



2024/KER/43611

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

FRIDAY, THE 21ST DAY OF JUNE 2024 / 31ST JYAISHTA, 1946

CRL.MC NO. 2942 OF 2024

CRIME NO.367/2019 OF ELOOR POLICE STATION, ERNAKULAM

AGAINST THE ORDER DATED 20.03.2024 IN SC NO.771 OF 2019 OF ADDITIONAL
DISTRICT COURT & SESSIONS COURT (VIOLENCE AGAINST WOMEN & CHILDREN),
ERNAKULAM

PETITIONERS/ACCUSED 1 AND 2:

- 1 HENA KHATOON
AGED 28 YEARS
D/O SHAREEF KHAN, EAST JAI NAGAR, WARD NO.4,
JAI NAGAR VILLAGE, BELA MAHALLA ROAD, KODARMA DISTRICT,
JHARKHAND, PIN - 825109
- 2 SHAHAJADHA KHAN
AGED 35 YEARS
S/O MUHAMMAD SAJID, MIRSA GALIB STREET, RAJBANDH,
RANIGANJU VILLAGE, BARDHAMAN DISTRICT, WEST BENGAL STATE,
PIN - 713347
BY ADVS.
ROJO JOSEPH
A.SAIN PAUL
P.R.SHIBU
P.C.THOMAS
P.T.JUDY
NAVIA SEBASTIAN

RESPONDENTS/STATE/DEFACTO COMPLAINANT:

- 1 THE STATE OF KERALA
REPRESENTED BY ITS STATE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM, PIN - 682031
- 2 SUB INSPECTOR OF POLICE
ELOOR POLICE STATION, ERNAKULAM, PIN - 683501

SR PP - RENJIT GEORGE

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON
21.06.2024, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

**“C.R”****ORDER****Dated this the 21st day of June, 2024**

This Criminal Miscellaneous Case has been filed under Section 482 of the Code of Criminal Procedure, 1973, to quash Annexure.A4 common order dated 20.03.2024 in C.M.P. Nos.540/2024, 541/2024 and 542/2024 in S.C. No.771/2019 on the files of the Special Court for the trial of Protection of Children From Sexual Offences Act [hereinafter referred as ‘POCSO Act’ for short] cases (Additional Sessions Court), Ernakulam.

2. Heard the learned counsel for the petitioners and the learned Public Prosecutor. Perused the relevant materials available.

3. In this matter, the prosecution allegation is that the 1st accused forcefully hit the head of a three year old boy, on the wall, resulting in internal bleeding and the same caused death of the child. Accordingly, the 1st accused/1st petitioner alleged to have committed offences punishable under Sections 302, 201 read with 34 of IPC as



well as under Section 75 of the Juvenile Justice (Care and Protection of Children) Act, 2015 [hereinafter referred as 'JJ Act' for short]. The allegation against the 2nd accused is that he gave false information about the crime with intention to screen the 1st accused from legal punishment and thereby committed offences punishable under Sections 118, 201 read with 34 of IPC as well as Section 75 of the JJ Act.

4. In this matter, the learned Special Judge proceed trial after completing pre-trial formalities. PW1 to PW22 were examined and Exts.P1 to P53 were marked (though in the impugned order documents wrongly shown as Annexures.A1 to A53). After the examination of PW22 on 16.03.2024, the prosecution filed three petitions viz. C.M.P. No. 540, 541 and 542 of 2024. The sum and substance of the petitions are as under:

1) CMP No.540 of 2024 under Section 311 of the Code to recall PW.1 Dr.Nalanda Jayadev, Consultant in Forensic Medicine, Rajagiri Hospital.

2) CMP No.541 of 2024 under Section 230 of the Code to issue summons to Dr.Sumana B.



Pallegar, Neuro Surgeon, Rajagiri Hospital to be examined as a witness, and

3) CMP No.542 of 2024 under Section 91 of the Code to issue Summons to PW.1 to produce treatment records of the deceased child.

5. The petitioners herein filed objections and resisted the petitions. According to the petitioners, the attempt of the prosecution is to fill up the lacuna in evidence and the petitions were filed without explaining the inordinate delay in filing the petitions. The trial court appraised contentions and referred decisions of the Apex Court reported in [AIR 2023 SC 1346] **Balu Sudam Khalde v. State of Maharashtra** and decisions of this Court reported in **Monson M.C. @ Monson Mavungal v State of Kerala** [2023 KHC 9077], **Sebastian v. Food Inspector** [1987 (1) KLT 130] and **Nanda Gopan v. State of Kerala** [2014 (4) KHC 435], allowed the petitions for the reasons stated in paragraph Nos.11 and 12 of the order, as under:

11. The trial has not crossed the stage of prosecution evidence. The accused themselves



*have consistently made suggestions to the witnesses that the child died due to the negligence in treatment. In such circumstances, the accused will not be put to any prejudice if the applications are allowed. Even though the additional witness was not part of the original witness list, his examination is not to provide a new case for the prosecution. It is true that there is no previous statement of the accused. However, it is settled law that a witness can be examined by the Court invoking Section 311 even without his previous statement. The court is also having power to receive any document which was not seized by the police in the course of the investigation. (See **Nanda Gopalan v. State of Kerala 2014 (4) KHC 435**).*

12. Having found the recalling of PW.1 and examination of additional witness are essential for the just decision of the case, and that the accused will not be put to prejudice by the same, I allow the petitions as follows.

a. CMP No.540 of 2024, is allowed. PW.1 is recalled and directed to be present along with the treatment records of the deceased and to give further evidence.

b. CMP No.541 of 2024 is allowed. Issue



Summons to Dr.Sumana B.Pallegar, Neuro Surgeon, Rajagiri Hospital after the documents sought for in CMP No.542 of 2024 are produced.

c. CMP No.542 of 2024 is allowed. PW.1 is directed to produce treatment records of the deceased.

6. While challenging the impugned common order, the learned counsel for the petitioners mainly argued that, the petitions were highly belated and the attempt of the prosecution is to fill up the lacuna in evidence. It is also submitted that the petitioners raised a specific contention before the trial court during trial that the child aged three years died due to medical negligence. Since the prosecution noticed that the said contention is having force, in order to save the hospital authorities from the clutches of prosecution, the present petitions were filed, without any bonafides. It is also submitted by the learned counsel for the petitioners that, the prosecution could not be allowed to fill up the lacuna in evidence after understanding the defense case. According to the learned counsel for the petitioners, in order to fill up the lacuna in



evidence, the power under Section 311 of Cr.P.C. could not be resorted to. He has placed decision of the Apex Court reported in [(2013) 5 SCC 741] **Natasha Singh v. Central Bureau of Investigation** with reference to paragraph No.15 of the said decision. The same is as under:

“The scope and object of the provision is to enable the court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 CrPC must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite -party. Further, the additional evidence must not be received as a disguise for a retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a



witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred under Section 311 CrPC 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 great caution and circumspection. The very use of words such as "any court", "at any stage", or "or any enquiry, trial or other proceedings", "any person" and "any such person" clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case."

7. The learned counsel for the petitioners also placed decision of the Apex Court reported in [(2016) 2 SCC 402] ***State (NCT of Delhi) v. Shiv Kumar Yadav and another*** and argued with reference to paragraph No.27 of the above decision that, recalling and re-examination of



witness/witnesses could be permitted, if the same is essential for the just decision of the case. It is argued further that, the mere observation that recall was necessary “for ensuring fair trial” is not enough unless there are tangible reasons to show how the fair trial suffered without recall. Recall is not a matter of course and the discretion given to the court has to be exercised judiciously to prevent failure of justice and not arbitrarily. In paragraph No.27 of the above decision the Apex Court held as under:

“It is difficult to approve the view taken by the High Court. Undoubtedly, fair trial is the objective and it is the duty of the court to ensure such fairness. Width of power under Section 311 CrPC is beyond any doubt. Not a single specific reason has been assigned by the High Court as to how in the present case recall of as many as 13 witnesses was necessary as directed in the impugned order. No fault has been found with the reasoning of the order of the trial court. The High Court rejected on merits the only two reasons pressed before it that the trial was hurried and the counsel was not competent. In the face of rejecting these grounds, without considering the hardship to the witnesses,



undue delay in the trial, and without any other cogent reason, allowing recall merely on the observation that it is only the accused who will suffer by the delay as he was in custody could, in the circumstances, be hardly accepted as valid or serving the ends of justice. It is not only matter of delay but also of harassment for the witnesses to be recalled which could not be justified on the ground that the accused was in custody and that he would only suffer by prolonging of the proceedings. Certainly recall could be permitted if essential for the just decision. but not on such consideration as has been adopted in the present case. Mere observation that recall was necessary "for ensuring fair trial" is not enough unless there are tangible reasons to show how the fair trial suffered without recall. Recall is not a matter of course and the discretion given to the court has to be exercised judiciously to prevent failure of justice and not arbitrarily. While the party is even permitted to correct its bona fide error and may be entitled to further opportunity even when such opportunity may be sought without any fault on the part of the opposite party, plea for recall for advancing justice has to be bona fide and has to be balanced carefully with the other relevant considerations including uncalled



for hardship to the witnesses and uncalled for delay in the trial. Having regard to these considerations, we do not find any ground to justify the recall of witnesses already examined.”

8. Repelling the contentions raised by the learned counsel for the petitioners, the learned Public Prosecutor would submit that, in this matter, the present petitions were filed even before completion of the prosecution evidence. According to the learned Public Prosecutor the power under Section 311 of Cr.P.C. could be exercised by the Court, even before pronouncement of the judgment, if such a course of action is absolutely necessary to meet the ends of justice and for the just decision of the case. According to the learned Public Prosecutor, in this matter, the specific contention raised by the accused during trial itself was that the reason for the cause of death of the child was medical negligence and the prosecution wants to examine the doctors with the support of the entire medical documents including the doctor, who was excluded from the list of witnesses by the prosecution, to prove the truth of the allegations and in such view of the



matter no prejudice also would be caused as far as the petitioners are concerned. Therefore, the impugned order is perfectly justified and interference thereof is unwarranted.

9. As regards to the power of the Court under Section 311 of Cr.P.C. is concerned, the law is well settled. In the decision reported in **Xxxx v. State of Kerala** [2024 (3) KHC 15 : 2024 KHC OnLine 295: 2024 KER 25575: 2024 KLT OnLine 1399] this Court held as under:

“8. S.311 manifestly in 2 parts. Whereas the word 'used' in the first part is 'may' the word used in the second part is 'shall'. In consequence, the first part which is permissive gives purely discretionary authority to the Criminal Courts and enables the Courts 'at any stage of enquiry, trial or other proceedings' under the Code to act in one of the three ways, namely,

*(1) to summon any person as a witness, or
(2) to examine any person in attendance, though not summoned as a witnesses, or
(3) to recall and re - examine any person already examined.*

The second part which is mandatory imposes an obligation on the Court--



(1) to summon and examine, or
(2) to recall and re - examine any such person if his evidence appears to be essential to the just decision of the case.

9. The power conferred under S.311 CrPC should be invoked by the Court only in the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with caution and circumspection. The Court has wide power under S.311 CrPC to recall witnesses for re - examination or further examination, if it is necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case.

10. Scope and object of S.311 of CrPC is well discussed in the decision reported in (AIR 1991 SC 1346 : 1991 Supp (1) SCC 271 : 1991 CriLJ 1521), **Mohanlal Shamji Soni v. Union of India**, wherein it is held that in order to enable the Court to find out the truth and render a just decision the salutary provisions of S.311 are enacted where under any Court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as witness or examine any person in attendance though not summoned as a witness or recall or re - examine any person



*already examined who are expected to be able to throw light upon the matter in dispute. Opportunity of rebuttal shall be given to other party. The aid of the section should be invoked only with the object of discovering relevant facts or obtaining proper proof of such facts for a just decision of the case and it must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undesirable results. It should not be used for filling up the lacuna by the prosecution or by the defence or to the disadvantage of the accused or to cause serious prejudice to the defence of the accused or to give an unfair advantage to the rival side and further the additional evidence should not be received as a disguise for a retrial or to change the nature of the case against either of the parties. It is held in the decision reported in (2002 (4) SCC 578 : AIR 2002 SC 1856 : (2002) 2 Crimes 200 : 2002 CriLJ 2547 (2562) (SC)), **Ramchandra Rao v. State of Karnataka**, that the criminal Courts should exercise their available powers such as those available under S.309, S.311 and S.258 CrPC to effectuate the right to speedy trial. The power under S.311 can be exercised both at the behest of accused (defence) as well as prosecution.*



11. In fact, the power to summon an accused under S.311 CrPC can be invoked by 3 modes:

- (i) At the option of the prosecution,*
- (ii) at the option of the accused, and*
- (iii) the Court suo motu.*

Second part of S.311 imposes a mandatory obligation on the part of the Court to summon and examine or to recall or re - examine any such person if his evidence appears to it to be essential to the just decision of the case."

10. Going by the prayers in the petitions, as pointed out by the learned counsel for the petitioners, summarily the prosecution wants to recall PW1, examination of another witness and production of documents, specifically on the ground that original treatment records of the deceased from Rajagiri Hospital, Aluva, where he was treated, could not be collected during the course of investigation and production and marking of the treatment records of the deceased in evidence before the Court are highly necessary for the just decision of the case.

11. In fact, the ratio of the decisions placed by the learned counsel for the petitioners as extracted herein



above is that an application under Section 311 CrPC must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the party asking the relief. Further, the additional evidence must not be received as a disguise for a retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred under Section 311 CrPC 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 great caution and circumspection. The very use of words such as "any court", "at any stage", or "or any enquiry, trial or other proceedings", "any person" and "any such person" clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the court in any way. There is thus



no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case.

12. Thus, an order allowing application under Section 311 of Cr.P.C. should have specific reasons explaining how re-calling and re-examination of the witnesses are necessary for the just decision of the case and a cryptic non speaking order would not suffice.

13. In this case, in paragraph No.11 of the impugned order, the learned Special Judge rightly observed that trial had not crossed the stage of prosecution evidence and the accused themselves had consistently made suggestions to the witnesses that the child died due to the negligence in treatment. In such circumstances, the accused would not be put to any prejudice if the applications were allowed. Further, it was observed by the learned Special Judge that though the additional witness was called for, the same was not to provide a new case for the prosecution, but to adduce



evidence for the prosecution. For the above reasons, the Special Judge allowed the petitions finding that the said procedure is necessary for the just decision of the case.

14. In the present case, where there is allegation from the side of the accused that medical negligence is the reason for the death of the child and the prosecution case is that the death was not due to any medical negligence, the learned Special Judge allowed the petitions as per Annexure.A4 order holding that the same was essential for the just decision of the case to do justice between the parties.

15. In such circumstances, it could not be held that Annexure.A4 order suffers any illegality and the attempt of the prosecution is merely to fill up the lacuna in evidence. Hence, challenge against Annexure.A4 order would not succeed.

Accordingly, this CrL.M.C. stands dismissed.

Sd/-
A. BADHARUDEEN
JUDGE



APPENDIX OF CRL.MC 2942/2024

PETITIONER ANNEXURES :

- Annexure -A1** TRUE COPY OF CMP NO.540/2024, FILED IN SC NO.771/19 REQUESTING THE RECALL OF PW1 DOCTOR FROM THE MULTISPECIALTY HOSPITAL, TO PRESENT THE TREATMENT RECORD OF THE DECEASED.
- Annexure -A2** TRUE COPY OF CMP NO.542/24 FILED IN SC NO.771/19 U/S 91 OF THE CRPC, SEEKING A SUMMONS TO OBTAIN THE TREATMENT RECORDS OF THE DECEASED CHILD.
- Annexure -A3** TRUE COPY OF CMP NO.541/24 IN SC NO.771/19 U/S 230 OF THE CODE, TO SUMMON THE DOCTOR WHO PERFORMED THE SURGERY ON THE CHILD
- Annexure -A4** CERTIFIED COPY OF THE COMMON ORDER DATED 20-03-2024, PERTAINING TO ANNEXURES-A-1 TO A-3, ALLOWING THEM.

RESPONDENTS' ANNEXURES : NIL