

HIGH COURT OF KERALA**Bench: Justice A. Badharudeen****Date of Decision: 20th May 2024**

CRIMINAL MISCELLANEOUS CASE NO. 3840 OF 2024
CRIME NO. 329/2022 OF ENATH POLICE STATION,
PATHANAMTHITTA

JERIN JOY ...PETITIONER**VERSUS****STATE OF KERALA & ANR. ...RESPONDENTS****Legislation:**

Section 482 of the Code of Criminal Procedure, 1973 (Cr.P.C.)
Protection of Children from Sexual Offences Act, 2012 (POCSO Act) –
Section 33(5)

Subject: Petition to quash the order denying the recall of a child witness
for re-cross-examination under the POCSO Act.

Headnotes:

Re-Cross-Examination – Child Witness under POCSO Act – Petitioner
sought to recall PW1 (child witness) to ask additional questions missed
during initial cross-examination – Petition was filed under Section 482
Cr.P.C. to quash the order denying the recall, citing the necessity for a
just decision [Paras 1-3].

Legal Precedent and Interpretation – Referenced *Vineeth v. State of
Kerala*, highlighting that Section 33(5) of the POCSO Act is not an
absolute bar against recalling a child witness if it is necessary for justice
– Emphasized that such recalls should not be used to fill gaps in
evidence due to oversight by counsel, but can be permitted if crucial for
a fair decision [Paras 3-6].

Judicial Discretion and Fair Trial – The court reiterated that while
ensuring a child is not recalled repeatedly, exceptions can be made in
the interest of justice – However, in this case, the court found that the
petitioner's attempt to recall PW1 was to fill evidentiary gaps and not due

to any new evidence or significant oversight affecting the case's merit [Paras 6-7].

Decision: The petition to recall PW1 was dismissed – The court upheld the lower court's order, finding no justifiable reason to recall the child witness merely to cover lapses in cross-examination by the defense counsel [Para 7].

Referred Cases:

Vineeth v. State of Kerala, 2022 KHC OnLine 8065

Representing Advocates:

For Petitioner: Roshen D. Alexander, Tina Alex Thomas, Harimohan, Kamal Roy M.

For Respondent: Public Prosecutor Sri. Renjith George.

ORDER

1. This Criminal Miscellaneous Case has been filed under Section 482 of the Code of Criminal Procedure, 1973, to quash Annexure A6 order in Crl.M.P. No.66/2024 in S.C. No.63/2023 pending before the Fast Track Special Court for Protection of Children from Sexual Offences Act (hereinafter referred as 'POCSO Act' for short) Cases, Adoor.

2. Heard the learned counsel for the petitioner and the learned Public Prosecutor, in detail. Perused the order impugned and judgment placed by the learned counsel for the petitioner, viz; **Vineeth v. State of Kerala** [2022 KHC OnLine 8065 : 2022 KHC 8065 : 2022 KER 71422 : 2022 LiveLaw (Ker) 656 : 2023 (1) KLT 135 : 2022 (6) KLT OnLine 1052].

3. It is argued by the learned counsel for the petitioner that, few questions which were material, omitted to be asked during cross-examination of PW1 sought to be put to PW1 by recalling her. The prayer in Crl.M.P. No.66/2024 is that, those six questions permitted to be put to PW1, by recalling PW1. The decision reported in **Vineeth's** case (supra) has been placed to contend that the bar under Section 33(5) of the POCSO Act is not absolute and in an appropriate case, if it is necessary for the just decision of the case, of course the child witness could be recalled. In paragraph No.6 of the above decision, this Court held as under:

“6. S.311 of CrPC gives wide power to the Magistrate to recall any witness already examined or to summon any additional witness at any stage of the proceedings for the just decision of the case. The bar under S.33(5) of POCSO Act is not absolute. In appropriate cases, if it is necessary for the just decision of the case, of course the child witness can be recalled. Admittedly when PW4 and PW6 were examined, the petitioner did not receive the 164 statement. The petitioner has every right to contradict the witness with the 164 statement. Hence, I am of the view that recalling of the witnesses is necessary for the just decision of the case. In the light of the above findings, Annexure - A2 stands hereby set aside. CrI.M.P.No.1392 of 2022 stands allowed. This CrI.M.C is disposed of.”

4. The learned Public Prosecutor opposed the prayer to recall PW1 on the ground that the attempt of the petitioner is to fill up the lacuna in evidence after completion of trial and the same is not legally permissible.

5. The legal position laid down in **Vineeth's** case (supra) is correct.

6. In this connection, it is worthwhile to note that as per Section 33(5) of the POCSO Act, it has been 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.

7. On perusal of the questions sought to be asked to PW1, stated in Annexure.A5 petition, it appears that the attempt of the petitioner is to fill up the lacuna and omission in evidence resulted due to laches in evidence at the instance of the counsel for the petitioner by recalling PW1 where Section 33(5) of the POCSO Act would apply. In fact, such

a plea is not legally sustainable. Therefore, dismissal of the petition as per Annexure.A6 order dated 17.04.2024 is fully justified. Thus, the prayer sought for in this petition cannot be granted. In the result, this CrI.M.C. stands dismissed.

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