



Crl.A.No.1062 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 29.10.2024

PRONOUNCED ON : 31.01.2025

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

CRL.A.No.1062 of 2024

Murugesan,

... Appellant / Accused

Vs.

State Represented by
The Inspector of Police,
Eriyur Police Station,
Dharmapuri District
(Crime No.161/2022)

... Respondent/Complainant

PRAYER: Criminal Appeal filed under Section 374 Cr.P.C. / 415 BNSS, to allow the appeal and acquit the appellant who has been convicted by the Special Court to deal with cases related to POCSO Act at Dharmapuri in Spl.S.C.No.254 of 2023 (old Spl.S.C.No.21/2023 of Fast Track Mahila Court at Dharmapuri), by the Judgment dated 05.03.2024 for a period of 20 years and to pay a fine of Rs.25,000/- in default to undergo one year simple imprisonment and set aside the same.

For Appellant : Mr.S.Shanmugavelayutham
Senior Counsel
For M/s.S.Thankira

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



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JUDGMENT

The petitioner/accused in Spl.S.C.No.254 of 2023 [Old Spl.S.C.No.21 of 2023 on the file of Fast Track Mahila Court at Dharmapuri] was convicted by the learned Sessions Judge, Special Court to deal with cases related to POCSO Act, Dharmapuri, by judgment dated 05.03.2024 and sentenced to undergo 20 years Rigorous Imprisonment and to pay a fine of Rs.25,000/-, in default, to undergo one year Simple Imprisonment, for the offence under Sections 5(m), 5(n) r/w. 6(1) of Protection of Children from Sexual Offences Act [POCSO Act]. Against which, the present appeal.

2. Mr.S.Shanmugavelayutham, the learned senior counsel appearing for the Appellant submitted that the victim was examined as P.W.2 in this case, Ex.P3/statement given to the Police and Ex.P4/164 statement marked through her. These two documents along with her evidence before the Court would not go together, but this has to be brought on record by way of cross examination. In this case, P.W.2 and some more witnesses not cross examined. Therefore, the petitioner filed a petition under Section 311 Cr.P.C. in Crl.M.P.No.1179 of 2023 to recall P.W.1 to P.W.4 and the Trial Court, by order dated 18.08.2023, permitted to recall



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P.W.1, P.W.3 and P.W.4, but disallowed as regards P.W.2/victim. Thereafter, the petitioner filed Crl.M.P.No.263 of 2023 to recall P.W.12/Dr.Kanimozhi and the same was allowed by order dated 04.12.2023. Again, the petitioner filed a petition in Crl.M.P.No.357 of 2023 to recall P.W.20/Dr.Prabha, which was also allowed by the Trial Court by order dated 06.01.2024. He would submit that restriction under Section 33(5) of POCSO Act is that it has to be ensured that the child is not called repeatedly to testify in the Court. Repeatedly means again and again or frequently and testifying is by way of solemn declaration of oath to give evidence as witness. Hence, without recalling and subject to cross examination, the evidence cannot be testified in view of gross variance in the evidence of P.W.2 to her earlier statements. In support of his contention, the learned senior counsel relied upon the decision of this Court in the case of **M.Kannan vs. State** reported in **2018 Crl.L.J. 116**, wherein in an identical situation, this Court set aside the conviction and remanded back the case to trial to the limited extent of denial of cross examination.

3. The learned Senior Counsel further submitted that the trial Court convicted the petitioner in Spl.S.C.No.254 of 2023, on 05.03.2024. During the trial P.W.1 to P.W.20 examined. Ex.P1 to



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P22 marked. The trial Court in its Judgment recorded that the occurrence taken place on 04.12.2022 and on that day, the Victim / P.W.2 is aged below 18 years. Admittedly, in this case, the victim girl / P.W.2 was not cross-examined. Some more witnesses also not cross-examined. The trial Court permitted to recall and cross-examination of other witnesses, except P.W.2, who is the victim, citing Section 33(5) of the POCSO Act that the child/victim not to be called repeatedly to testify in the Court. The petitioner not cross-examined P.W.1 to P.W.4. Hence, the appellant herein filed a Petition under Section 311 Cr.P.C., in Crl.M.P.No.1179/2023 to recall P.W.1 to P.W.4. The trial Court, by order dated 18.08.2023, permitted the petitioner to recall P.W.1, P.W.3 and P.W.4 but disallowed as regards P.W.2/victim citing Section 33(5) of the POCSO Act. He further submitted that in the entire Judgment, the evidence of P.W.1/Mother of the Victim is being discussed in detail. The trial Court failed to see that the evidence of P.W.2 / Victim is contrary to her 164(5) Statement / (Ex.P4) and her statement before the trial Court and 161 statement recorded by the Police, which is recorded as Ex.P3. There is total contradictions / variations in these three statements.



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4. It is further submitted that in this case, the trial Court conveniently refers to the evidence of P.W.1 / Mother of the Victim and takes credence that her statement is corroborated by the evidence of the Victim/P.W.2 failed to look into the fact that the victim herself has given three different versions at different stage. The trial Court failed to consider that P.W.12 / Doctor, who examined the Victim in her Medical Examination Reports / Ex.P12 and 13 recorded that, as per the history given it is suggestive of sexual assault and the Doctor categorically stated that the sexual contact may or may not have occurred. It is also to be seen that there have been no injuries that is Redness, Tenderness, Ecchymosis wounds and everything is found to be normal. The only marked sign of injury found is left Axilla Aberration seen 4 x 1 cm – red colour. This on the left armpit and nothing more.

5. The learned Senior Counsel referring to the Judgment of the lower Court submitted that the evidence of the victim is highly exaggerated considering in the background that there have been no good relationship between the appellant and the victim's parents, since victim's father / P.W.3 was not taking care of his father and he used to complain to the appellant, the paternal



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grandfather of victim was staying in appellant's house and took food. The appellant questioned P.W.3 about the same and there was no cordiality. Hence, there was a motive to implicate the appellant. Further, P.W.1 / Mother had given a version as though there was injury on the Lips and she questioned the same and thereafter, the victim is said to have narrated the sexual assault committed on her by the appellant. The victim was taken on 05.12.2022, the next day at about 11.30 a.m., to P.W.9/Nurse, and she advised P.W.1 & P.W.3, parents of the victim, to take P.W.2/victim to Government Hospital at Pennakaram. P.W.9 does not state about the injury in the Lips. P.W.11 is the Causality Doctor, who first examined the victim through P.W.12 / Doctor, treated the Victim, both in their evidence and medical records recorded that penetrative sexual assault might not be there. But, P.W.1, on her own gives a version that penetrative sexual assault committed on P.W.2/Victim. The trial Court goes around P.W.1's evidence and takes credence from un-testified version of P.W.2 and convicts the appellant for a major offence for 20 years.

6. The learned Senior Counsel filed a typed set referring to the various Judgments of the Apex Court as well as this Court and submitted that as per the Law Lexicon, the word, 'Testify' means



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making a solemn declaration on oath or affirmation for the purpose of establishing or making proof of some fact. As per Black's Law Dictionary, the word, "Testify" means, to give evidence as a witness; and as per Oxford Dictionary, the word, "Testify" means, again and again, frequently. In this case, admittedly, P.W.2/Victim called once for examination-in-chief on 01.06.2022 on one occasion. On that day, accused was produced from the prison, the Advocate for the accused not available and when the accused was questioned for cross-examination, he submitted that his Advocate only to cross-examine the witnesses. He further submitted that on 01.06.2022 it was not only P.W.2, other 3 witnesses, P.W.1/mother, P.W.3/father and P.W.4/maternal grand mother of the victim were examined. P.W.1 to P.W.4 chief examination was recorded since the advocate for the accused was not present, the cross-examination of all the four witnesses could not be done. When 311 Cr.P.C., petition filed by the Appellant was allowed to recall, all witnesses examined 01.06.2012, except P.W.2, when there was justification to recall P.W.1, P.W.3 and P.W.4, the same is applicable to P.W.2, but on the other hand, the trial Court denied the cross-examination of P.W.2, concluded the trial and convicted the appellant. The learned Senior Counsel further referred to the Judgment of the Delhi High Court in the case **of Vinod Rawat Vs. State** made in



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Crl.M.C.4584/2022 & Crl.M.As.18614/2022 & 18615/2022,

dated 20.09.2022, wherein held that Section 33(5) of POCSO Act cannot be read alone, as a balance of rights under Section 33(5) and Section 311 CrI.P.C., needs to be maintained and recalled the victim for further cross-examination, which the trial Court had earlier refused to the accused in that case.

7. Further, the learned Senior Counsel relied on the Judgments of the Apex Court in ***Kartar Singh Vs. State of Punjab*** reported in ***(1994) SCC 569***; in ***Menaka Gandhi Vs. Union of India*** reported in ***1978 SC 597***; in ***M.H.Hoskot Vs. State of Maharashtra*** reported in ***(1978) 3 SCC 544***; in ***Hussainnara Khatoon Vs. Home Secretary*** reported in ***(1980) 1 SCC 98***; in ***Zahira Habibullah Sheikh Vs. State of Gujarat*** reported in ***(2006) 3 SCC 374***; in ***Jayendra Vishnu Thakur Vs. State of Maharashtra*** reported in ***(2009) 7 SCC 729***; in ***Mohammed Hussain Alias Zulfikar Vs. State of Delhi*** reported in ***(2012) 2 SCC 584***.

8. The sum and substance is that no accused to be punished without giving an opportunity and Section 311 is wide enough to recall the witness in the interest of justice. Further, in the absence



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of the counsel for whatever reason, the case should not be decided forthwith. The right of cross-examination is the right of accused in criminal case to confront the witness against him not only on facts but also to discredit the witness by showing that his testimony in chief was untrue and biased. The accused, who are charged with serious offence must not be stripped of his valuable right of a fair and impartial trial. A Division Bench of this Court in ***Kannan Vs. State*** reported in ***2018 CrI. L.J.116***, held that the Court shall carefully strike balance between fair trial to the accused as well as the victim. The right of the accused to cross-examine the victim and the right of the victim to privacy should be measured meticulously and without causing any harm to any of these rights, the Court should draw the line. In that case, this Court held that there have been denial of fair trial to the appellant hence, the conviction and sentence was set aside and the matter was remanded back to trial Court to afford sufficient opportunity and therefore, the same relief can be extended to the appellant and the entire process can be completed within a stipulated period.

9. Mr.R.Vinothraja, the learned Government Advocate (crl.side) for the State filed counter and submitted that based on the complaint of the defacto complainant / mother of the victim,



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the case in Crime No.20/2022 was registered. The victim was examined, her statement recorded and thereafter, the victim examined in the presence of Victim's mother / defacto complainant, thereafter, the victim produced before the Magistrate and 164 statement recorded. In her statement she clearly deposed about the penetrative sexual assault committed by the petitioner and thereafter, the other witnesses namely, Victim's father, grandmother all examined. There is a delay in lodging a complaint. The mental trauma and reaction of each parents differs, hence took some time for P.W.1 and P.W.3, the parents of the victim, to reconcile to the shock and thereafter they approached P.W.9/Nurse, who advised them to go to the Government Hospital. Thereafter, they gone to the Hospital, latter came back, lodged the complaint, and on receipt of the complaint immediately the police swung into action, examined the witnesses, collected the materials, medical records from the Doctors and on conclusion of investigation charge sheet filed. During trial, P.W.1 to P.W.20 were examined and Exs.P1 to P22 were marked.

10. The learned Government Advocate submitted that the petitioner filed a recall petition to recall P.W.2/victim girl along with P.W.1, P.W.3 and P.W.4. He would submit that denial of cross



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examination of P.W.2 was known to the petitioner as early as on 18.08.2023, thereafter the petitioner filed other two petitions to recall P.W.12 and P.W.20 on 04.12.2023 and 06.01.2024, but the petitioner had not taken any steps to approach higher Court to recall P.W.2/victim girl and now after the judgment was rendered on 05.03.2024, such a plea is taken. He further submitted that as per Section 33(5) of POCSO Act, there is a specific restriction to call the victim repeatedly and the Trial Court is duty bound to ensure that the child is not repeatedly called and harassed. He would further submit that Ex.P3, Ex.P4 and the evidence of P.W.2 are not in much variance, the substance of the evidence is clear that the petitioner had committed penetrative sexual assault.

11. The learned Government Advocate further submitted that the trial Court given sufficient opportunity to the appellant to cross-examine all the witnesses in detail. P.W.2/victim girl was present along with her Parents/P.W.1 and P.W.3 for chief examination on 01.06.2023. On that day, for the absence of the advocate for the appellant, P.W.1 to P.W.4 not cross-examined and only chief examination was recorded. Thereafter, the appellant filed recall petition under Section 311 Cr.P.C., and the trial Court allowed recall of P.W.1, P.W.3 and P.W.4, except the Victim /



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P.W.2, since there is a bar under Section 33(5) wherein the victim not to be called repeatedly to testify. The trial Court on the evidence of victim's parents, victim, medical records, rightly convicted the appellant. Hence, he strongly opposed the plea of the appellant and prayed for dismissal of the Appeal.

12. I have heard the learned counsels appearing on either side and perused the materials available on record.

13. On perusal of the materials it is seen that except for P.W.2 / victim all other other witness have been cross-examined. In fact, on 01.06.2023, P.W.1 to P.W.4 were examined in chief. On that day, the accused was produced from the Jail. The counsel for the accused was not present. For that reason, P.W.1 to P.W.4 could not cross-examined, which is recorded in the evidence sheet. Thereafter, 311 Cr.P.C., Petition in Crl.M.P.No.1179 of 2023 filed to recall of P.W.1 to P.W.4. The trial Court, by order dated 18.08.2022 permitted to recall P.W.1, P.W.3 and P.W.4 and disallowed as regards P.W.2. The justification and reason assigned to recall P.W.1, P.W.3 and P.W.4 is also available to recall P.W.2. But the trial Court for the reason that there is a bar under Section 33(5) that the victim not to be called repeatedly had dismissed the



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petition. Ex.P3 and Ex.P4 the statements recorded by the Police and 164 Cr.P.C., statement, of the victim and the evidence recorded in chief of the victim / P.W.2 all perused. It is seen that in each statement there are some improvements and variations. The trial Court while convicting the appellant dealt in detail the evidence of P.W.1/mother of the victim and takes corroboration and credence referring to the evidence of P.W.2/victim, Ex.P3 & P4 whose evidence and credibility not tested by way of cross-examination.

14. The Full Bench of the Apex Court in ***Kartar Singh's case*** (cited supra) had detailed the importance, purpose and reason for cross-examination. The relevant paragraph 278, is extracted hereunder:-

“278. Section 137 of the Evidence Act defines what cross- examination means and Sections 139 and 145 speak of the mode of cross-examination with reference to the documents as well as oral evidence. It is the jurisprudence of law that cross-examination is an acid-test of the truthfulness of the statement made by a witness on oath in examination-in-chief, the objects of which are :



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1. to destroy or weaken the evidentiary value of the witness of his adversary;
2. to elicit facts in favour of the cross-examining lawyer's client from the mouth of the witness of the adversary party;
3. to show that the witness is unworthy of belief by impeaching the credit of the said witness;

and the questions to be addressed in the course of cross- examination are to test his veracity; to discover who he is and what is his position in life; and to shake his credit by injuring his character.”

15. The Delhi High Court in ***Vinod Rawat's case*** considered a similar situation. In the said case, formal questions have been put and thereafter, detailed cross-examination not conducted and held that there cannot be a total ban in denying recall of the victim citing Section 33(5) of the POCSO Act and it has to be interpreted keeping in mind the facts of each case. The Division Bench of this Court in the case of ***Kannan Vs. State*** (cited supra) in similar circumstances, referring to various Judgments of the Apex Court held that the failure of the counsel for the accused not appearing and cross-examining the witness on the assigned date and for that reason, the accused cannot be penalized. Further the Judgments of



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the Apex Court confirm, cross-examination is an essential ingredient of reasonable, fair and just procedure to an accused, who is to seek his liberation through the Court's process further holds effective legal assistance to be provided to the accused and hold if there is denial, it amounts to denial of fair trial to the appellant / accused and the conviction and sentence cannot be allowed to sustain and the matter needs to be remanded back to the trial Court so as to afford sufficient opportunity to the accused to cross-examine the witness and to examine the witness in defence. The Division Bench of this Court in ***Kannan's case***, in paragraph 36, held as follows:-

“36. The court shall carefully strike a balance between the fair trial to the accused as well as the victim. In other words, the right of the accused to cross examine the victim and the right of the victim to privacy should be measured meticulously and without causing any harm to any of these rights, the court should draw the line. When we do the said exercise, we are convinced that the right of the accused for fair trial which, in the instant case, has been denied on account of the gross dereliction of professional duty by the learned counsel needs to be provided once again, however with sufficient safeguard to the



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victim's privacy. Thus, we are inclined to remand the case back to the trial Court to allow the accused to cross examine the witnesses on the same day and to examine witnesses in defence and with a further direction to the trial Court to dispose of the case within three months. While the victim/child is under examination, the trial Court shall scrupulously follow the provisions of the POCSO Act.”

16. In view of the above settled position, the Criminal Appeal is allowed setting aside the conviction and sentence passed by the learned Sessions Judge, Special Court to deal with cases related to POCSO Act, Dharmapuri, in Spl.S.C.No.254 of 2023 (Old Spl.S.C.No.21 of 2023 on the file of Fast Track Mahila Court at Dharmapuri) dated 05.03.2024 and the case is remanded back to the trial Court with a direction to the trial Court to allow the accused to cross-examine P.W.2, on the same day and to examine witness in defence, if any, and to dispose of the case within a period of three months, thereafter. Consequently, connected miscellaneous petition is closed.

31.01.2025

Index: Yes/No
Internet: Yes/No
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To

1. The Sessions Judge,
Fast Track Mahila Court
Dharmapuri.
- 2.The Inspector of Police,
Eriyur Police Station,
Dharmapuri District
- 3.The Public Prosecutor,
High Court, Madras.

Note: Issue Order Copy on 03.02.2025.



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M.NIRMAL KUMAR, J.

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Pre-delivery judgment made in

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