



CrI.O.P.(MD) No.1630 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 30.01.2023

CORAM:

THE HONOURABLE MR. JUSTICE K.MURALI SHANKAR

CrI.O.P.(MD) No.1630 of 2023

and

CrI.M.P.(MD) No.1440 of 2023

Muthiah,

: Petitioner

Vs

The Inspector of Police,
All Women Police Station,
Valliyoor,
Tirunelveli District.

: Respondent

PRAYER: Criminal Original Petition filed under Section 482 Cr.P.C. praying this Court to call for the records relating to the order dated 19.12.2022 made in Cr.M.P No.4047 of 2022 in Special C.C No. 59 of 2022 on the file of the Special Court for POCSO Act Cases, Tirunelveli and set aside the same in respect of PW2.

For Petitioner : Mr.V.Angusamy

For Respondent : Mr.E.Antony Sahaya Prabahar
Additional Public Prosecutor



Crl.O.P.(MD) No.1630 of 2023

ORDER

WEB COPY This criminal original petition has been filed seeking to set aside the order dated 19.12.2022 made in Cr.M.P No.4047 of 2022 in Special C.C No. 59 of 2022 on the file of the Special Court for POCSO Act Cases, Tirunelveli, in respect of PW2.

2.The petitioner is facing trial for the offences under Sections 366, 506(i) IPC and Section 9(m) r/w Sections 10, 3(c), 3(d) r/w Section 4 of Protection of Children from Sexual Offences Act, 2012.

3.The learned Counsel appearing for the petitioner would submit that a legal aid Counsel appointed to the petitioner has not turned up on 17.10.2022, when the case was posted for examination of witnesses. But, subsequently, the petitioner has appointed his Counsel on 31.10.2022 and that his Counsel had cross-examined the witnesses PW.4 to PW.22.

4.The learned Additional Public Prosecutor would submit that except the Investigation Officer, all other witnesses were already examined and that after partly allowing the petition filed by the accused under Section 311



Cr.L.O.P.(MD) No.1630 of 2023

Cr.P.C., the case stands posted on 06.02.2023, for recalling of PW.1 and P.W.

3.

WEB COPY

5.It is evident from the records that in the impugned order, the learned Special Judge, by invoking Section 33(5) of the said Act, has dismissed the petition so far as the PW.2/victim girl is concerned. Admittedly, on 17.10.2022, when the P.W.2 was examined, there was no Counsel for the accused. As rightly pointed out, the legal aid Counsel appointed by the petitioner has not turned up on that day.

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



Crl.O.P.(MD) No.1630 of 2023

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. Though the petitioner is at fault for filing the petition belatedly, considering the facts and circumstances of the case and also the fact that the witness PW.2 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 said witness. But at the same time, 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 P.W.2 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 the witness.



Cr.L.O.P.(MD) No.1630 of 2023

WEB COPY

9. In the result, the Criminal Original Petition is allowed and the impugned order, dated 19.12.2022 in Cr.M.P.No.4047 of 2022 in Spl.C.C. No.59 of 2022 on the file of the Special Court for POCSO Act cases, Tirunelveli, is set aside and the petition to recall the witness P.W.2 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 P.W.2 whenever the witness is produced before the Court and in case of the petitioner's failure to cross examine the 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 on 06.02.2023 itself. Consequently, connected Miscellaneous Petition is closed.

30.01.2023

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

5/7



Crl.O.P.(MD) No.1630 of 2023

To

1. The Special Court for POCSO Act Cases,
Tirunelveli

2.The Inspector of Police,
All Women Police Station,
Valliyoor,
Tirunelveli District.

3. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.



WEB COPY



Crl.O.P.(MD) No.1630 of 2023

K.MURALI SHANKAR, J.

lr

Crl.O.P.(MD) No.1630 of 2023

30.01.2023