



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 17.11.2016

CORAM

THE HONOURABLE MR.JUSTICE K.KALYANASUNDARAM

Crl.O.P(MD)No.21818 of 2016

and

Crl.M.P.(MD).No.11233 of 2016

Roshan

.. Petitioner /sole accused

Vs.

State through,
The Inspector of Police,
All Women Police Station,
Golden Rock, Trichy City.
(Crime No.10 of 2016)

..Respondent / Complainant

PRAYER: Criminal Original Petition has been filed under Section 482 of Cr.P.C., praying to call for the records of the impugned order passed by the learned Sessions Judge, Mahila Court, Tiruchirappalli in Crl.M.P.No.270 of 2016, dated 07.11.2016 and set aside the same as illegal.

For Petitioner

:Mr.J.Selvam

For Respondent

:Mr.P.Kannithevan

Government Advocate(Crl. Side)

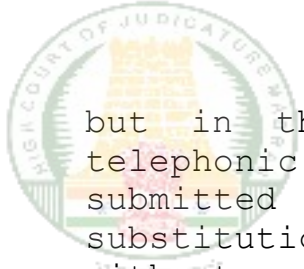
ORDER

This petition has been filed seeking to set aside the order passed by the learned Sessions Judge, Mahila Court, Tiruchirappalli in Crl.M.P.No.270 of 2016 in Spl.S.C.No.6 of 2016, dated 07.11.2016.

2. The petitioner is a sole accused facing the charge for the offences under Section 9(m) and 10 of POCSO Act. During the trial, the respondent filed petition seeking permission to examine one Velu, S/o.Sethu instead of LW.5, Iyyar, S/o.Palaniyandi.

3. The case of the prosecution is that LW5, Iyyar was working as an organiser in 'Child Help Line', a voluntary organisation and later the said Velu has joined in the place of the said Ayyar. Despite serious objection raised by the accused, the learned Sessions Judge, allowed the application filed by the respondent police. Aggrieved by the order, the present petition is filed.

4. Mr. J.Selvam, learned counsel for the petitioner would submit that as per the FIR, it is stated that the defacto complainant has preferred the written complaint before LW5, Iyyar,



but in the charge sheet, it is stated that he received a telephonic message from the defacto complainant. It is further submitted that as per Section 33 of the Indian Evidence Act, substitution is permitted only on limited circumstances and without satisfying the requirements another witness cannot be examined by the prosecution.

5. Heard the learned Government Advocate (Crl. Side) for respondent and perused the records.

6. It is seen that in the application filed by the prosecution, except stating that the said Velu knows the case details and he can be permitted to give evidence instead of the said Iyyar, LW5, nothing is stated about the other details satisfying in Section 33 of the Indian Evidence Act. For reference Section 33 is extracted is extracted hereunder;

" 33. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated.

Evidence given by a witness in a judicial proceeding or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:

Provided

That the proceeding was between the same parties or their representatives in interest;

That the adverse party in the first proceeding had the right and opportunity to cross-examine;

That the questions in issue were substantially the same in the first as in the second proceeding."

7. Since the prosecution has not made averments in the petition to satisfy the mandatory requirement, the order impugned in this case cannot be sustained. In such view of the matter, the impugned order passed by the learned Sessions Judge, Mahila Court, Tiruchirappalli in Crl.M.P.No.270 of 2016 in Spl.S.C.No.6 of 2016, dated 07.11.2016, is set aside. However, the prosecution is permitted to file a fresh petition giving details about the said Velu and Iyyar (LW5) to examine, as one of the witnesses in



8. Accordingly, this Criminal Original Petition is disposed of. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CSI)

WEB COPY/True Copy/

Sub Assistant Registrar

PJL

To

1. Sessions Judge,
Mahila Court,
Tiruchirappalli .

2. The Inspector of Police,
All Women Police Station,
Golden Rock, Trichy City.

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

+1cc to Mr.J.Selvam Advocate Sr.No. 70202

JAM/15.12.16/KM/ 3p-5c

Cr1.O.P(MD)No.21818 of 2016
17.11.2016