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CrI.O.P.(MD)No.20434 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 02.02.2023

Delivered on : 06.02.2023

CORAM:

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

CrI.O.P.(MD)No.20434 of 2022

and

CrI.M.P.(MD)No.14171 of 2022

Karuppaiah

... Petitioner

VS.

The Inspector of Police,
All Women Police Station,
Manaparai,
Trichy District.
(Crime No.6 of 2020)

...Respondent

PRAYER : Criminal Original Petition filed under Section 482 Cr.P.C, to set aside the order passed in CrI.M.P.No.598 of 2022 in Spl.S.C.No.92 of 2020 dated 14.07.2022 on the file of the Sessions Judge, Mahila Court, Tiruchirappalli and permit the petitioner to cross examine the witness P.W.1 to P.W.3, P.W.8 and P.W.9.

For Petitioner : Mr.S.C.Herold Singh

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

ORDER

The above Criminal Original Petition filed, under Section 482 Cr.P.C., is directed against the order passed in CrI.M.P.No.598 of 2022 in



Spl.S.C.No.92 of 2020, dated 14.07.2022, on the file of the Sessions Judge, Mahila Court, Tiruchirappalli.

2. The petitioner is the sole accused in Spl.S.C.No.92 of 2020 on the file of the Mahila Court, Tiruchirappalli and is charged for the offences under Sections 366 and 376(3) IPC and Sections 5(i), 5(l) and 6 of Protection of Child from Sexual Offences Act, 2012.

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, P.W.8 and P.W.9 for cross examination.

4. The petitioner's case is that when the witnesses P.W.1 to P.W.3, P.W.8 and P.W.9 were examined, his counsel was not available, that the above witnesses are material witnesses, 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 14.07.2022 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.

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 22.01.2021 and that P.W.8 and P.W.9 were examined in Chief on 28.04.2022. The learned trial Judge, by observing that the petitioner has not given any valid reason for the delay in filing this petition and the reason stated by the petitioner/accused is not sufficient to condone the delay in filing this petition under Section 311 of Cr.P.C. for recalling of P.W.1 to P.W.3, that the P.W.8 and P.W.9 are professional witnesses and they have given medical certificates for the accused and victim, that the expert witness need not be recalled for cross examination unless there is any strong reason for the petitioner to recall them and cross examine and that the petitioner has not given any specific reason for recalling P.W.8 and P.W.9 and by referring Section 33(5) of POCSO Act to ensure that a child is not repeatedly called to to testify in the Court, has come to a decision that the petitioner is not entitled to get the relief and dismissed the petition. The learned trial Judge has rightly quoted the judgment of this Court in ***S.Sankara***



Varman Vs. Inspector of Police, M.K.B. Nagar Police Station in Crl.O.P.No.12716 of 2016 dated 30.06.2016 and the judgments of the Hon'ble Supreme Court in **Vinod Kumar Vs. State of Punjab** reported in **2015 (1) MLJ (Crl) 288** and in **State of U.P. Vs. Jambunath Singh** reported in **J.J.2001(4) SCC 313**.

7. In the case on hand, as rightly observed by the learned trial Judge that P.W.1 to P.W.3, P.W.8 and P.W.9 were examined in Chief, they were not cross examined on that day as the defence counsel was in engaged in another court.

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.

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. 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 witnesses sought to be recalled were 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 witnesses. 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 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.

11. In the result, the Criminal Original Petition is allowed and the impugned order, dated 14.07.2022 in Crl.M.P.No.598 of 2022 in



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Spl.S.C.No.92 of 2020 on the file of the Sessions Judge, Mahila Court, Tiruchirappalli, is set aside and the petition to recall the witnesses is allowed on payment of cost of **Rs.20,000/- (Rupees Twenty 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 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 witnesses, then he will forfeit his right to cross examine the witnesses. 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.

06.02.2023

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

- 1.The Mahila Court,
Tiruchirappalli District.
- 2.The Inspector of Police,
All Women Police Station,
Manaparai,
Trichy District.
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.



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K.MURALI SHANKAR, J.

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Pre-delivery order made in
Crl.O.P.(MD)No.20434 of 2022
and
Crl.M.P.(MD)No.14171 of 2022

Dated : 06.02.2023