IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE M.R.ANITHA

FRIDAY, THE 19TH DAY OF NOVEMBER 2021 / 28TH KARTHIKA, 1943

CRL.MC NO. 3221 OF 2021

PETITIONER/PETITIONER/ACCUSED

XXXX

BY ADVS.
K.M.FIROZ
M.SHAJNA

RESPONDENT/RESPONDENT/STATE

STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM - 682 031.

PP SANGEETHARAJ.N.R

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 3.11.2021, THE COURT ON 19.11.2021 DELIVERED THE FOLLOWING:

ORDER

Dated : 19th November, 2021

1. This Crl.M.C. has been filed against the order dated 06.03.2021 in CMP No.17/2021 in S.C.No.347/2019 of the Fast Track Special Judge, Kozhikode.

2. Petitioner is the sole accused in S.C.No.347/2019 which has been registered for the offences punishable u/s.376(2)(f)(i) of IPC and Section 3(a) r/w. Section 4, Section 5(i), 5(m) and 5(n) r/w. Section 6 of POCSO Act, 2012.

3. According to the learned counsel for the petitioner, prosecution witnesses except the investigating officer have already been examined. CMP No.17/2021 has been filed by the accused under Section 311 Cr.P.C. for recalling PWs 1 and 2 victim and her mother. By by the impugned order the learned Special Court dismissed the petition. Aggrieved by the same, he came up before this court.

4. Notice was issued to the respondent and leanred Public Prosecutor appeared for the respondent – State.

5. Heard both sides.

6. Copy of the impugned order has been produced as Annexure A1. It would go to show that Section 311 petition has been filed by the petitioner alleging that during examination of PWs 1 and 2 accused failed to give instruction to his advocate regarding some of the questions to be put to those witnesses. Those questions are necessary to prove his innocence. In Crl.M.C. filed before this Court also it has been alleged by the petitioner that after the examination of PWs 1 and 2 it is understood that certain questions to be put to PWs 1 and 2 which are necessary and essential for the proper conduct of the case. Hence the petition was filed for recalling PWs 1 and 2. It is also contended that there are material contradictions in the deposition of the victim and the mother from the 161 statement as well as Section 164 Cr.P.C. statement. But the counsel omitted to call the attention of witnesses to those previous statements for contradicting the witnesses. That is the main point which was argued in this proceedings by the learned counsel.

7. The learned Public Prosecutor vehemently objects in

considering the petition and also contended about the bar u/s.33(5) of the POCSO Act in repeatedly calling the victim in a POCSO case.

8. In order to substantiate the contention that material omission would amount to contradiction and it is necessary as per Section 145 of the Evidence Act to impeach the credit of the witnesses the former inconsistent part of the statement to be brought to the attention of the witnesses as per Section 155(3) of the Indian Evidence Act etc, the learned counsel brought to my attention **Tahsildar Singh v. State of U.P. [AIR 1959 SC 1012 : 1959 KHC 577]; State of Maharashtra v. Bharat Chaganlal Raghani & Ors. [2001 (9) SCC 1 : AIR 2002 SC 409 : 2001 KHC 1392]; Mishra V.K. & Anr. v. State of Uttarakhand & Anr. [AIR 2015 SC 3043 : 2015 (9) SCC 588 : 2015 CriLJ 4021]; Karan Singh & Ors. v. State of M.P. [2003 (12) SCC 587 : 2003 KHC 1862]; To Issue Certain Guidelines Regarding Inadequacies and Deficiencies in Criminal Trials v. [2017 (2) KLT 809 : 2017 (1) KLD 609] and also Kochappan alias Thomayil v. State [1959 KLJ 716 : 1959 KLT 606 : ILR 1959 1959 Ker. 718: 1959 KHC 138].**

9. In **Tahsildar Singh's c**ase, learned counsel highlighted paragraph Nos.18, 26, 27 etc. wherein there is discussion regarding statement made by witnesses before police officer. Highlighted portion of paragraph No.26 reads thus.

> "(3) though a particular statement is not expressly recorded, a statement that can be deemed to be part of that expressly recorded can be used for contradiction, not because it is an omission strictly so-called but because it is deemed to form part of the recorded statement;"

10. In paragraph No.51 it has been found that relevant and material omissions amount to vital contradictions, which can be established by cross examination and confronting the witness with his previous statement.

11. In **Bharat Chaganlal Raghani'**s case, the learned counsel highlighted paragraph No.51, which reads thus:

> **"**In the light of the statement of PW48, it cannot be said that Sunil Jain (PW15) had made a statement with respect to the threats allegedly given by A4. Had it been true, such an important aspect of the case could not be lost sight of. Failure to mention such an important circumstance cannot be held to be merely an omission. Such an omission would amount to contradiction. The word "contradiction" is of a wide

connotation which takes within its ambit all material omissions and under the circumstances of the case a court can decide whether there is one such omission as to amount contradiction."

12. In **Mishra'**s case, the learned counsel highlighted paragraph No.18, which reads thus:

"18. Under Section 145 of the Evidence Act when it is intended to contradict the witness by his previous statement reduced into writing, the attention of such witness must be called to those parts of it which are to be used for the purpose of contradicting him, before the writing can be used. While recording the deposition of a witness, it becomes the duty of the trial court to ensure that the part of the police statement with which it is intended to contradict the witness is brought to the notice of the witness in his cross-examination. The attention of witness is drawn to that part and this must reflect in his cross-examination by reproducing it. If the witness admits the part intended to contradict him, it stands proved and there is no need to further proof of contradiction and it will be read while appreciating the evidence. If he denies having made that part of the statement, his attention must be drawn to that statement and must be mentioned in the deposition. By this process the contradiction is merely brought on record, but it is yet to be proved. Thereafter when investigating officer is examined in the court, his attention should be drawn to the passage marked for the purpose of contradiction, it will then be proved in the deposition of the investigating officer who again by referring to the police statement will depose about the witness having made that statement. The process again involves referring to the police statement and culling out that

part with which the maker of the statement was intended to be contradicted. If the witness was not confronted with that part of the statement with which the defence wanted to contradict him, then the court cannot suo moto make use of statements to police not proved in compliance with Section 145 of Evidence Act that is, by drawing attention to the parts intended for contradiction.”

13. In **Karan Singh**'s case, learned counsel highlighted paragraph No.5, which reads thus:

”5. When a previous statement is to be proved as an admission, the statement as such should be put to the witness and if the witness denies having given such a statement it does not amount to any admission and if it is proved that he had given such a statement the attention of the witness must be drawn to that statement. Section 145 of the Evidence Act is clear on this aspect. The object is to give the witness a chance of explaining the discrepancy or inconsistency and to clear up the particular point of ambiguity or dispute. In the instant case, Ext. D-4 statement as such was not put to the witness nor was the witness given an opportunity to explain it. Therefore, D-4 statement, even if it is assumed to be a statement of PW-1 Hari Singh, that is of no assistance to the appellants to prove their case of private defence.”

14. In **Kochappan**'s case, highlighted portion of paragraph No.7 reads thus:

“Whatever divergence of judicial opinion, there had

been in the past, it is now settled by the decision of the Supreme Court in Tara Singh v. The State, AIR 1951 S.C. 441, that in applying S.288, it is the duty of the Prosecutor to confront the witness, with those parts of his deposition in the committing court, which are to be used for the purpose of contradicting him, the object being, as under S. 145 of the Evidence Act, to afford an opportunity to him to explain the inconsistency between his statements."

15. According to the learned counsel, the above settled position of law would hold in unequivocal terms that material omissions would also amount to contradiction and that the relevant portion has to be put to the witnesses and the witnesses has to be given an opportunity to explain the inconsistency. He would contend that during examination of PWs 1 and 2 so many material omissions were brought out. But it was not marked. So for the purpose of marking the omission it is highly necessary to recall PWs 1 and 2.

16. He also produced copy of deposition of PW1 - the victim and PW2 - the mother, for perusal. As has been rightly found by the learned Judge there is a bar under Section 33(5) of the POCSO Act. Section 31 of the Act starts with a *non obstante* clause and provides that the

provisions of the Code of Criminal Procedure, 1973, shall apply to the proceedings before a special court and the Special Court shall be deemed to be a Court of Sessions for the purpose of the said procedures. Section 33(5) provides that special court shall ensure that the child is not called repeatedly to testify in the court. Since Section 31 of the Act starts with a *non obstante* clause, no doubt, application of the provisions of the Code, would be subject to Section 33(5) of the Act, which guard the special court from repeatedly calling the child to testify in the court.

17. So there is a bar for recalling the victim in the case repeatedly for testifying before the court. So also on going through the evidence of PWs 1 and 2 it could be seen that specific questions were put with regard to the omission and the witnesses were also asked as to whether they have to state anything for not stating the same to the police, for example, whether it has been stated to the police that she had seen the accused standing keeping the victim near to him. She answered in the affirmative. Then it is further asked it is not seen written by the police. Then she answered

she had told the matters to the police. Further she was questioned as to whether she had stated to the police that the daughter and accused were not seen in the middle room she answered in the affirmative. Further she was questioned it is not seen in the statement and what she has to say regarding, that then she reiterated that she has stated to the police. Further she was questioned as to whether she had stated to the police that she checked the room, she answered in the affirmative. Further it was put that it is not seen in her statement and what she has to say regarding that. So the deposition of PW2 would show that to almost all the omissions brought out during cross-examination she was asked as to whether she has to say anything regarding the omissions crept in. so the only factor is that the omission has not been marked specifically. But the investigating officer has not been examined. All these omissions which have been brought out during cross-examination of PWs 1 and 2 can be marked at the time of examining the investigating officer. It is true that at the time of cross-examination of PW2 if those omissions were marked subject to proof it could have been specifically put during the examination of the

investigating officer. In other words the fact that the omissions were not marked during cross-examination is not at all a reason for recalling the witnesses. So also it appears from the impugned order that the specific allegation of accused while filing Section 311 petition was that he omitted to give instruction to the advocate regarding some questions to be put to PW1 and PW2. He has no case about the failure to mark omissions during the cross-examination of the witnesses at the time of filing Section 311 petition. So the contention regarding the marking of omission and recalling of PWs 1 and 2 is a subsequent development at the instance of the accused while approaches before this Court. Since there is substantial compliance of bringing out the omission during cross-examination of PWs 1 and 2 the fact that omissions were not specifically marked is not seems to be a ground for recalling the witness especially because investigating officer is not examined and those omissions can very well be proved during the examination of investigating officer since questions were already put to PWs 1 and 2.

18. It is true that the learned counsel brought my

attention **To Issue Certain Guidelines Regarding Inadequacies and Deficiencies in Criminal Trials v. [2017 (2) KLT 809 : 2017 (1) KLD 609]**. In paragraph No.10 there is recommendation regarding the marking of contradictions/omissions also. So a direction has been given to all Registrar General of all the High Courts and the Chief Secretaries/the Administrators and the Advocates – General/Senior Standing Counsel of all the States/Union Territories etc, and suggestions were also called for from all the corners. The fact that material omissions would also amount to contradiction is a settled position of law. Since the omissions have already been put and explanation have also been sought for from the witnesses there is substantial compliance of the procedures under Section 145 of the Indian Evidence Act also in the present case. I also make it clear that I do not want to make it as a precedent that the materials omissions need not be marked during the cross-examination of witnesses.

19. The learned counsel further brought to my attention **Rajendra Prasad v. Narcotic Cell (1999 (6) SCC 110 = 1999 KHC 417).** Paragraph 8 of the said

decision is highlighted by the learned counsel which reads thus :-

> "...........No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better."

20. **Padhmanabhan v. State of Kerala (2018 (4) KHC 250)** was also brought to my attention which deals with Section 311 Cr.P.C. But that was a case in which prosecution filed the petition to recall the witness stating that there was no identification of the accused by the witnesses. In the said circumstances, it was said that the evidence with regard to identification could not be brought on record due to inadequacies and hence the trial court was right in allowing the application filed by the prosecution. It is also held that object of Section 311 Cr.P.C is to enable the Court to arrive at the truth. Irrespective of the fact

that the prosecution of the defence has failed to produce some evidence.

21. In **RajaRam Prasad Yadav V.State of Bihar and Another [2014 (4) SCC (CRL) 256]** a two judge Bench of the Apex court dealt with the nature and scope of Section 311 Cr.P.C. Paragraph 17 of the said decision provides the principles to be borne in mind by the courts which dealing with application under Section 311 Cr.P.C which is relevant in this context to be extracted which reads thus:-

> “17. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 CrPC read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the courts:
>
> 17.1. Whether the court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the court for a just decision of a case?
>
> 17.2. The exercise of the widest discretionary power under Section 311 CrPC should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated.

17.3. If evidence of any witness appears to the court to be essential to the just decision of the case, it is the power of the court to summon and examine or recall and re-examine any such person.

17.4. The exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

17.5. The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

17.6. The wide discretionary power should be exercised judiciously and not arbitrarily.
17.7 The court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.
17.8. The object of Section 311 CrPC simultaneously imposes a duty on the court to determine the truth and to render a just decision.

17.9. The court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

17.10. Exigency of the situation, fair play and good sense should be the safeguard, while exercising the

discretion. The court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified.

17.11. The court should be conscious of the position that after all the trial is basically for the prisoners and the court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

17.12. The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

17.13. The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

17.14. The power 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 care, caution and circumspection. The court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right.”

22. From the above settled position there is no doubt that the court can recall a witness if it is found that the evidence sought to be let in is necessary for a just decision of the case or that it is necessary for finding out the truth or obtaining proper proof of the facts.

23. I am not of the view that recalling of PW1 and 2 is necessary for a just decision of this case. Hence, I do not find any justifiable reason to interfere with the impugned order passed by the learned Special Judge.

24. In the result, Crl.M.C dismissed.

Sd/-

M.R.ANITHA, JUDGE

shg/Mrcs

APPENDIX OF CRL.MC 3221/2021

PETITIONER ANNEXURE

Annexure A1	CERTIFIED COPY OF THE ORDER DATED 06.03.2021 IN C.M.P.17 OF 2021 IN S.C.347 OF 2019 ON THE FILES FAST TRACK SPECIAL JUDGE, KOZHIKODE.
Annexure A2	A TRUE COPY OF THE DEPOSITION OF PW1 DATED 23.01.2021.