

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 24.06.2016

DELIVERED ON: 30.06.2016

CORAM:

THE HONOURABLE MR. JUSTICE P.N.PRAKASH

Crl.O.P. No.12716 of 2016 and Crl.M.P. No.6570 of 2016

S. Sankara Varman Petitioner/Accused

vs.

State represented by
the Inspector of Police
W-18, M.K.B. Nagar Police Station
M.K.B. Nagar, Chennai Respondent/Complainant

Criminal Original Petition filed under Section 482 Cr.P.C. to call for records and set aside the order passed by the Mahila Court, Chennai, (viz., to recall of P.W.1 was dismissed) in Crl.M.P. No.4532 of 2016 dated 18.04.2016 in S.C. No.433 of 2013.

For petitioner Mr. K.C.S.K. Balaji

For respondent Mr. C. Emalias
Additional Public Prosecutor

ORDER

This Criminal Original Petition is filed to call for the records and set aside the order dated 18.04.2016 passed by the Mahila Court, Chennai, dismissing Crl.M.P. No.4532 of 2016 with regard to recall of P.W.1.

2 A vignette of the facts leading to the filing of this petition is as under:

In respect of an attempt to rape a 14 year old girl by name Elastha Keerthana, a case was registered against the petitioner in the year 2013 and after investigation, the police filed a final report in S.C. No.433 of 2013 before the Mahila Court, Chennai against the petitioner for offences under Section 341, 342, 323, 354, 294 and 376 read with Section 511 and 506(II) IPC and Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for brevity "the POCSO Act"), 2012. Charges were framed against the accused and the victim girl (P.W.1) was examined in chief on 05.02.2014. At that time, the petitioner/accused did not cross-examine her. Thereafter, he filed an application in Crl.M.P. No.4532 of 2016 under Section 311 Cr.P.C. to recall the victim girl (P.W.1) and P.W.s 2 and 3 who are her parents. The Trial Court, by the impugned order dated 18.04.2016, allowed the petition in part and permitted the recall of P.W.s 3 and 4 and dismissed the

petitioner with regard to the victim girl (P.W.1), aggrieved by which, the accused is before this Court.

3 Heard the learned counsel for the petitioner and the learned Additional Public Prosecutor appearing for the respondent.

4 The learned counsel for the petitioner submitted that the accused is facing prosecution for a very grave offence and therefore, denial of opportunity to cross-examine the victim girl (P.W.1) will offend the right of a fair trial guaranteed under Article 21 of the Constitution of India.

5 Per contra, the learned Additional Public Prosecutor submitted that the Court below had given opportunity twice to the accused to cross-examine the victim girl (P.W.1), but the accused had not availed of the opportunity and therefore, he cannot claim that his right to fair trial has been extinguished by the order of the Court below.

6 This Court gave its anxious consideration to the facts and circumstances of the case and also perused the impugned order.

7 In this case, the victim girl was examined as P.W.1 on 05.02.2014 and she should have been cross examined by the accused on the very same day, as held by the Supreme Court in Vinoth Kumar vs. State of Punjab, [2015 (1) MLJ (Crl.) 288]. However, for reasons best known to the accused, the victim girl was not cross examined by the accused on 05.02.2014. All other witnesses were examined and the prosecution side was closed on 12.01.2015. The accused was questioned under Section 313 Cr.P.C. on 23.01.2015 and the case was posted for the examination of defence witnesses.

8 At that juncture, after lapse of a year, the accused filed a petition under Section 311 Cr.P.C. to recall the victim girl (P.W.1) and P.W.3 to P.W. 11 for cross examination, which was allowed by the Trial Court on 08.01.2016.

9 Pursuant to that, the victim girl (P.W.1), P.W.s 3 and 4 were present in the Court on 23.02.2016 for the purpose of cross examination by the accused. On that day, the accused did not appear and a petition under Section 317 Crl.P.C. was filed by him and adjournment was sought on a specious ground that the counsel cannot cross-examine the victim girl (P.W.1), in the absence of the accused, by relying upon Section 36(1) of the POCSO Act. The Trial Court rejected the contention and passed the following docket order on 23.02.2016:

"Accused absent. P.O. P.W.1, P.W.3 and P.W.4 are present. S.33(5) of POCSO Act was explained to the counsel for the accused. The counsel is informed to cross examine the victim P.W.1 (who is 14 years old). Counsel for accused is not ready to cross examine since the accused is absent. Petition u/s 317 Cr.P.C. filed and allowed. Chief examination of P.W.1, P.W.3 and P.W.4 is closed. Issue FS to P.W.5 and P.W.6. C/o 21.03.2016."

10 From a reading of the above docket order, it is manifest that the Presiding Officer has taken pains to educate the learned counsel for the accused about the contours of Section 33(5) of the POCSO Act, despite which the learned counsel for the accused did not elect to cross-examine the victim girl (P.W.1). Thereafter, the accused filed another petition in CrI.M.P. No.4532 of 2016 to recall the victim girl (P.W.1) and P.Ws. 3 and 4, which was partly allowed by the Trial Court, as stated above.

11 The learned counsel for the petitioner took me through the provisions of Section 36(1) of the POCSO Act and stated that the presence of the accused is essential when a child victim is being examined. In order to examine this contention, it is profitable to extract Section 36(1) of the POCSO Act as under:

"36 Child not to see accused at the time of testifying:

(1) The Special Court shall ensure that the child is not exposed in any way to the accused at the time of recording of the evidence, while at the same time ensuring that the accused is in a position to hear the statement of the child and communicate with his advocate."

12 This Court is not able to countenance this submission of the learned counsel for the petitioner for more than one reason. Whenever an accused is arrested and released on bail, he executes a bond to the satisfaction of the Court that he will appear and take part in the proceedings till its culmination.

13 Section 273, Cr.P.C. as amended with effect from 03.02.2013, reads thus:

"273. Evidence to be taken in presence of accused:

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.

Provided that where the evidence of a woman below the age of eighteen years who is alleged to have been subjected to rape or any other sexual offence, is to be recorded, the Court may take appropriate measures to ensure that such woman is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused."

14 On 23.02.2016, when the victim girl (P.W.1) was present in the Court, the learned counsel for the accused filed an application under Section 317 CrI.P.C. to dispense with the personal appearance of the accused and permit him to be represented by a pleader. This was allowed by the Trial Court and under Section 309 Cr.P.C., when a witness is present, no adjournment or

postponement shall be granted without examining the witness, except for special reasons to be recorded in writing.

15 Now, this Court has to see whether the provisions of Section 36(1) of the POCSO Act, upon which the learned counsel for the petitioner places reliance, would form a special reason for sending back the witness without examination.

16 The interpretation placed by the learned counsel for the petitioner on Section 36(1) of the POCSO Act is indeed weird. Section 36(1) mandates that a child should not be exposed to the accused when it is deposing and at the same time, it protects the right of the accused to remain in a place from where he can hear the statement of the child witness. It does not give a carte blanche to the accused to absent himself when the child witness is present and later, claim that there is violation of Section 36(1) of the POCSO Act. Section 36(1) of the POCSO Act does not say that a child witness should not be examined in the absence of the accused. When the Trial Court allows an application under Section 317, Cr.P.C., it presupposes that the counsel for the accused will conduct the trial in the absence of the accused. If the interpretation canvassed by the learned counsel is accepted, it will lead to ludicrous results and every accused will absent himself when the child witness comes for giving evidence and take shelter under Section 36(1) of the POCSO Act. For the sin of having suffered sexual abuse, the child victim should not be made to suffer further at the hands of the accused during trial.

17 Words are too inadequate to explain the trauma of a rape victim. A part of the statement of a victim girl in the Stanford sexual assault case that is now hogging the headlines in the U.S. is reproduced below, which is indeed heartrending:

"My independence, natural joy, gentleness, and steady lifestyle I had been enjoying became distorted beyond recognition. I became closed off, angry, self-deprecating, tired, irritable, empty. The isolation at times was unbearable. You cannot give me back the life I had before that night either. While you worry about your shattered reputation, I refrigerated spoons every night so when I woke up, and my eyes were puffy from crying, I would hold the spoons to my eyes to lessen the swelling so that I could see. I showed up an hour late to work every morning, excused myself to cry in the stairwells, I can tell you all the best places in that building to cry where no one can hear you, the pain became so bad that I had to tell my boss I was leaving, I needed time because continuing day to day was not possible. I used my savings to go as far away as I could possibly be.

I can't sleep alone at night without having a light on, like a five year old, because I have nightmares of being touched where I cannot wake up, I did this thing where I waited until the sun came up and I felt safe enough to sleep. For three months, I went to bed at six o' clock in the morning." (for full statement, see

www.theguardian.com).

18 Section 33 (5) of the POCSO Act reads as under:
"33 Procedure and powers of Special Court:

(5) The Special Court shall ensure that the child is not called repeatedly to testify in the Court."

19 Section 311 Cr.P.C., no doubt, gives power to the Court to recall any witness to serve the cause of justice. But, the said Section is subject to Section 33(5) of the POCSO Act on the principle of generalia specialibus non derogant.

20 In this case, the victim was examined-in-chief on 05.02.2014 and the accused was examined under Section 313 Cr.P.C. on 23.01.2015. During the interregnum, the accused never took steps to recall the child victim (P.W.1). It may be relevant to state here that the accused was on bail and not in judicial custody. In A.G. Vs. Shiv Kumar Yadav and another, [(2015) 9 Scale 649], the Supreme Court has laid down parameters for exercise of powers under Section 311, Cr.P.C. and has held that just because the accused is in custody, that cannot be a reason to recall the witnesses.

21 The learned counsel for the accused submitted that if the accused is not permitted to cross-examine the victim girl (P.W.1), serious prejudice would befall. It is true that the Courts should balance the conflicting claims and render substantial justice in a given case by permitting the accused to cross-examine a witness. But, the facts of this case are a little different. It was the supine indifference of the accused to cross-examine the victim girl (P.W.1) when she came to the Court twice that has landed him in this situation. It was his own making for which he has to suffer.

22 In Vinoth Kumar vs. State of Punjab, [2015 (1) MLJ (Crl.) 288, the Supreme Court has held that a witness should be cross examined on the day he is examined-in-chief, pursuant to which, the Registrar General of this High Court has issued a circular dated 18.12.2015 to all the Presiding Officers of the subordinate courts to follow the mandates of the Supreme Court's directions, strictly.

23 The POCSO Act is a special act which mandates that a child victim should not be called repeatedly to testify in the Court. Thus, in the considered opinion of this Court, the Trial Court was very correct in placing reliance upon Section 33(5) of the POCSO Act and dismissing the petition of the accused in respect of recall of the girl victim (P.W.1) on the ground that he failed to avail of the opportunity to cross-examine her on 05.02.2014, when she was examined in chief and even subsequently, on 23.02.2016, when she was recalled at his request. One has to suffer the consequences of one's conscious actions.

24 In the result, this Criminal Original Petition is dismissed as being devoid of merits. Connected Crl.M.P. is closed. The Trial Court is directed to complete the trial within a period of three months from the date of receipt of a copy of this order. If the accused adopts any dilatory tactics, it is open to the Trial

Court to remand the accused to custody, as held by the Supreme Court in State of Uttar Pradesh vs. Shambhu Nath Singh [JT 2001 (4) SC 319]. It is made clear that boycott of courts shall be no reason for the accused to refrain from cross examining the witnesses, as held by the Supreme Court in Harish Uppal vs. Union of India and another, [(2003) 2 SCC 45].

Sd/-
Asst.Registrar (CS III)

/true copy/

Sub Asst. Registrar

To

- 1 The Presiding Officer, Mahila Court,
Chennai.
- 2 The Inspector of Police
W-18, M.K.B. Nagar Police Station
M.K.B. Nagar, Chennai
- 3 The Public Prosecutor
High Court of Madras
Chennai 600 104

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