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Crl.O.P.No.18328 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.08.2023

CORAM

THE HONOURABLE MR.JUSTICE N.ANAND VENKATESH

W.P.No.18328 of 2023
and Crl MP No.12188 of 2023

Nagaraj

.. Petitioner

Vs.

State Represented by
Inspector of Police,
All Women Police Station,
Chengalpattu – 603 001

.. Respondent

PRAYER : This Criminal Original petition filed under Section 482 of Cr.PC to set aside the order passed by the Sessions Judge, Special Court Exclusive trial of case under POCSO Act, Chengalpattu, in Crl MP No.418 of 2023 in Spl SC No.58 of 2021 dated 08.06.2023 by dismissing the petition filed under Section 311 of Crl PC consequently direct the learned court to re-open the complainant side evidence to recall PW1 to PW3 and PW13 for further cross examination.

For Petitioner	: Revathi Sreedhar for Mr.R.Sreedhar
For Respondents	: Mr.A.Damodaran Additional Public prosecutor



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ORDER

This petition has been filed challenging the order passed by the Court below dismissing the application filed by the petitioner in Crl MP No.418 of 2023 by order dated 08.06.2023 for recalling PW1 to PW3 and PW13 for cross-examination.

2. Heard M/s.Revathi Sreedhar, learned counsel for the petitioner and Mr.A.Damodaran, learned Additional Public prosecutor appearing on behalf of respondents.

3. The petitioner is facing trial before the Court below for offence under Section 376(2), 376(a) (b), 506(ii) IPC r/w. Section 8, Section 4(2), Section 6(1), Section 10 and Section 12 of the Protection of Child from Sexual offences Act, 2012 (hereinafter called as the “POCSO Act”). PW1, is the mother of the victim girl and she was examined in chief and she was also elaborately cross examined on the side of the petitioner. PW2, who is the victim girl was examined in Chief on 24.02.2023 and 25.05.2022 and



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on both dates, the counsel for the petitioner was very much present in the Court and inspite of the same, PW2 was not cross examined. Similarly, PW3 was examined in Chief on 25.05.2022 and for some reasons, even PW3, who is the elder brother of the victim girl was not cross examined. Thereafter, PW4 to PW12 were examined and ultimately, the investigation officer [PW13] was examined in chief on 13.03.2023. Even on that day, the counsel for the petitioner was present before the Court but he did not cross examine PW13. At this stage, an application was filed under Section 311 of Cr.PC to recall PW1 to PW3 and PW13 for cross examination. The same was dismissed by the Court below.

4. In the considered view of this Court, the age of PW2, who is the victim girl, is 12 years and the age of the brother of the victim girl (PW3) is 13 years. It is a case of sexual violence and Section 33 (5) of the POCSO Act, mandates that a child cannot be called repeatedly to testify before the Court. The Counsel appearing on behalf of the petitioner for the reasons best known to him did not chose to cross examine PW2 & PW3 even though they were very much present before the Court. Hence, without any valid reasons, the Court cannot recall a child witness and the Court



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below was perfectly right in rejecting the application insofar as PW2 and PW3 are concerned.

5. Insofar as PW1 is concerned, she is the mother of the victim girl. She has also been elaborately cross examined on the side of the petitioner. Without any valid reasons, PW1 cannot be recalled for further cross examination. Therefore, the Court below was right in rejecting the application even insofar as PW1 is concerned.

6. The Court below has allowed the application insofar as PW13 (Investigation officer) and has permitted recalling this witness for cross examination.

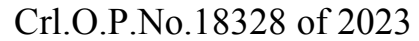
7. On carefully reading the order passed by the Court below, this Court does not find any illegality or infirmity and it does not require the interference of this Court in exercise of its jurisdiction under Section 482 of Cr.PC.

8. Before concluding this order, this Court wants to remind that



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if a counsel choses not to cross examine a witness, there is a procedure that has been provided under the code of Criminal procedure under Section 231(2) of Cr.PC in the case of sessions trial and proviso to Section 242(3) of Cr.PC in a warrant trial before the Magistrate. These provisions enable the deferment of the cross examination of a witness by filing an appropriate application before the concerned Court. Unfortunately, all these procedures have been forgotten over a period of time and the counsel conducting the Trial do not even assign reasons as to why they did not cross examine the witness after they are examined in chief and they do not even resort to filing application for deferment of cross examination. If the counsel for sufficient reason does not want to cross examine the witness immediately, the Apex Court has evolved the principles for deferment of cross-examination in ***[State of Kerala Vs. Rasheed]*** reported in ***2019 1 MLJ Crl 326***. This Court only hopes that the Trial Court lawyers keep themselves abreast with the relevant provisions of the procedural laws and also the judgment of the Apex Court in that regard. Since the counsel who had conducted the Trial before the Court below was not aware of this, valuable right of his client is now lost and the petitioner has to only blame his destiny.



16.08.2023

To

3. The Public Prosecutor

Madras High Court, Madras.



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N.ANAND VENKATESH, J

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