

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.03.2021

CORAM

THE HONOURABLE MR. JUSTICE N. ANAND VENKATESH

Crl.O.P No.5799 of 2021
and Crl.M.P No.3769 of 2021

Mahimaidoss

Petitioner

vs.

The State rep. by
The Inspector of Police,
All Women Police Station,
Sethiyathope,
Cuddalore District.

Respondent

PRAYER: Criminal Original Petition filed under Section 482 of the Code of Criminal Procedure, to call for the records pertaining to the Crl.MP.No.183/2020 in Spl.S.C.No.81/2019 on the file of Special Judge (POCSO Court), Cuddalore and set aside the same.

For Petitioner : Mr.M.Selvam

For Respondent : Mr.M.Mohammed Riyaz

Additional Public Prosecutor

ORDER

This petition has been filed challenging the order passed by the Court below dismissing the application filed under Section 311 Cr.P.C. insofar as the PW-2 is concerned.

2.The petitioner is facing trial before the Court below for offences under Sections 7 and 8 of POCSO Act 2012. The Court below framed the charges on 12.09.2019 and PW-1 to PW-4 were examined-in-chief on 11.02.2020 since, they were not cross examined, their evidence was closed. The petitioner filed an application under Section 311 of Cr.P.C. on 18.02.2020 to recall PW-1 to PW-4 for cross examination. The reason assigned by the petitioner for not examining PW-1 to PW-4 on the date of their appearance was that the mother of the counsel who was appearing for the petitioner was indisposed. The Court below on considering the facts and circumstances of the case, allowed the application insofar as PW-1, PW-3 and PW-4 are concerned on

payment of cost of Rs.1000 to each of these witnesses. The Court below dismissed the application insofar as PW2, victim girl is concerned by placing reliance upon the Section 33(5) of POCSO Act. Aggrieved by the same, the present petition has been filed before this Court.

3.Heard the learned counsel for the petitioner and the learned Additional Public Prosecutor appearing on behalf of the respondent.

4.In the considered view of this Court, the petitioner is facing serious charges before the Court below and the petitioner has not committed any undue delay in filing the application to recall the witnesses. The Court below was not able to take the application immediately due to pandemic situation and the application itself came to be disposed of only on 19.11.2020. It is true that the minor victim girl should not be made to recall the incident repeatedly and that is the purport behind Section 33(5) of POCSO Act. However, this provision is more in the nature of a caution to the trial Court not to entertain frivolous petitions to recall the victim girl and make her undergo the agony of explaining the alleged incident. However, this provision cannot be taken to be a complete bar to recall the victim girl and it is always permissible for the trial Court to exercise its discretion considering the facts and circumstances of the case. While exercising the discretion, the threshold will be very high since, the Court will be considering the application for recalling the victim girl who may have to undergo the agony of recalling the incident.

5.Taking into consideration the facts and circumstances of the case and also of the fact that the counsel for the petitioner was not able to cross examine the witness due to his personal inconvenience and since, the Court below has thought it fit to recall other witnesses for cross examination, this Court is inclined to give one last opportunity to the petitioner to recall PW-2 for cross examination.

6.In view of the above discussion, the order passed by the Court below in Crl.M.P.No.183 of 2020 dated 19.11.2020 is hereby set aside insofar as dismissing the application for PW-2. The petitioner is directed to deposit a cost of Rs.10,000/- before the Court Below on or before 07.04.2021. A memo shall be filed before the Court below on 08.04.2021 informing the compliance of the condition imposed by this Court. The Court below shall thereafter fix a date for the appearance of PW-2 and the petitioner shall cross examine PW-2 on the same day of her appearance and the cross examination shall also be completed on the same day. The Court below shall ensure that the victim girl is not made to wait for a very long time and the case is called

immediately after the victim girl comes to the Court. If for any reasons, the petitioner fails to cross examine PW-2 on the date of her appearance, the petitioner will forfeit his right to recall PW-2 in future and the order passed by the Court below dismissing the application for PW-2 will stand revived. It is also made clear that the petitioner will cross examine all the other prosecution witnesses on the same day, they are examined in-chief.

7.This criminal original petition is allowed and the Court below is directed to complete the proceedings in Spl.S.C.No.81 of 2019, within a period of three months from the date of receipt of copy of this order. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

ssr
To

1. The Special Judge (POCSO Court), Cuddalore.
2. The Inspector of Police,
All Women Police Station,
Sethiyathope,
Cuddalore District.
3. The Public Prosecutor,
High Court, Madras.

+1 cc to M/s.M.Selvam, Advocate Sr.No. 19459

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SSI(CO)
RMP(29/03/2021)