



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.03.2022

CORAM

THE HONOURABLE MR. JUSTICE A.D.JAGADISH CHANDIRA

CRL.O.P.NO.6603 OF 2022

Ganesh

...Petitioner

Vs.

Station Officer,
All Women's Police Station,
Cuddalore.
(Crime No.7 of 2017)

...Respondent

PRAYER: This Criminal Original Petition filed under Section 482 of Cr.P.C., to set aside the order passed by the learned Session Judge (POCSO Act), Cuddalore on 22.12.2020, dismissing the Crl.M.P.No.716 of 2020 in Spl.S.C.No.5 of 2019 and grant leave for the petitioner to recall the witness PW1 and PW2 for cross examination.

For Petitioner : Mr.R.Udhayakumar

For Respondent : Mr.A.Gokulakrishnan,
Additional Public Prosecutor.

O R D E R

This Criminal Original Petition has been filed to set aside the order passed by the learned Session Judge (POCSO Act), Cuddalore on 22.12.2020, dismissing the Crl.M.P.No.716 of 2020 in Spl. S.C.No.5 of 2019 and grant leave for the petitioner to recall the witness PW1 and PW2 for cross examination.

2. The learned counsel appearing for the petitioner would submit that the petitioner is an accused facing Trial in Spl.S.C.No.5 of 2019 for the offence under Section 3 & 4 of Protection of Child from Sexual Offences Act, 2012 and 506(1) of IPC. PW1 and PW2 are important witnesses in this case and their evidence is essential to arrive at a just decision of the case. However, due to lack of proper advise, the petitioner had failed to put certain important and vital questions to PW1 and PW2 and thereby, application has been filed before the Trial Court to recall the witnesses PW1 and PW2 whereas, the Trial Court had dismissed the same. He would further submit that PW1 is not a "child" as on date and the bar under Section 33(5) of POCSO Act



will not be applicable against the petitioner. Learned counsel would further submit that the petitioner is facing serious charges under the POCSO Act and there are statutory presumptions against him under Section 29 of the Act. The petitioner has to take every step to rebut the presumptions as against him. If one opportunity is given to the petitioner, he will cross examine PW1 and PW2 on the same day of the appearance. If the petitioner is not permitted to recall and cross examine PW1 and PW2 he will be put to predicament. In support of his contention, he relied upon the judgment of this Court in Crl.O.P.No.4131 of 2022 dated 07.03.2022.

3.Mr.A.Gokulakrishnan, learned Additional Public Prosecutor for the respondent would submit that the the petitioner is an accused and the witnesses PW1 and PW2 were examined in chief on 07.06.2018 and this petition has been filed belatedly after three years. He would further submit that earlier, the petitioner had filed an application to recall PW2 and the same was allowed. The petitioner had cross examined PW2 and once again he had filed this second application to recall PW2.

4.He further submits that the trial Court taking into consideration the mandate of the order passed by the Hon'ble Apex Court in the case of Vinoth Kumar Vs. State of Punjab, had dismissed the application.

5.At this juncture, learned counsel for the petitioner would reiterate that if one chance is given to the petitioner to recall PW1 who has not been cross examined so far and some cost is imposed, the petitioner is prepared to pay the amount to the witnesses and the petitioner undertakes to cross examine the witnesses on the same day of their appearance before the trial Court.

6.Heard the learned counsel appearing on either side and perused the materials placed on record.

7.The Trial Court taking into consideration the judgment of Hon'ble Apex Court in the case of Vinoth Kumar Vs. State of Punjab, had dismissed the application. This Court does not find any infirmity in the order passed by the Trial Court. However, in this case, it appears that evidence of PW1 is essential to arrive at a just decision of the case. If the petitioner is not allowed to cross examine the PW1, it would be a case of no defence resulting in grave prejudice to the petitioner. Further, as per the Section 29 of POCSO Act, unless the contrary is proved, it is presumed that the accused has committed or abetted or attempted to commit offence as the case may be. A heavy burden is cast on the petitioner to rebut the presumptions, which operates against him. It is stated that the PW1 is now not



a child. This Court in CrI.O.P.No.4131 of 2022 in the case of "S.Ganeshan Vs.State of Tamil Nadu" dated 07.03.2022, in similar circumstances had directed recall of the witnesses. Whereas, in respect of PW2/mother of the victim, already one chance had been given to the petitioner to recall and she had been cross examined.

8. In view of the above, this Court is of the opinion, the petitioner may be permitted to recall PW1 alone on imposition of cost and terms. The petitioner is permitted to file recall application on the next hearing to recall PW1. On such application, the Trial Court shall fix a date for appearance of PW1 and the petitioner shall cross examine on the same day of her appearance before the Trial Court. At time of filing recall application, the petitioner shall deposit the amount of Rs.5,000/- as costs and the amount shall be disbursed to the witness on the day of her appearance. In the event the petitioner fails to cross examine on the day of her appearance, the petitioner shall lose his chance of cross examining PW1.

9. In view of the above, this Criminal Original Petition stands Partly allowed.

Sd/-

Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

shk/sai

To

1. The Session Judge (POCSO Act),
Cuddalore

2. The Station Officer,
All Women's Police Station,
Cuddalore.

3. The Public Prosecutor,
High Court of Madras.

4. The Chairman,
POCSO Committee,
High Court, Madras -104.

+2cc to Mr.R.Udhayakumar, Advocate, S.R.No.19768

CrI.O.P.No.6603 of 2022

BS(CO)

RGA(28/03/2022)