



Crl.O.P.(MD) No.427 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATE : 09.01.2023

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

CRL.O.P.(MD).No.427 of 2023

Muniappan

: Petitioner

Vs.

State rep.by it is
The Inspector of Police,
Nilakkottai Police Station,
Dindigul District.
Crime No.633 of 2021.

: Respondent

PRAYER: Criminal Original Petition filed under Section 482 Cr.P.C, to call for the entire records pertaining to the order dated 09.11.2022 passed in Crl.M.P.No.1858 of 2022 in Spl.S.C.No.90 of 2021 on the file of the learned Sessions Judge (Mahila Fast Track Court), Dindigul and set aside the same in so far as the dismissal of the petition filed under Section 311 Cr.P.C against P.W. 2 alone and for other reliefs.

For Petitioner : Mr.J.Lawrance,

For Respondent : Mr. M.Muthu Manikkam,
Government Advocate(Crl.Side)



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ORDER

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This Criminal Original Petition filed, under Section 482 of Cr.P.C., is directed against the order passed in Crl.M.P.No.1858 of 2022 in Spl.S.C. No.90 of 2021, dated 09.11.2022, on the file of the learned Sessions Judge (Mahila Fast Track Court), Dindigul.

2. The petitioner is the accused in Spl.S.C.No.90 of 2021 on the file of the learned Sessions Judge (Mahila Fast Track Court), Dindigul and is charged for the offences under Section 363 and IPC 5(l) r/w 6 of POCSO Act.

3.It is not in dispute that the prosecution has examined 8 witnesses as P.W.1 to P.W.8 and after closure of prosecution side evidence, the petitioner/accused was questioned under Section 313(1) (b) of Cr.P.C and that when the case stood posted for defence evidence, the above petition came to be filed under Section 311 Cr.P.C, seeking permission to recall P.W.1 to P.W.5 for cross examination.

4. The respondent has raised objections to allow the petition. The learned Sessions Judge, after enquiry, has passed the impugned order, dated



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09.11.2022, partly allowing the petition and permitted to recall P.W.1, P.W.3 to P.W.5 and dismissed the petition to recall P.W.2. Aggrieved by the said order, the accused has come forward with the present petition invoking Section 482 Cr.P.C., for setting aside the impugned order.

5. It is not in dispute that P.W.1 was examined on 24.03.2022; P.W.2/victim was examined on 13.04.2022; P.W.3 was examined on 31.05.2022; P.W.4 was examined on 20.06.2022 and that P.W.5 was examined on 18.07.2022. It is also not in dispute that the above petition came to be filed on 07.10.2022. The learned trial Judge, invoking Section 33(5) of POCSO Act, has come to a decision that the victim girl cannot be recalled again and hence, he was not inclined to grant permission for recalling of P.W.2 for cross examination.

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.



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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 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. 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.

9. Now turning to the hostile witness, according to the trial Court, since P.W.3 had turned hostile, there was no need to cross examine her. Recently, the Hon'ble Supreme Court in *Neeraj Dutta Vs. State* reported in **2022 Live Law (SC) 1029**, while answering the reference, has specifically held that testimony of hostile witness can be considered to convict the accused, if corroborated by other evidence and also reiterated the position that a witness has been declared hostile does not result in an automatic rejection of his evidence and the relevant portion is extracted hereunder:



“This Court cautioned that even if a witness is treated as "hostile" and is cross-examined, his evidence cannot be written off altogether but must be considered with due care and circumspection and that part of the testimony which is creditworthy must be considered and acted upon. It is for the judge as a matter of prudence to consider the extent of evidence which is creditworthy for the purpose of proof of the case. In other words, the fact that a witness has been declared "hostile" does not result in an automatic rejection of his evidence. Even, the evidence of a "hostile witness" if it finds corroboration from the facts of the case may be taken into account while judging the guilt of the accused. Thus, there is no legal bar to raise a conviction upon a "hostile witness" testimony if corroborated by other reliable evidence.”

10. Considering the above, the finding of the trial Court with regard to the hostile witness is not proper and is not in accordance with law.

11. 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. It is not the case of the prosecution that the petition under Section 311 Cr.P.C to recall the victim girl and other witnesses were filed belatedly or frivolously. Though the petitioner



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is at fault, 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.

12. In the result, the Criminal Original Petition is allowed and the impugned order, dated 09.11.2022 in Crl.M.P.No.1858 of 2022 in Spl.S.C. No.90 of 2021, on the file of the learned Sessions Judge (Mahila Fast Track Court), Dindigul, rejecting the petition in so far as the P.W.2, is set aside and the petition to recall the witness P.W.2 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 1000 00070, IFSC Code: IOBA0001172) and on payment of



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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 one month from the date of receipt of copy of this order. Consequently, connected Miscellaneous Petition is closed.

09.01.2023

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

- 1.The Sessions Judge (Mahila Fast Track Court),
Dindigul.
- 2.The Inspector of Police,
Nilakkottai Police Station,
Dindigul 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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