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Crl.R.C.No.29 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 19.04.2023

PRONOUNCED ON: 27.04.2023

CORAM

THE HONOURABLE MR. JUSTICE V.SIVAGNANAM

Crl.R.C.No.29 of 2023

A.Kalaiselvan

...

Petitioner

/vs/

State Rep.by

The Inspector of Police

W8, All Women Police Station,

Thirumangalam, Chennai-101.

...

Respondent

PRAYER : Criminal Revision Case has been filed under Section 397 r/w 401 of Code of Criminal Procedure to set aside the order dated 23.11.2022 passed in Crl.M.P.No.1432 of 2022 in S.C.No.36 of 2018 by the Special Court for Exclusive Trial of Cases under POCSO Act at Chennai and allows the revision petition.

For Petitioner

...

Mr.N.Jothi

Senior Counsel

for P.Rathanavel

For Respondent

...

Mr.R.Vinothraja

Govt.Advocate (Crl.side)



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ORDER

WEB COPY Challenging the impugned order dated 23.11.2022 passed in Crl.M.P.No.1432 of 2022 in S.C.No.36 of 2018 by the Special Court for Exclusive Trial of Cases under POCSO Act at Chennai, the present criminal revision case has been filed.

2.The petitioner, who is an accused in crime No.29 of 2015, has been prosecuted by the respondent police for having committed offences punishable under Sections 498 (A), 406, 495, 354(A) and 506 (ii) IPC and also for having committed aggravated sexual assault upon her daughter offence punishable under section 10 of POCSO Act, 2012. After investigation, the respondent police filed a final report before the Special Court for Exclusive Trial of cases under POCSO Act, Chennai- 104, which was taken on file in S.C.No.36 of 2018.

3.After framing charges, the trial Court ordered for trial and prosecution witnesses were examined. Victim child's mother was examined as PW1 and the victim child was examined as PW2. PW2 being a victim



child witness, the trial Court examined in the presence of her mother in compliance with the Section 33(3) POCSO Act and also recorded the evidence of PW2 by following the provisions of Section 36(2) POCSO Act by keeping the victim child in a separate child friendly room attached with the Court and examined through video conference. In consequence, the petitioner filed an application in Crl.M.P.No.1432 of 2022 to eschew the evidence of victim child PW2 on two grounds that is, (i) while the victim child is examined in the presence of her mother PW1, the mother dictated to the child and she gave evidence, which was recorded through Video conference and (ii) while recording the evidence through video conference, the Court violated the Rule 11 (6) of Madras High Court Video conference Rules, 2018. The learned trial Judge dismissed the petition by passing the impugned order on the ground that the victim child PW2 was summoned by the Court by serving summon to her as a witness for the purpose of recording her evidence and on her appearance, by following the provisions under Section 36(2) of POCSO Act, without exposing the child witness to the accused, at the same time, ensuring the accused is in a position to hear the statement of the child, keeping the child in a separate child friendly



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room attached with the Court and examined through video conference and not in accordance with the Madras High Court video conference Rules 2018, which is not applied for recording the evidence of the child and therefore, no merit in the contention of the petitioner and dismissed the petition filed by the petitioner. Aggrieved by this order, the present criminal revision case has been filed.

4. The learned counsel for the petitioner submitted that the accused is the father of the victim child PW2 and husband of the PW1. Due to misunderstanding between the husband and wife, the wife instigated the child to make false allegations against her own father. Upon the complaint given by the mother of the child, the respondent police registered a case in Crime No.29 of 2015 and after investigation, filed a final report before the Special Court for Exclusive Trial of Cases under POCSO Act, Chennai – 600 104 for the offences under Sections 498(A), 406, 495, 354(A), 506(ii) IPC @ 498(A), 406, 495, 354(A), 506(ii) IPC & 10 of POCSO Act, which was taken on file in S.C.No.26 of 2018. While recording the evidence, the trial Court permitted the mother PW1 to sit along with the victim child, she



dictated the evidence to the child in turn the child deposed before the Court and the trial Court had not followed the procedure as contemplated under Rule 11 (6) of Madras High Court Video conference Rules, 2018. On the abovesaid two grounds, the evidence of PW2 ought to be eschewed and her evidence has to be recorded afresh in accordance with the rules and thus, pleaded to allow the criminal revision and eschewed the evidence of PW2.

5.Further, the learned counsel for the petitioner would contend that when a procedure is prescribed, that procedure must be followed. There was nothing on record to be shown that the procedure as prescribed in the Rule has been followed, while recording the evidence of the victim child PW2. Therefore, the evidence has to be excluded.

6.To support his argument, the learned counsel for the petitioner placed reliance upon the judgments (i) *Privy Council (Nazir Ahmad Vs. King-Emperor)*, (ii).*Murugan Vs. The State through The Deputy Superintendent of Police, Sivagangai Division, Sivagangai & others* reported in *(2021-1-L.W.(Crl).432)*. (iii) *Zahira Habibullah Sheikh (5)*



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and another vs. State of Gujarat And Others reported in (2006) 3 Supreme Court Cases 374, (iv) *Zahira Habibulla H. Sheikh and another Vs. State of Gujarat And another reported in (2004) 4 Supreme Court Cases 158.*

7.The learned Government Advocate (Crl.side) would submit that there is no illegality in recording the evidence of PW2 before the trial Court. The trial Court recorded the evidence in accordance with the provisions under Section 36(1) & 2 of POCSO Act. There is no need for applying Madras High Court Video Conference Rules 2018. Since the child witness was summoned by the Court and evidence has been recorded in the Court, there is no merit in the revision petition, thus, pleaded to dismiss the criminal revision case.

8.I have considered the matter in the light of the submissions made by the learned counsel for the petitioner as well as the learned counsel for the respondent.



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9. On perusal of records and materials, it reveals that the petitioner is the father of the victim child PW2 and husband of PW1 namely Srividya. In pursuance of a complaint given by wife PW1, the case has been registered in crime No.29 of 2015 and after investigation, final report has been filed and prosecuted the petitioner for the offence under Sections 498(A), 406, 495, 354(A), 506(ii) IPC and 10 of POCSO Act, 2012 and now, the case in S.C.No.36 of 2018 is pending before the Special Court for Exclusive Trial of Cases under POCSO Act, Chennai. The trial commenced and the complainant/mother is examined as PW1, victim child witness is examined as PW2.

10. Further, I have perused the copy of the evidence of PW2 child witness. It is noticed that the witness was summoned by the Court for giving evidence and it is also recorded in the deposition, since the witness being a child, her mother was permitted to be present during recording of the child evidence. It is permitted under Section 33(4) of POCSO Act, which runs as follows:



“33. Procedure and powers of Special Court

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(2). . . .

(3).

(4). The Special Court shall create a child-friendly atmosphere by allowing a family member, a guardian, a friend or a relative, in whom the child has trust or confidence, to be present in the court.

(5). . . . “

11.In view of the above provision, permitting the presence of the mother of the child witness during recording the evidence of the child is not in violation of any rule, it is in accordance with the law. Further, there is no material to show that the mother of the child dictated to the child what to be deposed. Therefore, the argument placed by the learned counsel for the petitioner in this regard has no merit.

12.I have considered another ground of not following the Rule 11 (6) of Madras High Court Video Conferencing Rules, 2018, which runs as follows:



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“11. General Procedures:

(1)

(2).....

(3).....

(4).....

(5).....

(6) *The record of proceedings including transcription of statement shall be prepared at the Court Point under the supervision of the court and accordingly authenticated. The soft copy of the transcript, digitally signed by the co-ordinator at the Court Point shall be sent by e-mail through NIC or any other Service Provider (owned by State/Central) to the Remote Point, where printout of the same will be taken and signed by the deponent. A scanned copy of the statement digitally signed by the co-ordinator at the Remote Point would be sent by e-mail through NIC or any other Indian service provider to the Court Point. The hard copy would also be sent subsequently, preferably within three days of recording, by the co-ordinator at the Remote Point to the Court Point by courier/post.*

(7).....



(8). “

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13.In the instant case, the witness was summoned to the Court and examined in the Court, while keeping the child in a separate room through Video conference and further, it is noticed in the evidence recorded by the trial Court that the accused were present and their counsel also present though the petitioners’ counsel not cross examined the witness, the accused appearing for the second accused cross examined the witnesses on the same date.

14.Section 36 (1) & (2) of the Act runs as follows:

“36. Child not to see accused at the time of testifying

(1) The Special Court shall ensure that the child is not exposed in any way to the accused at the time of recording of the evidence, while at the same time ensuring that the accused is in a position to hear the statement of the child and communicate with his advocate.

(2) For the purposes of sub-section (/), the Special Court may record the statement of a child through video



conferencing or by utilising single visibility mirrors or curtains or any other device.”

15. In view of the abovesaid provision, the child witness should not be exposed in any way to the accused at the time of recording of the evidence while at the same time the court ensured that the accused is in a position to hear the statement of the child and communicate with his advocate. The cross examination of the child witness by the accused counsel on the same date in the court evidenced the fact that the child witness was examined in the Court in the presence of the accused person and his counsel. Therefore, the trial Court had not recorded the evidence by following the Madras High Court Video Conference Rules, 2018; only by following the procedure as mandated under Section 36 (1) & (2) of the Act. In fact, it is to be noted that the petitioner counsel represented no cross examination, but the counsel appearing for another accused A2 cross examined the child witness on the same date.

16. The trial should be a search for the truth and not a boat over technicalities. On perusal of the deposition, it is noticed that the agreed



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procedure is followed. On a perusal of the proceedings, on recording the evidence, it is clear that the procedure adopted is quite transparent and the procedures were conducted in the presence of the learned counsel for the accused persons. The grievance of the petitioner is that the child witness was tutored by her mother during recording the evidence is not supported by any materials and the allegations that the evidence was not properly recorded, is clearly untenable. The other pleas, which have been stated by the learned counsel for the petitioner, do not in any way affect the credibility or acceptability of the evidence of PW2 victim girl, it has to be evolved by the trial Court at the time of conclusion of the trial. Above being the position, the decision relied on by the learned counsel for the petitioner is not helpful to advance his argument and there is no reason to eschew / discard the evidence of PW2 child victim. Therefore, the impugned order is accordingly confirmed and I find no merit in the criminal revision. Accordingly, the criminal revision case is dismissed.

Index : Yes/No
Internet : Yes/No
sms

27.04.2023



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To

- 1.The Inspector of Police
W8, All Women Police Station,
Thirumangalam, Chennai-101.
- 2.The Special Court for Exclusive Trial
of Cases under POCSO Act, Chennai.
- 3.The Public Prosecutor,
High Court, Madras.



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V.SIVAGNANAM,J.

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Pre-delivery order made in
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