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Crl.O.P.No.19535 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.08.2023

CORAM :

THE HON'BLE MR.JUSTICE N.ANAND VENKATESH

**Crl.O.P.No.19535 of 2023
and Crl.M.P.No.13187 of 2023**

Kesavan

.. Petitioner

Versus

**State Rep. by its
Inspector of Police,
All Women Police Station,
Chengalpattu.
(Cr.No.3 of 2018)**

.. Respondent

Prayer : Criminal Original Petition filed under Section 482 of the Code of Criminal Procedure, to set aside the order, dated 01.08.2023 passed in Crl.M.P.No.515 of 2023 in Spl.S.C.No.111 of 2019 by the Session Judge, Special Court, for Exclusive Trial of Case under POCSO Act, Chengalpattu and subsequently, direct the Sessions Judge, Special Court (POCSO Act) to recall the witnesses P.W.1 and P.W.3, P.W.9 and P.W.11 for further cross in Spl.S.C.No.111 of 2019 pending on the file the Session Judge, Special Court, For Exclusive Trial of Case under POCSO Act, Chengalpattu.

For Petitioner : Mr.J.Rajmohan

For Respondent : Mr.A.Damodaran,



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Additional Public Prosecutor

ORDER

This petition has been filed challenging the order passed by the Court below dismissing the application filed under Section 311 of Cr.P.C., to recall P.W.1 to P.W.3 and P.W.9 and P.W.11 for further cross-examination.

2. Heard Mr.J.Rajmohan, learned Counsel for the petitioner and Mr.A.Damodaran, learned Additional Public Prosecutor for the respondent.

3. The petitioner is facing trial before the Court below for offences under Sections 354A(2), 376(1) read with Section 511 of I.P.C and Section 18 read with Section 4 of the POCSO Act, 2012. The prosecution examined 11 witnesses and marked 13 exhibits and the incriminating materials were also put to the petitioner while he was questioned under Section 313 of Cr.P.C. The arguments were also completed and the case is at the stage of pronouncing judgment. At this stage, the Court below exercised its power under Section 216 of Cr.P.C., and altered the charges to Section 354A(2) of I.P.C and Section 7 read with Section 8 of the POCSO Act, 2012.



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4. At this juncture, the petitioner filed an application under Section 311 of Cr.P.C., in Crl.M.P.No.515 of 2023 to recall P.W.1 to P.W.3 and P.W.9 and P.W.11 for further cross-examination. This application has been dismissed by the Court below and aggrieved by the same, the present petition has been filed before this Court.

5. The Court below had dismissed the application mainly on the ground that the witnesses, who were sought to be recalled by the petitioner, have already been cross-examined by the petitioner and that apart, P.W.2 is the victim girl and P.W.1 and P.W.3 are her parents and they are vulnerable witnesses and hence, they cannot be recalled. Insofar as P.W.9 and P.W.11 are concerned, the Court below came to a conclusion that they were Investigation Officers and they have already been cross-examined by the petitioner.

6. In the considered view of this Court, the Court below completely lost sight of Section 217 of Cr.P.C. Whenever a charge is altered / added by the Trial Court after the commencement of the trial, both the prosecution as well as the accused person have the right to recall and examine the



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witnesses with reference to such altered / added charges unless the Court gives a finding that such recalling of witnesses is vexatious or it is done to delay or defeat the ends of justice.

7. In the instant case, the matter was at the stage of final hearing and in fact, both the sides have argued the case and thereafter, the Court decided to alter the charges. The Trial Court has all the power to alter / add the charges at any time before the judgment is pronounced. Once the Court exercises such a power and alters the charges, an opportunity must be given to the accused person to examine the witnesses insofar as the altered charge is concerned. Such a right has in fact been given under Section 217 of Cr.P.C. The Court below did not take into consideration such a right given and it went merely by the earlier cross-examination that was done by the petitioner for the charges for which the petitioner underwent trial.

8. In the light of the above discussion, the order passed by the Court below in Crl.M.P.No.515 of 2023, dated 01.08.2023 is hereby set aside. The Court below shall fix a date for recalling the witnesses namely viz., P.W.1 to P.W.3 and P.W.9 and P.W.11 and they shall be cross-examined



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before the Court below only towards facts pertaining to the altered charges and the petitioner will not be allowed to conduct a *de novo* trial in this case.

It is also made clear that the petitioner will complete the cross-examination on the date of the appearance of the witnesses and the cross-examination will be completed on the same day. The Court below shall ensure that it takes an effective participation and keep in mind the provisions of Sections 136 and 165 of the Indian Evidence Act to ensure that only appropriate questions are put to the witnesses pertaining to the altered charges.

9. This Criminal Original Petition is allowed with the above directions. Consequently, connected miscellaneous petition is closed.

29.08.2023

Index : yes/no
Speaking order/Non-speaking order
Neutral Citation : yes/no
grs

Note : Issue order copy on 01.09.2023.

To

1. The Sessions Judge,
Special Court for Exclusive Trial of Cases
under POCSO Act, Chengalpattu.
2. The Inspector of Police,



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Chengalpattu.

3. The Public Prosecutor,
High Court of Madras.

N.ANAND VENKATESH, J.

grs

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