



Crl.O.P.(MD) No.21589 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 13.12.2022

Delivered on : 03.01.2023

CORAM

THE HONOURABLE MR.JUSTICE **K.MURALI SHANKAR**

CRL.O.P.(MD).No.21589 of 2022

and

CRL.M.P(MD)No.15216 of 2022

A.Maruthan

: Petitioner

Vs.

State rep.by it is
The Inspector of Police,
All Women Police Station,
Usilampatti, Madurai District.
Crime No.8 of 2020

: Respondent

PRAYER: Criminal Original Petition filed under Section 482 Cr.P.C, to call for the records in Crl.M.P.No.1138 of 2022 in Spl.S.C.No.119 of 2020 on the file of the Sessions Judge, Principal Special Court for Exclusive Trial of Cases under POCSO Act, Madurai, dated 04.11.2022 and set aside the same and consequently, direct the learned Sessions Judge, Principal Special Court for Exclusive Trial of Cases under POCSO Act, Madurai to recall the witnesses for cross examination namely P.W.1 to P.W.6.



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For Petitioner : Mr.S.M.Aantha Murugan,

For Respondent : Mr. R.Sivakumar,
Government Advocate(Crl.Side)

ORDER

This Criminal Original Petition filed, under Section 482 of Cr.P.C., is directed against the order passed in Crl.M.P.No.1138 of 2022 in Spl.S.C.No. 119 of 2020, dated 04.11.2022, on the file of the Sessions Judge, Principal Special Court for Exclusive Trial of Cases under POCSO Act, Madurai.

2. The petitioner is the sole accused in Spl.S.C.No.119 of 2020 on the file of the Principal Special Court for Exclusive Trial of Cases under POCSO Act, Madurai and is charged for the offences under Section 5(l), 6 of POCSO Act and under Section 506(i) IPC.

3.It is not in dispute that the trial has already been commenced and out of 18 witnesses, six witnesses have already been examined and that when the



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case stood posted for further evidence, the above petition in CrI.M.P.No.1138 of 2022 came to be filed under Section 311 of Cr.P.C, seeking permission to recall P.W.1 to P.W.6 for cross examination.

4.The petitioner's case is that when the witnesses P.W.1 to P.W.6 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 04.11.2022 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.



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6. It is not in dispute that P.W.1, who is the victim girl was examined in Chief on 08.10.2021; that P.W.2 to P.W.5 were examined in Chief on 18.03.2022 and that P.W.6 was examined in Chief on 12.04.2022. The learned trial Judge by observing that the accused as well as his counsel were not interested and not actively participated in the trial; that the above petition came to be filed belatedly; that the above petition was filed only to delay the trial and drag on the case and that there may be chances to gain over material witnesses to turn hostile to the case of the prosecution, as the case is pending for long time for the purpose of cross examination, has come to a decision that the petitioner is not entitled to get the relief, dismissed the petition. 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 in hospital; that when P.W.2 to P.W.5 were examined, they were also not cross examined for the reason that the defence counsel had engaged in Peraiyur Court and that when P.W.6 was examined in Chief, he was also not cross examined for the reason that the defence counsel was out of station.



8.As rightly observed by the learned trial Judge, though P.W.1 victim girl was examined in Chief on 08.10.2021, the petitioner has not chosen to file any application to recall P.W.1 for cross examination immediately. As already pointed out, the other witnesses P.W.2 to P.W.5 were examined in Chief on 18.03.2022 nearly after five months, since the examination of P.W.1 and three weeks thereafter P.W.6 was examined on 12.04.2022. Considering the above, the finding of the trial Court that the above petition came to be filed belatedly cannot be found fault with.

9. 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.

10.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.



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11. In the present case, according to the prosecution, P.W.1 victim girl was born on 27.07.2004 and as rightly contended by the learned counsel for the petitioner, she had now crossed 18 years of age.

12. 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.



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13. In the result, the Criminal Original Petition is allowed and the impugned order, dated 04.11.2022 in CrI.M.P.No.1138 of 2022 in Spl.S.C. No.119 of 2020 on the file of the Sessions Judge, Principal Special Court for Exclusive Trial of Cases under POCSO Act, Madurai, is set aside and the petition to recall the witnesses 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 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 witness, then he will forfeit his right to cross examine the witness. 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.

03.01.2023

Internet : Yes/No
Index : Yes/No
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To

- 1.The Sessions Judge,
Principal Special Court for Exclusive
Trial of Cases under POCSO Act, Madurai.
- 2.The Inspector of Police,
All Women Police Station,
Usilampatti, Madurai District.
3. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.



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K.MURALI SHANKAR,J.

das

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and
CRL.M.P(MD)No.15216 of 2022

03.01.2023