

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.02.2016

CORAM :

THE HONOURABLE MS. JUSTICE R.MALA

Crl.O.P.No.1457 of 2016

and Crl.M.P.No.685 of 2016

Hariharan

.. Petitioner/Accused

Vs.

State rep. by
Inspector of Police
J-5 Shastri Nagar police station
Chennai.

.. Respondent

Prayer: Criminal Original Petition is filed under Section 482 of Cr.P.C., to call for records in Crl.M.P.No.15974 of 2015 and set aside the order passed by the trial Court by allowing the recall of P.W.2, P.W.3 and P.W.14 in S.C.No.202 of 2014 on the file of the learned Sessions Judge, Mahila Court, Chennai.

For Petitioner :Mr.V.Ramesh

For Respondent :Mr.C.Emalias
Addl. Public Prosecutor

सत्यमेव जयते
O R D E R

The petitioner has come forward with this petition for setting aside the order dated 31.12.2015 made in Crl.M.P.No.15974 of 2015 in S.C.No.202 of 2014 on the file of the Sessions Court, Mahila Court, Chennai, by allowing the recall of P.W.2, P.W.3 and P.W.14 for cross-examination.

2.The learned counsel for the petitioner/accused submitted that after the case was posted for questioning under Section 311 Cr.P.C., the petitioner has filed an application for recall P.W.1 to P.W.3, P.W.14 and the same was allowed. On that basis, P.W.1 to P.W.3, P.W.14 were present before the trial Court.

P.W.1 was partly cross-examined by the defence counsel and then he sought for adjournment to continue cross-examination of P.W.1, which was adjourned to 04.09.2015. He further submitted that on 04.09.2015, P.W.1 to P.W.3 were present. But the petitioner cross-examined P.W.1 alone and he is not ready to cross-examine P.W.2 and P.W.3, who are child witnesses. Hence, the trial Court has closed the evidence. So the petitioner has come forward with the application in Crl.M.P.No.15974 of 2015 for issuing a direction to the Mahila Court, Chennai, to give an opportunity to the petitioner to recall P.W.2 and P.W.3 for cross-examination and that he is also ready to submit the questionnaire as per the provisions under Section 33(2) of POCSO Act. But that application was dismissed. Therefore, he prays for setting aside the order passed by the trial Court and permitting him to cross-examine P.W.2, P.W.3 and P.W.14.

3. Resisting the same, learned Additional Public Prosecutor submits that chief-examination of P.W.2 and P.W.3, who are child witnesses, was completed, but they were not cross-examined. Hence, the petitioner/accused has filed an application for recall P.W.2 and P.W.3 and that application was allowed. On that basis, on 24.08.2015 and 04.09.2015, P.W.1 to P.W.3 were present. P.W.1 was cross-examined on 24.08.2015 and it was completed on 04.09.2015. But the petitioner was not ready to cross-examine P.W.2 and P.W.3 and that it was closed on 04.09.2015. Further, the petitioner has not furnished the questionnaire under Section 33(2) of POCSO Act, on the previous hearings (i.e.) on 24.08.2015 and 04.09.2015. Hence, the trial Court has closed the cross-examination of P.W.2 and P.W.3, against which, the petitioner has filed Crl.M.P.No.15974 of 2015 before the trial Court for recall P.W.2 and P.W.3 and the same was also dismissed. Therefore, he prays for dismissal of this petition.

4. At this juncture, learned counsel for the petitioner would submit that a fair opportunity must be given to the accused/petitioner to put forth his case.

5. Heard both sides and perused the materials available on record.

6. The petitioner is the accused for the offences punishable under Section 4 of Protection of Children from Sexual Offences Act, 2012 and Section 506(ii) IPC in Crime No.594 of 2014 and the same was taken on file in S.C.No.202 of 2014 on the file of the Sessions Court, Mahila Court, Chennai. The prosecution witnesses have already examined. On 06.08.2015, the application

under Section 311 Cr.P.C. for recall P.W.1 to P.W.3 and P.W.14 was filed by the petitioner and it was allowed. On 24.08.2015, P.W.1 to P.W.3 were present, P.W.1 was cross-examined in part. Subsequently, it was adjourned to 04.09.2015, on that date, PW.1 alone was cross-examined. But the defence counsel was not ready to cross-examine P.W.2 and P.W.3, so their evidence has been closed. Then the petitioner has filed an application in CrI.M.P.No.15974 of 2014 to recall P.W.2 and P.W.3 for cross-examination and that application was dismissed. Challenging the same, the present petition is filed by the accused/petitioner.

7.This Court by an order dated 02.02.2016, called for report from the Sessions Court, Mahila Court, Chennai and the same was received. On a perusal of the report reveals that P.W.2 and P.W.3 are sister and brother and they are aged about six and eight years respectively.

8.Admittedly, the petitioner has not cross-examined the child witnesses on the date of their examination. Once the petitioner has filed an application for recall P.W.1 to P.W.3, he ought to furnish the questionnaire, but he has not furnished the same. However, the trial Court has granted time on 24.08.2015 and 04.09.2015. But the petitioner has not taken steps to furnish the questionnaire and get along with the cross-examination. After it was closed, the petitioner has again filed the application for recall P.W.2 and P.W.3 on 21.09.2015 along with the questionnaire as per the provisions under Section 33(5) of POCSO Act, 2012.

9.Chapter VIII of POCSO Act deals with procedure and powers of Special Courts and recording of evidence. So it is appropriate to extract Section 33(2) to 33(6) of the POCSO Act, which run as follows:

“(2) The Special Public Prosecutor, or as the case may be, the counsel appearing for the accused shall, while recording the examination-in-chief, cross-examination or re-examination of the child, communicate the questions to be put to the child to the Special Court which shall in turn put those questions to the child.

(3) The Special Court may, if it considers necessary, permit frequent breaks for the child during the trial.

(4) The Special Court shall create a child-friendly atmosphere by allowing a family member, a guardian, a friend or a relative, in whom the child has trust or confidence, to be present in the Court.

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

(6) The Special Court shall not permit aggressive questioning or character assassination of the child and ensure that dignity of the child is maintained at all times during the trial."

10. In the case on hand, P.W.2 and P.W.3 were examined before the Court and their chief-examination was completed and subsequently, the application under Section 311 Cr.P.C. to recall P.W.2, P.W.3 and P.W.14 was filed by the accused and the same was allowed. They appeared before the Court on 24.08.2015 and 04.09.2015. But the petitioner/accused was not ready to cross-examine P.W.2 and P.W.3, who are school going children and he has also not furnished the questionnaire. So the trial Court has dismissed the application and in para-8, it was specifically held that as per the provision of POCSO Act, from the stage of investigation till the end of trial, protective measures are to be taken to ensure that the children are kept in a safe manner.

11. It is to be noted that if P.W.2 and P.W.3, the child witnesses, are repeatedly summoned to be appeared before the Court, certainly they would suffer mental agony. So the trial Court to protect the interest and welfare of the children/P.W.2 and P.W.3, has rightly dismissed the application and assigned reason in para-10 of its order. Under such circumstances, I do not find any merits in this petition to permit the petitioner/accused to recall P.W.2 and P.W.3 for cross-examination. Even though the petitioner/accused has given sufficient time to put forth his defence and P.W.2 and P.W.3, who are only six and eight years old brought to the Court for cross-examination several times, the petitioner/accused was not ready to cross-examine them and not even furnished the questionnaire. Therefore, the Criminal Original Petition stands dismissed in respect of recall P.W.2 and P.W.3 for cross-examination.

12.In respect of recall P.W.14 is concerned, this Criminal Original Petition is allowed. The petitioner is permitted to cross-examine P.W.14 and that P.W.14 is directed to appear before the trial Court as soon as he received summons. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

To

1.The Sessions Judge,
Mahila Court,
Chennai.

2.Inspector of Police
J-5 Shastri Nagar police station
Chennai.

3.The Public Prosecutor,
High Court,
Chennai.

Crl.O.P.No.1457 of 2016
and Crl.M.P.No.685 of 2016

ksj (CO)
srg (22/02/2016)

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