



CrI.O.P.(MD) No.11129 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED: 23.06.2022

CORAM

THE HONOURABLE MR. JUSTICE V.SIVAGNANAM

CRL.O.P (MD) No.11129 of 2022

Thangapandi

... Petitioner

Vs

The Inspector of Police,
All Women Police Station,
Madurai South,
Madurai City.

... Respondent

PRAYER: Criminal Original Petition filed under Section 482 of Cr.P.C, praying to set aside the dismissal order passed in CrI.M.P.No.273 of 2018 in Special S.C.No.51 of 2016 on the file of the Principal Special Court for exclusive trial of cases under POCSO Act, Madurai and recall the witness of P.W.1/Victim girl and allow to cross examine her.

For Petitioner : Mr.L.Prabhu

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



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ORDER

This Criminal Original Petition has been filed to set aside the dismissal order passed in Crl.M.P.No.273 of 2018 in Special S.C.No.51 of 2016, on the file of the Principal Special Court for exclusive trial of cases under POCSO Act, Madurai and recall the witness of P.W.1/Victim girl and allow to cross examine her.

2.The learned counsel appearing for the petitioner submitted that the petitioner is A1 in Special S.C.No.51 of 2016, on the file of the Principal Special Court for exclusive trial of cases under POCSO Act, Madurai. The petitioner was prosecuted by the respondent Police for the offences under Sections 5(1) and 6 of POCSO Act. On 10.04.2017, the victim girl/P.W.1 was examined in chief. But, she was not cross examined by the petitioner/A1. Thereafter, he changed his counsel and for defending him, the present counsel was engaged by the petitioner and filed a petition in Crl.M.P.No.273 of 2018 in Special S.C.No.51 of 2016 before the Principal Special Court for exclusive trial of cases under POCSO Act, Madurai, to



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recall the victim girl/P.W.1 for the purpose of cross examination on behalf of the petitioner/A1, which was dismissed by the trial Court on the ground that the trial has to be completed within the time frame and recalling the witness for the purpose of cross examination and harassing the victim girl cannot be permitted after 18 months from the date of chief examination of the victim girl.

3.The learned Government Advocate (Crl. Side) appearing for the respondent submitted that all the prosecution witnesses have been examined and the case is posted for 313 questioning.

4.On perusal of records, it is seen that the petitioner is accused/A1 in Special S.C.No.51 of 2016 on the file of the Principal Special Court for exclusive trial of cases under POCSO Act, Madurai, and he was prosecuted by the respondent Police for the offences under Sections 5(1) and 6 of POCSO Act. After framing of charges, the prosecution witnesses were examined, the victim girl was examined as P.W.1 and the complaint was marked as Ex.P.1 on 10.04.2017. Unfortunately, the petitioner/A1 has not cross examined the victim girl on the ground of want of Advocate to defend



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him. Later he changed his counsel to defend him. Except the petitioner, all the other accused have cross examined the victim girl/P.W.1 on the same day.

5.I considered the matter in the light of the submissions made on either side. The petitioner has been prosecuted by the respondent police for the offences under Sections 5(1) and 6 of POCSO Act. The petitioner is a lodge owner and the allegation attributed against him is grave in nature. Under these circumstances, an opportunity has to be given to this petitioner to place his defense effectively.

6.Admittedly, the petitioner failed to cross examine the victim girl/P.W.1, when chief examination was done. With regard to the recalling of witnesses for cross-examination, the Hon'ble Supreme Court laid down the principles as follows:

'In Rajaram Yadav's case the Supreme Court has summed up the legal position relating to Section 311 Cr.P.C and has enumerated the following principles which will have to be borne in mind by the Courts:

(a) Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence



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sought to be led in under Section 311 is noted by the Court for a just decision of a case?

(b) The exercise of the widest discretionary power under Section 311 Cr.P.C should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.

(c) If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person.

(d) The exercise of power under Section 311 Cr.P.C should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

(e) The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

(f) The wide discretionary power should be exercised judiciously and not arbitrarily.

(g) The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

(h) The object of Section 311 Cr.P.C simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

(i) The Court arrives at the conclusion that



additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

(j)Exigency of the situation, fair play and good sense should be the safe guard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.

(k)The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

(l)The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

(m)The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

(n)The power under Section 311 of Cr.P.C must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and



the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right [Rajaram Yadav v State of Bihar, AIR 2013 SC 3081 : 2013 Cr LJ 3777 (SC) : (2013) 14 SCC 461].'

7.Considering the decision laid down by the Honourable Supreme Court cited supra and also considering the grave charged against the petitioner, I am inclined to give an opportunity to the petitioner to place his defense, by way of cross examining the victim girl/P.W.1.

8.Accordingly, the impugned order dated 16.05.2022, in CrI.M.P.No.273 of 2018 in Special S.C.No.51 of 2016 passed by the Principal Special Court for exclusive trial of cases under POCSO Act, Madurai is hereby set aside, on condition that the victim girl/P.W.1 has to be cross examined on the same day, without seeking adjournment and the petitioner has to pay day cost for the victim girl/P.W.1 to come back to the Court for giving evidence. The the Principal Special Court for exclusive trial of cases under POCSO Act, Madurai, is hereby directed to recall the victim girl/P.W.1 in Special S.C.No.51 of 2016, to enable the petitioner to cross examine the victim girl/P.W.1 on the same day and further collect the



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day cost for the victim girl/P.W.1, from the petitioner and pay to the victim girl/P.W.1.

9.Accordingly, this Criminal Original Petition is allowed.

23.06.2022

Internet:Yes./No
Index:Yes/no
vsg



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To

- 1.The Principal Special Court
for exclusive trial of cases under POCSO Act,
Madurai.
- 2.The Inspector of Police,
All Women Police Station,
Madurai South,
Madurai City.
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.



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V.SIVAGNANAM, J.

vsg

ORDER IN
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