

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 03.07.2018

CORAM

THE HONOURABLE Mr.JUSTICE P.N.PRAKASH

CRL.O.P.No.16922 of 2018
and CRL.M.P.No.8740 of 2018

Damodaran

.. Petitioner

Vs

State by

The Inspector of Police,
All Women Police Station,
Ayanavaram, Chennai-23.

.. Respondent

Criminal Original Petition filed under Section 482 Cr.P.C., praying to call for the entire records connected with the order in Crl.M.P.No.7906 of 2018 in S.C.No.226 of 2016 dated 21.05.2018 passed by the Mahila Court, Chennai insofar as dismissing the petition under Section 311 Cr.P.C. for cross-examination of PW2, PW8 and PW9 and direct the Mahila Judge, Chennai permitting the petitioner to cross-examine PW2, PW8 and PW9 and set aside the Same.

For Petitioner : Mr.B.Janakiram
For Respondent : Ms.P.Kritika Kamal, GA [Crl. Side]

O R D E R

This Criminal Original Petition has been filed praying to set aside the order dated 21.05.2018, passed by the learned Sessions Judge, Mahila Court, Chennai in Crl.M.P.No.7906 of 2016 in S.C.No.226 of 2016.

2.Heard the learned counsel for the petitioner and the learned Government Advocate [Crl. Side] appearing for the respondent.

3.On the complaint lodged by Regina Mary that her six year old daughter[x] was sexually abused by the petitioner herein, the respondent Police registered a case in Crime No.9 of 2015 and after completing the investigation, have filed a final report and trial in S.C.No.226 of 2016 is pending on the file of the Mahila Court, Chennai for various offences under POCSO Act. Charges were framed against the petitioner/accused and the

prosecution witnesses were examined. The victim girl-x was examined as PW2 on 09.02.2017. She was not cross-examined by the accused. The prosecution examined 11 witnesses, who were not cross-examined by the accused. After 1½ years, the accused filed Crl.M.P.No.7906 of 2018 in S.C.No.226 of 2016 under Section 311 Cr.P.C. to recall PW1 to PW11, which has been partly allowed by the trial Court. Challenging which, the accused is before this Court.

4. On a reading of the impugned order, it is seen that the trial Court has refused permission to recall the victim girl-x [PW2]. But, whereas, the trial Court has ordered the recall of PW1, PW3 to PW7, PW10 and PW11.

5. Learned counsel for the accused submitted that a false case has been foisted on the accused and therefore, it is necessary for the accused to recall the victim girl-x and the two Doctors, namely, PW8 and PW9, who have examined the victim girl and the accused. He placed strong reliance on the judgment of the Supreme Court in Mannan SK and Others Vs State of West Bengal and Another, wherein, the Supreme Court has held as follows :

"... The second part of the Section uses the word 'shall'. It says that the court shall summon and examine or recall or re-examine any such person if his evidence appears to it to be essential to the just decision of the case. The words 'essential to the just decision of the case' are the key words. The court must form an opinion that for the just decision of the case recall or re-examination of the witness is necessary. Since the power is wide its exercise has to be done with circumspection. It is trite that wider the power greater is the responsibility on the courts which exercise it. ..."

6. This Court gave its anxious consideration to the rival submissions. It is true that power under Section 311 Cr.P.C. can be invoked at any time before the judgment is delivered, if it is found that the evidence of a particular witness is just and essential. In this case, the victim girl was examined on 09.02.2017. She was not cross-examined by the counsel.

7. Learned counsel for the accused submitted that the earlier counsel had bungled and therefore, on change of counsel, an opportunity should be given to recall the victim girl. Section 33[5] of the POCSO Act states that a child witness should not be called repeatedly to the Court for the purpose of examination. The idea behind this provision is that a child will suffer psychological trauma, if she is made to repeat the ordeal that was undergone by her. In this case, the victim is a nine year old girl. Proviso to Section 309 Cr.P.C. reads as follows :

"[b] the fact that the Pleader of a party is engaged in any other Court, shall not be a ground for adjournment."

Thus, the statute says that just because the pleader of a party is engaged in another Court, that cannot be a ground for adjournment. It will be a travesty of justice to overlook Section 309 Cr.P.C. and Section 33[5] of POCSO Act and say that on account of change of counsel, the victim girl should be recalled.

8.As regards PW8 and PW9, they are Government Doctors, whose time is indeed precious. In Vinodh Kumar Vs State of Punjab reported in 2015[1] MLJ [Crl] 288, the Supreme Court has taken note of the pernicious practice that is prevailing in the trial Courts today, whereby no witness is cross-examined on the day they are examined in-chief, they recalled after several days and in the meantime, they are either intimidated or won over.

9.In Mannan S.K. case relied upon by the learned counsel for the accused, the prosecution wanted to recall the Investigating Officer, who had recorded the statement of the deceased at the scene of the offence. Since the statement of the deceased is relevant as dying declaration under Section 32 of the Evidence Act, the Supreme Court thought it fit, not to shut out such a valuable piece of evidence.

10.In A.G. Vs Shiv Kumar Yadav reported in 2015[9] Scale 649, the Supreme Court has stated that a petition under Section 311 Cr.P.C. cannot be allowed, on the mere asking even if the accused is in judicial custody. The reasons given by the accused to recall PW2, PW8 and PW9 does not pass muster, the law laid down by the Supreme Court in Vinodh Kumar's case and A.G. Vs Shiv Kumar Yadav's case. Under such circumstances, this Court dos not find any infirmity in the order passed by the trial Court warranting interference and this petition stands dismissed. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Deputy Registrar

//True Copy//

Sub Assistant Registrar

gya

To

1.Sessions Judge,
Mahila Court, Chennai.

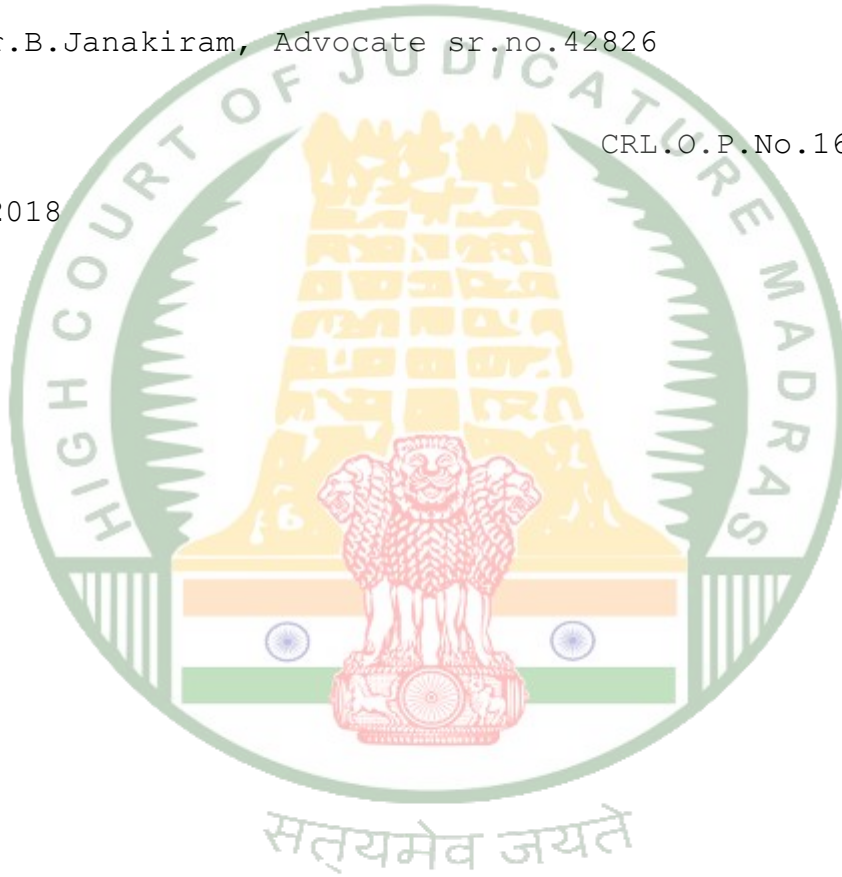
2.The Inspector of Police,
All Women Police Station,
Ayanavaram, Chennai-23

3.The Public Prosecutor,
High Court, Madras.

+2cc to Mr.B.Janakiram, Advocate sr.no.42826

CRL.O.P.No.16922 of 2018

nr 11/07/2018



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