



Crl.O.P.(MD)No.760 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.760 of 2023

Kumaran @ Kumaravel

... Petitioner

Vs.

State represented by its
The Inspector of Police,
West Police Station,
Kumbakonam,
Thanjavur District.
(Crime No.258 of 2017)

... Respondent

PRAYER : Criminal Original Petition filed under Section 482 of Criminal Procedure Code, to call for the records in Crl.M.P.No.38 of 2019 in Spl.S.C.No.26 of 2019 on the file of the Sessions Judge, Special Court Exclusive Trial of Cases under POCSO Act, Thanjavur, dated 29.01.2020 and set aside the same.

For Petitioner : Mr.M.Karunanithi

For Respondent : Mr.M.Muthumanikkam
Government Advocate (Crl. Side)



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ORDER

This Criminal Original Petition filed, under Section 482 Cr.P.C., is directed against the order passed in Crl.M.P.No.38 of 2019 in Spl.S.C.No.26 of 2019, dated 29.01.2020, on the file of the Sessions Judge, Special Court Exclusive Trial of Cases under POCSO Act, Thanjavur.

2. The petitioner is the sole accused in Spl.S.C.No.26 of 2019 on the file of the Special Court Exclusive Trial of Cases under POCSO Act, Thanjavur and is charged for the offences under Section 366 IPC, Sections 4 and 3(a) of Protection of Child from Sexual Offences Act, 2012 and Sections 3(1)(w) and 3(2)(v) of the Scheduled Caste and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015.

3. It is not in dispute that 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.



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4. The petitioner's case is that when the witnesses P.W.1 to P.W.3 were examined, his counsel was not available, that the above witnesses are material witnesses, that due to non-availability of the defence counsel, the said witnesses were not cross examined, that their failure to cross examine the said witnesses is neither willful nor wanton, that the petitioner will be put to great prejudice, if the said witnesses are not cross examined and that therefore, the petitioner was constrained to file the above petition under Section 311 Cr.P.C.

5. No doubt, the respondent has raised serious objections for allowing the said petition. The learned Sessions Judge, after enquiry, has passed the impugned order, dated 29.01.2020 dismissing the said petition as against the recall of P.W.1 and allowing the said petition as against the recall of P.W.2 and P.W.3 on cost. 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.

6. It is not in dispute that P.W.1, who is the victim girl, P.W.2 and P.W.3 were examined in Chief on 18.11.2019. The learned trial Judge,



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by observing that the petitioner has not mentioned about what are all the documents and statements not available in his petition, that advocate boycott is not a sufficient and bonafide reason for the recalling of witnesses for cross examination, has come to a decision that the petitioner is not entitled to get the relief and dismissed the petition as against the recall of P.W.1. The learned trial Judge has rightly quoted the judgment of Hon'ble Supreme Court in ***Vinod Kumar Vs. State of Punjab*** reported in ***2015 (1) MLJ (Crl) 288***.

7. In the case on hand, as rightly observed by the learned trial Judge that P.W.1 was examined in Chief, she was not cross examined on that day as the defence counsel was not present due to boycott.

8. 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.



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9. 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.

10. In the present case, according to the prosecution, P.W.1 victim girl was born on 12.08.1999 and as rightly contended by the learned counsel for the petitioner, she had now crossed 23 years of age.

11. 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. Though the petitioner is at fault for filing the present petition belatedly, considering the facts and circumstances of the case and also the fact that the witness sought to be recalled was not at all cross examined and also taking note of the fact that the petitioner is facing trial for the serious offences, this Court is of the clear view that the petitioner should be given one more opportunity to cross examine the witness. But at the same time,



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considering the length of delay and the conduct of the petitioner, 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 witness on the day, when the witness is produced before the Court and if for any reason, the petitioner fails to cross examine the said witness on that particular day, then he will forfeit his right to cross examine them.

12. In the result, the Criminal Original Petition is allowed and the impugned order, dated 29.01.2020 in Crl.M.P.No.38 of 2019 in Spl.S.C. No.26 of 2019 on the file of the Sessions Judge, Special Court Exclusive Trial of Cases under POCSO Act, Thanjavur, is set aside and the petition to recall the witness is allowed on payment of cost of **Rs.5,000/- (Rupees Five Thousand Only)** to the 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 witness and on further condition that the petitioner side should cross examine the witness whenever the witness is produced before the Court and in case of the petitioner's failure to cross examine



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the particular witness, then he will forfeit his right to cross examine the witness. The trial Court is directed to summon the said witness for the purpose of cross examination and complete the examination of the said witness within one month from the date of receipt of copy of this order.

12.01.2023

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

To

- 1.The Special Court Exclusive Trial of Cases under POCSO Act,
Thanjavur.
- 2.The Inspector of Police,
West Police Station,
Kumbakonam,
Thanjavur 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
Crl.O.P.(MD)No.760 of 2023

Dated: 12.01.2023