



IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE GOPINATH P.

THURSDAY, THE 11TH DAY OF JANUARY 2024 / 21ST POUSHA, 1945

CRL.MC NO. 9412 OF 2023

CRIME NO.231/2022 OF Payyannur Police Station, Kannur

AGAINST THE ORDER/JUDGMENT SC 392/2022 OF FAST TRACK SPECIAL COURT,

THALIPARAMBA

PETITIONER/S:

MANOJ.T.K.

AGED 53 YEARS

S/O. GOPALAN, THEKKADAVANKALLATH HOUSE, KELOTH,
PAYYANNUR, AMSOM, KANNUR, PIN - 670307

BY ADVS.

S.S.ARAVIND

M.V.AMARESAN

RESPONDENT/S:

STATE OF KERALA

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

OTHER PRESENT:

SRI. VIPIN NARAYAN (SR PP)

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON
11.01.2024, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:



'C.R.'

ORDER

The petitioner is the accused in Crime No.231/2022 of Payyannur Police Station, Kannur registered alleging commission of offences under Sections 354 A (1), 354 B, 354 (D)(1)(i), 511, 376 of the Indian Penal Code and Section 10 read with 9 (f) (l) (p) and Section 12 read with 11 (iv) of the Protection of Children from Sexual Offences Act, 2012 (the POCSO Act). Following the investigation, a final report was filed. Charges were framed against the accused under Sections 354 A (1)(1), 354 D (9),(l),(i), 511 read with 376 of the Indian Penal Code and Section 9 read with (I), (f), (p), (m) Sections 10, 11 read with Section 12 of the POCSO Act on 09-08-2023. Following the framing of charges, a summons was issued to CW1 (the victim in the case), and the case was adjourned to 21-09-2023. On 21-09-2023, the petitioner / accused was present in court. However, CW1 was absent. Therefore, a summons was issued to CW2, and a bailable warrant was issued to CW1. The matter was adjourned to be listed on 16-10-2023. On 16-10-2023, the petitioner / accused appeared through counsel and filed Annexure-A4 application numbered as CMP No.466/2023 seeking to condone the absence of the accused on that date (on medical grounds) and praying that the case be adjourned to any date after



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three weeks. The Special Court proceeded to record the chief examination of CW1, who was examined as PW1. Annexure-A4 petition was allowed on costs of Rs.3,500/- and the matter was adjourned to 08-11-2023 for the cross-examination of PW1. CW2, who was also present on the summons, was bound over on account of lack of time. The petitioner has approached this court challenging the proceedings of the Fast Track Special Court, Thaliparamaba, in examining PW1 in the absence of the petitioner. According to the petitioner, PW1 could not have been examined in his absence going by the mandate of Section 273 of the Code of Criminal Procedure (Cr.P.C). This Crl. M.C has been filed under Section 482 Cr.P.C seeking a direction to the Fast Track Special Court, Thaliparamaba, to examine PW1 *“in the presence of the petitioner ignore/deleting the evidence already taken in the absence of the petitioner in S.C No.392/2022 pending before the Fast Track Special Court, Thaliparamaba.”*

2. Sri. S. Aravind, the learned counsel for the petitioner / accused, refers to the provisions of Section 273 Cr.P.C to contend that it is the mandate of Section 273 that the recording of evidence in a criminal trial shall be in the presence of the accused. It is submitted with reference to the provisions of Sections 299 and 317 of the Cr.P.C that it is only when the personal



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appearance of the accused is dispensed with in the circumstances contemplated by those provisions that the deposition of witnesses can be recorded in the absence of the accused. It is submitted that the language of Section 273 Cr.P.C admits of no other interpretation. The learned counsel placed considerable reliance on the judgment of the Supreme Court in ***Atma Ram and others v. State of Rajasthan; (2019) 20 SCC 481*** in support of this proposition. The learned counsel has also referred to the judgments of this court in ***Bhanujan v Jayabhanu; 1993 (2) KLT 889, Alice George v. Deputy Commissioner of Police; 2003 (1) KLT 339, Raju T.P. v. State of Kerala; 2009 (3) KHC 14 and Arun Baby v. State of Kerala and another; 2021 (3) KLT OnLine 1014***. The learned counsel has also referred to the judgment of the Supreme Court in ***Mydeen A.T and another v Assistant Commissioner, Customs Department; 2021 (5) KLT OnLine 1177***.

3. Sri. Vipin Narayanan, the learned Senior Public Prosecutor on the other hand submits that there is absolutely no illegality in the procedure adopted by the learned Special Judge in permitting the examination in chief of PW1 in the absence of the petitioner / accused. The learned Public Prosecutor referred to the provisions of Section 309 Cr.P.C to contend that the provisions



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of that Section indicate that when witnesses are in attendance no adjournment or postponement shall be granted without examining them except for special reasons to be recorded in writing. The learned Public Prosecutor has placed reliance on the judgment of the Supreme Court in ***Bhaskar Industries Ltd. v Bhiwani Denim & Apparels Ltd and others; (2001) 7 SCC 401*** to contend that the provisions of Section 273 Cr.P.C do not create an absolute bar in the recording of evidence in the absence of the accused. It is submitted that the aforesaid decision is authority for the proposition that when the accused has been granted exemption from attending the court, evidence can be recorded in the absence of the accused also. The learned Public Prosecutor has also placed reliance on the judgment of the Supreme Court in ***Puneet Dalmia v. Central Bureau of Investigation, Hyderabad; AIR 2020 SC 214, State of U.P v. Shambhu Nath Singh and others; (2001) 4 SCC 667*** and ***Mukesh Singh v. The State of Uttar Pradesh and another; 2022 LiveLaw (SC) 826*** in support of his contention.

4. Having heard the learned counsel for the petitioner / accused and the learned Senior Public Prosecutor appearing for the State, I am of the view that there is absolutely no illegality in the procedure followed by the Fast



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Track Special Court, Thaliparamba in proceeding to allow the examination-in-chief of PW1 in the absence of the petitioner / accused and in the presence of his counsel. I believe that the answer to the question posed by the learned counsel for the petitioner lies in the provisions of Section 273 itself. Section 273 Cr.P.C to the extent it is relevant reads as follows;

*“273. Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, **when his personal attendance is dispensed with, in the presence of his pleader.**” (emphasis applied)*

It is clear from a reading of Section 273 as extracted above that the normal rule is that evidence in a criminal trial shall be recorded in the presence of the accused. However, it is clear from a reading of the provision itself that where the personal attendance of the accused is dispensed with evidence can be recorded in the presence of his pleader. The contention of the learned counsel appearing for the petitioner that the words ‘*when his personal attendance is dispensed with*’ occurring in Section 273 Cr.P.C refers only to situations covered by Section 299 Cr.P.C or Section 317 Cr.P.C does not appeal to this court. There is nothing in Section 273 which would indicate that the words ‘*when his personal appearance is dispensed with*’ apply only to situations covered by Sections 279 or 317 in Cr.P.C. In other words, the provisions of



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Section 273 indicate that even when the personal appearance of the accused is dispensed with for a day on the application of the accused and when witnesses are in attendance it is open to the court to record the evidence of the witnesses in the absence of the accused and in the presence of his pleader. The impugned proceedings (Annexure-A5) of the Fast Track Special Court, Thaliparamba indicate that the accused was represented by counsel on 16-10-2023. The application filed by the petitioner / accused as CMP No.466/2023 was allowed on payment of costs and the matter was adjourned for the cross-examination of PW1 to 08-11-2023. Going by the plain meaning of the words used in the latter part of Section 273 Cr.P.C no canon of interpretation calls upon this Court to read into it any further limitation leading to a conclusion that evidence in a criminal trial can be recorded in the absence of the accused only when the personal appearance of the accused is dispensed with in circumstances contemplated by Sections 299 and 317 Cr.P.C.

5. In ***Atma Ram (supra)*** the Supreme Court was considering a case where the trial court had proceeded to record the statements of 12 witnesses in the absence of the accused. The trial court thereafter proceeded to convict the accused. The appeal filed by the appellants before the High Court was heard along with criminal death reference No.2/2017 (as a sentence



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of death had been imposed by the trial court). On a consideration of the matter the High Court took the view that the entire trial was not vitiated and the matter could be remanded to the trial court for recording the statements of the witnesses in question afresh. The appellants before the High Court proceeded to challenge the judgment of the High Court before the Supreme Court contending *inter alia* that the act of the trial court in proceeding to record the statements of certain witnesses in the absence of the accused had vitiated the entire trial and the High Court could not have remanded the matter for a fresh recording of evidence of the witnesses in question. While considering the aforesaid issue the Supreme Court considered the provisions of Section 273 Cr.P.C and held as follows;

*“17. Section 273 opens with the expression “Except as otherwise expressly provided....” By its very nature, the exceptions to the application of Section 273 must be those which are expressly provided in the Code. Shri Hegde is right in his submission in that behalf. Sections 299 and 317 are such express exceptions provided in the Code. In the circumstances mentioned in the said Sections 299 and 317, the contents of which need no further elaboration, the courts would be justified in recording evidence in the absence of the accused. **Under its latter part, Section 273 also provides for a situation in which evidence could be recorded in the***



absence of the accused, when it says “when his personal attendance is dispensed with, in the presence of his pleader”. There was a debate during the course of hearing in the present matter whether such dispensation by the Court has to be express or could it be implied from the circumstances. We need not go into these questions as the record clearly indicates that an objection was raised by the advocate appearing for the appellants right at the initial stage that the evidence was being recorded without ensuring the presence of the appellants in court. There was neither any willingness on the part of the appellants nor any order or direction by the trial court that the evidence be recorded in the absence of the appellants. **The matter, therefore, would not come within the scope of the latter part of Section 273 and it cannot be said that there was any dispensation as contemplated by the said section.** We will, therefore, proceed on the footing that there was no dispensation and yet the evidence was recorded without ensuring the presence of the accused. The High Court was, therefore, absolutely right in concluding that Section 273 stood violated in the present matter and that there was an infringement of the salutary principle under Section 273.”
(Emphasis is supplied)

The Supreme Court has indeed taken the view that Sections 299 and 317 Cr.P.C are exceptions to the application of Section 273. However, the decision cannot come to the aid of the petitioner / accused firstly for the reason that in



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the facts of the case before the Supreme Court, the advocate for the accused before the trial court had raised an objection that evidence should not be recorded in the absence of the accused and secondly and more pertinently the Supreme Court proceeds to hold that the latter part of Section 273 itself contemplates the taking of evidence in the absence of the accused and in the presence of his pleader when an exemption from personal appearance has been granted. There is no finding by the Supreme Court that the provisions of Sections 299 and 317 are the only exceptions to Section 273 provided for in the Code.

6. The decisions of this Court in ***Bhanujan (supra)***, ***Alice George (supra)***, ***Raju T.P. (supra)*** and ***Arun Baby (supra)*** on which reliance is placed by the learned counsel for the petitioner do not apply in the facts of the present case. In ***Bhanujan (supra)*** this court was considering the question as to whether a Magistrate can impose conditions while granting exemption from personal appearance under Section 205 Cr.P.C. Though there is an observation in the said judgment that in criminal cases personal appearance is the rule and appearance through counsel is the exception the said decision does not support the case of the petitioner that except in cases covered by Sections 299 and 317 Cr.P.C (or Section 205 Cr.P.C) the evidence



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of witnesses can be recorded only in the presence of the accused. In **Alice George (Supra)** this court was considering a question as to whether it would be unreasonable to insist on the personal presence of the accused on all dates of posting irrespective of the nature and purpose of the posting. While considering that question this court referred to provisions of Section 273 Cr.PC and held that the provision insists on the personal presence of the accused at the time when evidence is recorded. Therefore the said decision also does not come to the aid of the petitioner. In **Raju T.P (Supra)** this court was concerned with the question as to whether permanent exemption from personal appearance can be granted to an accused in cases where a warrant trial is contemplated by the provisions of the Cr.P.C. This court took the view that even in cases where the code contemplates a warrant trial permanent exemption from appearance can be granted to an accused subject to certain conditions. Therefore the said decision also is not authority for the proposition that the only exceptions to Section 273 Cr.P.C are those contained in Sections 299 or 317 Cr.P.C. In **Mydeen A.T (supra)** which is the only other judgment referred to by the learned counsel appearing for the petitioner, the Supreme Court was concerned with a situation where the High Court while considering two appeals filed by the Customs Department against



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the acquittal of the accused in the case had proceeded to convict all the accused by rendering a common judgment in appeals arising out of two separate trials and two separate judgments and considering the evidence of only one case. While considering the said issue the Supreme Court has held:-

“21. The exception of this provision finds place in section 205 of Cr.P.C. wherein personal attendance of accused is dispensed with and he is permitted to appear by his pleader and also in section 299 of Cr.P.C., which provides for recording of evidence in the absence of the accused under certain eventualities like absconding of accused or commission of an offence punishable with death or imprisonment for life by some person or persons unknown. However, this exception has few conditions to be strictly followed by the trial court and prosecution. Besides such an exception, the basic principle of recording evidence in presence of the accused is imperative.”

Therefore, the said decision also is not authority for the proposition now canvased on behalf of the petitioner / accused that the only exception to Section 273 Cr.PC can be the provisions of Sections 299 and 317 of the Cr.P.C.

7. In the light of the above findings, it is unnecessary to burden this judgment by reference to the decisions placed by the learned Senior Public Prosecutor or to the effect of the provisions of Section 309 Cr.P.C. Therefore, I hold that while the normal rule is that the evidence in a criminal trial must be



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recorded in the presence of the accused the evidence of witnesses can be recorded in the presence of the counsel for the accused even in situations where the court grants exemption from personal appearance to the accused even of a day. The CrI. M.C fails and it is accordingly dismissed.

Sd/-
GOPINATH P.
JUDGE

AMG



APPENDIX OF CRL.MC 9412/2023

PETITIONER ANNEXURES

- Annexure- 2 TRUE COPY OF THE PROCEEDING OF FRAMING OF CHARGES
UPDATED IN ECOURT'S DATED 09/08/2023 IN SC 392/2022
OF COURT OF FAST TRACK SPECIAL COURT POCSO,
TALIPARAMBA
- Annexure -3 TRUE COPY OF THE PROCEEDINGS OF COURT OF FAST TRACK
SPECIAL COURT POCSO, TALIPARAMBA ON 21/09/2023 IN SC
392/2022
- Annexure- 4 TRUE COPY OF THE CMP NO.466/2023 IN SC NO. 392/2022
DATED 16/10/2023 FILED BY THE PETITIONER BEFORE
COURT OF FAST TRACK SPECIAL COURT POCSO, TALIPARAMBA
- Annexure -5 TRUE COPY OF THE PROCEEDINGS UPDATED IN E-COURTS
DATED 16/10/2023 IN SC NO. 392/2022 OF THE COURT OF
FAST TRACK SPECIAL COURT POCSO, TALIPARAMBA