

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE V.G. ARUN

MONDAY, THE 21ST DAY OF DECEMBER 2020 / 30TH AGRAHAYANA, 1942

Cr1.MC.No.5128 OF 2020 (A)

AGAINST THE ORDER/JUDGMENT IN SC 548/2018 OF ADDITIONAL DISTRICT
COURT & SESSIONS COURT (VIOLENCE AGAINST WOMEN & CHILDREN)

CRIME NO.784/2020 OF NEDUMBASSERY POLICE STATION , Ernakulam

PETITIONER/S:

JOSEPH
AGED 58 YEARS
S/O OUSEPH, POOVELI HOUSE,
CHETHOKODE, ANAKAMALY VILLAGE,
NAYATHODU KARA, ERNAKULAM DIST.

BY ADV. SRI.M.J.SANTHOSH

RESPONDENT/S:

THE STTE OF KERALA
REPRESENTED BY THE CIRCLE INSPECTOR OF
POLICE, NEDUMBASSERY POLICE STATION, THROUGH THE PUBLIC
PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

OTHER PRESENT:

PP RAMESH CHAND

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON
17.11.2020, THE COURT ON 21.12.2020 PASSED THE FOLLOWING:

V.G.ARUN, J.

CRL.M.C.No. 5128 of 2020

Dated this the 21st day of December, 2020

O R D E R

Petitioner is the sole accused in S.C.No.548 of 2018 pending before the Additional Sessions Court (for the Trial of Cases Relating to Sexual Violence Against Women and Children), Ernakulam. The case originated from Crime No.784 of 2016 registered at the Nedumbassery Police Station for offences punishable under Section 376(f) of IPC and Sections 7, 8, 9(l), (m) & (n) of POCSO Act. The prosecution allegation is that, the accused, a close relative of the victim, had committed rape and aggravated sexual assault on the victim over a period of five years continuously from 1.6.2012 to 30.5.2016. After investigation, the police filed four separate final reports and the Special Court took cognizance and numbered the cases as S.C.Nos.548, 549, 550 and 551 of 2018. As per the final reports, the date of occurrence in S.C.No.548 of 2018 is between 1.6.2012 and 30.5.2013, in S.C.No.549 of 2018 between 31.5.2013 and 30.5.2014, in S.C.No.550 of 2018 between 31.5.2014 and 30.5.2015 and in S.C.No.551 of 2018, between 31.5.2015 and 30.5.2016. Trial has commenced in S.C.No.548 of 2018, and charge has not been framed in

the other cases, which are now pending before the newly established Fast Track Court at Aluva. During the course of trial in S.C.No.548 of 2018, defence counsel filed a petition under Section 218(1) of Cr.P.C, seeking to club and try all four cases as a single case. By Annexure A8 order, the trial court dismissed the petition. Hence, this CrI.M.C.

2. Heard Sri.Ranjith Marar, learned Counsel for the petitioner and Sri. Ramesh Chand, learned Public Prosecutor.

3. Learned Counsel for the petitioner assailed the findings in the impugned order contending that the trial court committed an illegality in placing reliance on Section 219(1). It is submitted that the allegation being of aggravated sexual assault under Section 9 (I) of the POCSO Act, which gets attracted on the victim being subjected to sexual assault more than once, or repeatedly, Section 220(4) is the applicable provision. According to the learned Counsel, the other three cases were transferred to the Fast Track Court on its formation and there is no impediment in trying those cases along with SC No.548 of 2018. It is contended that the decision in ***State of Punjab v. Rajesh Syal*** [AIR 2002 SC 3687], relied on by the trial court was rendered under entirely different circumstances. Finally it is submitted that the intention of the POCSO Act is to conduct the trial in such a manner that least difficulty is caused to the child victim and hence, forcing the victim to face the trauma of giving evidence in the four cases separately should be avoided by trying the cases together. The learned

Counsel placed reliance on the decision in ***State of Andhra Pradesh v. Kandimalla Subbaiah and another*** [AIR 1961 SC 1241], ***State of Punjab and another v. Rajesh Syal*** [(2002) 8 SCC 158], ***Manoharan v. Director General of Police*** [2001 (3) KLT 509] and ***Lichen Metals Pvt. Ltd and another v. Central Bureau of Investigation*** [2019 Cri.LJ 3397], in support of his contentions.

4. learned Public Prosecutor submitted that trial has commenced in SC.No.548 of 2018 and the victim was examined as PW1. All the prosecution witnesses, except the investigating officer, have been examined. In the other cases, charge is yet to be framed and further, those cases are pending before another court, which makes consolidation and joint trial impossible. It is contended that in any event, there cannot be a joint trial since separate charges are framed for reason of the offences having been committed by the petitioner over a period of five years and that, at best, three offences of the same kind, committed within the span of 12 months, alone can be charged and tried at one trial.

5. In order to decide the question, it is necessary to have a careful scrutiny of the relevant provisions of Cr.P.C extracted hereunder;

“218. Separate charges for distinct offences.—(1)

For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately:

Provided that where the accused person, by an application in writing, so desires and the Magistrate is of opinion that such person is not likely to be prejudiced thereby, the Magistrate may try together all or any number of the charges framed against such person.

(2) Nothing in sub-section (1) shall affect the operation of the provisions of Sections 219, 220, 221 and 223.

219. *Three offences of same kind within year may be charged together.*

(1) When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, whether in respect of the same person or not, he may be charged with, and tried at one trial for, any number of them not exceeding three.

(2) Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code (45 of 1860) or of any special or local laws:

Provided that, xxxx

220. Trial for more than one offence.—

(1) If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence.

(2) xxx

(3) xxx

4) If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with, and tried at one trial for the offence constituted by such acts when combined, and for any offence constituted by any one, or more, of such acts.

(5) xxx”

6. Going by Section 218, there has to be a separate charge for every distinct offence and every such charge has to be tried separately. The proviso makes it possible for the accused to make an application in writing for joint trial of all or any number of the charges framed against him. The magistrate can allow the request, if the accused is not likely to be prejudiced thereby. Sub-section (2) of Section 218 makes it clear that nothing in Section 218(1) shall affect the operation of the provisions of Sections 219, 220, 221 and 223. Section 219 (1) brings in inhibits the trial of more than three offences of the same kind committed within a span of twelve months. Section 220(4) would apply, if several acts, when combined, would constitute a different offence.

7. As far as the instant case is concerned, the offences are alleged to have been committed over a period of five years. Therefore, separate final reports, pertaining to twelve month periods, were filed in terms of Section 219(1). As regards the contention based on Section 220(4), it is pertinent to note that, other than the offence under Section 9(l), offences under Sections 7, 8, 9(m) and 9(n) of POCSO Act and Section 376(f) of IPC are alleged. In such circumstances, there cannot be a joint trial, on the premise that the offence under Section 9(l) of POCSO Act is constituted, on commission of sexual assault on the victim more than once.

8. The reliance placed on the decision in **Rajesh Syal** (*supra*)

cannot be faulted, since the Honourable Supreme Court had, on the question of joint trial of cases pending before different courts, held as follows:-

“6.In our opinion, proviso to Section 218 would apply only in such a case where the distinct offences for which the accused is charged are being tried before the same Magistrate. In the instant case, offences were being tried before different Magistrates and proviso to S.218 cannot give any single Magistrate the power to order transfer of cases to him from different Magistrates of Courts. Even S.220 does not help the respondent as that applies where any one series of facts are so connected together as to form the same transaction and where more than one offence is committed, there can be a joint trial.”

The decision in ***Kandimalla Subbaiah*** (*supra*) was rendered in the context of the Criminal Procedure Code, 1898. It was held therein that, where the alleged offences have been committed in the course of the same transaction, the limitation placed by Section 234(1) cannot operate. Similarly, in ***Manoharan and Lichen Metals Pvt. Ltd*** (*supra*) also, all the offences were found to have been committed in one series of acts, so as to form the same transaction. Hence, those decisions cannot be relied on to direct consolidation of joint trial of all cases. Undoubtedly, each offence of sexual assault on the victim gives rise to a separate cause of action and cannot be termed as an offence committed in the course of the same transaction, merely for reason of the petitioner having committed the offence repeatedly. The submission that it would be in the interest of the victim child to have a

joint trial, is being mooted at this belated stage cannot be entertained.

9. While pronouncing the order, learned Counsel for the petitioner submitted that S.C.No.548 of 2018 is posted on 22.12.2020 for examination of the investigating officer and that, the learned Counsel is not in a position to conduct cross-examination immediately, due to other pressing engagements. It is requested that the trial may be deferred till 05.01.2021. I consider the request to be reasonable and accordingly, the learned Additional Sessions Judge is directed to defer the trial in S.C.No.548 of 2018 till 05.01.2021.

In the result, the CrI.M.C is dismissed with the above direction.

Sd/-

V.G.ARUN, JUDGE

vgs

APPENDIX

PETITIONER'S/S EXHIBITS:

ANNEXURE A1	THE TRUE COPY OF THE CRIME NO.784/20 OF NEDUMBASSERY POLICE STATION DATED 26.6.2016
ANNEXURE A2	THE TRUE COPY OF FIR IN CRIME NO.784/20 OF NEDUMBASSERY POLICE STATION DATAD 25.6.2016
ANNEXURE A3	THE TRUE COPY OF THE FINAL REPORT IN S.C.NO.548/2018
ANNEXURE A4	TRUE COPY OF THE FINAL REPORT IN S.C.NO.549/2018.
ANNEXURE A5	TRUE COPY OF THE FINAL REPORT IN S.C.NO.550/2018
ANNEXURE A6	THE TRUE COPY OF FINAL REPORT IN S.C.NO.551/2018.
ANNEXURE A7	THE TRUE COPY OF PETITIONIN CRL.M.P.NO.449/2020 DATED 15/9/2020.
ANNEXURE A8	THE TRUE COPY OF THE ORDER IN CRL.M.P.NO.449/2020 DATED 6/11/2020.
ANNEXURE A9	THE TRUE COPY OF THE STATEMENT OF THE VICTIM U/S.164 OF CRPC.
ANNEXURE A10	THE TRUE COPY OF THE DEPOSITION OF PW1 IN S.C.NO.548/2018
ANNEXURE A 11	THE TRUE COPY OF THE DEPOSITION OF PW2 INS.C.NO.548/2018
ANNEXURE A 12	THE TRUE COPY OF JUDGMENT IN 1997 KHC 501 STATE OF MAHARASHTRA VS.P.S.MAHARAJ.