



CrI.O.P.(MD) No.12302 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 08.07.2022

CORAM:

THE HONOURABLE MR. JUSTICE **V.SIVAGNANAM**

CrI.O.P.(MD) No.12302 of 2022

and

CrI.M.P(MD) No.7815 of 2022

Periyakaruppan,

: Petitioner

Vs

The Inspector of Police,
Koodalpudur Police Station,
Madurai City.
Crime.No.195 of 2013.

: Respondent

PRAYER: Criminal Original Petition filed under Section 482 Cr.P.C. praying this Court to call for the records relating to the impugned order dated 21.04.2022 made in CrI.M.P.No.438 of 2022 in Spl.S.C.No. 70 of 2017, on the file of the Sessions Judge, Special Court for Exclusive trial of cases under POCSO Act, Madurai and set aside the same.



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For Petitioner : M/s. Lakshmanan.V,
For Respondent : Mr.R.Suresh Kumar,
Government Advocate (Crl.Side)

ORDER

This criminal original petition has been filed seeking to quash the order made in Crl.M.P.No.438 of 2022 in Spl.S.C.No. 70 of 2017, by the learned Sessions Judge, Special Court for Exclusive trial of cases under POCSO Act, Madurai.

2.The learned Counsel appearing for the petitioner submitted that the petitioner is the accused person in Crime No.195 of 2013 in Spl.S.C.No.70 of 2017, on the file of the learned Sessions Judge, Special Court for Exclusive trial of cases under POCSO Act, Madurai. The petitioner is charged for having committed offences under Sections 3, 4, 5(m) and 6 of POCSO Act and Section 506(i) of IPC. After framing of charges, thirteen witnesses have been examined, among them PW-10 is the Doctor, who examined the victim girl, PW-11 is the Scientific Expert, who examined the materials collected from the victim girl and PW-12 is a Head Constable, who produced the accused person for medical examination at Madurai Government Rajaji



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Hospital and PW-13 is the Sub-Inspector, who received the complaint and registered the case. For want of document, PW-10 i.e., Doctor was not cross examined fully but, cross-examination has been partially done. With regard to other witnesses i.e., PW-11 to PW-13, cross-examination was not done, due to non-availability of their Advocate. Hence the petitioner filed a petition to recall the evidences PW-10 to PW-13 for cross-examination, which was dismissed by the trial Court. The reason assigned by the trial Court is unsustainable. The facts have to be gone into, a fair chance has to be given to the accused person to meet the prosecution case and pleaded to set aside the impugned order made in Crl.M.P.No.438 of 2022 in Spl.S.C.No.70 of 2017, by the learned Sessions Judge, Special Court for Exclusive Trial of cases under POCSO Act, Madurai, and permit to recall the witnesses PW-10 to PW-13.

3.The learned Government Advocate (Crl.Side) submitted that the witness PW-10 was sufficiently cross-examined and the remaining witnesses was not cross-examined. The reasons stated by the learned Counsel appearing for the petitioner is not an acceptable one and further, he stated that in view of Section 35 of the POCSO Act, the evidence of the child has to be recorded



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within thirty days. Therefore, the trial Court rightly dismissed the petition and pleaded to dismiss this petition.

4.Heard both sides and perused the materials available on records.

5.I have considered the submissions made by both the parties. On a perusal of records, it reveals the fact that the petitioner is the accused person in Spl.S.C.No.70 of 2017, on the file of the learned Sessions Judge, Special Court for Exclusive Trial of cases under POCSO Act, Madurai. The petitioner is prosecuted by the respondent police for having caused rape and sexually assaulted the victim girl, for the offence under Sections 3, 4, 5(m) and 6 of POCSO Act and Section 506(i) of IPC and to establish the prosecution case, they examined so far thirteen witnesses. According to the learned Government Advocate (CrI.Side), the case is posted for examination of the Investigation Officer. In order to meet the prosecution case effectively, a fair chance has to be given to the accused person for the cross-examination of the witnesses PW-10, PW-11 and PW-13. Since the witness PW-12 is a Head Constable, who produced the accused for medical examination, need not be recalled.



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6. Therefore, in order to give a fair chance to the accused person to meet the prosecution case and place his defence, recalling and cross-examination of the witnesses PW-10, PW-11 and PW-13 is to be allowed.

7. 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].'

8.In view of the above, with regard to the witnesses PW-10, PW-11 and PW-13, the impugned order made in CrI.M.P.No.438 of 2022 in Spl.S.C.No. 70 of 2017, by the learned Sessions Judge, Special Court for Exclusive trial of cases under POCSO Act, Madurai, is hereby set aside. Accordingly this criminal original petition is allowed with a condition that the petitioner has to cross-examine the witnesses PW-10, PW-11 and PW-13 on the same day and



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the petitioner has to pay per day cost to the witnesses. However, the petitioner is not permitted to recall the witness PW-12 for cross-examination.

9. Consequently, the connected miscellaneous petition is closed.

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Internet: Yes
Index: Yes/No
Speaking/Non speaking order
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V.SIVAGNANAM, J.

lr

To

1.The Inspector of Police,
Koodalpudur Police Station,
Madurai City.

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

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