

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.12.2018

CORAM:

THE HONOURABLE MR. JUSTICE N.ANAND VENKATESH

Crl.O.P.No.28197 of 2018
and Crl.M.P.No.16395 of 2018

1.Sundaram
2.Natarajan
3.Govindan
4.Murugavel
5.Palani
6.Venkatesan

...Petitioners / Respondents
Accused 1 to 6

Vs.

State Represented by

1.The Sub-Inspector of Police,
Thirupalapanthal Police Station,
Villupuram.
(Crime No.252/2012)

...Respondent

PRAYER: Criminal Original Petition filed under Section 482 of the Cr.P.C., to set aside the order in Crl.M.P.No.4553 of 2018 in C.C.No.554 of 2018, dated 24.10.2018 on the file of the Judicial Magistrate Court, Tirukovilur.

For Petitioners : Mr.P.Vasanth

For Respondent : Mr.M.Mohamed Riyaz
Additional Public Prosecutor

O R D E R

This petition has been filed challenging the order passed by the Court below in Crl.M.P.No.4553 of 2018, dated 24.10.2018, wherein, the Court below has allowed the petition filed by the prosecution to recall PW1 to PW.6 and PW.8.

2 The learned counsel for the petitioner would submit that the petitioners are facing trial before the Court below for an offence under Sections 147, 294 B 323, 324, 427, 448 and 506 (ii) of IPC r/w Section 4 of the Tamil Nadu Prohibition of Women Harassment Act. The prosecution had examined PW.1 to PW.13 and the examination of the witnesses was concluded and the case was

at the stage of argument. At that stage, the prosecution has filed a petition under Section 311 of Cr.P.C. and the same has been allowed by the Court below.

3 The learned counsel for the petitioner would submit that the petition filed by the prosecution is completely bereft of particulars and the prosecution has virtually made an attempt to fill up the lacuna and the Court below without properly satisfying itself with regard to the grounds made out by the prosecution for the purpose of recalling the witnesses, has allowed the petition merely on the ground that the recalling of the witnesses is necessary for arriving at a just conclusion in the case.

4 The learned Additional Public Prosecutor appearing on behalf of the respondent police would submit that the prosecution has stated in the petition that the evidence of PW.1, PW.2 and PW.4 discloses that the tractor and other articles were damaged by the accused persons at the time of occurrence and this has been stated by the said witnesses. The photo of the damaged property was sought to be produced while examining the witnesses.

5 The learned counsel would further submit that the discretion vested in the Court under Section 311 of Cr.P.C. is very wide and the Court can recall any witness in order to arrive at a just decision in the case.

6 This Court has carefully considered the submissions made on either side. There are only two reasons that have been given in the petition filed by the prosecution for recalling the witnesses. The first reason is that originally there were 11 accused persons and the final report was filed only as against 6 accused persons and no notice was given to the defacto complainant with regard to dropping the 5 accused persons. It is not known as to how this can be a reason for recalling the prosecution witnesses. The second reason that has been given in the petition is that PW1, PW2 and PW4 have disclosed about damage to certain articles. The photo showing the damages was sought to be marked through these witnesses. Surprisingly the charge in this case was not under Section 4 of the Tamil Nadu Prevention of Damage to Public Property Act, 1984. Therefore, there is no necessity for the prosecution to recall these witnesses for the said purpose.

7 It could be clearly seen that the prosecution literally wants a retrial of the entire case by recalling PW.1 to PW.6 and PW.8. Such a whole sale recall of witnesses without giving any reason, can never be permitted by this Court under Section 311 of Cr.P.C. No party should be allowed to fill up lacuna. The petition filed by the prosecution is exactly for the said purpose.

8 The learned counsel for the petitioners brought to the notice of this court the judgment in Gayes Vs. State rep.by its, Inspector of Police, Kulassekaranpattinam Police Station, Thoothukudi reported in 2018-2-L.W.(Crl) 721 and the relevant portion is extracted hereunder:-

"17.The Judgments which have been referred to herein above clearly states that the exercise of the said power cannot be allowed to filling up lacuna in a prosecution case. Unless the facts and circumstances of the case, makes it apparent that non exercise of the power by the Court would result in causing serious prejudice, resulting in mis-carriage of justice, the Court cannot exercise its power mechanically. Even though, the exercise of power under Section 311 of Cr.P.C is very wide, the same has to be exercised judiciously and not arbitrarily.

18.In this case, the prosecution has attempted to virtually conduct the trial all over again by recalling all the 16 witnesses. This attempt has been made even without assigning any reason in the petition. Even, without there being any reason in the petition, the Court below has proceeded to allow the petition merely on the ground that interest of justice will have to be safeguarded. Power exercised under Section 311 of Cr.P.C must be exercised judiciously which means that the Court should have apply its mind on the materials placed before it and should have assigned independent reasons as to why the application is being allowed. In this case, the Court has not undertaken such an exercise. Therefore, necessarily, this Court has to come to an conclusion that the power exercised by the Court below is arbitrary. Any exercise of discretionary power when done arbitrarily can be interfered by this Court under Section 482 of Cr.P.C.

19.The Court below by allowing the petition has virtually permitted the prosecution to conduct the trial afresh from the beginning. The order of the

Court below will have the effect of a denova trial. Obviously, the prosecution wanted to fill up some lacuna in the evidence and that is the reason why a petition was filed without assigning any reason wherein the prosecution has sought for recalling all the witnesses."

9 The learned counsel for the petitioners also placed reliance to the order made in CrI.O.P.(MD)No.15427 of 2018 and the relevant portion is extracted hereunder:-

"7. Even otherwise, it can be seen that the said Venkatraman, who was said to be the witness to the statement given by the petitioner, was examined by the prosecution on 10.11.2011 and no documents were marked through him, even though the document which is now sought to be relied upon by the prosecution was very much available. The document that is sought to be relied upon by the prosecution is said to be a self-incriminatory document, which is the statement given by the petitioner accepting the guilt. There is a reference to this statement dated 01.06.1999, both in the 161 statement recorded from Govindaraj and also in the FIR registered by the respondent Police. However, this document did not form part of the final report filed by the respondent Police. If really this document was available, the respondent Police would have filed it along with the final report or at least would have attempted to mark the said document, when Venkatraman was examined as a witness. The prosecution never attempted to do that. After a period of nearly five years, in the year 2016, the prosecution has filed an application to recall the said Venkatraman and mark the above said statement dated 01.06.1999. This clearly amounts to filling up the lacuna by the prosecution. An application under Section 311 of CrPC can never be entertained, where the Court finds that the prosecution wants to fill up the lacuna. Therefore, even on merits, this Court is of the considered view that the application filed by the prosecution to recall PW.5 and to mark the alleged statement given by the petitioner has no merits."

10 The above referred judgments will directly apply to the facts of this case. The documents sought to be marked by the prosecution was available with them even at the time of filing of the final report. The final report was filed in the year 2013 and after nearly 5 years, the prosecution wants to mark certain

photographs by recalling nearly 7 witnesses. The Court below did not properly appreciate the petition filed by the prosecution and has allowed the petition only on the ground that it will be useful for coming to a just decision in the case. The order passed by the Court below is illegal and the same has to be interfered by this Court in exercise of its jurisdiction under Section 482 of Cr.P.C.

11 In the result, the order passed by the Court below in CrI.M.P.No. 4553 of 2018 dated 24.10.2018 is hereby quashed and Criminal Original Petition is accordingly allowed. Consequently, connected miscellaneous petitions is also closed. The Court below is directed to complete the proceedings in C.C.No.554 of 2018 within a period of three months from the date of receipt of a copy of this order and file a compliance report before this Court after the completion of the proceedings.

Sd/-
Assistant Registrar

//True Copy//

rpl

Sub Assistant Registrar

To

1.The Sub-Inspector of Police,
Thirupalapanthal Police Station,
Villupuram.

2.The Judicial Magistrate,
Thirukovilur

3.The Public Prosecutor,
High Court, Madras.

4.The Section Officer,
Criminal Section,
High Court, Madras.

+1 cc to Mr.P.Vasanth, Advocate, SR No.84086

CrI.O.P.No.28197 of 2018
and CrI.M.P.No.16395 of 2018

mr(co)
ssm(28/12/18)