



*Crl.M.P.No.11746 of 2024
in Crl.A.No.1062 of 2024*

Crl.M.P.No.11746 of 2024
in
Crl.A.No.1062 of 2024

M. NIRMAL KUMAR, J.

The petitioner/accused in Spl.S.C.No.254 of 2023 [Old Spl.S.C.No.21 of 2023 on the file of Fast Track Mahila Court at Dharmapuri] was convicted by the learned Sessions Judge, Special Court to deal with cases related to POCSO Act, Dharmapuri by judgment dated 05.03.2024 and sentenced to undergo 20 years rigorous imprisonment and to pay a fine of Rs.25,000/-, in default, to undergo one year simple imprisonment for the offence under Sections 5(m), 5(n) r/w. 6(1) of Protection of Children from Sexual Offences Act [POCSO Act]. Against which, the present appeal and suspension of sentence petition filed.

2.The learned senior counsel appearing for the petitioner submitted that the victim was examined as P.W.2 in this case, Ex.P3/statement given to the Police and Ex.P4/164 statement marked through her. These two documents along with her evidence before the Court would not go together



*Crl.M.P.No.11746 of 2024
in Crl.A.No.1062 of 2024*

WEB COPY

but this has to be brought on record by way of cross examination. In this case, P.W.2 and some more witnesses not cross examined. Therefore, the petitioner filed a petition under Section 311 Cr.P.C. in Crl.M.P.No.1179 of 2023 to recall P.W.1 to P.W.4 and the Trial Court by order dated 18.08.2023 permitted to recall P.W.1, P.W.3 and P.W.4 but disallowed as regards P.W.2/victim. Thereafter, the petitioner filed Crl.M.P.No.263 of 2023 to recall P.W.12/Dr.Kanimozhi and the same was allowed by order dated 04.12.2023. Again, the petitioner filed a petition in Crl.M.P.No.357 of 2023 to recall P.W.20/Dr.Prabha which was also allowed by the Trial Court by order dated 06.01.2024. He would submit that restriction under Section 33(5) of POCSO Act is that it has to be ensured that the child is not called repeatedly to testify in the Court. Repeatedly means again and again or frequently and testifying is by way of solemn declaration of oath to give evidence as witness. Hence, without recalling and subject to cross examination, the evidence cannot be testified in view of gross variance in the evidence of P.W.2 to her earlier statements. In support of his contention, the learned senior counsel relied upon the decision of this Court in the case of *M.Kannan vs. State* reported in *2018 Crl.L.J. 116*, wherein in



*Crl.M.P.No.11746 of 2024
in Crl.A.No.1062 of 2024*

an identical situation, this Court set aside the conviction and remanded back the case to trial to the limited extent of denial of cross examination. Hence, prayed for appeal to be listed and the petitioner's contention can be considered.

3.The learned Government Advocate (Crl. Side) submitted that the petitioner filed a recall petition to recall P.W.2/victim girl along with P.W.1, P.W.3 and P.W.4. He would submit that denial of cross examination of P.W.2 was known to the petitioner as early as on 18.08.2023, thereafter the petitioner filed other two petitions to recall P.W.12 and P.W.20 on 04.12.2023 and 06.01.2024 but the petitioner had not taken any steps to approach this Court to recall P.W.2/victim girl and now after the judgment was rendered on 05.03.2024, such a plea was taken. He further submitted that as per Section 33(5) of POCSO Act, there is a specific restriction to call the victim repeatedly and the Trial Court is duty bound to ensure that the child is not repeatedly called and harassed. He would further submit that Ex.P3, Ex.P4 and the evidence of P.W.2 are not in much variance, the substance of the evidence is clear that the petitioner had committed



*Crl.M.P.No.11746 of 2024
in Crl.A.No.1062 of 2024*

penetrative sexual assault.

WEB COPY

4.The learned senior counsel for the petitioner, at this stage, submitted that the allegations made against the petitioner with the evidence available would not amount to penetrative sexual assault.

5.In view of the specific plea of the learned senior counsel for the petitioner that the appeal to be taken, this Criminal Miscellaneous Petition is dismissed.

cse

10.09.2024
($\frac{1}{2}$)



WEB COPY



*Crl.M.P.No.11746 of 2024
in Crl.A.No.1062 of 2024*

M. NIRMAL KUMAR, J.

cse

**Crl.M.P.No.11746 of 2024
in
Crl.A.No.1062 of 2024**

**10.09.2024
($\frac{1}{2}$)**