



Crl.O.P.(MD)No.3358 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

WEB COPY

Dated : 22.09.2023

CORAM

THE HON'BLE DR.JUSTICE D.NAGARJUN

Crl.O.P.(MD)No.3358 of 2023

M.Kalidoss

... Petitioner/
Accused

Vs.

1. The Inspector of Police,
Jaihindpuram (L&O) Police Station,
Madurai.
(Crime No.614 of 2015)

... Respondent/
Complainant

PRAYER : Criminal Original Petition filed under Section 482 of Criminal Procedure Code, to call for the records pertaining to the order dated 23.01.2023 made in Crl.M.P.No.2279 of 2022 in S.C.No.18 of 2017 on the file of the learned Sessions Judge, Principal Special Court for Exclusive Trial of cases under POCSO Act, Madurai and set aside the same and allow the same.

For Petitioners : Mr.J.William Christopher



WEB COPY



Crl.O.P.(MD)No.3358 of 2023

For Respondents : Mr.SS.Madhavan
Govt. Advocate (Crl. Side)

ORDER

The sole accused in Spl.S.C.No.18 of 2017 pending on the file of learned Sessions Judge, Principal Special Court for Exclusive Trial of cases under POCSO Act, Madurai has filed this petition under Section 482 of Cr.P.C. seeking quashment of the orders passed in Crl.M.P.No. 2279 of 2022 dated 23.01.2023 declining to recall P.Ws.1 to 15 for cross-examination.

2. The facts as per record insofar as the petition before this Court are that the victim, who was aged about 17 years, daughter of one Muthumari has developed friendship with the accused which was turned into love affair. The accused has enticed her on 08.06.2015 and took her to Mariyamman Temple near Crime Branch Police Station, Madurai and tied Thali to her. Thereafter, they spent 20 days at Sivakasi. The petitioner/accused knowing well that the victim is a minor committed aggravated penetrated sexual intercourse several times thereby based on



Crl.O.P.(MD)No.3358 of 2023

a complaint, a case has been registered and after investigation, charge sheet is filed alleging that the petitioner/accused has committed offences punishable under Sections 5(1), (6) of the Protection of Children from Sexual Offences Act, 2012 (in short "POCSO Act") in Spl.S.C.No.18 of 2017.

3. During the course of trial, when the case was posted for defence evidence, the petitioner/accused has filed Crl.M.P.No.2279 of 2022 seeking to recall P.Ws.1 to 15 for the purposes of cross-examination. The said petition was ultimately dismissed. Aggrieved by the same, the present petition is filed.

4. It is submitted by learned counsel for the petitioner/accused that the counsel who was on record at the time of cross-examination of witnesses could not cross-examine the witnesses as it was not possible for him to cross-examine thereby another counsel was engaged. In the meanwhile, examination of witnesses completed without cross-examination. It is submitted that the examination of witnesses is very essential otherwise it would cause prejudice to the petitioner and



Crl.O.P.(MD)No.3358 of 2023

therefore, prayed as sought for.

WEB COPY

5. Learned Government Advocate on the other hand submits that if the victim is called repeatedly to the Court to face the cross-examination, she would suffer pain and that as per Section 33(5) of POCSO Act, the victim shall not be called repeatedly to testify in the Court. He further submitted that as per Section 35(2) of POCSO Act, the trial required to be completed within a period of one year from the date of taking cognizance of the offences and if the petition is allowed for cross-examination, it may further delay the disposal of the case.

6. In POCSO Act, there is no provision enabling either of the parties to recall a witness, thereby, the parties are required to fall back on Section 311 of Cr.P.C. runs as under:-

"Power to summon material witness, or examine person present.

Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a



Crl.O.P.(MD)No.3358 of 2023

witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case "

7. As seen from the record, the petitioner/accused could not cross-examine the prosecution witnesses. In normal course, the petitioner/accused shall be given an opportunity to cross-examine all the prosecution witnesses otherwise the veracity of the prosecution witnesses cannot be gauged only on the basis of chief examination. However, it does not mean that when the petitioner/accused deliberately evades to cross-examination, the opportunity cannot be extended for indefinitely. The principles of natural justice demands that the fair opportunity must be given to the accused enabling him to cross-examine all the witnesses. However, in case, if the accused fails to avail the opportunity then he cannot alleged that non cross-examination of prosecution witnesses would cause prejudice to him.



Crl.O.P.(MD)No.3358 of 2023

8. In the case on hand, the P.Ws.1 to 15 witnesses were examined right in the presence of the petitioner/accused and when the witnesses were being examined, the petitioner/accused is having legal support as he has engaged the counsel. It is mentioned that initially, the counsel who was engaged by him could not cross-examine the witnesses thereby the petitioner/accused has changed the counsel. It is also borne out from the record that subsequently the petitioner/accused has engaged one more counsel to defend his case thereby the petitioner/accused is very conscious of defending the case and that the prosecution witnesses required to be cross-examined.

9. The offence allegedly took place in the year 2015. All the material witnesses were examined in the year 2017 and 2018. Six years have been lapsed from the date of cross-examination of witnesses. Fair opportunity required to be given not only to the accused but also to the prosecution/victim. When the chief examination is recorded during the year 2017 and 2018, if the same witnesses were subjected to cross-examine in the year 2023, prejudice would cause to the prosecution/victim. The witnesses might not remembering what they



Crl.O.P.(MD)No.3358 of 2023

have deposed in chief examination and they might even forgotten the incident also. There is also possibility that witnesses might not be traced by the prosecution. Even, if at all the witnesses were brought before the Court, certainly they will not be speaking as they were expected to as they were examined in chief in the year 2017 and 2018.

10. Further, the petitioner/accused has also earlier filed an application for recalling of P.Ws.2 and 3 in the year 2019 and said petition was allowed. However, the petitioner/accused has not paid bata for summoning the witnesses and accordingly, the evidence of P.Ws.2 and 3 were closed. That means, an opportunity given to the petitioner/accused could not be availed thereby again the petitioner/accused is not expected to file a similar application for recalling of witnesses.

11. Only ground on which the petitioner has filed this application is that he has changed his counsel as his counsel could not be able to



Crl.O.P.(MD)No.3358 of 2023

cross-examine. It is settled legal position that change of counsel or the counsel is engaged on some other cases in any other Court cannot be the ground for recalling of witnesses. The petitioner should have filed the application in the year 2017 or 2018 or at the earlier point of time for recalling of witnesses. No explanation has offered for the delay in filing this application after six years. Further, in case if the petitioner/accused could not cross-examine the one or two witnesses for the reasons which are beyond his control, the Court can consider the same sympathetically. But, here is the case where the petitioner/accused has filed application to cross-examine all the prosecution witnesses itself indicates the attitude of the accused that he is not intending to cross-examine any of the witnesses. The petitioner can explain excuse so far as not cross-examining one or two witnesses but not in respect of all the witnesses. It is settled that as far as possible unless things are beyond the control of the accused, cross-examination of all the witnesses shall be done on the

very same day when chief examination was done in order to see that quality of the evidence is not diluted. Further, as already observed, as per



Crl.O.P.(MD)No.3358 of 2023

Section 33(5) of the POCSO Act, the victim shall not be called again and again to face the cross-examination as she would suffer pain and trauma.

Further Section 35(2) of the POCSO Act requires trial to be completed within a period of one year from the date of taking cognizance.

12. Considering the discussions made above, it is clear that the explanation offered by the petitioner/accused for non cross-examination of P.Ws.1 to 15 is not satisfactory and in a serious case like this, though the petitioner/accused has given an opportunity to cross-examine the witnesses has ultimately chosen not to cross-examine them and as already observed, though in the year 2019, when an opportunity was given to cross-examine the principal material witnesses, the petitioner/accused has not even paid bata to issue summons to the witnesses.

13. In view of the above, the petitioner/accused has failed to convince the Court that the trial Court has committed error in declining to recall of witnesses and accordingly, this petition is dismissed.



Crl.O.P.(MD)No.3358 of 2023

WEB COPY

22.09.2023

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

PKN/mvs.



Crl.O.P.(MD)No.3358 of 2023

WEB COPY

To

1. The Inspector of Police,
Jaihindpuram (L&O) Police Station,
Madurai.
2. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.



WEB COPY



Crl.O.P.(MD)No.3358 of 2023

DR.D.NAGARJUN,J

PKN/mvs.

Pre-delivery order in
Crl.O.P.(MD)No.3358 of 2023

Dated: 22.09.2023