



CRL.O.P (MD) No.11220 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 24.06.2022

CORAM

THE HONOURABLE MR. JUSTICE V.SIVAGNANAM

CRL.O.P (MD) No.11220 of 2022

Thangapandi

... Petitioner/Accused No.1

Vs

State Rep. by
The Inspector of Police,
All Women Police Station,
Madurai South,
Madurai City.
(Crime No.1 of 2016)

... Respondent/Complainant

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.658 of 2022 in Special S.C.No.51 of 2016, dated 15.06.2022 on the file of the Principal Special Court for Exclusive Trial of Cases under POCSO Act, Madurai and re-call the witness of P.W.15/Investigating Officer and allow to cross examine him.

For Petitioner : Mr.L.Prabhu

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



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ORDER

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This Criminal Original Petition has been filed to set aside the dismissal order passed in CrI.M.P.No.658 of 2022 in Special S.C.No.51 of 2016, dated 15.06.2022 on the file of the Principal Special Court for Exclusive Trial of Cases under POCSO Act, Madurai and re-call the witness of P.W.15/Investigating Officer and allow to cross-examine him.

2.The learned counsel appearing for the petitioner submitted that the petitioner is arrayed as the first accused 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 punishable under Sections 5(1) and 6 of POCSO Act. On 28.03.2022, the Investigating Officer / PW15 was examined in chief. But, he 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 CrI.M.P.No.658 of 2022 in Special S.C.No.51 of 2016 before the Principal Special Court for Exclusive Trial of Cases under POCSO Act, Madurai, to recall the Investigating Officer/PW.15 for the purpose of cross-examination on behalf of the



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petitioner / A1, which was dismissed by the trial Court on the ground that the victim girl has not been cross-examined.

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 punishable under Sections 5(1) and 6 of POCSO Act. After framing of charges, the prosecution witnesses were examined, the Investigating Officer was examined as P.W.15 on 28.03.2022. Unfortunately, the petitioner/A1 has not cross-examined the Investigating Officer on the ground of want of Advocate to defend him. Later, he changed his counsel to defend him. Except the petitioner, all the other accused have cross-examined the Investigating Officer/PW.15 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 punishable 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 Investigating Officer/P.W.15, 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 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



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petitioner, I am inclined to give an opportunity to the petitioner to place his defense, by way of cross examining the Investigating Officer/P.W.15.

8.Accordingly, the impugned order dated 16.05.2022, in Crl.M.P.No. 658 of 2022 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 Investigating Officer/P.W.15 has to be cross-examined on the same day, without seeking adjournment. The Principal Special Court for Exclusive Trial of Cases under POCSO Act, Madurai, is hereby directed to re-call the Investigating Officer/P.W.15 in Special S.C.No.51 of 2016, to enable the petitioner to cross examine the Investigating Officer/P.W.15 on the same day.

9.Accordingly, this Criminal Original Petition is allowed.

24.06.2022

Internet:Yes./No
Index:Yes/no
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V.SIVAGNANAM, J.

vsd

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.

ORDER IN
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