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CrI.O.P.(MD) No.15392 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 20.09.2022

PRONOUNCED ON : 25.11.2022

CORAM

THE HON'BLE MR.JUSTICE SATHI KUMAR SUKUMARA KURUP

CrI.O.P (MD) No.15392 of 2022

and

CrI.M.P.(MD) No.10112 of 2022

Nagooran

...Petitioner

vs

The Inspector of Police,
All Women Police Station,
Pattukkottai,
Thanjavur District.
Crime No.6 of 2017

...Respondent

PRAYER: Criminal Original Petition filed under Section 482 of Cr.P.C, praying to set aside the order dated 08.08.2022 in Cr.M.P.No.844 of 2022 in Special Sessions Case No.68 of 2019 on the file of the Special Court for Exclusive Trial of Cases under POCSO Act, Thanjavur.

For Petitioner : Mr.R.Prasanna

For Respondent : Mr.R.Meenakshi Sundaram
Additional Public Prosecutor



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ORDER

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This Criminal Original Petition has been filed to quash the order dated 08.08.2022 made in Cr.M.P.No.844 of 2022 in Spl.S.C.No.68 of 2019 on the file of the Special Court for Exclusive Trial of Cases under POCSO Act, Thanjavur.

2.It is the submission of the learned Counsel for the Petitioner that after examination of all the witnesses by the prosecution, the prosecution filed a petition under Section 311 Cr.P.C., to recall Forensic Expert regarding the videograph presented by the prosecution in the Court to compare with the photographs of the Petitioner, Accused No.2.

3.It is the further submission of the learned Counsel for the Petitioner that at the investigation stage, the Forensic Expert concerned was unable to come to a conclusion that the image in the mobile phone and the photographs are one and the same. Therefore, he had given an opinion that it is inconclusive. Under those circumstances, no purpose will be served by taking the photographs of the Petitioner at the present time, whereas the subject matter of the investigation was in the year 2017. Therefore, he had



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protested the petition under Section 311 Cr.P.C., In spite of the same, the learned trial Judge had allowed the petition under Section 311 Cr.P.C., filed by the prosecution.

4.The learned Additional Public Prosecutor for the Respondent vehemently objects stating that this is the important document to prove the case of the prosecution and again the Forensic Expert has been asked to give an opinion regarding the full image.

5.In the light of the submission made by the learned Counsel for the Petitioner and the learned Additional Public Prosecutor for the Respondent and on perusal of the records, particularly the order passed by the learned Sessions Judge, Special Court for Exclusive Trial of Cases under POCSO Act, Thanjavur in Cr.M.P.No.844 of 2022, which was filed under Section 311 Cr.P.C. by the prosecution seeking to subject the mobile phone of the Petitioner for comparison with the CCTV footage seized by the Respondent to take full size photograph of the Petitioner and compare that with the video file after four years of the alleged occurrence, it is to be noted that at the earliest point of time, during the investigation, when the accused was



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under the custody of the Respondent, the Respondent ought to have taken full size photograph of the accused. They had not done so. Therefore, what was sent to the Forensic Laboratory was returned as inconclusive. There is evidence by the victim before the trial Court that the accused had committed the offence alleged in the statement of the victim before the police, based on which the FIR was registered under the provisions of POCSO Act. Further, for the offences under the POCSO Act, there is always presumption that the victim's statement is true, when the Petitioner objects to subject himself and subject the photograph to comparison at this further distance of time from the date of the occurrence. Therefore, the Trial Court can draw adverse inference regarding the Petitioner's contention before the Trial Court.

6.The objection of the Petitioner to subject his latest photograph for comparison after four years from the date of occurrence is found reasonable as it will not be helpful to the Prosecution. Already, the Prosecution has exhausted such scientific procedure, where the Forensic Expert has stated that the video recording on the mobile phone could not be considered as it was not clear and inconclusive. It is only for further proof to buttress the claim of the Prosecution, the Prosecution had subjected the video seized



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from the mobile phone for Expert's opinion. When the video is not clear and inconclusive, at the earliest point of time. When the accused was under the custody during the remand period, the Prosecution had failed to take his photograph at the earliest stage, as per the experts in the Forensic Department and the police Department. When that was not done, after commencement of the trial, forcing the Petitioner to furnish the photograph or forcing him to undergo Forensic Examination, during the pendency of the trial, amounts to violation of the rights of the accused to incriminate himself in a criminal case, which is against the Constitutional provisions under Articles 21 and 14 of the Constitution of India.

7.The Constitution of India guarantees its citizen fundamental right to protect his right against the self-incrimination. The prosecution/Investigating Agency had the opportunity at the initial stage of the investigation, when the accused was arrested and under the custody to subject him to forensic test regarding his physical image as recorded in the mobile phone. They had not done it at that stage. Further, the mobile phone was subjected to forensic examination, where the report of the Forensic Expert is inconclusive.



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8. Irrespective of the Forensic Expert's opinion, there is direct evidence from the victim before the trial Court by way of deposition. The victim has identified the accused in the Court. In that case, there is no necessity for this particular procedure. The best evidence is available through the evidence of the victim. If the prosecution or the Investigating Agency had not conducted the test identification parade at the initial stage of the investigation, it is a lapse on the part of the Investigating Agency. Still there are reported rulings of the Hon'ble Supreme Court that the Trial Court can convict the accused, if the victim of crime recognized the accused in the Court during trial.

9. In the reported ruling of the Hon'ble Supreme Court in the case of ***Dana Yadav and others Vs. State of Bihar*** reported in ***MANU/SC/0763/2002***, it had been stated as under:-

“(c) Evidence of identification of an accused in court by a witness is substantive evidence whereas that of identification in test identification parade is, though a primary evidence but not substantive one, and the same can be used only to corroborate identification of accused by a witness in court.



(d) Identification parades are held during the course of investigation ordinarily at the instance of investigating agencies and should be held with reasonable despatch for the purpose of enabling the witnesses to identify either the properties which are subject matter of alleged offence or the accused persons involved in the offence so as to provide it with materials to assure itself if the investigation is proceeding on right lines and the persons whom it suspects to have committed the offence were the real culprits.

(e) Failure to hold test identification parade does not make the evidence of identification in court inadmissible rather the same is very much admissible in law, but ordinarily identification of an accused by a witness for the first time in court should not form basis of conviction, the same being from its very nature inherently of a weak character unless it is corroborated by his previous identification in the test identification parade or any other evidence. The previous identification in the test identification parade is a check valve to the evidence of identification in court of an accused by a witness and the same is a rule of prudence and not law.

(f) In exceptional circumstances only, as discussed above, evidence of identification for the first time in court, without the same being corroborated by previous identification in the test identification parade or any other evidence, can form the basis of conviction.

(g) Ordinarily, if an accused is not named in the first Information report, his identification by witnesses in court, should not be relied upon, especially when they did not disclose name of the



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accused before the police, but to this general rule there may be exceptions as enumerated above.”

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10.The trial Court is directed to proceed with the trial and based on the appreciation of evidence has to deliver the judgment. For the present, the order passed in Cr.M.P.No.844 of 2022 in Spl.S.C.No.68 of 2019 on the file of the Special Court for Exclusive Trial of Cases under POCSO Act, Thanjavur, dated 08.08.2022 is set aside.

**In the result, this Criminal Original Petition is allowed.
Consequently, connected Miscellaneous Petition is closed.**

Internet :Yes./No
Index :Yes/No
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25.11.2022

To

1.The Sessions Judge,
Special Court for Exclusive Trial of Cases under POCSO Act,
Thanjavur.

2.The Inspector of Police,
All Women Police Station,

8/10



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Pattukkottai,
Thanjavur District.

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



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SATHI KUMAR SUKUMARA KURUP, J.

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Order made in
CRL.O.P (MD) No.15392 of 2022

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