

2022 LiveLaw (Mad) 116

IN THE HIGH COURT OF JUDICATURE AT MADRAS
CORAM THE HON'BLE MR.JUSTICE A.D.JAGADISH CHANDIRA
Crl.O.P.No.4131 of 2022 and Crl.M.P.No.2060 of 2022; 07.03.2022
S. Ganeshan Vs State Represented by the Inspector of Police

Protection of Children from Sexual Offences Act, 2012; Section 33 (5) - the bar against recalling a child (minor victim) is not applicable after such victim attains majority.

Summary: In this case, the victim is now aged about 21 years and she will not fall within the definition of "child" so as to Section 33(5) of the POCSO Act, 2012.

For Petitioner : Mr.G.Balamanikandan; For Respondent : Mr.A.Gokulakrishnan Additional Public Prosecutor

ORDER

This Court by order dated 22.02.2022, had dismissed this petition. However, before signing, this Court sought for some clarification with regard to the age of PW2 as of today. Thereby, this case stands posted today. This petition has been filed seeking to set aside the order passed by the Special Court for Exclusive Trial of Offences under POSCO Act in Crl.M.P.No.953 of 2021 in Spl.C.C.No.21 of 2019 dated 04.12.2021 dismissing the petition filed to recall PW1 to PW12.

2. Learned counsel for the petitioner would submit that the petitioner is an accused facing trial for the offence under Section 366 of IPC, Section 5(l) read with Section 6 of the POCSO Act, 2012 and under Section 9 of the Prohibition of Child Marriage Act 2006. There are 12 witnesses in this case and the petitioner had cross examined all the witnesses, excepting PW2/Victim and doctors viz., PW7 and PW8. The petitioner had changed the counsel now and since the earlier Advocate was not instructed properly, certain vital questions were left out to the witnesses, the petitioner had filed the present petition seeking to recall the witnesses, after the appointment of new counsel.

3. Learned counsel for the petitioner would further submit that the Trial Court relied on the decisions of the Hon'ble Supreme Court in **Vinod Kumar Vs State of Punjab reported in 2015 (3) SCC 220** and also in the case of **State NCT of Delhi Vs Shir Kumar Yadav reported in (2016) 2 SCC 402**, and had dismissed the petition holding that change of counsel cannot be a ground to recall the witnesses.

4. Learned counsel would further submit that the Trial Court while dismissing the petitioner, had further held that PW2/victim is a "Child" and that as per Section 33(5) of the POCSO Act, the child witness cannot be called repeatedly to testify in the Court. He would submit that on the date of occurrence, PW2/victim was a minor and as of now, she is 21 years old and the bar under Section 33(5) of the POCSO Act will not operate against the petitioner. The learned counsel would further reiterate that the petitioner is facing

serious charges under the Provisions of the POCSO Act and there is statutory presumption operating against the petitioner under Section 29 of the POCSO Act, 2012. The petitioner has not cross-examined PW2/victim so far and in the event of non cross-examination, it would amount a case of no defence resulting in grave prejudice to the petitioner. The evidence of PW2/victim, PW7 and PW8/Doctors are essential arriving at a just decision of the case. Failure to give an opportunity to cross-examine the witnesses would be a violation of the constitutional guarantee to the accused and it would be resulting in vitiating the trial. Learned counsel would further submit that though the petition has been filed to recall PW1 to PW12, the petitioner now restricts his claim to recall the witnesses PW2, PW7 and PW8 only.

5. Learned counsel would further undertake that the petitioner is prepared to pay necessary cost for appearance of the witnesses and that the petitioner undertakes to cross-examine the witnesses on the same day of their appearance before the Court. In support of his contention, the learned counsel relied on the recent Judgment of the Hon'ble Orissa High Court in Crl.Rev.No.490 of 2021 dated 04.03.2022. (In the case of **Pidika Sambaru Vs State of Odisha and Another**).

6. Mr.A.Gokulakrishnan, learned Additional Public Prosecutor would vehemently opposes stating that the Trial Court had rightly found that change of counsel cannot be a reason for recalling the witnesses and had rightly dismissed the same. The Trial Court had also relied on the Judgment of the Honb'le Apex Court in the case of **Vinod Kumar Vs State of Punjab** reported in **2015 (3) SCC 220**, and dismissed the application. However, he would fairly concede that the victim is aged about 21 years now.

7. Heard the learned counsel for the petitioner and the learned Additional Public Prosecutor and perused the materials available on record.

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 be essential to the just decision of the case."

On the other hand, Section 33(5) of the POCSO Act reads as under:

"Procedure and powers of Special Court:

(5) The Special Court shall ensure that the child is not called repeatedly to testify in the Court."

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 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 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."

9. In this case, the petitioner has been charged for the offences under Section 366 of IPC, Section 5(l) read with Section 6 of the POCSO Act and under Section 9 of the Prohibition of Child Marriage Act, 2006. Section 29 of the POCSO Act raises presumption against the accused. It is also useful to refer Section 29 of the POCSO Act, which reads as under:-

"29. Presumption as to certain offences: *Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3,5,7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved."*

This Clause provides for presumption as to certain offences. It provides that where a person is prosecuted for violating any of the provisions under Clauses 3,5,7 and 9 of the proposed legislation, and where the victim is a child below the age of sixteen years, the Special Court shall presume that such person has committed the offence, unless the contrary is proved (Notes on clauses)."

10. As per Section 29 of the POCSO Act, unless the contrary is proved, the Special Court shall presume that the accused has committed or abetted or attempted to commit the offence as the case may be, unless, the contrary is proved.

11. In view of the above, a heavy burden is caused on the petitioner to rebut the presumption which operates against him. As stated above, PW2, PW7 & PW8 are crucial witnesses. If the witnesses are not cross-examined, the evidence stands unrebutted and it would amount to a case of no defence resulting in grave prejudice to the petitioner. However, in this case, the victim is now aged about 21 years and she will not fall within the definition of "child" so as to Section 33(5) of the POCSO Act, 2012.

12. In view of the peculiar facts and circumstances of the instant case, this Court is of the opinion that, a chance should be given to the petitioner to recall PW2, PW7 and PW8 who have not been cross-examined so far. Therefore, the impugned order in respect of PW2, PW7 and PW8 stands set aside on condition that the petitioner shall deposit a sum of Rs.6,000/- before the Trial Court on the next hearing date and file an application to recall the witnesses PW2, PW7 and PW8. The Trial Judge shall recall and fix date for their appearance and on such date, the petitioner shall cross-examine the witnesses without any delay. If the petitioner fails to cross-examine the witnesses on the date of their appearance, the petitioner shall lose the chance of further cross-examining the witnesses. Each of the witnesses shall be paid Rs.2,000/- on the date of their appearance before the Trial Court. This Criminal Original Petition stands allowed with the above observations. Consequently, connected Criminal Miscellaneous Petition is closed.