify in the court. This provision to be read and understood to hold that repeated examination of the child shall be avoided and this provision shall not be interpreted to hold that recalling of the child witness is prohibited in toto. Therefore, bar under Section 33(5) of the POCSO Act is not absolute and in an appropriate case, in order to meet the ends of justice, relaxation of the mandate under Section 33(5) of the POCSO Act is legally permissible. However, in such cases, it should be established that such recalling is absolutely necessary for the just decision of the case and the same shall not be for the purpose of filling up the lacuna in evidence or to fill up the omission at the instance of the counsel for the accused vis-a-vis the public prosecutor.

7. On perusal of the questions sought to be asked to PW1, stated in Annexure.A5 petition, it appears that the



attempt of the petitioner is to fill up the lacuna and omission in evidence resulted due to laches in evidence at the instance of the counsel for the petitioner by recalling PW1 where Section 33(5) of the POCSO Act would apply. In fact, such a plea is not legally sustainable. Therefore, dismissal of the petition as per Annexure.A6 order dated 17.04.2024 is fully justified. Thus, the prayer sought for in this petition cannot be granted.

In the result, this Crl.M.C. stands dismissed.

**Sd/-
A. BADHARUDEEN
JUDGE**

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APPENDIX OF CRL.MC 3840/2024

PETITIONER ANNEXURES :

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| Annexure A1 | TRUE COPY OF THE FIR BEARING NO.548/2022 OF PUTHOOR POLICE STATION ALONG WITH FIS DATED 18.04.2022 |
| Annexure A2 | TRUE COPY OF THE UNDATED 1ST ADDITIONAL STATEMENT GIVEN BY THE 2ND RESPONDENT |
| Annexure A3 | TRUE COPY OF THE UNDATED 2ND ADDITIONAL STATEMENT GIVEN BY THE 2ND RESPONDENT |
| Annexure A4 | TRUE COPY OF THE FINAL REPORT FILED BY THE ENATHU POLICE IN CRIME NO.329/2022 OF ENATHU POLICE STATION BEFORE THE HON'BLE ADDITIONAL DISTRICT AND SESSIONS COURT-I (SPECIAL COURT), PATHANAMTHITTA |
| Annexure A5 | TRUE COPY OF THE PETITION FILED UNDER SECTION 311 OF CR P C |
| Annexure A6 | TRUE COPY OF THE ORDER DATED 17.04.2024 IN CRL.M.P. NO.66/2024 IN SC NO.63/2023 ON THE FILES OF THE HON'BLE FAST TRACK SPECIAL COURT FOR POCSO CASES, ADOOR |

RESPONDENTS' ANNEXURES : NIL