

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

Crl.P.No.11623 of 2017

ORDER

This petition is filed under Section 482 of Cr.P.C., to quash the order passed in Crl.M.P.No.2422 of 2017 in C.C.No.27 of 2012 by the Additional Judicial Magistrate of First Class, Kovur, dated 06.11.2017, dismissing the application filed under Section 311 Cr.P.C., to recall P.Ws.1 to 4 for further cross-examination.

2. Petitioners/accused are facing trial in C.C.No.27 of 2012 for various offences and during trial, P.Ws.1 to 4 were examined in-chief and cross-examined by the counsel. But the present petition is filed to recall P.Ws.1 to 4 on the sole ground that the witnesses were not cross-examined on the aspect of test identification parade and other aspects to determine the case of the prosecution as the trial was conducted by the junior counsel and that when the senior counsel was preparing for cross-examination of other witnesses, it is noticed that due to mistake and oversight, his junior counsel did not cross-examine P.Ws.1 to 4 on material aspects and therefore, he sought for recall of P.Ws.1 to 4. The trial Court dismissed the petition assigning its own reasons and the same is now under challenge in the petition filed under Section 482 of Cr.P.C.

3. According to Section 311 of Cr.P.C., the Court can exercise power to recall any witness subject to recording satisfaction to recall such witnesses. Here in this case, the reason assigned by the petitioners is that the cross-examination of P.Ws.1 to 4 was conducted by the junior counsel, but they did not disclose the name

of the junior counsel in the entire affidavit filed along with the petition. Failure to cross-examine any witness by a senior counsel entrusting cross-examination to the junior counsel and failure of the junior counsel to cross-examine to the satisfaction of the senior counsel, is not a ground to exercise power under Section 311 of Cr.P.C. In identical situation, in **AG vs. Shiv Kumar Yadav and Others**¹, the Apex Court culled out following principles to be borne in mind for exercising power under Section 311 Cr.P.C, and they are as follows:

1. Whether the court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in Under Section 311 is noted by the court for a just decision of a case?
2. The exercise of the widest discretionary power Under Section 311 Code of Criminal Procedure should ensure that the judgment should not be rendered on inchoate, inconclusive and speculative presentation of facts, as thereby the ends of justice would be defeated.
3. If evidence of any witness appears to the court to be essential to the just decision of the case, it is the power of the court to summon and examine or recall and re-examine any such person.
4. The exercise of power Under Section 311 Code of Criminal Procedure should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.
5. The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.
6. The wide discretionary power should be exercised judiciously and not arbitrarily.
7. The court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.
8. The object of Section 311 Code of Criminal Procedure simultaneously imposes a duty on the

¹ AIR 2015 SC 3501

court to determine the truth and to render a just decision.

9. The court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.
10. Exigency of the situation, fair play and good sense should be the safeguard, while exercising the discretion. The court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified.
11. The court should be conscious of the position that after all the trial is basically for the prisoners and the court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.
12. The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.
13. The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.
14. The power Under Section 311 Code of Criminal Procedure 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 care, caution and circumspection. The court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right."

4. In view of the guidelines in the above judgment, failure to cross-examine the witness by the previous counsel and finding some irregularity in the cross-examination by the latter counsel is not a ground. Here, the counsel is already on record, but did not cross-examine the witness on various aspects, and therefore sought for recall of P.Ws.1 to 4 on the ground that the junior counsel conducted

cross-examination of P.Ws.1 to 4 without touching the material aspects, but that is not a ground to recall the witnesses as per the guidelines laid down by the Apex Court in **AG vs. Shiv Kumar Yadav's** case, referred supra.

5. The order under challenge passed under Section 311 of Cr.P.C. is an interlocutory in nature and against the said order, no revision is maintainable in view of the bar under Sub-section 2 of Section 397 Cr.P.C and in view of the law declared by the Apex Court in **SETHURAMAN v. RAJAMANICKAM**². Since the revision is not maintainable under Section 397 of Cr.P.C., before the Sessions Court or before this Court under Sections 397 and 401 of Cr.P.C., the petitioner invoked the jurisdiction of this Court under Section 482 of Cr.P.C. But, in the recent judgment of the Apex Court in **Girish Kumar Suneja v. C.B.I**³, the Apex Court held that no revision is maintainable against an interlocutory order in view of the bar under Section 397(2) of Cr.P.C., and the same cannot be achieved by invoking power under Section 482 of Cr.P.C. since Section 397(2) of Cr.P.C. governs Section 482 Cr.P.C.

6. In view of the law declared by the Apex Court that no revision is maintainable, the parties cannot approach the Court under Section 482 of Cr.P.C., circumventing the law. Therefore, on this ground also, the petition under Section 482 Cr.P.C., is not maintainable. In view of the law declared by the Apex Court, I find that the reason assigned by the petitioner is not sufficient to recall P.Ws.1 to 4 for further cross-examination on any aspect, including

² 2009 Cr.L.J. 2247

³ AIR 2017 SUPREME COURT 3620

Test Identification Parade. Therefore, I find that the order passed by the trial Court is in accordance with law and this Court cannot interfere with the order impugned while exercising the power under Section 482 of Cr.P.C., since it is limited to prevent the abuse of process of law and to secure the ends of justice. Hence, the petition is liable to be dismissed.

7. Accordingly, the Criminal Petition is dismissed at the stage of admission.

8. Miscellaneous petitions, if any, pending in this criminal petition shall stand dismissed.

27th November, 2017

sj

M. SATYANARAYANA MURTHY, J

