

Shakthi vs State Of Kerala on 20 November, 2024

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

WEDNESDAY, THE 20TH DAY OF NOVEMBER 2024 / 29TH KARTHIKA, 1946

CRL.MC NO. 9471 OF 2024

CRIME NO.853/2023 OF Adoor Police Station, Pathanamthitta
CRMP.NOS.274 & 275 OF 2024 IN SC NO.47 OF 2024 OF FAST TRACK
SPECIAL COURT, AD00R

PETITIONER/PETITIONER/ACCUSED:

SHAKTHI, AGED 20 YEARS
S/O. SASI, CHETTYSSERI VEEDU (SHAKTHI NIVAS),
KAVILAMMAKKADAVU, NOORNAD (PO), PALAMEL VILLAGE,
ALAPPUZHA DISTRICT, PIN - 689512.

BY ADVS.
K.B.ARUNKUMAR
PRATHAP.G.PADICKAL
POOJA K.S.

RESPONDENTS/RESPONDENTS/STATE AND SURVIVOR:

- 1 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, PIN - 682031.
- 2 THE INSPECTOR OF POLICE
PANDALAM POLICE STATION,
PANDALAM, PATHANMTHITTA, PIN - 689501.
- 3 XXXXXXXXXXXX
XXXXXXXXXXXX XXXXXXXXXXXX

PUBLIC PROSECUTOR SRI M P PRASANTH

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON
11.11.2024, ALONG WITH CrL.MC NOS.9473/2024 & 9474/2024, THE COURT
ON 20.11.2024 PASSED THE FOLLOWING:

2024:KER:87496

CrL.M.C.Nos.9471, 9473 & 9474 of 2024 2

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

WEDNESDAY, THE 20TH DAY OF NOVEMBER 2024 / 29TH KARTHIKA, 1946

CRL.MC NO. 9473 OF 2024

CRIME NO.869/2023 OF Adoor Police Station, Pathanamthitta

CRMP.NOS.269 & 270 OF 2024 IN SC NO.811 OF 2023 OF FAST TRACK

SPECIAL COURT, ADOOR

PETITIONERS/PETITIONERS/ACCUSED NOS.1, 3-5:

- 1 ANOOP, AGED 24 YEARS
S/O. RAVIKUMAR, CHIRAMULAVADAKETHIL VEEDU,
KOTTAKKATTUSSERY, L.S.P.O, THAMARAKULAM VILLAGE,
ALAPPUZHA DISTRICT, PIN - 690530.
- 2 SHAKTHI, AGED 20 YEARS
S/O. SASI, CHETTYSSERI VEEDU (SHAKTHI NIVAS),
KAVILAMMAKKADAVU, NOORNAD (PO), PALAMEL VILLAGE,
ALAPPUZHA DISTRICT, PIN - 689512.
- 3 ABHIJITH, AGED 22 YEARS
S/O. PRASAD, PAYYATTUMVILAMEENATHETHIL VEEDU,
KOTTAKKATTUSSERY, L.S.P.O, THAMARAKULAM VILLAGE,
ALAPPUZHA DISTRICT, PIN - 690530.
- 4 ARAVIND, AGED 30 YEARS
S/O. RAMANAN, CHIRAYILTHEKKETHI VEEDU,
KOTTAKKATTUSSERY, L.S.P.O, THAMARAKULAM VILLAGE,
ALAPPUZHA DISTRICT, PIN - 690530.

BY ADVS.
K.B.ARUNKUMAR
PRATHAP.G.PADICKAL
POOJA K.S.

2024:KER:87496

Crl.M.C.Nos.9471, 9473 & 9474 of 2024 3

RESPONDENTS/RESSPONDENTS/ STATE AND SURVIVOR:

- 1 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,HIGH COURT OF KERALA,
PIN - 682031

2 THE INSPECTOR OF POLICE
ADDOOR POLICE STATION, PATHANAMTHITTA., PIN - 689694

3 XXXXXXXXXX
XXXXXXXXXX XXXXXXXXXX

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON
11.11.2024, ALONG WITH CrI.MC.9471/2024 AND CONNECTED CASES, THE
COURT ON 20.11.2024 PASSED THE FOLLOWING:

2024:KER:87496

CrI.M.C.Nos.9471, 9473 & 9474 of 2024 4

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

WEDNESDAY, THE 20TH DAY OF NOVEMBER 2024 / 29TH KARTHIKA, 1946

CRL.MC NO. 9474 OF 2024

CRIME NO.854/2023 OF Adoor Police Station, Pathanamthitta

CRMP.NOS.267 & 268 OF 2024 IN SC NO.829 OF 2023 OF FAST TRACK

SPECIAL COURT, ADDOOR

PETITIONER/PETITIONER/ACCUSED:

ANOOP, AGED 24 YEARS
S/O. RAVIKUMAR, CHIRAMULAVADAKETHIL VEEDU,
KOTTAKATTUSSERY, L.S.P.O, THAMARAKULAM VILLAGE,
ALAPPUZHA DISTRICT, PIN - 690530.

BY ADVS.
K.B.ARUNKUMAR
PRATHAP.G.PADICKAL
POOJA K.S.

RESPONDENTS/RESPONDENTS/STATE AND SURVIVOR:

1 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, PIN - 682031.

2 THE INSPECTOR OF POLICE
ADDOOR POLICE STATION, PATHANAMTHITTA., PIN - 689694.

3 XXXXXXXXXX
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SENIOR PUBLIC PROSECUTOR SRI RENJIT GEORGE

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON
11.11.2024, ALONG WITH CrI.MC.9471/2024 AND CONNECTED CASES, THE
COURT ON 20.11.2024, PASSED THE FOLLOWING:

2024:KER:87496

CrI.M.C.Nos.9471, 9473 & 9474 of 2024 5

A. BADHARUDEEN, J.

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CrI.M.C.Nos.9471 of 2024, 9473 of 2024
and
CrI.M.C.No.9474 of 2024
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Dated this the 20th day of November, 2024

COMMON ORDER

Criminal Miscellaneous Case No.9471 of 2024 has been filed under Section 528 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (`BNSS' for short), challenging order in CrI.M.P.Nos.274/2024 and 275/2024 in S.C.No.47/2024 on the files of the Special Court under the Protection of Children from Sexual Offences Act (`POCSO Act' for short) Cases, Adoor.

2. Criminal Miscellaneous Case No.9473 of 2024 has been filed under Section 528 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (`BNSS' for short), challenging order in CrI.M.P.Nos.269/2024 and 270/2024 in S.C.No.811/2023 on the files of the Special Court under the Protection of Children from Sexual Offences Act (`POCSO Act' for short) Cases, Adoor.

2024:KER:87496

3. Criminal Miscellaneous Case No.9474 of 2024 has been filed under Section 528 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (`BNSS' for short), challenging order in CrI.M.P.Nos.267/2024 and 268/2024 in S.C.No.829/2023 on the files of the Special Court under the Protection of Children from Sexual Offences Act (`POCSO Act' for short) Cases, Adoor.

4. Heard the learned counsel for the petitioners and the learned Public Prosecutor in detail. In all these cases the defacto complainant and the 3rd respondent is one and the same. Perused the relevant documents.

5. In CrI.M.C.No.9471/2024 the accused alleged to have committed offences punishable under Sections 363, 354D and 376 of the Indian Penal Code (`IPC' for short) as well as Sections 4(1) r/w 3(a) and

(b), 12 r/w 11 and 17 r/w 16 of the POCSO Act, Section 84 of the Juvenile Justice (Care and Protection) Act (`JJ Act' for short) and Sections 3(1)(w)

(i) and 3(2)(v)(va) of Scheduled Cast Schedule Tribe (Prevention of Atrocities) Act (`SC/ST (POA) Act' for short).

6. In CrI.M.C.No.9473/2024 the accused alleged to have 2024:KER:87496 committed offences punishable under Section 363, 366A and 376 of the Indian Penal Code (`IPC' for short) as well as Sections 4(1) r/w 3(a), 6 r/w 5(g), 8 r/w 7 and 17 r/w 16 of the POCSO Act, Section 84 of the Juvenile Justice (Care and Protection) Act (`JJ Act' for short).

7. In CrI.M.C.No.9474/2024 the accused alleged to have committed offences punishable under Section 363, 354D and 376(2) of the Indian Penal Code (`IPC' for short) as well as Sections 4(1) r/w 3(a) and

(b), 6 r/w 5(1) and 12 r/w 11(iv) of the POCSO Act, Sections 77 and 84 of the Juvenile Justice (Care and Protection) Act (`JJ Act' for short) and Sections 3(1)(w)(i) and 3(2)(v)(va) of Scheduled Cast Schedule Tribe (Prevention of Atrocities) Act (`SC/ST (POA) Act' for short).

8. These cases were tried separately. The common survivor got examined separately and cross examined at length. Thereafter, at the fag end of the trial, separate petitions were filed to recall and re-examine PW1 and the one and only reason stated to recall PW1, the survivor, is that at the time of giving evidence, PW1 was at ACH, Kollam, and she gave evidence in the court due to the threat and inducement due to the authorities at ACH, Kollam and police officials. Therefore, she wanted to 2024:KER:87496 recall herself. The accused also filed petition to recall PW1, on the assertion that he obtained copy of the affidavit accompanying the petition filed by the survivor. Therefore recalling is necessary.

9. Prosecution side zealously opposed recalling PW1 and the learned Special Judge considered the objection in the light of the decisions reported in [2005] 10 SCC 701], Mishralal & Ors. v. State of M.P & Ors's case and [AIR 2009 SC 69], Hanuman Ram v. State of Rajasthan & Ors. and dismissed the applications filed for recalling PW1 holding the view that once the witness was cross examined fully, such witness should not be recalled and re-examined to deny the evidence she had already given before the court.

10. The learned counsel for the petitioner pressed for recall of PW1, which was denied in all these petitions.

11. Law regarding recalling of child witness is well settled. Law regarding recalling of child witness is subject to the rider under Section 33(5) of the POCSO Act. While dealing with the same question, in

the decision reported in *Jerin Joy v. State of Kerala* [2024 (4) KHC 188], this Court held that, as per Section 33(5) of the POCSO Act, it has been 2024:KER:87496 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.

12. In a recent decision of the Apex Court reported in [2024 LiveLaw (SC) 615] *Madhab Chandra Pradhan and Others v. State of Odisha* (Special Leave Petition (Crl.) No.10082/2024) also, the Apex Court deprecated the practice of recalling of child witness repeatedly in view of the mandate under Section 33(5) of the POCSO Act. In fact, a witness already examined in chief and crossed at length need not be 2024:KER:87496 recalled and re-examined with a view to erase his earlier evidence, by the subsequent version in view of recalling.

13. As rightly pointed out by the learned Public Prosecutor and found by the learned Special Judge relying on the decisions in *Mishralal & Ors. v. State of M.P & Ors's case* (supra) and *Hanuman Ram v. State of Rajasthan & Ors.'s case* (supra), once the witness in chief cross examined in full, such witness should not be recalled and re-examined to deny the evidence he/she had already given before the court and the same is abusing the process of court. It appears that PW1, the survivor had given evidence supporting the prosecution case and she was effectively cross-examined, but nothing extracted to see either her version as dis-believable or the same as one obtained by threat, in any manner. As an afterthought, for reasons known to the survivor and the accused, may be as part of stifling the prosecution, the survivor would allege that she had given evidence due to threat and inducement due to the authorities at ACH, Kollam and police officials and accordingly she wanted to recall herself. Such procedure is not permissible. In view of the matter, the learned Special Judge dismissed the petitions as per the orders impugned 2024:KER:87496 rightly and the same do not warrant interference at the hands of this Court.

Accordingly, these petitions stand dismissed. Registry shall forward a copy of this order to the jurisdictional court for information and further steps.

Sd/-

A. BADHARUDEEN, JUDGE rtr 2024:KER:87496 APPENDIX OF CRL.M.C.NO.9471/2024 PETITIONER'S EXHIBITS

1. SEALED COVER 1 : TRUE COPY OF THE RELEVANT PORTION OF THE FINAL REPORT IN S.C.NO.47 OF 2024 ON THE FILE OF FAST TRACK SPECIAL COURT, ADOOR, PATHANAMTHITTA.

2. SEALED COVER 2 : TRUE COPY OF THE APPLICATION FILED BY THE 3RD RESPONDENT NUMBERED AS CRL.M.P.NO.274/2024 IN S.C.NO.47/2024 ON THE FILE OF FAST TRACK SPECIAL COURT, ADOOR, PATHANAMTHITTA.

3. SEALED COVER 3 : TRUE COPY OF THE APPLICATION FILED BY THE PETITIONERS NUMBERED AS CRL.M.P.NO.275/2024 IN S.C.NO.47/2024 ON THE FILE OF FAST TRACK SPECIAL COURT, ADOOR, PATHANAMTHITTA.

4. SEALED COVER 4 : THE CERTIFIED COPY OF THE COMMON ORDER DATED 04.11.2024 IN CRL.M.P.NO.274 OF 2024 AND CRL.M.P.NO.275 OF 2024 IN S.C.NO.47/2024 ON THE FILE OF FAST TRACK SPECIAL COURT, ADOOR, PATHANAMTHITTA.

2024:KER:87496 APPENDIX OF CRL.M.C.NO.9473/2024 PETITIONERS' EXHIBITS

1. SEALED COVER 1 : TRUE COPY OF THE RELEVANT PORTION OF THE FINAL REPORT IN S.C.NO.811 OF 2023 ON THE FILE OF FAST TRACK SPECIAL COURT, ADOOR, PATHANAMTHITTA.

2. SEALED COVER 2 : TRUE COPY OF THE APPLICATION FILED BY THE 3RD RESPONDENT NUMBERED AS CRL.M.P.NO.269/2024 IN S.C.NO.811/2023 ON THE FILE OF FAST TRACK SPECIAL COURT, ADOOR, PATHANAMTHITTA.

3. SEALED COVER 3 : TRUE COPY OF THE APPLICATION FILED BY THE PETITIONERS NUMBERED AS CRL.M.P.NO.270/2024 IN S.C.NO.811/2023 ON THE FILE OF FAST TRACK SPECIAL COURT, ADOOR, PATHANAMTHITTA.

4. SEALED COVER 4 : THE CERTIFIED COPY OF THE COMMON ORDER DATED 04.11.2024 IN CRL.M.P.NO.269 OF 2024 AND CRL.M.P.NO.270 OF 2024 IN S.C.NO.811/2023 ON THE FILE OF FAST TRACK SPECIAL COURT, ADOOR, PATHANAMTHITTA.

2024:KER:87496 APPENDIX OF CRL.M.C.NO.9474/2024 PETITIONER'S EXHIBITS

1. SEALED COVER 1 : TRUE COPY OF THE RELEVANT PORTION OF THE FINAL REPORT IN S.C.NO.829 OF 2023 ON THE FILE OF FAST TRACK SPECIAL COURT, ADOOR, PATHANAMTHITTA.

2. SEALED COVER 2 : TRUE COPY OF THE APPLICATION FILED BY THE 3RD RESPONDENT NUMBERED AS CRL.M.P.NO.267/2024 IN S.C.NO.829/2023 ON THE FILE OF FAST TRACK SPECIAL COURT, ADOOR, PATHANAMTHITTA.

3. SEALED COVER 3 : TRUE COPY OF THE APPLICATION FILED BY THE PETITIONERS NUMBERED AS CRL.M.P.NO.268/2024 IN S.C.NO.829/2023 ON THE FILE OF FAST TRACK SPECIAL COURT, ADOOR, PATHANAMTHITTA.

4. SEALED COVER 4 : THE CERTIFIED COPY OF THE COMMON ORDER DATED 04.11.2024 IN CRL.M.P.NO.267 OF 2024 AND CRL.M.P.NO.268 OF 2024 IN S.C.NO.829/2023 ON THE FILE OF FAST TRACK SPECIAL COURT, ADOOR, PATHANAMTHITTA.