



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 30.08.2017

CORAM:

THE HONOURABLE MR.JUSTICE **S.S.SUNDAR**

CRL.OP.(MD) No.11405 of 2017

Rajendran

... Petitioner

Vs.

The State Rep.by
The Inspector of Police,
Krishnankovil Police Station,
Virudhunagar District.
(in Crime No.44 of 2009)

... Respondent

PRAYER: Criminal Original petition filed under Section 482 of Code of Criminal Procedure, to set aside the impugned order dated 07.08.2017 passed by the learned Judicial Magistrate No.II, Srivilliputhur, in Crl.M.P.No.4370 of 2017 and consequently direct the learned Judicial Magistrate No.II, Srivilliputhur, to permit the petitioner's counsel to cross examine the witnesses.

For Petitioner	: Mr.R.Murugan
For Respondent	: Mr.K.Anbarasan
	Government Advocate (Crl. Side)

ORDER

This petition has been filed to set aside the impugned order dated 07.08.2017 passed by the learned Judicial Magistrate No.II, Srivilliputhur, in Crl.M.P.No.4370 of 2017 and consequently to direct the learned Judicial Magistrate No.II, Srivilliputhur, to permit the petitioner's counsel to cross examine the witnesses.

2.The petitioner is the accused in Crime No.44 of 2009 on the file of the respondent police, for the offences punishable under Sections 420, 468, 471, r/w 34 of IPC. The criminal case is pending from the year 2009. Earlier, the petitioner himself filed an application to cross examine some witnesses in Crl.M.P.No.9042 of 2014. Though the said application was allowed by an order dated 16.12.2014, the petitioner did not cross examine the witnesses, by utilizing the opportunity. Consequently, after three years, another petitioner is filed by the petitioner in Crl.M.P.No.4370 of 2017 to recall and cross examine the witnesses PW4 to PW6.

3.The cross examination of the witnesses on the prosecution side was completed about three years back and it was in these circumstances, the Trial Court dismissed the petition, holding that the delay is not explained and that the petitioner miserably failed



to utilise the opportunity and filed the petition with a delay of three years. In the said circumstances, the petitioner has come forward with the above criminal original petition.

4. Though the reason given by the lower Court is perfectly valid and justified, it is brought to the notice of this Court by the learned counsel for the petitioner that serious prejudice will be caused to the petitioner, in case the petitioner is denied a further opportunity to cross examine the crucial witnesses, namely, PW-4 to PW-6.

5. The learned counsel for the petitioner relied upon a judgment of the Honourable Supreme Court in the case of **Natasha Singh vs. CBI**, reported in **2013 CRL.L.J. 3346**, wherein, the Honourable Supreme Court, after relying upon the earlier judgment of the Honourable Supreme Court in the case of **P. Sanjeeva Rao vs. State of Andhra Pradesh**, upheld the earlier view of Honourable Supreme Court and held as follows:

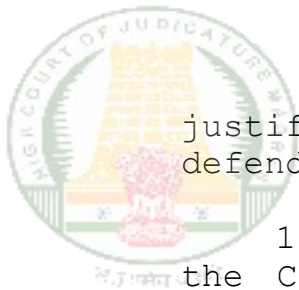
".....12. Similarly, in P. Sanjeeva Rao v. State of A.P., AIR 2012 SC 2242, this Court examined the scope of the provisions of Section 311 Cr.P.C. and held as under:-

"Grant of fairest opportunity to the accused to prove his innocence was the object of every fair trial, observed this Court in Hoffman Andreas v. Inspector of Customs, Amritsar, (2000) 10 SCC 430. The following passage is in this regard apposite:

'In such circumstances, if the new Counsel thought to have the material witnesses further examined, the Court could adopt latitude and a liberal view in the interest of justice, particularly when the Court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible.'

xxx xxx xxx xxx

We are conscious of the fact that recall of the witnesses is being directed nearly four years after they were examined in chief about an incident that is nearly seven years old.... we are of the opinion that on a parity of reasoning and looking to the consequences of denial of opportunity to cross-examine the witnesses, we would prefer to err in favour of the appellant getting an opportunity rather than protecting the prosecution against a possible prejudice at his cost. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too high to protect that virtue. A possible prejudice to prosecution is not even a price, leave alone one that would



justify denial of a fair opportunity to the accused to defend himself."

14. The scope and object of the provision is to enable the Court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311Cr.P.C. must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party.

The power conferred under Section 311Cr.P.C. must therefore, be invoked by the Court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection.

The very use of words such as 'any Court', 'at any stage', or 'or any enquiry, trial or other proceedings', 'any person' and 'any such person' clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the Court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case.

15. 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. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized. Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the denial of a fair trial. Thus, it is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be



zealous in ensuring that there is no breach of the same. (Vide: Talab Haji Hussain v. Madhukar Purshottam Mondkar & Anr., AIR 1958 SC 376; Zahira Habibulla H. Sheikh & Anr. v. State of Gujarat & Ors., AIR 2004 SC 3114; Zahira Habibullah Sheikh & Anr. v. State of Gujarat & Ors., AIR 2006 SC 1367; Kalyani Baskar (Mrs.) v. M.S. Sampooram (Mrs.), (2007) 2 SCC 258; Vijay Kumar v. State of U.P. & Anr., (2011) 8 SCC 136; and Sudevanand v. State through C.B.I., (2012) 3 SCC 387)“.....

6. Since the law is settled that it is the duty of the court to ensure that fairness should be shown to the accused to the maximum possible. There may be circumstances, which may suggest any action on lack of prudence or any other commission or omission to doubt the bona fide of the accused in defending the case. However, the Court must always ensure that the right of the accused to a fair trial is fully protected. In the said circumstances of the present case, this Court is able to see that one opportunity should be given to the petitioner to cross examine PW-4 to PW-6, to ensure fair opportunity to the petitioner in defending the criminal case. In that way of the matter, this petition is allowed and the order passed by the learned Judicial Magistrate No.2, Srivilliputhur, Crl.M.P.No.4370 of 2017 in C.C.No.209 of 2009 is set aside. However, this order is subject to the payment of a sum of Rs.2,000/- to the credit of the Hon'ble The Chief Justice relief fund, Madurai Bench of Madras High Court, Madurai. The petitioner is also directed to cross examine all the three witnesses on date of their appearance without seeking further time for cross examination.

Sd/-

Assistant Registrar (CRL.SIDE)

/True Copy/

Sub Assistant Registrar

To

1. The Judicial Magistrate No.2,
Srivilliputhur.
2. -do- Thro' The Chief Judicial Magistrate,
Virudhunagar.
3. The Inspector of Police,
Krishnankovil Police Station,
Virudhunagar District.
4. The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.
+1cc to Mr.R.MURUGAN Advocate in SR. No.75387

CMR

<https://hcservices.ecourts.gov.in/hcservices/>

JS/SV/SAR.2/18.09.2017/4P-6C

CRL.OP.(MD) No. 11405 of 2017

30.08.2017