

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.02.2015

CORAM

THE HON'BLE MR. JUSTICE R.S.RAMANATHAN

Crl.O.P.No.1312 of 2015
and M.P.No.1 of 2015

M.Lalitha

.. Petitioner

vs.

State Represented by
Inspector of Police,
Kaveripattinam Police Station,
Kaveripattinam,
Krishnagiri District.
(Cr.No.225 of 2010)

.. Respondent

Criminal Original Petition filed under Section 482 of the Criminal Procedure Code praying to call for the records in Crl.M.P.No.1150 of 2014 in S.C.No.41 of 2012, on the file of the Chief Judicial Magistrate, Krishnagiri and to set aside the order dated 06.01.2015 made in Crl.M.P.No.1150/2014 in S.C.No.41/2012 on the file of the Chief Judicial Magistrate, Krishnagiri.

For Petitioner : Mr.S.Sathiaseelan

For Respondent : Mr.M.Maharaja
Additional Public Prosecutor

O R D E R

The petitioner is the first accused in S.C.No.41/2012, on the file of the Chief Judicial Magistrate, Krishnagiri and she filed an application in Crl.M.P.No.1150/2014, for recalling PWs.2 and 16 and her application was dismissed by the learned Chief Judicial Magistrate, Krishnagiri, by order dated 06.01.2015 and aggrieved by the same, this petition is filed.

2. It is submitted by the learned counsel for the petitioner that PW2 was cross-examined on 08.08.2012 and PW16 was cross-examined during April 2014 and PW2-Perumal stated in his cross examination that within 10 days he handed over the third female child and the said answer was not recorded by the learned Magistrate and she immediately filed a memo before the Court and no action was taken. Further, on the side of the defence, DW1-Doctor was examined on 16.06.2014 and he deposed that on 16.04.2010, no person in the name

of Easwari, who is PW1, was admitted in the hospital for delivery and after going through the records maintained by the hospital, the said Doctor deposed that from 01.04.2010 to 30.04.2010, no person in the name of Easwari was admitted and no child was delivered by the said person in the said hospital. He therefore submitted that having regard to the evidence of the Doctor -DW1, the evidence of PW1-Easwari becomes unreliable. PW2-Perumal deposed that within 10 days the third female child was handed over and that was not recorded and for that purpose, to elicit further answer from PWs.2 and 16, the application under Section 311 CrPC was filed and without properly appreciating the same and without appreciating that examination of PWs.2 and 16 would be essential for just decision of the case and without rendering any finding to that effect, the trial Court dismissed the application stating that the case was posted for judgement and unnecessarily the proceedings were prolonged for no reason and therefore, the order is liable to be set aside. The learned counsel for the petitioner relied upon the following judgments, in support of his submissions:

Mohanlal Shamji Soni and Union of India and Another [1991 Supp (1) SCC 271]

Mannan Shaikh and Others v. State of West Bengal and Another [(2014) 13 SCC 59]

Natasha Singh v. Central Bureau of Investigation (State) [(2013) 5 SCC 741]

Suresh @ Dhanasekar v. The State [2013 (3) MWN (Cr.) 75]

N.Vijayakumar v. Lazar [2010 (3) MWN (Cr.) DCC 10]

S.Thangaraj v. Union of India [2013 (1) MWN (Cr.) 78]

Ramalingam v. State of Inspector of Police [2006 (1) CTC 705]

P.Sanjeeva Rao v. State of Andhra Pradesh [(2012) 7 SCC 56]

Henry v. State by its Inspector of Police [2007 (2) MWN (Cr.) 314]

3. The learned counsel for the petitioner submitted that even though in the petition filed under Section 311 CrPC, there was no reference to the memo filed earlier regarding non-recording the answer of PW2, that may not be a reason to reject the application and relied upon the judgement in P.Sanjeeva Rao v. State of Andhra Pradesh [(2012) 7 SCC 56], wherein the Hon'ble Supreme Court held that merely because a mistake was committed, should not result in the accused suffering a penalty totally disproportionate to the gravity

of the error committed by his lawyer and therefore, non-mentioning of the memo in the petition filed under Section 311 CrPC, cannot be a ground to reject the same.

4. The learned counsel for the petitioner brought to my notice paragraphs 7, 8, 10, 16, 18 and 21 of the judgement in Mohanlal Shamji Soni and Union of India and Another [1991 Supp (1) SCC 271] and submitted that in those paragraphs, the scope of Section 311 CrPC has been elaborately dealt with and the Court has got power to permit recalling of witnesses in such of the case and the Court has to consider whether the evidence is essential to the just decision of the case by getting the truth by all lawful means and therefore, the Court ought to have allowed the application.

5. The learned counsel for the petitioner also relied upon paras 1, 4, 8, 10, 12 to 16, 21 and 22 of the judgement in Natasha Singh v. Central Bureau of Investigation (State) reported in (2013) 5 SCC 741 wherein it has been held that fair trial is the main object of criminal procedure and it is the duty of the Court to ensure that such fairness is not hampered or threatened in any manner. He also submitted that fair trial includes the grant of fair and proper opportunities to person concerned, and the same must be ensured as this is a constitutional as well as a human right.

6. The learned counsel for the petitioner also brought to my notice paras 1 to 7, 16, 17, 22 and 23 of the judgement in Mannan Shaikh and Others v. State of West Bengal and Another reported in (2014) 13 SCC 59 and submitted that the accused should not be prejudiced and having regard to the facts of that case, the Hon'ble Supreme Court allowed the recalling of PW15 for the purpose of eliciting some answers and the facts of the present case are also similar and therefore, the application ought to have been allowed.

7. The learned counsel for the petitioner also submitted that the phrase "at any stage" in Section 311 CrPC includes the stage in which evidence of both sides have been taken and case was adjourned for delivering judgement and therefore, the application filed under Section 311 CrPC cannot be dismissed on that ground and for that proposition, relied upon the judgements of this Court in Henry v. State by its Inspector of Police reported in 2007 (2) MWN (Cr.) 314, N. Vijayakumar v. Lazar reported in 2010 (3) MWN (Cr.) DCC 10 and Ramalingam v. State by Inspector of Police reported in 2006 (1) CTC 705. The learned counsel for the petitioner also submitted that in the interest of justice, the accused must be given opportunity to examine the witnesses and therefore, having regard to the various judgements relied upon by him and having regard to the facts of the case, the Trial Court ought to have allowed the application filed by the petitioner and prays that this petition is liable to be allowed.

8. Before going to the merits of the case, certain facts are to be stated. The accused was charge sheeted for having committed the offences punishable under Sections 363, 368 r/w. 120-B IPC. It is seen from the 'A' Diary extract filed by the petitioner in the additional typed set of papers that the prosecution evidence was closed on 01.04.2014 and the case was adjourned for questioning of the accused and the accused was questioned on 02.06.2014 and the case was adjourned to 16.06.2014 for examination of defence witnesses. On 16.06.2014, one witness was present and was examined as DW1 and Exs.D1 and D2 were marked and the case was adjourned to 01.07.2014 for examination of further defence witnesses. On 01.07.2014, the case was adjourned at the instance of the accused to 08.07.2014 and thereafter to 15.07.2014, 22.07.2014, 04.08.2014, 11.08.2014, 20.08.2014, 02.09.2014, 16.09.2014, 23.09.2014, 07.10.2014, 13.10.2014, 29.10.2014, 11.11.2014, 24.11.2014, 01.12.2014, 02.12.2014 and finally on 03.12.2014, the defence side was closed and the case was posted for judgement on 05.12.2014. Therefore, it is seen from 'A' Diary extract that from 16.06.2014 to 03.12.2014, the case was adjourned to various dates for examination of defence witnesses and after examining DW1 on 16.06.2014, no steps were taken by the accused to examine any other witness and the case was posted for judgement on 05.12.2014, after hearing both sides. Thereafter, the case was adjourned to 09.12.2014, 16.12.2014, 19.12.2014, 23.12.2014 and 29.12.2014 for delivering judgement and finally the case was adjourned to 29.12.2014 and at that time, the application under Section 311 Cr.PC in Crl.M.P.No.1150/2014 was filed for recalling of PWs.2 and 16 and it was dismissed on 06.01.2015.

9. Thus it is evident from the above 'A' Diary extract that sufficient opportunity was given to the accused to enable him to examine the defence witnesses and even after the case was posted for judgement, several adjournments were given and the judgement was not delivered due to default on the part of the Judicial Officer and no attempt was made by the petitioner/accused to file an application and on 29.12.2014, the application was filed under Section 311 CrPC for recalling of witnesses, namely PWs.2 and 16.

10. Bearing this in mind, let us consider the submissions made by the learned counsel for the petitioner. As stated supra, PW2 was cross-examined on 08.08.2012 and PW16 was cross-examined during April 2014 and the main reason stated by the learned counsel for the petitioner that while examining PW2 on 08.08.2012, he gave an answer which was not recorded and a memo was filed and the memo was not disposed of and for the purpose of eliciting answers from PWs.2 and 16, the application under Section 311 CrPC was filed and without appreciating the same, the said application was dismissed.

11. The contention of the learned counsel for the petitioner is that as per the second part of Section 311 CrPC, the Court has no discretion except to summon and examine or recall and re-examine any

such person if his evidence appears to it to be essential to the just decision of the case. But no such finding was given by the learned Chief Judicial Magistrate that further evidence of PWs.2 and 16 was not required for the just decision of the case and in the absence of any such finding, the lower Court ought to have allowed the petition. According to me, the said submission cannot be accepted. As stated supra, in the petition filed under Section 311 CrPC, there was no whisper regarding the memo filed on 08.08.2012 or the answer given by PW2, which was not recorded. Though it is contended by the learned counsel for the petitioner that mistake of the counsel cannot be the reason to deny justice to the parties and relied on the judgement in P.Sanjeeva Rao v. State of Andhra Pradesh reported in (2012) 7 SCC 56, having regard to the facts of the case the said principle cannot be applied, as in the petition filed under Section 311 CrPC, there was no reference to the memo and even assuming that the answer was omitted to be recorded by the Magistrate while examining PW2, no steps were taken by the petitioner from 08.08.2012 till 29.12.2014 and if really such answer was not recorded by the Magistrate while examining PW2, the petitioner would have taken steps either to get a finding on the memo filed by the petitioner or could have taken the matter to the higher forum and therefore the inaction on the part of the petitioner in not insisting upon passing any order on the memo filed by the petitioner for more than 2 years would lead to the conclusion that the only intention of the petitioner in filing the petition under Section 311 CrPC was to protract the proceedings.

12. The judgements of the Hon'ble Supreme Court relied on by the learned counsel for the petitioner lay down the law relating to Section 311 CrPC and we will have to see whether the judgements can be applied to the facts of the case. As stated supra, having regard to the conduct of the parties in getting adjournments for examining the defence witnesses and also the conduct of the accused in not filing the application even after the arguments were heard and posted for judgement, would reveal that the interest of the party was only to prolong the litigation and had no real intention to get any evidence for just decision of the case. Further in the petition filed by the petitioner, it is only stated that some more questions in respect of defence of the petitioner were not put to the witnesses and further questions were to be asked with regard to PWs.2 and 16, but no such materials were furnished and the only argument submitted by the learned counsel for the petitioner was a memo was filed, but no action was taken and for that purpose, filing the application under Section 311 CrPC at the belated stage cannot be accepted. Therefore, having regard to the fact that PW2 was cross-examined on 08.08.2012 and PW16 was cross-examined on April 2014 and the case was adjourned at the instance of the accused for examination of defence witnesses for more than three months and during that period no steps were taken by the petitioner to recall PWs.2 and 16, would lead to the conclusion that the petition under Section 311 CrPC was filed by the petitioner only with an intention to protract the proceedings.

13. The learned counsel for the petitioner also relied on the evidence of DW1-Doctor. As stated supra, DW1 was examined on 16.06.2014 and he deposed that during 01.04.2010 to 30.04.2010, there was no record in the hospital to the effect that PW1-Easwari delivered a child in the hospital. But the case of the prosecution is that the said Easwari delivered a child on 16.04.2010 in the Government Hospital, Kauveripattinam and on 20.04.2010, when she came to the hospital for further treatment, the first accused took care of the child and disappeared and therefore, the case was filed against Lalitha and others. According to me, if the Doctor's evidence is accepted and no child was born to PW1-Easwari on 16.04.2010, that can be taken advantage by the defence and for that purpose, there is no need to recall PW2 and as a matter of fact, if any question is to be asked by the defence, only PW1 has to be recalled, but no attempt was made by the defence to recall PW1.

14. Considering all these circumstances, in my opinion, the Trial Court has rightly rejected the application. I do not find any reason to interfere with the order of the learned Chief Judicial Magistrate, Krishnagiri.

15. In the result, this Criminal Original Petition is dismissed. Consequently, connected miscellaneous petition is closed.

jvm

-s/d-
Assistant Registrar (CS-II)
Dt:13/2/2015

True Copy

Sub-Assistant Registrar

To

1. The Chief Judicial Magistrate,
Krishnagiri.
2. Inspector of Police,
Kaveripattinam Police Station,
Kaveripattinam, Krishnagiri District
3. The Public Prosecutor,
High Court, Madras.

+ 1 cc to Mr.S.Sathiaseelan, Advocate SR 7322

rv(co)
prk13/2

Cr1.O.P.No.1312 of 2015