

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 22.11.2018

CORAM:

THE HONOURABLE MR. JUSTICE V.PARTHIBAN

CrI.O.P.No.27096 of 2016 and
CrI.M.P.No.13712 of 2016

1.Sathish @ Karthick

2.S.Manivannan

... Petitioners

Vs.

State Rep by
The Inspector of Police,
All Women Police Station, Rasipuram,
Namakkal District.
(Crime No.4/2015)

... Respondent

PRAYER : The Criminal Original Petition filed under Section 482 of Code of Criminal Procedure to set aside the order made in C.M.P.No.548 of 2016 in Spl.C.C.No.37 of 2015 by the learned Sessions Judge (Fast Track Mahila Court) Namakkal, dated 10.11.2016.

For Petitioners : Mr.C.D.Johnson

For Respondent : Mr.G.Harihara Arun Somashankar,
Government Advocate (CrI.Side)

O R D E R

The present criminal original petition is filed against the order passed by the learned Sessions Judge (Fast Track Mahila Court) Namakkal, in C.M.P.No.548 of 2016 in Spl.C.C.No.37 of 2015, dated 10.11.2016, dismissing the petition filed by the petitioners herein under Section 311 of Cr.P.C for recalling the prosecution witnesses viz., P.W.1 to P.W.3 for cross examination.

2. The facts which gave rise to filing of this criminal original petition are stated hereunder:

(i) According to the petitioners, on 23.09.2016, P.W.1 to P.W.3 were examined in chief and unfortunately, the learned counsel appearing for the accused viz., the petitioners herein, could not be present as he was not well. On 03.11.2016, a

petition was filed under Section 311 of the Cr.P.C for recalling the witnesses for the purpose of cross examination.

(ii) On the other hand, opposing the 311 petition, a counter was filed on behalf of the prosecution, stating that despite sufficient opportunity given, the prosecution witnesses were not cross examined and as such, there was no merit in the petition and prayed for dismissal of the petition.

(iii) After advertng to the submissions made on behalf of the parties, the learned Sessions Judge had dismissed the petition, stating that the petition was filed with the sole intention to drag the proceedings and the learned Sessions Judge also relied on Section 33 (5) of POCSO Act, holding that the child victim cannot be repeatedly called to testify in the Court and the trial should be completed as far as possible within a period of one year. The dismissal order is the subject matter of challenge in the present petition.

3. The learned counsel for the petitioners would submit that on the particular day, the learned counsel for the petitioners/accused was not present as he was not well and immediately thereafter, he filed a petition to recall the witnesses. He would therefore submit that the accused were denied fair trial by not affording an opportunity to cross examine the crucial witnesses viz., P.W.1 to P.W.3. In the absence of cross examination, the evidence of P.W.1 to P.W.3 would become untested testimony and would be fatal to the defence of the accused. Moreover, the request of the first petitioner herein for ordering DNA test, has been allowed by this Court in Crl.R.C.No.180 of 2018 and in which event, it is imperative on the part of the learned Sessions Judge to recall the witnesses for the purpose of cross examination.

4. On the other hand, the learned Government Advocate (Crl.Side) appearing for the respondent has objected to grant any relief in the present petition.

5. Considering the facts and circumstances of the case and also the fact that Crl.R.C.No.180 of 2018, is being allowed by this Court, ordering for DNA test on the first petitioner, the contention of the learned counsel for the petitioners needs to be accepted. The prosecution witnesses viz., P.W.1 to P.W.3, were not cross examined only for the reason that the learned counsel for the petitioners/accused was not well on the particular day. Although this Court is conscious of the fact that the child victim need not be subjected to repeated trial, at the same time, balance of convenience is to ensure that the accused gets a fair trial as they are charged under serious offence under POCSO Act, for which, minimum sentence is ten

years in Jail. In such circumstances, the Court has to ensure that the accused is given a fair trial in order to set up his defence.

6. From the materials as placed on record, it could be seen that the learned counsel for the accused was not present only on the particular day when the witnesses were examined in chief and the absence on the particular occasion, cannot said to be wanton or deliberate and the petition for recalling of the witnesses had also been filed not belatedly. That being the case, the conclusion by the learned Sessions Judge that the petition was intended to drag the proceedings, cannot be acceptable.

7. For the above said reasons, this Court is unable to confirm the order passed by the learned Sessions Judge (Fast Track Mahila Court) Namakkal, in C.M.P.No.548 of 2016 in Spl.C.C.No.37 of 2015, dated 10.11.2016 and therefore, the same is set aside. The petition filed by the petitioners/accused under Section 311 of Cr.P.C dated 03.11.2016, is allowed and the prosecution witnesses viz., P.W.1 to P.W.3, shall be recalled for the purpose of cross examination by the defence and the cross examination shall be completed on a particular day, within a period of two weeks from the date of declaration of the result of the DNA test as per the directions passed in Crl.R.C.No.180 of 2018.

8. This Criminal Original Petition is allowed as indicated above. Consequently, connected miscellaneous petition is closed.

s/d-

Assistant Registrar(CS VIII)

True Copy

Sub-Assistant Registrar

gsk

To

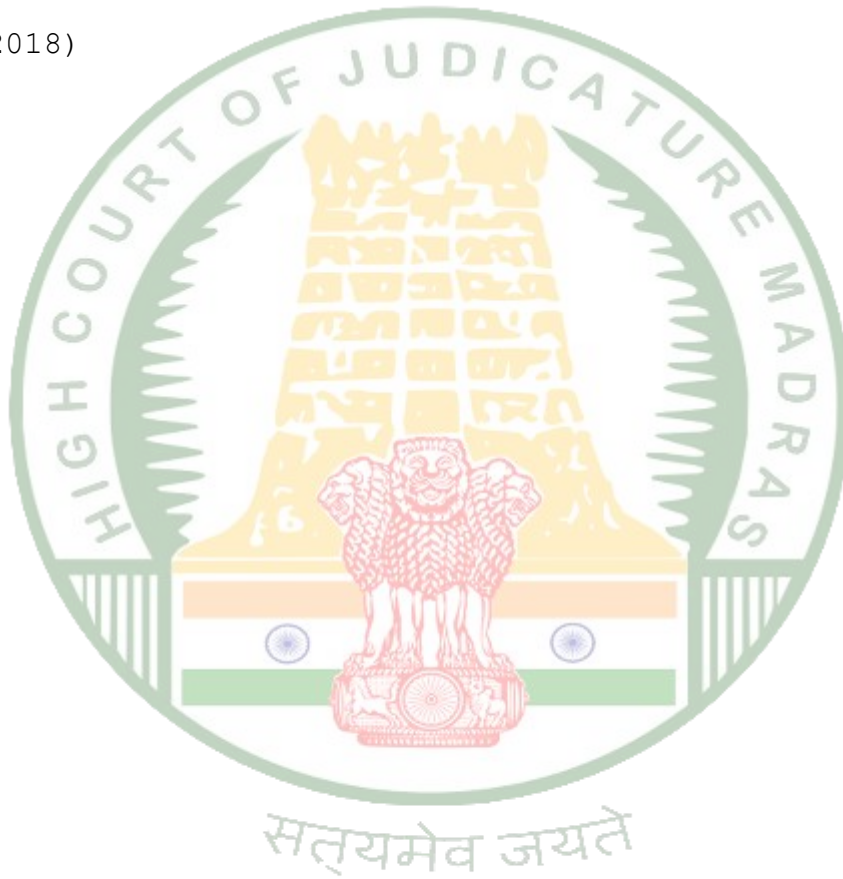
1. The Additional District and Sessions Judge
Magalir Neethi Mandram
Fast Track Mahila Court,
Namakkal.
2. The Inspector of Police,
All Women Police Station, Rasipuram,
Namakkal District.

Copy to
The Director
DNA Test Department
Forensic Lab, Chennai.

+1 CC to Mr.C.D.Johnson, Advocate sr 79494.

Cr1.O.P.No.27096 of 2016

SP(30/11/2018)



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