

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.11.2018

CORAM

THE HONOURABLE MR. JUSTICE N.ANAND VENKATESH

CRL.O.P.No.26097 of 2018

and

Crl.M.P.No.14981 of 2018

C.Vijay

...Petitioner/Petitioner/Accused

Versus

The State

Rep. by the Inspector of Police,
W-3, All Women Police Station,
Chinthadhiripet,
Chennai.

..Respondent/Respondent/Complainant

PRAYER: Criminal Original Petition filed under Section 482 of the Code of Criminal Procedure, to set aside the order passed by the Sessions Judge, Mahila Court, Chennai in Crl.M.P.No.17837 of 2018 in S.C.No.33 of 2018 dated 25.10.2018.

For Petitioner : Mr.V.Padmanaban,
Senior Counsel
for Mr.S.B.Viswanathan

For Respondent : Mr.M.Mohamed Riyaz
Additional Public Prosecutor

O R D E R

This petition has been filed challenging the order passed by the Special Court, dismissing the application filed by the petitioner under Section 311 of the Code of Criminal Procedure to recall and further cross-examine PW1 to PW10.

2. The petitioner is facing trial before the Special Court for an offence under Sections 6 and 10 of the POCSO Act. The prosecution had examined ten witnesses and the counsel representing the petitioner had also cross-examined those witnesses. However, the petitioner claims that certain

important questions have not been put to the witnesses in the course of cross-examination and therefore, the petitioner wants to recall the witnesses for further cross-examination. This petition has been dismissed by the Court below by an order dated 25.10.2018.

3. The learned Senior Counsel appearing on behalf of the petitioner would fairly concede that PW4, PW5 and PW6 are the victim girls and therefore, the petitioner is not pressing for recalling them in view of the bar contained under Section 33 (5) of the POCSO Act. The learned Senior Counsel would further submit that the petitioner will confine to recall and cross examine PW1 to PW3 and PW7 and PW8. The learned senior counsel further submits that the petitioner is facing a serious charge before the Court below and in view of the presumption under Section 29 of the POCSO Act, the burden of proof falls heavily on the petitioner, to rebut the presumption. Therefore, a fair opportunity must be given to the petitioner to recall the above said witnesses for the purpose of further cross-examination.

4. It is seen from the records that the charges were framed in this case on 21.03.2018. Thereafter, the trial commenced on 11.05.2018. The petitioner had also actively participated in the trial and the counsel representing the petitioner had also cross-examined the witnesses. However, the petitioner found at a later point of time that certain vital questions which ought to have been put to the witnesses in the course of the cross-examination, were not effectively done and therefore wanted to recall the witnesses for further cross-examination.

5. The Court below had dismissed the petition mainly on the ground that the victim children should not be subjected to repeated examination before the Court in view of the bar under Section 33(5) of the POCSO Act. The Court below has also taken into consideration the fact that the petitioner has engaged a senior counsel and on the advice given by the Senior counsel, such a petition for recall and further cross-examination cannot be entertained. In short, the Court below had found that a change of counsel will not be a ground for recalling witnesses for further cross-examination. The Court below has also taken note of the Judgment of the Honourable Supreme Court in "Vinod Kumar Versus State of Punjab (2015 (1) MLJ (CrL.) 288)" wherein it has held that the witnesses must be cross-examined on the very same day, when they are examined in chief and in this case, sufficient opportunity has been given to the petitioner to cross-examine the witnesses and infact the petitioner has also cross-examined the witnesses examined by the prosecution. Therefore, the Court below thought it fit not to entertain the petition, insofar as PW1 to PW9 are concerned and dismissed the

same and permitted the petitioner to recall PW10 on payment of cost.

6. In view of the specific stand taken by the learned senior counsel representing the petitioner that the petitioner does not want to put the child witnesses (Victim) again in the box for cross-examination, this Court deems it fit to give the petitioner one last opportunity to recall and cross-examine the other witnesses. After all the petitioner is facing trial for a very serious charge under the POCSO Act and there is a legal burden cast on the petitioner to rebut the presumption under Section 29 and 30 of the POCSO Act. Therefore, it becomes important to give a fair opportunity to the petitioner to defend himself before the Court below. It is also seen that the case is of the year 2018 and the petitioner had also effectively participated in the proceedings without attempting to protract the proceedings.

7. In view of the above, the order of the Court below made in CrI.M.P.No.13837 of 2018, dated 25.10.2018 is partly set aside and the Court below is directed to issue summons and fix the date for cross-examination of PW1 to PW3, PW7 and PW8. When the witnesses appear before the Court below, the counsel representing the petitioner has to cross-examine the witnesses on the very same day. If for any reason, the petitioner fails to cross-examine the witnesses, the petitioner shall forfeit his right to cross-examine those witnesses in future. The petitioner shall also pay costs of Rs.500/- (Rupees five hundred only) to each of the witnesses on the day when they appear before the Court below.

8. The learned senior counsel would submit that the matter is posted tomorrow for questioning under Section 313 of the Code of Criminal Procedure. The counsel for petitioner is directed to file a memo before the Court below bringing to the notice of the Court the order passed by this Court. The Court below shall await the copy of the order and shall adjourn the proceedings to any date next week. Thereafter, the Court below shall proceed further with the case in accordance with the directions given by this Court.

9. In the result, this Criminal Original Petition is partly allowed to the extent indicated herein above. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

To

1.The Sessions Judge,
Mahila Court, Chennai.

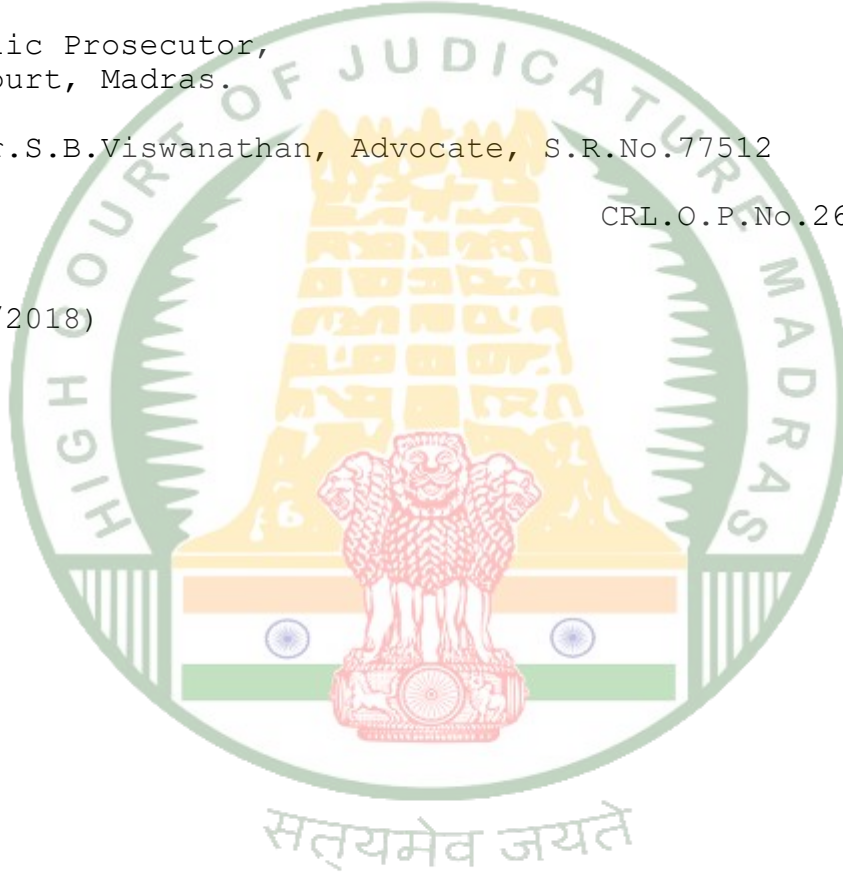
2.The Inspector of Police,
W-3, All Women Police Station,
Chinthadhiripet,
Chennai.

3.The Public Prosecutor,
High Court, Madras.

+1cc to Mr.S.B.Viswanathan, Advocate, S.R.No.77512

CRL.O.P.No.26097 of 2018

SSV(CO)
GSP(15/11/2018)



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