



CrI.O.P.(MD)No.20873 of 2022

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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.20873 of 2022

and

CrI.M.P.(MD)No.14573 of 2022

Vigneshkumar @ Vicky

... Petitioner

vs.

The State represented by
The Inspector of Police,
Vadamadurai Police Station,
(Crime No.1472 of 2020)

...Respondent

PRAYER : Criminal Original Petition filed under Section 482 Cr.P.C, to set aside the order passed in Cr.M.P.No.1468 of 2022 in Spl.S.C.No.3 of 2021 on the file of the Fast Track Mahila Court, Dindigul District and to recall the P.W.2 for further cross examination.

For Petitioner : Mr.T.R.Subramanian

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



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ORDER

The above Criminal Original Petition filed, under Section 482 Cr.P.C., is directed against the order passed in CrI.M.P.No.1468 of 2022 in Spl.S.C.No.3 of 2021, dated 31.10.2022, on the file of the Sessions Judge, Fast Track Mahila Court, Dindigul District.

2. The petitioner is the sole accused in Spl.S.C.No.3 of 2021 on the file of the Fast Track Mahila Court, Dindigul District and is charged for the offences under Section 363 IPC and Sections 5(1) r/w 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.5 for further cross examination.

4. The petitioner's case is that when the witnesses P.W.1 and P.W.2 were cross examined, due to ill health of the accused, he was unable to instruct his counsel and hence, some questions were not asked to the said witnesses, that when the witnesses P.W.3 to P.W.5 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 31.10.2022 dismissing the said petition as against to recall the witness P.W.2 and allowing the said petition as against to recall the witnesses P.W.1 and P.W.3 to P.W.5 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 and P.W.2, who is the victim girl, were examined in Chief on 17.09.2021 and they were cross examined on the same day itself, that P.W.3 and P.W.4 were examined in Chief on 16.11.2021 and that P.W.5 was examined in Chief on 03.12.2021. The learned trial Judge, by referring Section 33(5) of POCSO Act to ensure that a child is not repeatedly called to testify in the Court, has come to a decision that the petitioner is not entitled to get the relief and dismissed the petition as against to recall the witness P.W.2. 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 judgment of the Hon'ble Supreme Court in ***Vinod Kumar Vs. State of Punjab*** reported in ***2015 (1) MLJ (Crl) 288***.

7. The learned counsel appearing for the petitioner would submit that there was love affair between the petitioner and the victim girl and that since the victim girl had attained majority, the petitioner married the victim girl on 10.01.2023 and the marriage was registered and they are now living together.

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. In the present case, according to the prosecution, P.W.2 victim girl was born on 06.01.2005 and as rightly contended by the learned counsel for the petitioner, she had now crossed 18 years of age.

11. The Karnataka High Court in ***Mahammad Ali Akbar @ Ali Umar vs State Of Karnataka*** reported in ***2022 (SCC) online Kar 1048***, has specifically observed that once the victim crosses 18 years of age, the rigor under Section 33(5) of the Act gets diluted, as it is the child victim who shall not be called for cross examination or re-cross examination repeatedly.

12. It is pertinent to note that the prohibition under Section 33(5) of POCSO Act for calling the child victim repeatedly would not mean that the accused can be deprived in his right to cross examination in a trial, particularly for a serious offence which is punishable for more than 10 years.



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13. As rightly contended by the learned counsel for the petitioner, in the case on hand, the above petition was filed for the purpose of further cross examination. Considering the facts and circumstances of the case 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, 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.

14. In the result, the Criminal Original Petition is allowed and the impugned order, dated 31.10.2022 in CrI.M.P.No.1468 of 2022 in Spl.S.C.No.3 of 2021 on the file of the Sessions Judge, Fast Track Mahila Court, Dindigul District, dismissing the petition to recall of P.W.2 is set aside and the petition to recall the witness is allowed on payment of cost of **Rs.10,000/- (Rupees Ten 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 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 two weeks 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
csm

To

- 1.The Fast Track Mahila Court,
Dindigul District.
- 2.The Inspector of Police,
Vadamadurai Police Station,
Dindigul 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
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and
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Dated : 06.02.2023