



Crl.O.P.(MD)No.856 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **12.01.2023**

CORAM

THE HON'BLE MR.JUSTICE K.MURALI SHANKAR

Crl.O.P.(MD)No.856 of 2023

and

Crl.M.P.(MD)No.794 of 2023

Ramesh @ Kishore Kumar

... Petitioner

Vs.

1.The Inspector of Police,
All Women Police Station,
Colachel,
Kanyakumari District.

2.A.Sangeetha

... Respondents

PRAYER : Criminal Original Petition filed under Section 482 of Criminal Procedure Code, to call for the records relating to the order passed in Crl.M.P.No.1592/2022 in Special Sessions Case No.41 of 2019 on the file of the Special Court for Exclusive Trial of Cases under POCSO Act, Kanyakumari at Nagercoil District dated 15.11.2022 and set aside the same and further issue direction to the Special Court for Exclusive Trial of Cases under POCSO Act to recall the witnesses P.W. 1, P.W.2 and P.W.3 for cross examination within a time stipulated by this Court.



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For Petitioner : Mr.K.P.Krishnadoss
For R1 : Mr.M.Muthumanikkam
Government Advocate (Crl. Side)

ORDER

This Criminal Original Petition filed, under Section 482 Cr.P.C., is directed against the order passed in Crl.M.P.No.1592 of 2022 in Spl.S.C.No.41 of 2019, dated 15.11.2022 on the file of the Special Court for Exclusive Trial of Cases under POCSO Act, Kanniyakumari at Nagercoil, dismissing the petition filed under Section 311 Cr.P.C.

2. The petitioner is the sole accused in Spl.S.C.No.41 of 2019 on the file of the Special Court for Exclusive Trial of Cases under POCSO Act, Kanniyakumari at Nagercoil and is charged for the offences under Section 324 IPC and Sections 9(m), 9(l) and 10 of Protection of Child from Sexual Offences Act, 2012.

3. The petitioner has filed a petition under Section 311 Cr.P.C., seeking permission to recall P.W.1 to P.W.3 for cross examination. The



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respondent has filed a counter statement raising serious objections. The learned Sessions Judge, after enquiry, has passed the impugned order, dated 15.11.2022 dismissing the said petition. Aggrieved by the said dismissal order, the accused has come forward with the present petition invoking Section 482 Cr.P.C. for setting aside the impugned order.

4. The learned counsel appearing for the petitioner would submit that the trial Court has earlier issued trial proceedings dated 19.03.2022 for examination of the witnesses from 21.04.2022 to 25.04.2022, that since the witnesses were not produced, proceedings were again issued on 17.06.2022 for examination of the witnesses from 21.07.2022 to 28.07.2022 and on that days, witnesses were not produced, that without issuing any further proceedings, P.W.1 and P.W.3 were examined on 19.09.2022 and that since the defence counsel was not in good health, he could not be cross examined the witnesses.

5. The learned trial Judge, taking note of Section 33(v) of POCSO Act that the child witness shall not be called repeatedly to testify in the Court and by observing that no sufficient reason is put forth for not cross examining the P.W.1 and other two witnesses P.W.2 and P.W.3, who are



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parents of the victim girl, on the same day of chief examination, has dismissed the petition.

6. It is pertinent to note that the petitioner is facing trial for very serious charges under the POCSO Act. Moreover, there is a legal burden on the accused to rebut the presumption under Sections 29 and 30 of POCSO Act. No doubt, there is a statutory bar imposed on Special Courts by Section 33(5) of POCSO Act to ensure that a child is not repeatedly called to to testify in the Court.

7. As rightly observed by the Kerala High Court in *Vinith Vs. State of Kerala* reported in *2022 Live Law (Kerala) 656*, that the bar under Section 33(5) POCSO Act is not absolute and in appropriate cases, if it is necessary for the just decision of the case, the child witness can be recalled.

8. As rightly contended by the learned counsel for the petitioner, in the case on hand, the above petition was not filed for the purpose of further cross examination, but for cross examination itself. Considering



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the facts and circumstances of the case and also the fact that the witnesses sought to be recalled were not at all cross examined and also taking note of the facts that the petitioner is facing trial for the serious offences and that the trial Court has not issued any proceedings to examine the witnesses, this Court is of the clear view that the petitioner should be given one more opportunity to cross examine the witnesses. But at the same time, this Court is of the further view that the petitioner must be mulcted with costs and with further condition that the petitioner/accused, should cross examine the witnesses on the day, when the witnesses are produced before the Court and if for any reason, the petitioner fails to cross examine the said witnesses on that particular day, then he will forfeit his right to cross examine them.

9. In the result, the Criminal Original Petition is allowed and the impugned order, dated 15.11.2022 in Crl.M.P.No.1592 of 2022 in Spl.S.C.No.41 of 2019 on the file of the Sessions Judge, Special Court for Exclusive Trial of Cases under POCSO Act, Kanniyakumari at Nagercoil, is set aside and the petition to recall the witnesses is allowed on payment of cost of **Rs.5,000/- (Rupees Five Thousand Only)** to the



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credit of Government of Tamil Nadu, CMPRF in IOB, Secretariat Branch, Chennai-9 (Account No.11720 10000 00070, IFSC Code: IOBA0001172) and on payment of process fee and batta to the said witnesses and on further condition that the petitioner side should cross examine the witnesses whenever the witnesses are produced before the Court and in case of the petitioner's failure to cross examine the particular witness, then he will forfeit his right to cross examine the witness. The trial Court is directed to summon the said witnesses for the purpose of cross examination and complete the examination of the said witnesses within one month from the date of receipt of copy of this order. Consequently, connected Miscellaneous Petition is closed.

12.01.2023

NCC : Yes / No
Index : Yes / No
Internet : Yes / No
csm



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WEB COPY To

- 1.The Special Court for Exclusive Trial of Cases under POCSO Act,
Kanniyakumari at Nagercoil.
- 2.The Inspector of Police,
All Women Police Station,
Colachel,
Kanyakumari District.
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.



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K.MURALI SHANKAR,J.

csn

Order made in
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and
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Dated: 12.01.2023