



2025:KER:28458

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C. JAYACHANDRAN

THURSDAY, THE 3RD DAY OF APRIL 2025 / 13TH CHAITHRA, 1947

CRL.MC NO. 2924 OF 2025

CRIME NO.27/2022 OF Eloor Police Station, Ernakulam

AGAINST THE ORDER/JUDGMENT DATED IN SC NO.269 OF 2022
OF FAST TRACK SPECIAL COURT, NORTH PARAVUR

PETITIONER/ACCUSED:

VISHNU
AGED 26 YEARS
S/O SHIBU, PERUMPADAPPIL HOUSE, NEAR MOSQUE DEPOT
BHAGAM, VADAKKUMBHAGAM KARA, ELOOR VILLAGE,
ERNAKULAM DISTRICT, PIN - 683521

BY ADVS.
K.BIJU
K.R.SAJITH

RESPONDENTS/COMPLAINANT:

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

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION
ON 03.04.2025, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

**ORDER**

Dated this the 3rd day of April, 2025

The petitioner is the sole accused in S.C.No.269/2022 pending before the Fast Track Special Court, North Paravur, who is facing charges under Sections 342,363,376(2)(n),376(3) and 506(1) of the Penal Code and also under Section 4(2), read with Section 3(a); and Section 6(1), read with Section 5(1) of the Protection of Children from Sexual Offences Act. The petitioner is aggrieved by Annexure A1 Order, which dismissed an application under Section 311 of the Code of Criminal Procedure.

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

3. Having heard so, this Court notice that the instant application under Section 311 Cr.P.C was filed at the stage, when the case was posted for defence evidence. The reason espoused for filing such an application is that, certain important questions were omitted to be put to the



victim, who was examined as PW1. The omission is sought to be explained on the premise that there was a change of Vakalath at the stage when the matter was posted for defence evidence. The counsel who was earlier appearing for the accused, was not alert enough to put the relevant questions, for which sin, the petitioner may not be punished, is the sum and substance of the submission made by the learned counsel for the petitioner. Learned counsel would submit that, the instant application was dismissed vide Annexure A1 Order for two reasons. Firstly, an omission on the part of the defence counsel is no sufficient ground to recall a child victim. Secondly, a child witness cannot be recalled, in view of Section 33(5) of the POCSO Act. In respect of the first, the learned counsel would rely upon a judgment of this Court in ***Manu Dev v. XXXX and another*** [2023 (1) KLJ 734] to point out that lacuna in the context of filling up is different from mistakes, if any, committed by the parties or their lawyers. Specific attention of this Court was invited to paragraph No.19 of the said judgment. As regards the second limb under Section 33(5) of the POCSO



Act, the learned counsel would submit that, the witness sought to be recalled is presently having an age of 21 years and hence, Sec.33(5) may not apply.

4. This application was seriously opposed by the learned Public Prosecutor on two grounds. Firstly, the learned Public Prosecutor would point out that, the attempt of the petitioner is to prolong the trial, which has now reached the stage of final hearing. Secondly, this is a calculated attempt to fill up the lacuna in the evidence.

5. Having heard the learned counsel appearing for the respective parties, this Court finds apparent merits in the instant Crl.M.C. As rightly pointed out by the learned counsel for the petitioner, the judgment in ***Manu Dev (Supra)*** would clearly indicate that an omission on the part of the lawyer to put the relevant questions, cannot be treated as an attempt to fill up the lacuna. The learned Single Judge in that case has placed reliance upon the judgment of the Apex Court in ***Rajendra Prasad v. Narcotic Cell*** (AIR 1999 SC 2292). Such an omission on



the part of the lawyer is sought to be explained on account of change of Vakalath. The learned counsel would point out that the serious omission to put the relevant questions was noticed only when the new lawyer engaged studied the file. Secondly, on the question of the applicability of Section 33(5) of the POCSO Act, it has already been held by this Court that the mandate under Section 33(5) is not inflexible. Rather, the same is directive in nature. If the recall of a witness is otherwise essential to do justice between the parties, or for the reasons culled out in Section 311 Cr.P.C., Section 33(5) cannot be treated and construed as an absolute embargo. Moreover, as pointed out by the learned counsel for the petitioner, the victim, who is sought to be recalled, is presently 21 years and she is no more a child.

6. On facts also, this Court is persuaded to allow the instant Crl.M.C. Learned counsel would point out that the same victim/PW1 had raised a similar allegation against another person by name Rony, which is the subject matter



of S.C.No.506/2021. In that case, the date on which FIS given was 18.03.2021; whereas in the instant case, the FIS was given only on 12.01.2022. The victim/PW1, during the course of cross-examination, was put with a specific question as to whether she maintained an intimacy with the said Rony, to which she answered in the negative. Learned counsel would hand over a copy of the statement under Section 164 Cr.P.C. given by the same victim in S.C.No.506/2021, wherein she would clearly state that, she was having an affair/relationship with the said Rony. This Court notice that the offences alleged are serious in nature. Therefore, the petitioner/accused should be afforded with a meaningful opportunity to defend the charges against him, which is a concomitant part of the right to fair trial.

7. For the reasons set out above, this Court is inclined to allow Crl.M.P.No.106/2025 for the limited purpose of confronting the witness/PW1 with respect to the previous crime, which is the subject matter of S.C.No.506/2021. In order to enable the same, Annexure A1 Order will stand



set aside. It is clarified that, the purpose of recall will be strictly limited to the above aspect. The trial Court will recall PW1 to a convenient date, on which date itself, the petitioner will make arrangements to cross-examine the witness. Under no circumstance, adjournment shall be granted, so as to ensure that the attempt of the petitioner is not to prolong the trial. Once the cross-examination is over, which shall be completed on the same day, it will be up to the learned Sessions Judge to post the matter for final hearing.

This Crl.M.C. is allowed as directed above.

Sd/-
C.JAYACHANDRAN, JUDGE

STB



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APPENDIX OF CRL.MC 2924/2025

PETITIONER ANNEXURES

ANNEXURE A1

**17. CERTIFIED COPY OF THE ORDER DATED
17.03.2025 IN CRL MP 106 OF 2025 IN SC
NO.269 OF 2022 IN THE HON'BLE FAST TRACK
SPECIAL COURT, NORTH PARAVUR**