

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 26.09.2016

CORAM:

THE HONOURABLE MR.JUSTICE P.N.PRAKASH

CRL.O.P.No.21598 OF 2016 &

Crl.M.P.No.9993 of 2016

Suresh Babu ... Petitioner

versus

Union Territory of Puducherry,
represented by the Inspector of Police,
CBCID, Puducherry ... Respondents

Prayer: This petition is filed under Section 482 Cr.P.C.,
praying to set aside the order passed by the learned II
Additional Sessions Judge, Puducherry, dated 25.8.2016 made in
Crl.M.P.No.48 of 2016 in S.C.No.83 of 2012.

For Petitioner : Mr.M.Ravi

For Respondent No.1 : Mr.M.R.Thangavelu
Addl.Public Prosecutor

ORDER

This petition is filed, praying to set aside the order
passed by the learned II Additional Sessions Judge,
Puducherry, dated 25.8.2016 made in Crl.M.P.No.48 of 2016 in
S.C.No.83 of 2012.

2. It is the case of the prosecution that one Devu Satti Babu (deceased) was taken into illegal custody by five policemen of Yanam Police Station on 9.11.2011 and he was confined in the police station in connection with a theft case and was kept in their custody for the purpose of interrogation. On 9.11.2011, at around 5.00 p.m., he was rushed to Government Hospital, Yanam for alleged food poison, where he died. The police took up investigation of the case and after completion of the investigation, filed a final report against five police men for the offences under Sections 302, 342, 201 and 199 r/w 34 IPC.

3. After the case was committed to the Court of Sessions, it was taken on file as SC No.83 of 2012 and trial commenced before the learned III Additional Sessions Judge. In the final report, the prosecution had cited as many as 35 witnesses, of whom, 27 witnesses were examined. After closure of the evidence, the accused were questioned under Section 313 Cr.P.C. and thereafter, arguments were heard by the trial

Court and case was posted for judgment on 29.7.2016. In the mean time, the prosecution filed a petition in CrI.M.P.No.48 of 2016, praying to issue fresh summons to one Vera Venkata Adityan (LW.9) to examine him as a prosecution witness. The said petition was resisted by the accused. However, by order, dated 25.8.2016, the trial Court allowed the petition. Questioning the same, the petitioners/accused are before this Court.

4. Heard Mr.M.Ravi, learned counsel for the petitioners and the learned Additional Public Prosecutor for the State.

5. Mr.Ravi, learned counsel appearing for the petitioners submitted that the trial Court ought not to have allowed the petition for recalling LW.9 especially when the case was posted for judgment after hearing the arguments and that the prosecution should not be permitted to fill up any lacuna.

6. Per contra, Mr.M.R.Thangavelu submitted that several steps were taken to examine Venkata Adityan LW.9, but despite receipt of summons, he did not come forward for giving evidence and therefore, at one point of time, the trial Court Public Prosecutor dispensed with his examination. Thereafter, the Public Prosecutor having realized that the evidence of LW.9 is important for rendering just decision in the case, he filed the petition, which was rightly allowed by the trial Court and as such, there is no infirmity in the order passed by the Court below.

7. This Court has given its anxious consideration to the rival submissions.

8. It is trite law that a witness can be recalled at any time before final judgment is delivered under Section 311 Cr.P.C. The Hon'ble Supreme Court in its recent decision in "State (NCT of Delhi) Vs. Shiv Kumar Yadav and another" reported in (2016) (2) SCC 402 has laid down certain parameters for re-call/re-examination of a witness under the provisions of Section 311 Cr.P.C. The Supreme Court has emphasized that the re-call cannot be allowed on plea that defence counsel (previous) was not competent and had not effectively cross-examined witnesses. Re-call is not a matter of course. Plea for recall for advancing justice has to be bona fide and has to be balanced carefully with other relevant considerations including uncalled for hardships to witnesses and uncalled for delay in the trial. Whenever the prosecution seeks to file an application under Section 311 Cr.P.C., the defence will always cry foul that it is an attempt by the prosecution to fill up lacuna and that the Court should not permit such attempt, but should see whether the evidence of the said witness is relevant for the just decision of the case. Therefore, this Court had to perforce examine the rival contentions in order to see whether the evidence of Venkata Adityan (LW.9) would be essential for the just decision of the case.

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9. A perusal of the averments made in the petition filed

by the prosecution for recalling LW.9 under Section 311 Cr.P.C., would show that nowhere it is stated as to how the evidence of LW.9 will be essential for the just decision of the case. But whereas, the petition states that the steps that were taken earlier by the prosecution to examine LW.9 before the trial Court proved futile. It appears that the wife of the deceased, PW.1 had sent a complaint to the Chief Judge, Puducherry, alleging that the prosecution has not examined LW.9 for the reasons best known to them. This complaint appears to have been forwarded by the Chief Judge to the trial Court which perhaps had prompted the prosecution to file the present petition under Section 311 Cr.P.C. seeking to recall LW.9.

10. As already stated above, in the petition filed under Section 311 Cr.P.C., it is not stated as to how the evidence of LW.9 would be essential for the just decision of the case, of-course but failure of the prosecution to aver this in the petition will not denude the power of either the trial Court or this Court to examine the relevance of the evidence of a witness and come to an independent decision as to whether his evidence will be essential for the just decision of the case.

11. Venkata Adityan LW.9 was examined by the police and his statement was recorded, which is available in the case diary. According to him, he had gone to the police station along with his brother-in-law, Sakthikumar on 10.11.2011 in order to lodge a complaint with regard to missing of his mobile phone. There, he found two policemen in the station and also a person chained to a nearby table. After giving the complaint to the police with regard to missing of mobile phone, he left the Police Station along with his brother-in-law. Sakthi Kumar was examined as PW.7, but he turned hostile to the prosecution case. It may be relevant to state here that no test identification parade was conducted for either Venkata Aditya LW.9 or his brother-in-law PW.9 to identify the police men whom they allegedly saw in the police station on 10.11.2011. That apart, LW.9 has not even been asked to identify whether the deceased was the person whom he had seen in the police station on 10.11.2011. Even according to the prosecution case, the deceased was not admitted in the hospital on 10.11.2011, but he was admitted in the hospital on the complaint of food poison on 11.11.2011 at 6.00 p.m., where he died. A perusal of the evidence of Dr.P.Jaisri PW.17 would clearly show that on 11.11.2011 Devu Satti Babu was brought to the hospital by two male persons and that Devu Sattibabu told her he consumed poison at about 5.10 p.m. on 11.11.2011 at his home and he was given treatment for it. She has also categorically stated that the two persons who accompanied him, were not policemen, but civilians and that the wife of the deceased also came to the hospital. A test identification parade was conducted for Dr.Jayasri to identify the police men who had allegedly brought the deceased to the hospital, in which, she did not identify anyone.

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12. As stated above, Venkata Adityan LW.9 has neither identified the policemen nor identified the deceased as the

person who were in the police station on 10.11.2011, when he went there to give the complaint for missing his mobile phone. Even if Venkata Adityan makes a parrot like repetition of the police statement in his evidence in the witness box and the defence report 'No cross', the case of the prosecution will not in any way be advanced. Therefore, just because PW.1 addressed a communication to the learned Chief Judge, Puducherry, alleging that the prosecution had deliberately not examined Venkata Adityan (LW.9) as a witness, it does not mean that the prosecution should develop a knee jerk reaction and examine him as a witness that too at the fag end of the trial when the matter was posted for judgment after arguments in order to appease the family of the deceased. This court is of the view that the examination of Venkata Adityan (LW.9) will not be essential for the just decision of the case at hand.

For the foregoing reasons, the petition is allowed. The order dated 25.8.2016 made in Crl.M.P.No.48 of 2016 in S.C.No.83 of 2012 is hereby set aside. However, the trial Court is directed to render the judgment based on the available material evidence, without being influenced by any of the observations made in this order.

Sd/-
Asst.Registrar (CS VII)

/true copy/

Sub Asst. Registrar

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To

1. The II Additional Sessions Judge
Puducherry

2. The Inspector of Police
CBCID, Puducherry

3. The public Prosecutor,
High court, Madras (Puducherry)

1 cc to Mr.M.Ravi, Advocate, Sr. 55162

1 cc to Senior Government pleader cum Senior Public
Prosecutor, Sr. 55193

CRL.OP.No.21598 of 2016

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