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Crl.O.P.No.29680 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.06.2023

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THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

Crl.O.P.No.29680 of 2022 and
Crl.M.P.Nos.18185 & 18187 of 2022

Manoj Kumar

... Petitioner

Vs.

State represented by,
The Inspector of Police,
Karamadal Police Station,
Crime No.299 of 2019,
Coimbatore District.

... Respondent

PRAYER: Criminal Original Petition is filed under Section 482 of the Code of Criminal Procedure, to set aside the order dated 02.11.2022 in Crl.M.P.No.1279 of 2022 in C.C.No.13 of 2020 on the file of the learned Principal Special Court for Exclusive Trial of Cases under POCSO Act, Coimbatore and direct the trial Court to permit the petitioner to cross examine the PW-1.

For Petitioner	:	Ms.V.Bhavani for Mr.H.Rajasekar
For Respondent	:	Mr.A.Gokulakrishnan, Additional Public Prosecutor

ORDER

The petitioner/accused in C.C.No.13 of 2020 facing trial for offence under Sections 448 & 323 IPC and Section 7 r/w 8 of Protection



Crl.O.P.No.29680 of 2022

WEB COPY

of Children from Sexual Offence Act, 2012, has filed a petition under Section 311 Cr.P.C., to recall PW1/victim girl in Crl.M.P.No.1279 of 2022 in C.C.No.13 of 2020 before the learned Sessions Judge, Principal Special Court for Exclusive Trial of Cases under POCSO Act, Coimbatore (trial Court). The trial Court, by order, dated 02.11.2022 dismissed the petition filed under Section 311 Cr.P.C., against which, the present petition.

2.Learned counsel for the petitioner submitted that on 04.12.2020, the chief examination of PW1 to PW5 was done. Since there was bandh and disruption of traffic, no bus service at Metupalayam, the Advocate, who defending the petitioner in main case C.C.No.13 of 2020, was unable to travel from Metupalayam to Coimbatore and present before the trial Court to conduct cross examination of witnesses. Thereafter, the petitioner filed Crl.M.P.No.658 of 2020 in C.C.No.13 of 2020 to recall PW1 to PW5 for recall and to cross examine. The trial Court, by order, dated 11.01.2021 considering the facts and circumstances of the case, which beyond the control, permitted recall of PW2 to PW5 for cross examination and dismissed the petition as regards cross examination of



Crl.O.P.No.29680 of 2022

WEB COPY

victim girl/PW1 citing Section 33(5) of Protection of Children from Sexual Offence Act, 2012 [For brevity 'Act'] that child not to be called repeatedly for cross examination. Thereafter, the trial continued, PW2 to PW5 appeared, cross examined. Further to it, PW6 to PW8 examined and also cross examined.

3.Learned counsel further submitted that the petitioner elicited some contradiction and probablized his defence. Certain of the vital questions now necessarily to be put to victim girl/PW1 to show that the petitioner is prosecuted on a motivated complaint. The petitioner was tenant under the parents of the victim girl/PW1. She further submitted that the restrictions imposed in Section 33(5) of the Act would be applicable if the Advocate not cross examined the witnesses without reasons, buying time and calling the witnesses repeatedly. In this case, for the reason of bandh and disruption of traffic, there is no bus service and mode of transportation available, the Advocate could not appear, which was accepted by the trial Court and permitted recall of PW2 to PW5, who were examined in chief when the same day victim girl/PW1 was examined. Hence, the impediment to cross examine PW2 to PW5 is



CrI.O.P.No.29680 of 2022

WEB COPY

very much available even for cross examination of victim girl/PW1. The trial Court citing Section 33(5) of Act will not be proper on the facts and circumstances of above case. She further submitted that cross examination of witnesses is necessary to put forth defence of the accused. It is indispensable more so in the case of presumption starrng against the accused. She further submitted that the petitioner will not be a reason for any delay on the day when victim girl/PW1 appears without taking time cross examination will be conducted. Hence, she prayed for an opportunity to recall and cross examine the victim girl/PW1.

4.Learned Additional Public Prosecutor appearing for respondent Police submitted that victim girl was 13 years old when she was called for evidence. Still she is minor aged around 15 years. The petitioner is a tenant under the parents of the victim girl/PW1. The petitioner entered the house of victim girl/PW1 and misbehaved, on her cry, people around gathered and petitioner was caught. He further submitted that on 04.12.2020, case was posted for examination of PW1 to PW5, they appeared on that day evidence in chief examination. Learned counsel defending the petitioner/accused before the trial Court, failed to appear



Crl.O.P.No.29680 of 2022

WEB COPY

and cross examine witnesses PW1 to PW5, thereafter, filed petition under Section 311 Cr.P.C., to recall PW1 to PW5 for cross examination citing reason that there was bandh and disruption of traffic, no availability of transport from Metupalayam, which the learned Additional Public Prosecutor does not dispute. The trial Court, by order, dated 11.01.2021 permitted recall of witnesses PW2 to PW5 and dismissed recall as regards PW1 citing Section 33(5) of the Act. Thereafter, trial continued, petitioner cross examined PW2 to PW5 and three other witnesses, now, the case is at the stage of arguments. At this stage, this petition is filed to further delay and protract the proceedings. Hence, he prayed for dismissal.

5.This Court considered the rival submissions and perused the materials available on record.

6.In this case, PW1 is the victim girl, PW2 and PW3 are her parents, PW4 is her sister and PW5 is the witness for Observation Mahazar. The evidence of PW1 to PW5 were recorded in chief on 04.12.2020. On the same day, cross examination of said witnesses could



Crl.O.P.No.29680 of 2022

WEB COPY

not be conducted since the Advocate who is defending the petitioner could not reach the Court due to bandh and disruption of traffic, non-availability of transport from Metupalayam, which was accepted by the trial Court and permitted recall of PW2 to PW5 in Crl.M.P.No.658 of 2020 in C.C.No.13 of 2020, by order, dated 11.01.2021 and dismissed as regards cross examination of victim girl/PW1. After cross examination of PW2 to PW5, three other witnesses examined in chief and cross examined.

7.The reason cited by the trial Court that the victim girl/PW1 could not be called repeatedly to the Court citing Section 33(5) of the Act may not be proper on the above circumstances. When PW2 to PW5 were permitted to be cross examined condoning the absence of the petitioner counsel on 04.12.2020, the same ought to have been extended to recall PW1 for cross examination. The petitioner is facing trial for serious offence where presumption is starring at him. Only by way of cross examination, accused can put forth his case and probablize his defence. The Hon'ble Division Bench of this Court in the case of “***M.Kannan Versus The State*** reported in ***2017-1-LW (Crl.) 681***”, explained the



CrI.O.P.No.29680 of 2022

purpose of cross examination and affirmed that for the failure of the Advocate to appear and extend legal assistance by cross examining the witnesses, the accused cannot be blamed and made to suffer. Hence, this Court is inclined to give one opportunity to petitioner to cross examine victim girl/PW1.

8.The trial Court is directed to fix a date and recall the witness victim girl/PW1 for the purpose of cross examination. The petitioner is permitted to cross examine the victim girl/PW1 on the date of her presence without seeking any adjournment.

9.In view of the above, the order, dated 02.11.2022, made in C.M.P.No.1279 of 2022 in Special C.C.No.13 of 2020 passed by the Sessions Judge, Principal Special Court for Exclusive Trial of cases under the POCSO Act, Coimbatore is hereby set aside. Accordingly, this Criminal Original Petition is allowed. Consequently, the connected Miscellaneous Petitions are closed.

28.06.2023

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WEB COPY



Crl.O.P.No.29680 of 2022

M.NIRMAL KUMAR, J.
vv2

Index: Yes/No
Internet: Yes/No
Neutral Citation: Yes/No
Note: Issue Today on 30.06.2023.

To

- 1.The Principal Special Court for Exclusive
Trial of Cases under POCSO Act,
Coimbatore.
- 2.The Inspector of Police,
Karamadal Police Station,
Coimbatore District.
- 3.The Public Prosecutor,
High Court, Madras.

Crl.O.P.No.29680 of 2022

28.06.2023