



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 24.03.2017

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THE HON'BLE MR.JUSTICE P.N.PRAKASH

CrI.O.P. (MD) No.41 of 2017

&

CrI.M.P. (MD) No.46 of 2017

Moideen Batcha

... Petitioner/Petitioner/Accused

-vs-

State through
The Inspector of Police,
All Women Police Station,
Madurai City.
(in Crime No.6 of 2015)

... Respondent/Respondent/Complainant

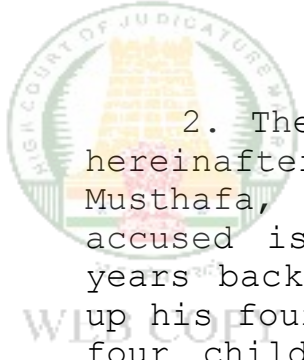
Prayer: Petition filed under Section 482 of Code of Criminal Procedure to call for the records relating to the order dated 07.10.2016 made in Cr.M.P.744 of 2016 in Special S.C.No.18 of 2015 on the file of the Learned Sessions Judge, Mahalir Neethimandram, Madurai against the petitioner and set aside the same as illegal.

For Petitioner : Mr.B.A.Muruganantham
For Respondent : Mr.A.P.Balasubramani
Govt. Advocate (CrI.Side)

Reserved on	Pronounced on
21.03.2017	24.03.2017

O R D E R

This petition has been filed to call for the records relating to the order dated 07.10.2016 made in Cr.M.P.744 of 2016 in Special S.C.No.18 of 2015 on the file of the learned Sessions Judge, Mahalir Neethimandram, Madurai against the petitioner and set aside the same as illegal.

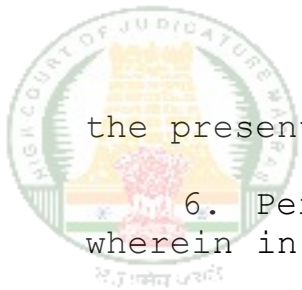


2. The victim in this case is a 13 year old girl, who would hereinafter be referred to as "X". The father of "X" is one Musthafa, who has an elder sister, by name Mymoon Beevi and the accused is her son. Musthafa's wife left him for good some 10 years back and since then, Musthafa has been struggling to bring up his four children, including "X". Apart from taking care of his four children, Musthafa would also pay money frequently to his elder sister Mymoon Beevi. Musthafa had engaged a maid by name Lakshmi to take care of household chores, which was not to the liking of Moideen Batcha / the accused herein. On 23.02.2015, the accused is said to have attacked Musthafa, in connection with which, on the complaint of Musthafa, a case in B-6, Jaihindpuram Police Station Crime No.220 of 2015 was registered and after completing the investigation, charge sheet has been filed in C.C.No.57 of 2015 before the learned Judicial Magistrate No.IV, Madurai for offences under Sections 448 and 324 IPC against Moideen Batcha and the same is pending.

3. In the meanwhile, the "X" brought to the notice of her father Musthafa that Moideen Batcha would frequently come to the house, when children were alone and would misbehave with "X" by putting his hand inside her top and fondling her breasts. When she resisted, he would abuse and threaten her. On coming to know of this, Musthafa lodged a complaint with All Women Police Station, Madurai, based on which, a case in Crime No.6 of 2015 was registered on 01.03.2015 against Moideen Batcha and after completing the investigation, the Police have filed a charge sheet in Spl.S.C.No.18 of 2015 before the Sessions Court, Mahalir Neethimandram, Madurai for offences under Sections 7 & 8 of POCSO Act, 2012. Charges were framed against Moideen Batcha. Trial commenced on 08.02.2016 with the examination of Musthafa as P.W.1. Moideen Batch did not cross examine Musthafa on that date, but cross examined only on 23.11.2016. "X" was examined in chief on 30.05.2016 and on that date, she was not cross examined by Moideen Batcha. Thereafter, Moideen Batcha filed a petition under Section 311 Cr.P.C. in Cr.M.P.744 of 2016, which was dismissed by the Trial Court on 07.10.2016, aggrieved by which, Moideen Batcha is before this Court.

4. Heard the learned counsel for the accused and the learned Government Advocate (Crl.Side) appearing for the State.

5. Learned counsel for the accused submitted that the accused had engaged another Lawyer earlier and he had changed the Lawyer and that is why, the "X" was not cross examined. He further submitted that the present case has been engineered by Musthafa, because Moideen Batcha questioned Musthafa's relationship with his maid Lakshmi. He also contended that he had deferred the cross examination of P.W.2, but the then Presiding Officer told him that he could file a petition under Section 311 Cr.P.C. By the time, he filed the said petition, the Presiding Officer was transferred and



the present Presiding Officer dismissed the petition.

6. Per contra, the respondent police have filed a counter, wherein in Paragraph No.4, it is stated as follows:

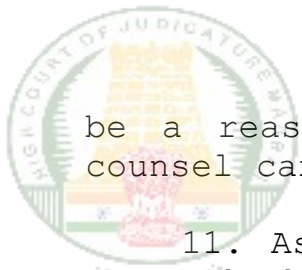
WEB COPY "4. I submit that after completion of the investigation, the charge sheet came to be filed on 30.03.2015 before the learned Sessions Judge (Mahila Court) Madurai and the same was taken on file on 08.06.2015. On the side of prosecution totally 10 witnesses were examined. The examination of the witnesses was commenced on 08.02.2016 from PW1. But the petitioner has not shown any interest even to cross examine PW1 and he preferred to cross examine PW1 on 23.11.2016. Further more, the victim child who was examined as PW2 and she was appearing regularly on the dates of 28.03.2016, 12.04.2016 and 10.05.2016 and 30.05.2016. Though the accused had opportunity to have fair trial by cross examining the PW2, but he did not prefer to cross examine the victim child. Since the petitioner has played so many types of tactics to drag on the proceedings. Likewise, when PW9 entered into witness box for giving chief examination, he did not prefer to cross examine the PW9 and now the case is posted for cross examining of Pw9 as well as Chief Examination of PW10 on 22.03.2017. From the attitude of the petitioner alone, this Hon'ble Court can infer his intention to drag on the proceedings."

7. Learned counsel for the accused submitted that the accused has cross examined other prosecution witnesses diligently.

8. This Court gave its anxious consideration to the rival submissions made on either side.

9. As regards the contention of the learned counsel for the accused that the accused had questioned Musthafa, on his relationship with the maid Lakshmi, this Court is of the view that the accused is raising this plea only as a counter blast to set up a defense in the present case. That apart, the accused is already facing a prosecution in C.C.No.57 of 2015 before the learned Judicial Magistrate No.IV, Madurai, which has nothing to do with the present case.

10. As regards the contention of the learned counsel for the accused that the counsel was changed in the Trial Court and therefore, the new counsel should be given an opportunity to cross examine "X", this Court is of the view that change of counsel cannot give any cause of action for recalling the witnesses. In Section 309 Cr.P.C., it is clearly stated that when witnesses are in attendance, no adjournment or postponement shall be granted and the counsel being engaged in another Court cannot



be a reason for adjournment. When that is the law, change of counsel cannot be a reason for recalling a prosecution witness.

11. As regards the contention of the learned counsel for the accused that the earlier Judge had advised him to file a recall petition, when he filed a defer petition, the records do not show any material in support of this contention. Judges are not there to advise counsel. Even deferring of cross examination of a victim girl is not permissible. In **State of Haryana vs. Ram Mehar and others**, reported in **2016 (8) Scale 192**, the Hon'ble Supreme Court has stated that just because, the accused is in jail and has changed his counsel, the prosecution witnesses need not be recalled under Section 311 Cr.P.C.

12. In this case, the allegations against the accused / petitioner herein is that he had misbehaved with a 13 year old girl and has traumatised her. Under Section 33(5) of POCSO Act, a victim girl cannot be asked to come again and again and narrate to the Court as to how she was sexually abused, as that would very deeply affect her psyche. Already the victim girl must be in trauma and hence, one cannot add salt to her injury by recalling her to explain her sufferings. Moreover, the counter affidavit filed by the State also shows that "X" came to the Court on several dates for the purpose of cross examination, but the accused did not cross examine her.

In the result, this petition is devoid of merits and the same is accordingly dismissed. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS-I)

/True Copy/

Sub Assistant Registrar

To:

1. The Sessions Judge,
Mahalir Neethimandram,
Madurai.
2. The Inspector of Police,
All Women Police Station,
Madurai City.



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

+1cc to Mr.B.A.Muruganantham, Advocate Sr.No.17579

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VB/KP/SAR4/11.04.2017/5P/5C

**PRE-DELIVERY ORDER IN
Crl.O.P. (MD) No.41 of 2017
24.03.2017**