



2024:KER:66006

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

FRIDAY, THE 30<sup>TH</sup> DAY OF AUGUST 2024 / 8TH BHADRA, 1946

CRL.MC NO. 6648 OF 2024

SC NO.679 OF 2022 OF FAST TRACK SPECIAL COURT,

HARIPAD

PETITIONER/ACCUSED:

SREEJITH MON  
AGED 28 YEARS  
S/O.SAJIMON, PULIPRA VEEDU, PACHA MUN,  
EDATHUA VILLAGE, ALAPPUZHA DISTRICT, PIN -  
689573

BY ADV G.PRIYADARSAN THAMPI

RESPONDENTS/STATE AND COMPLAINANT:

- 1 STATE OF KERALA  
REPRESENTED BY PUBLIC PROSECUTOR,HIGH COURT  
OF KERALA, ERNAKULAM, PIN - 682031
- 2 THE INSPECTOR OF POLICE  
MANNAR POLICE STATION, MANNAR, ALAPPUZHA  
DISTRICT, PIN - 689622

BY SR.PUBLIC PROSECUTOR SRI.RENJIT GEORGE

THIS CRIMINAL MISC. CASE HAVING COME UP FOR  
ADMISSION ON 7.8.2024, THE COURT ON 30.08.2024, PASSED  
THE FOLLOWING:



2024 : KER : 66006

**“C.R”*****A. BADHARUDEEN, J.***

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*Crl.M.C.No.6648 of 2024*

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*Dated this the 30<sup>th</sup> day of August, 2024*

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***ORDER***

This Criminal Miscellaneous Case has been filed under Section 528 of the Bharatiya Nagarik Suraksha Sanhita, 2023, challenging Annexure A6 order in CMP.No.403/2024 dated 29.07.2024 in S.C.No.679/2022 on the files of the Special Court for the trial of offences against Children from Sexual Offences Act ('POCSO' for short), Haripad, arose out of Crime No.903/2016 of Mannar Police Station.

2. Heard the learned counsel for the petitioner and the learned Public Prosecutor in detail. Perused the relevant documents, including Annexure-A6 order.

3. It is submitted by the learned counsel for the petitioner that, in this matter, the prosecution evidence was completed, where the petitioner alleged to have committed



offence punishable under Section 376 of the Indian Penal Code ('IPC' for short) as well as Section 3 r/w S.4 and Section 8 read with S.7 of the POCSO Act. At this stage, the learned Special Judge considered a petition filed by the prosecution earlier in 2017, and in consideration of the same, the learned Special Judge ordered the accused to appear before the S.H.O, Edathua Police Station, on 09.08.2024 and the SHO was directed to produce the accused before the Forensic Department of the Medical College Hospital, Alappuzha, for taking blood sample to conduct D.N.A. profiling of the blood sample of the accused with the human semen and spermatozoa found in the material objects collected during the investigation of the case, for getting report of D.N.A. profiling of the petitioner/accused. It is submitted by the learned counsel for the petitioner further that even though as per the decision of this Court reported in [2022 KHC OnLine 747], ***Thankappan V.E and another v. State of Kerala***, this Court held that even after filing the final report, the investigating officer has ample power to investigate a crime and to file further report in



view of the mandate of Section 173(8) of Cr.P.C, on the basis of further evidence, either oral or documentary and Annexure-A6 order was passed relying on the said decision, that doesn't take away the right of the accused for fair trial in a case where evidence was already recorded. He also submitted that though the petition was filed much earlier, the court failed to consider the same in time. Belated consideration of the same would go against the interest of the accused and in such view of the matter, Annexure A6 would require interference.

4. Opposing this contention, the learned Public Prosecutor submitted that, in fact, this petition for conducting D.N.A. profiling of the accused was filed much earlier on 16.08.2017 and the Special Court, which dealt with the matter during the relevant time, failed to consider the same and it was noticed by the Special Court now dealing with the matter, and accordingly, the learned Special Judge allowed the same, with a view to collect a very material piece of evidence. Therefore, the order doesn't require any interference, as no prejudice would be



caused to the accused when the prosecution seeks further investigation to collect material evidence.

5. Having considered the rival arguments, the legal position regarding the power to investigate further under Section 173(8) of Cr.PC is well settled. In ***Thankappan V.E and another v. State of Kerala***'s case (*supra*), in paragraph No. 16, this Court stated as under:

*16. The above discussion would lead to the conclusion that collection of blood samples from the accused is legally permitted as part of the investigation under Section 53 of Cr.P.C. read with Explanation(a). Therefore, it is well within the power of a competent criminal court to direct an accused to subject himself for blood test and the said power can be exercised even after filing final report, in an appropriate case involving facts narrated in this case. Hence, the Special Court rightly allowed the application of the Investigating Officer directing the petitioners herein/accused to subject themselves for blood test.*

6. In this case the application numbered as



C.M.P.No.403/2024 has been styled as a report, filed much earlier on 16.08.2017, whereby the prosecution sought further investigation on the ground that after conducting postmortem on the body of the girl, who was a child victim in this crime, Dr.Sreechithra opined that the uterus of the deceased had enlargement and small fern were also found therein. Further, the possibility of pregnancy of the victim could be opined only after obtaining the forensic report. When FSL report was obtained, the same revealed that human spermatozoa and semen detected in the pants, top and bed sheet used by the victim. In fact, going through opinion of the doctor and the FSL report; DNA profiling of the accused is found to be an inevitable part of collecting evidence, for which petition was filed as early on 16.08.2017, but it was omitted to be considered by the court concerned. It is true that, as argued by the learned counsel for the petitioner, even though the application has been filed as early on 16.08.2017, the same was considered only during trial.

7. In paragraph Nos.11 and 12 of Annexure A6,



the trial court assigned reasons while allowing the petition. The same are extracted as under.

*“11. xxxx xxxx xxxx In order to ascertain whether the accused had any role in the suicide of the deceased, it is very necessary to prove whether the accused had any sexual relationship with the deceased. It is further to be noted that from the report received from the forensic science laboratory Thiruvananthapuram, it is found that human spermatozoa and semen were detected in the top and pants and from the bed sheet collected by the investigating officer during the investigation. This is a strong circumstance in the prosecution evidence which establishes that the deceased was subjected to sexual intercourse and as per the report filed, the doctor who conducted postmortem on the deceased expressed a strong doubt that the deceased had pregnancy.*

*12. It is to be noted that the court is duty bound to ensure a fair trial and for that the court has to aid the prosecution. In the facts and circumstances, it is found that the DNA profiling of the accused will ensure a fair trial. If the DNA profiling of the accused show that the sperm and spermatozoa collected by the investigating officer does not correspond the DNA of the accused, he is entitled for an honorary acquittal. Thus, it is found that in the interest of justice and to ensure a*



*fair trial, the DNA profiling of the accused is to be conducted for which the blood sample of the accused is to be collected.”*

8. It is true that the learned Special Judge, who dealt with the matter during crime stage should have considered the petition in the form of a report filed on 16.08.2017 in time to collect the crucial evidence in this regard in view of the opinion of the doctor. But there was omission and fault on the part of the court in considering the petition in time. In this connection, reference of the legal maxim “*Actus Curiae Neminem Gravabit*” is necessary, which means ‘an act of the Court shall prejudice no-one’ or nobody should be allowed to suffer for the fault of the court. This is an important Latin Maxim of Equity. This principle is considered fundamental in the Indian Judiciary and Jurisprudence. The maxim in simple words means that if any loss is suffered by a litigant due to the negligence of the Court, it becomes the duty of the Court to restore the matter as it would have been before the mistake of the Court.

9. In this context, it would be relevant to refer to





***Inderchand Jain (Dead) through LRS. Vs. Motilal (Dead) through LRs.***, (2009) 14 SCC 663, wherein the Apex Court observed that the said maxim is founded upon equity and justice and helpful in the administration of law. Quoting from ***Rajesh D.Darbar & Ors. v. Narasingrao Krishnaji Kulkarni & Ors.*** [(2003) 7 SCC 219], it was observed thus:

*"This well settled position need not detain us, when the second point urged by the appellants is focused. There can be no quarrel with the proposition as noted by the High Court that a party cannot be made to suffer on account of an act of the Court. There is a well recognised maxim of equity, namely, actus curiae neminem gravabit which means an act of the Court shall prejudice no man. This maxim is founded upon justice and good sense which serves a safe and certain guide for the administration of law."*

10. Again, it is appropriate to refer to ***Karnataka Rare Earth & Anr. v. Senior Geologist Department of Mines & Geology & Anr.*** [2004 (2) SCC 783], wherein the Apex Court reiterated the scope/ambit of the said maxim as laid down in ***South Eastern Coalfields v. M.P*** [2003 (8) SCC 648] and held that the doctrine of actus curiae neminem gravabit is not



confined in its application only to such acts of the Court which are erroneous; the doctrine is applicable to all such acts as to which it can be held that the Court would not have so acted had it been correctly apprised of the facts and the law. It is the principle of restitution which is attracted. When on account of an act of the party, persuading the Court to pass an order, which at the end is held as not sustainable, has resulted in only causing an advantage which it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the Court and the act of such party, then the successful party finally held entitled to a relief, assessable in terms of money at the end of the litigation, is entitled to be compensated in the same manner in which the parties would have been if the interim order of the Court would not have been passed.

11. Furthermore, in *South Eastern Coalfields Ltd. vs State of M.P. and Ors.* (supra), the Apex Court held that the aim of the maxim *Actus Curiae Neminem Gravabit* was not only



just to rectify the mistakes of the Court but also to make sure that the order or decree which was mistaken had not proved to be advantageous to one party and harmful for the other. It was held further that, no one shall suffer by an act of the court is not a rule confined to an erroneous act of the court; the 'act of the court' embraces within its sweep all such acts as to which the court may form an opinion in any legal proceedings that the court would not have so acted had it been correctly apprised of the facts and the law. The factor attracting applicability of restitution is not the act of the Court being wrongful or a mistake or error committed by the Court; the test is whether on account of an act of the party persuading the Court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage which it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the Court and the act of such party. The quantum of restitution, depending the facts and circumstances of a given case, may take into consideration not



only what the party excluded would have made but also what the party under obligation has or might reasonably have made. There is nothing wrong in the parties demanding being placed in the same position in which they would have been had the court not intervened by its interim order when at the end of the proceedings the court pronounces its judicial verdict which does not match with and countenance its own interim verdict. Whenever called upon to adjudicate, the court would act in conjunction with what is the real and substantial justice.

12. Indubitably, the law itself and its administration is understood to disclaim as it does in its general aphorisms, all intention of compelling impossibilities, and the administration of law must adopt that general exception in the consideration of particular cases. The applicability of the aforesaid maxims has been approved by the Apex Court in ***Raj Kumar Dey v. Tarapada Dey*** (1987 (4) SCC 398); ***Gursharan Singh v. New Delhi Municipal Committee*** (1996 (2) SCC 459) and ***Mohammad Gazi v. State of M.P. and Ors.*** (2000(4) SCC



342) also.

13. Having explained the legal principles, here what is sought to be proved is the D.N.A profiling of the blood sample of the accused with the human semen and spermatozoa found in the material objects collected during the investigation of the case, where the prosecution alleges that the accused herein raped the victim and remnants of the said overt act found in the material objects collected. Therefore, even though this application is found to be allowed at a belated stage, and the delay itself is the fault of the court and the same, in no way, would prejudice the prosecution, there is no legal embargo in allowing the petition to obtain crucial evidence as far as the prosecution is concerned, in a case, where serious offences are alleged against the accused.

14. In such view of the matter, the order doesn't require any interference at the hands of this Court. Accordingly, this Crl.M.C is dismissed.

15. Interim order, granted shall stand vacated.



Registry shall forward a copy of this order to the jurisdictional court for information and further steps.

*Sd/-*

**A. BADHARUDEEN, JUDGE**

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APPENDIX OF CRL.M.C.NO.6648/2024-A

PETITIONER'S ANNEXURES

- ANNEXURE A1 TRUE COPY OF THE FINAL REPORT IN CRIME NO.903/2016 OF EDATHUA POLICE STATION, ALAPPUZHA DISTRICT.
- ANNEXURE A2 TRUE COPY OF THE DEPOSITION OF THE MOTHER OF THE ALLEGED VICTIM (PW3) IN S.C.NO.679/2022 OF FAST TRACK SPECIAL COURT, HARIPAD
- ANNEXURE A3 TRUE COPY OF THE DEPOSITION OF THE FATHER OF THE ALLEGED VICTIM (PW6) IN S.C.NO.679/2022 OF FAST TRACK SPECIAL COURT, HARIPAD
- ANNEXURE A4 TRUE COPY OF THE APPLICATION DATED 5.1.2018 FILED BY THE INVESTIGATION OFFICER BEFORE THE PRINCIPAL SESSIONS COURT, ALAPPUZHA IN CRIME NO.903/2016 OF EDATHUA POLICE STATION, ALAPPUZHA DISTRICT.
- ANNEXURE A5 TRUE COPY OF THE OBJECTION DATED 20/6/2024 FILED BY THE COUNSEL FOR THE ACCUSED IN C.M.P.NO.403/2024 IN S.C.NO.679/2022 OF FAST TRACK SPECIAL JUDGE, HARIPAD
- ANNEXURE A6 CERTIFIED COPY OF THE ORDER DATED 297/2024 IN C.M.P.NO.403/2024 IN S.C.NO.679/2022 OF FAST TRACK SPECIAL JUDGE, HARIPAD.

RESPONDENTS' ANNEXURES NIL