



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.10.2021

CORAM:

THE HON'BLE MR.JUSTICE M.NIRMAL KUMAR

CRL.O.P.No.17894 of 2021

P.Viswapandian

....Petitioner/Accused

Vs.

State by:

The Inspector of Police
W-8, All Women Police Station
Thirumangalam, Anna Nagar
Chennai.

... Respondent/Complainant

PRAYER: Criminal Original Petition filed under Section 482 of the Code of Criminal Procedure, to set aside the order dated 29.01.2019 in Crl.M.P.No.675 of 2019 in S.C.No.406 of 2018 passed by the Sessions Judge, Mahila Court, Chennai, consequently direct the Court to recall PW1, Hariharan and permit the petitioner to cross-examine PW1 and render justice.

For Petitioner : Mr.S.Suresh

For Respondent : Mr.A.Damodaran
Additional Public Prosecutor

ORDER

This petition has been filed to set aside the order dated 29.01.2019 in Crl.M.P.No.675 of 2019 in S.C.No.406 of 2018 passed by the Sessions Judge, Mahila Court, Chennai, consequently direct the Court to recall PW1, Hariharan and permit the petitioner to cross-examine PW1.

2. The petitioner/accused, who is facing trial for the offence under Sections 5 (m), 5(n), 6, 9(m), 9(n) and 10 of the Protection of Child from Sexual Offences Act, 2012 in SC.No.406 of 2018, had filed recall petition to recall PW1/victim boy in Crl.M.P.No.675 of 2019 and the same was dismissed on 29.01.2019,



as against which, the present petition.

3. The contention of the petitioner is that the alleged occurrence is said to have taken place to the victim boy, who is none other than his own son and at that time, he was aged about three years and few months old. The petitioner as well as the estranged wife both are Software Engineers. There is a matrimonial dispute between them and they are living separately. Taking advantage of this, the estranged wife tutored the boy and thereafter, lodged a complaint against him. The petitioner further submitted that on the day of examination of PW1, i.e., on 17.12.2018, he filed a petition under Section 317 of Cr.P.C., to condone his absence. Though his counsel was standing in the corridor, the chief examination had been taken place in-camera proceeding without their presence. Thereafter, the learned counsel for the petitioner made objections and called for the video and audio recording, but it was denied. The petitioner was not aware of the same and hence, he could not cross examine the witness. Subsequently, the family members from the petitioner as well as the estranged wife/PW2, the mother of the victim, had tried to resolve the issue and several grounds were satisfied. However, the same could not be proceeded further when the dispute arose about the custody of the child. The petitioner has now got no other remedy other than to conduct the case on merits. The estranged wife, tutored the victim boy and hence, he wanted to examine the victim boy/PW1.

4. The learned Additional Public Prosecutor has submitted that the Lower Court order has passed a detailed order extensively on the provision of law and the happenings taken place on 17.12.2018 when PW1 was examined. He further submitted that the petitioner admits his counsel was present in the Court premises at the time of examination of the child and a petition was filed under Section 317 Cr.P.C. to condone his absence. The trial was conducted in-camera. Later, his counsel entered the Court and made an objections, which according to the prosecution is a preplanned one to avoid the cross examination of witness on the same day. The Lower Court considering the above aspects recording the presence of the Public Prosecutor and the learned counsel for the petitioner, had dismissed the same.

5. Considering the same and perused the materials, it is seen that the victim boy is none other than the son of the petitioner and PW2 is the mother of the victim. Admittedly, there is a matrimonial dispute between the petitioner and his estranged wife/PW2. The age of the victim boy at that time of occurrence was three years and few months old. Further 164 Cr.P.C., statement of the victim boy could not be recorded since he was not mature enough to understand the proceedings and disposed the same. Further, PW2 had given exaggerated version



with regard to the matrimonial life and more about the physical relationship between the petitioner and the victim boy. The victim is admittedly with his mother before deposing and there is a chance of tutoring .

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6. In view of the same and also the fact that the petitioner is the father of the victim boy, hence PW1 is recalled for examination. Further, the petitioner shall prepare a questionnaire for cross examination of the victim and give it to the Court well in advance and thereafter the victim boy shall be examined. Admittedly matrimonial dispute are pending including custody of the minor boy.

7. With the above directions, this Criminal Original Petition is allowed.

Sd/-
Assistant Registrar (CS-IX)

//True Copy//

Sub Assistant Registrar

dna

To

1. The Sessions Judge,
Mahila Court,
Chennai.
2. The Inspector of Police
W-8, All Women Police Station
Thirumangalam, Anna Nagar
Chennai.
3. The Public Prosecutor
High Court, Madras.

+1cc to Mr.S.Suresh, Advocate, S.R.No.57780

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KK (CO)
SU (27/10/2021)