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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 28.06.2022

CORAM

THE HONOURABLE MR. JUSTICE V.SIVAGNANAM

CRL.O.P (MD) No.11427 of 2022

and

Crl.M.P(MD) No.7226 of 2022

Sankar

... Petitioner/ Petitioner/
Sole Accused

Vs

State Represented through
The Inspector of Police,
Tirunelveli Town Police Station,
Tirunelveli District.
(Crime No.274 of 2019)

... Respondent/
Respondent/ Complainant

PRAYER: Criminal Original Petition filed under Section 482 of Cr.P.C, praying to call for the records pertaining to the impugned order passed in Cr.M.P.No.1721 of 2021 in Spl.C.C.No.09 of 2020 on the file of the learned Special Court for POCSO Cases, Tirunelveli and set-aside the same and allow the set- aside petition.

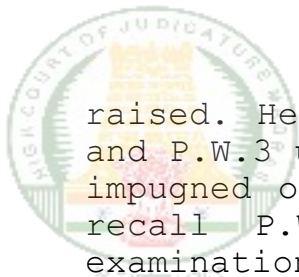
For Petitioner : Mr.R.Karunanidhi

For Respondent : Mr.R.Suresh Kumar
Government Advocate (Crl.Side)

O R D E R

This Criminal Original Petition has been filed challenging the impugned order passed in Cr.M.P.No.1721 of 2021 in Spl.C.C.No.9 of 2020 on the file of the learned Special Court for POCSO Cases, Tirunelveli and set aside the same and allow the set aside petition.

2. The learned counsel for the petitioner submitted that the petitioner is the accused in Spl.C.C.No.9 of 2020 on the file of the learned Special Court for POCSO Cases, Tirunelveli. He was charged for the offences under Sections 366 (A) of IPC and Section 5(1), r/w 6 of POCSO Act. In this case, so far 12 witnesses have been examined. P.W.2 is the victim girl and P.W.3 is the mother of the victim girl. Even though P.W.2 and P.W.3 were examined in chief and cross-examined on 07.10.2021, in the cross examination, some important defence with regard to the contradictions that have been mentioned in the chief examination of P.W.2 and P.W.3 could not be



raised. Hence, the petitioner filed an application to recall P.W.2 and P.W.3 under Section 311 Cr.P.C in Cr.M.P.No.1721 of 2021. By the impugned order, dated 13.04.2022, the learned Judge, permitted to recall P.W.3, mother of the victim girl for further cross-examination on payment of cost and with regard to the victim P.W.2, dismissed the said petition. This petition is partly allowed, on payment of cost of Rs.3,000/- on or before 29.04.2021 and permitted to recall for further cross-examination on payment of batta and process to P.W.3 and with regard to P.W.2, the said petition is dismissed. Aggrieved by this order, this petition has been filed.

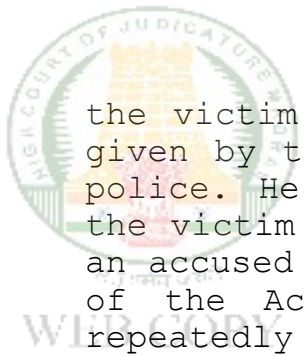
3. The learned Government Advocate (Criminal Side) appearing for the respondent submitted that so far, the trial Court examined P.W.1 to P.W.12 and posted the matter on 01.07.2022 for further proceedings. Already P.W.3 was permitted to recall, for further cross-examination and P.W.2 being a victim girl, in order to avoid harassment to victim girl, the petition was dismissed by the trial Court and there is no reason to interfere with the order passed by the trial Court.

4. I have considered the rival submissions and on perusal of the records, it is seen that the petitioner is an accused in Spl.C.C.No.9 of 2020 on the file of the Special Court for POCSO Cases, Tirunelveli. The respondent police prosecuted the petitioner for having sexually harassed the victim girl and the accused committed the offence punishable under Sections 366(A) I.P.C, and Section 5(1) r/w 6 of POCSO Act. At the time of occurrence, the victim girl was studying in the College, B.A. II year and the occurrence took place in the year 2018 and at that time, the victim girl was aged about 17 years.

5. On perusal of the impugned order passed by the learned trial Judge, in view of the Section 33 (5) of POCSO Act, to avoid repeatedly harassing the victim, the trial Court dismissed the petition with regard to P.W.2 and with regard to P.W.3, the petition was allowed with cost of Rs.3,000/- to be paid on or before 29.04.2021.

6. The learned counsel for the petitioner in support of the argument relied upon the judgment of the **Karnataka High Court in Crl.O.P.No.4449 of 2022, dated 06.06.2022** and submitted that once the victim crosses 18 years of age, the rigor of Section 33 (5) of the Act get diluted and in order to give a fair chance to the petitioner/accused, the victim may be recalled.

7. I have considered the submission made by the learned counsel for the petitioner in this aspect. Admittedly, the victim was aged about 17 years at the time of occurrence in the year 2018. Now, she becomes major and also this incident happened due to the love affair between the petitioner/ accused and the victim girl. The father of



the victim gave a complaint against the accused. The state as given by the victim under Section 161 Cr.P.C before the respondent police. He wants to expose the contradictions in the statement of the victim before the trial Court. An opportunity must be given to an accused to place his defence. Further illustration Section 33 (5) of the Act is only to ensure that the child should not be repeatedly called for the Court for examining as it would affect the mind of the child. Now, the victim is not a child, and becomes major. Therefore, by invoking Section 33 (5) of Act, to recall a victim for the purpose of cross examination by the accused and in order to give a last chance to the accused to place his defence to make prosecution of criminal proceedings against him, P.W.2 may be recalled and the petitioner may be permitted to cross-examine.

8. Therefore, the impugned order passed by the trial Court dismissing the petition filed by the petitioner to recall P.W.2 for cross examination is set aside and this petition is allowed. The trial Court is hereby directed to recall P.W.2 for further cross examination and the petitioner is hereby directed to cross-examine the P.W.2 and P.W.3 on the same day. **(*)It is further directed to pay cost of the witnesses, as stated by the witnesses in the expenses barred details.**

9. In the result, this Criminal Original Petition is allowed as above. Consequently the connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CS-II)

(*)Corrected as per the order of this Court dated 10.08.2022 made in Crl.O.P(MD)No.11427 of 2022

Sd/-

Assistant Registrar(CS-II)

// True Copy //

/08/2022

Sub Assistant Registrar(CS)

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To

(*) To be substituted to the order already despatched on 13/07/2022

1. The Judge, Special Court for POCSO Cases, Tirunelveli.
2. The Inspector of Police,
Tirunelveli Town Police Station,
Tirunelveli District.



Crl.O.P.(MD) No



22

3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.

+1 CC to M/s.R. KARUNANIDHI, Advocate SR-28574[F] dated 28/06/2022

ORDER IN

CRL.O.P (MD) No.11427 of 2022

28.06.2022

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IMS (ASO)

TR(08.07.2022) 4P 5C

RD(24/08/2022) 4P 5C