



Crl.O.P(MD) No.5626 of 2025

WEB COPY **BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

DATED : 17.04.2025

CORAM

THE HONOURABLE MR.JUSTICE P.DHANABAL

Crl.O.P(MD) No.5626 of 2025
and Crl.M.P(MD) No.4091 of 2025

Jeyabal @ Senthivel

... Petitioner

Vs

1. The State of Tamilnadu,
Rep by the Inspector of Police,
Nayinarkovil Police Station,
Paramakudi, Ramanathapuram District.
Crime No.209 of 2022.

2. Subramaniyan

... Respondents

Prayer : Criminal Original petition has been filed under Section 528 of BNSS to call for the records related to the impugned order in Crl.M.P.No.3047 of 2024 in Spl.S.C.No.11 of 2023 dated 10.02.2025 on the file of the learned Sessions Judge (Fast Track Mahila Court) Ramanathapruam District and Set aside the same.

For Petitioner : Mr.R.Babu Jaganath

For Respondents : Mr.M.Sakthi Kumar (R1)
Government Advocate (Crl.Side)



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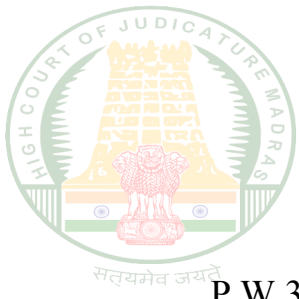
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ORDER

The present Criminal Original petition has been filed to set aside the impugned order in Crl.M.P.No.3047 of 2024 in Spl.S.C.No.11 of 2023 dated 10.02.2025 passed by the learned Sessions Judge (Fast Track Mahila Court) Ramanathapuram District.

2.The learned counsel appearing for the petitioner would submit that the petitioner is arrayed as A2 and A2 in Spl.S.C.No.11 of 2023. In this case, totally 23 witnesses were listed, out of which, 10 witnesses were examined in chief and so far, cross examination is not done except PW3. Therefore, the petitioner has filed a petition to recall the witness of P.W.1, P.W.3 to P.W.5, P.W.8 to P.W.10 for cross examination and the same was partly allowed by the trial Court to the effect of recalling P.W.3, P.W.8 to P.W.10 alone on payment of cost. Challenging the same, this petition has been filed.

3.The learned Government Advocate (Crl.Side) appearing for the respondent police would submit that considering the nature of offence, the trial Court has allowed the petitioner to recall the witnesses



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P.W.3, P.W.8 to P.W.10. The trial Court rightly dismissed the petition on the ground of Section 33(5) of POCSO Act. There is no infirmity in the order passed by the trial Court.

4.Heard the learned counsel on either side and perused the records available on record.

5.In this case, the petitioner is accused in Spl.SC.No.11 of 2023 on the file of Sessions Judge (Fast Track Mahila Court) Ramanathapruam District. During the trial proceedings witnesses were examined in chief, but not cross examined, thereby the petitioner filed petition to recall the witnesses but the trial Court partly allowed the petition and dismissed the petition in respect of victims. It is true as per Section 33(5) of POCSO Act, the Special Court shall ensure that the victim is not called repeatedly to testify before the Court. At the same time the fair trial also to be taken into account and reasonable opportunity to be given for cross examination of the witnesses.



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6.At this juncture, the learned counsel for the petitioner relied on the decision of this Court in Crl.O.P.No.4131 of 2022, dated 07.03.2022, wherein, in paragraph No.8 it is held that

“8. Though the present petition has been filed to recall the PW1 to PW12, the petitioner now restricts his claim in respect of recalling PW2, PW7 and PW8 alone. PW2 is the victim, PW7 and PW8 are the Doctors. It is admitted that as on today, PW2 is aged about 21 years. It is useful to refer Paragraphs 5 to 9 of the Judgment of the Orissa High Court in Crl.Rev.No. 490 of 2021 dated 04.03.2022, which is extracted hereunder:-

"5. Secion 311 of the Code provides:

"Power to summon material witness, or examine person present. Any Court may, at any stage of any enquiry, trial or other proceeding under this Code, summon any person as a witness, or examine nay person in attendance, though not summoned as a witness, or recall and reexamine any person already examined; and the Court shall summon and examine or recall and reexamine any such person if his evidence appears to it to b 6 "Procedure and powers of Special Court: (5) The Special Court shall ensure that the child is not called repeatedly to testify in the Court."



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6. It is also contended that the intention behind enacting Section 33(5) of the POCSO is only to ensure that in a genuine case the child victim is not harassed, but cannot be used as a shield by the trial Court to deprive the accused of a right of proper cross examination and therefore a right of fair trial. 7. It is mandatory for a Court to recall witness for further cross-examination if his evidence appears to be essential for just decision of the case. There is no bar for a Court to recall a witness for further cross examination. In *Godrej Pacific Tech. Ltd. Vs Computer Joint India Ltd*, which has rightly by referring to Section 311 of the Code, the Hon'ble Apex Court has held: "The section is manifestly in two parts. Whereas the word used in the first part is "may", the second part uses "shall". In consequence, the first part gives purely discretionary authority to a criminal court and enables it at any stage of an enquiry, trial or proceeding under the Code (a) to summon anyone as a witness, or (b) to examine any person present in the court, or (c) to recall and reexamine any person whose evidence has already been recorded. On the other hand, the second part is mandatory and compels the court to take any of the aforementioned steps if the new evidence appears to it essential to the just decision of the case. This is a



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supplementary provision enabling, and in certain circumstances imposing on the court the duty of examining a material witness who would not be otherwise brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the court should be exercised, or with regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts." 8. In Vimal Khanna Vs State the Court has held that denial of opportunity to cross examine the witnesses violates the Constitutional guarantee to an accused and vitiates the trial. Vimal Khanna (Supra) has been followed in Mohd. Gulzar Vs The State (GNCTD), wherein after recording that the counsel for the accused was not present on three consecutive dates to cross examine the witness, the Court held that since the right of cross



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examination is a valuable right, the child's right under Section 33(5) of the POCSO Act has to be balanced with the aforesaid rights of the accused and thus permitted one more opportunity to the accused to cross examine the alleged victim. In B.C.Deva @ Dyava Vs State of Karnataka, the Court was clearly of the view that the power to recall a witness at the instance of either party to ensure justice is done is greater than the provisions set out in Section 33 POCSO Act. The provisions of Section 33 laid down a general principle which must guide the trial Court and is similar to Section 309 Cr.P.C, being in the nature of laws to ensure speedy trial. However, by virtue of Sections 4 and 5 of Cr.P.C, Section 311 Cr.P.C shall prevail as no specific procedure is provided under POCSO Act for recall of a witness. Section 42A of POCSO Act clarifies that the Act is not in derogation of any other law. 9. In that view of the aforesaid, this Court is of the view that cross-examination of the prosecution witnesses being an essential right of the accused, it is evident that non-cross examination of the said witnesses will put the petitioner to prejudice. In such circumstances, it is not unjust to afford an opportunity to the petitioner to cross-examine PWs.1 to 3 by recalling them."



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7.On careful perusal of the said Judgments, it is clear that in appropriate cases, child witness can be recalled for the purpose of cross examination and to ensure fair trial. In view of the aforesaid decision, this Court is inclined to allow this petition.

8.In the result, this Criminal Original Petition is allowed and the impugned order in Crl.M.P.No.3047 of 2024 in Spl.S.C.No.11 of 2023 dated 10.02.2025 passed by the learned Sessions Judge (Fast Track Mahila Court) Ramanathapruam District is set aside as against the order passed in respect of PW1, P.W.4 and P.W.5. The petitioner is directed to deposit a sum of Rs.1,000/- (Rupees One Thousand only) each towards cost to the witnesses/P.W.1, P.W.4 and P.W.5, to be deposited before the trial Court. After such deposit being made, the trial Court is directed to issue summons to P.W.1, P.W.4 and P.W.5 by fixing the date for cross-examination by the petitioner/accused. The petitioner are directed to cross-examine the witnesses/P.W.1, P.W.4 and P.W.5 on the same day without getting further adjournment. The impugned order, dated 10.02.2025 remains unaltered as far as the other conditions.



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9.In view of the above terms, this petition is allowed.

Consequently, connected miscellaneous petition is closed.

17.04.2025

NCC : Yes / No
Index : Yes / No
Internet : Yes
PNM

To

1. The Sessions Judge (Fast Track Mahila Court),
Ramanathapuram District

2.The Inspector of Police,
Nayinarkovil Police Station,
Paramakudi, Ramanathapuram District.
Crime No.209 of 2022.

3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.



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P.DHANABAL, J.

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