

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.10.2018

CORAM :

THE HONOURABLE MR.JUSTICE P.N.PRAKASH

CRL.O.P.No.24801 of 2018

Kathir

...Petitioner

-Vs-

State Rep by
Inspector of Police,
W-26, All Women Police Station,
Chennai.

...Respondent

Criminal Original Petition filed under Section 482 Cr.P.C., praying to set aside the order passed by the Mahila Sessions Judge, Chennai in Crl.M.P.No.14909 of 2018 dated 14.09.2018 dismissing the recall petition of PW-1 for cross examination and imposing a cost of Rs.2,000/- each to PW-2 and PW-3 for recalling the witnesses for cross examination in S.C.No. 340 of 2017 pending on the file of Mahila Sessions Court, Chennai.

For Petitioner : Mr.P.R.Dinesh Kumar

For Respondent : Ms.M.Prabhavathi

Addl. Public Prosecutor

O R D E R

The petitioner is facing prosecution in S.C.No.340 of 2017 before the Mahila Sessions Court, Chennai for the offences under Section 11 of the Protection of Children from Sexual Offences Act (POCSO) read with Section 506 (ii) of IPC. The petitioner filed Crl.M.P.No.14909 of 2018 in S.C.No.340 of 2017 for recalling PW1 to PW3 for the purpose of cross examination. The Trial Court by an order dated 14.09.2018, has allowed the petition in part by ordering the recall of PW2 and PW3, on payment of cost of Rs.2,000/- each. Challenging the order of the Trial Court declining to recall PW1, the accused is before this Court.

2.Heard the learned counsel for the accused and Ms.M.Prabhavathi, learned Additional Public Prosecutor appearing for the respondent.

3.The learned counsel for the accused submitted that the accused had engaged a lawyer who did not cross examine PW1 and after the counsel was changed, the present petition under Section 311 Cr.P.C was filed for recalling P.W.1 and that one opportunity may be given to the accused to cross examine the victim.

4.Per contra, the learned Additional Public Prosecutor refuted the contentions.

5.This Court gave its anxious consideration to the rival submissions.

6.In the affidavit filed by the accused in CrI.M.P.No.14909 of 2018 under Section 311 Cr.P.C, the petitioner has merely stated that

"counsel could not able to cross examine the above said witness on the same day as LW-4, Tmt.Malliga also is going to depose similar facts as that of the other three witnesses stated above. Cross examining of PW-1 to PW-3 before the chief examination of PW-4 would give vital clues about the stand of the defence to PW-4 which would seriously prejudice the case of the petitioner".

7.The allegation against the petitioner is that he had sexually abused the victim girl X who was 5 years old. The victim girl X was examined in chief on 01.06.2018 and she was not cross examined by the accused on the same day though opportunity was given by the Court. The accused also did not file any petition before the Trial Court for deferring the cross of the victim girl.

8.The proviso to Section 309 Cr.P.C and Section 33 (5) of the POCSO Act reads as follows:

Proviso to Section 309 Cr.P.C:

"b.The fact that the pleader of a party is engaged in another Court, shall not be a ground for adjournment;"

Section 33(5) of the POSCO Act:

33.Procedure and powers of Special Court -

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

9.From a reading of the above provisions, it is clear that

even if the counsel is engaged in any other Court, it is not necessary for the Court to adjourn the hearing of the case. Just because the accused has changed the counsel, that cannot be a reason to recall a five year old girl and make her repeat the sexual abuse that she had undergone.

10. In Vinod Kumar Vs. the State of Punjab 2015 3 SCC 220, the Hon'ble Supreme Court has very clearly stated that the victim should be cross examined on the day they are examined in chief. In A.G Vs. Shiv Kumar Yadav and others (2015) 9 Scale 649, the Hon'ble Supreme Court has given guide lines for invoking the provisions under Section 311 Cr.P.C to recall witnesses. In such view of the matter, this Court does not find any infirmity in the order passed by the Trial Court.

11. The learned counsel for the petitioner submitted that the Trial Court has imposed a cost of Rs.2,000/- each for recalling PW2 and PW3 and that the accused is working as a Carpenter and does not have necessary means.

12. Accepting the submission, the cost component in the order dated 14.09.2018 in Crl.M.P.No.14909 of 2018 in S.C.No.340 of 2017 alone is reduced from Rs.2,000/- each to Rs.1,000/- each.

With the above modification alone, this petition stands dismissed.

s/d-
Assistant Registrar (CS VI)

True Copy

Sub-Assistant Registrar

kkn/gsa

To

1. The Judge

Mahila Sessions Court
Chennai.

2. The Inspector of Police,

The State of Tamil Nadu,
W-26, All Women Police Station,
Chennai.

3. The Public Prosecutor

High Court, Madras 104.

CRL.O.P.No.24801 of 2018

SP(02/11/2018)