



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 27.06.2018

CORAM:

WEB COPY

THE HONOURABLE MR.JUSTICE D.KRISHNAKUMAR

Crl.O.P.(MD) No.5040 of 2018

1.Sukumaran
2.Nagappan

... Petitioners

Vs.

The state represented by
The Sub Inspector of Police,
Kadayalumoodu Police Station,
Kanyakumari District,
Crime No.36 of 2010.

... Respondent

PRAYER: Criminal Original Petition filed under Section 482 of Criminal Procedure Code to set aside the order made in Crl.M.P.No.9072 of 2017 in S.T.C.No.309 of 2010 on the file of Judicial Magistrate No.I, Kulithurai, dated 19.12.2017 and allow the petition seeking recall the witness namely P.Ws.1 and 4.

For Petitioners : Mr.T.Selvakumaran
For Respondent : Mr.K.K.Ramakrishnan,
Additional Public Prosecutor

ORDER

This Criminal Original Petition has been filed to set aside the order made in Crl.M.P.No.9072 of 2017 in S.T.C.No.309 of 2010 on the file of learned Judicial Magistrate No.I, Kulithurai, dated 19.12.2017 and allow the petition seeking recall the witness namely P.Ws.1 and 4.

2.The petitioner filed a petition to recall the witnesses P.Ws.1, 4 and 8 before the Learned Judicial Magistrate No.I, Kulithurai in S.T.C.No.309 of 2010. The said application was rejected by the Trial Court.

3.The learned counsel for the petitioner relying upon the judgment reported in 2016-2-LW(Crl.)484, wherein, it is stated as follows:

"The object of conducting the trial is to ascertain



the truth and unless the witness is put to cross examination, the truth is not likely to come out. Fair trial requires that opportunity must be given to the accused to cross examine the witnesses, but, of course, by imposing stringent conditions to ensure that the time of the Court and time of the accused are not wasted any more."

Therefore, in the light of the aforesaid judgment, the order of the trial Court is liable to be set aside.

4. Contrarily, the Additional Public Prosecutor appearing for the respondent submitted that the Court below has considered and allowed the petitioner's application insofar as the P.W.8 is concerned and dismissed the application so far as the P.Ws.1 and 4 are concerned.

5. Heard the counsel for the parties and perused the materials available on record.

6. From the above said matrix of the case, the evidence of P.Ws.1, 4 and 8 were concluded on 23.08.2012, 07.11.2014 and 07.12.2017 respectively. Thereafter, the petitioner has filed the petition on 31.10.2017 to recall the witnesses, after a lapse of more than 6 and 4 years respectively.

7. This Court as well as the Hon'ble Supreme Court has held that this kind of application to recall the witnesses after a lapse of inordinate delay cannot be entertained and the order of the Trial Court is perfectly valid in law.

8. It is clear from the aforesaid fact that the petitioner has not chosen to file the application to recall the witness insofar as the P.Ws.1 and 4 within the time and also with the bonafide reasons. Further, the petitioner has not stated any satisfactory explanation for the delay in filing the said application. If the application is allowed, then it will cause prejudice to the prosecution witness by recalling the witness after 6 years and 4 years respectively, after conclusion of the cross examination.

9. The Hon'ble Supreme Court, in the decision reported in **(2016) 2 Supreme Court Cases 402 [State (NCT of Delhi) v. Shiv Kumar Yadav]**, has held as follows:-

"29. We may now sum up our reasons for disapproving the view of the High Court in the present case:

(i) The trial court and the High Court held that the accused had appointed counsel of his choice. He was facing trial in other cases also. The earlier counsel were given due opportunity and had duly conducted cross-examination. They were under no handicap;

(ii) No finding could be recorded that the counsel appointed by the accused were incompetent particularly at the back of such counsel;



(iii) *Expeditious trial in a heinous offence as is alleged in the present case is in the interests of justice;*

(iv) *The trial Court as well as the High Court rejected the reasons for recall of the witnesses;*

(v) *The Court has to keep in mind not only the need for giving fair opportunity to the accused but also the need for ensuring that the victim of the crime is not unduly harassed;*

(vi) *Mere fact that the accused was in custody and that he will suffer by the delay could be no consideration for allowing recall of witnesses, particularly at the fag end of the trial;*

(vii) *Mere change of counsel cannot be ground to recall the witnesses;*

(viii) *There is no basis for holding that any prejudice will be caused to the accused unless the witnesses are recalled;*

(ix) *The High Court has not rejected the reasons given by the trial court nor given any justification for permitting recall of the witnesses except for making general observations that recall was necessary for ensuring fair trial. This observation is contrary to the reasoning of the High Court in dealing with the grounds for recall I.e., denial of fair opportunity on account of incompetence of earlier counsel or on account of expeditious proceedings;*

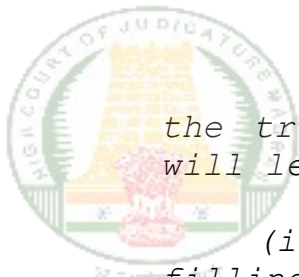
(x) *There is neither any patent error in the approach adopted by the trial court rejecting the prayer for recall nor any clear injustice if such prayer is not granted."*

10. Further, in **Rajaram Prasad Yadav Vs. State of Bihar** reported in **(2013) 14 SCC 461**, the Hon'ble Supreme Court has culled out certain principles to be kept in mind, while exercising power under Section 311 Cr.P.C., and the said portion of the judgment is extracted as follows:-

"(i) The exercise of the widest discretionary power under Section 311 Cr.P.C. should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.

(ii) 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.

(iii) The exercise of power under Section 311 Cr.P.C. 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.

(iv) 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.

(v) The wide discretionary power should be exercised judiciously and not arbitrarily.

(vi) 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.

(vii) The object of Section 311 Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

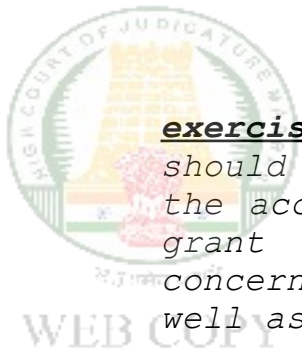
(viii) The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

(ix) Exigency of the situation, fair play and good sense should be the safe guard, 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.

(x) 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.

.....

(xi) The power under Section 311 Cr.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 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."

11. The said decision has also been followed in **Haryana Vs. Ram Mehar and others reported in (2016) 8 Supreme Court Cases 762**, where the Hon'ble Supreme Court has held that **"concept of fair trial cannot be limitlessly stretched to permit recall of witnesses endlessly on ground of magnanimity, etc."**

12. This Court has already dealt with the similar issue involved in this petition in CrI.O.P.No.94 of 2017, relying upon the judgment rendered by the Hon'ble Supreme Court in **(2016) 2 Supreme Court Cases 402** and dismissed the said petition, rejecting the contention on similar facts. In this case also, the petitioner has not adduced any satisfactory reason to make interference in the order passed by the Court below.

13. Therefore, the trial Court has rightly dismissed the petitioner's application, after considering all the materials available on record and the same does not warrant any interference of this Court. Therefore, this Court does not find any merits in this Criminal Original Petition and it deserves to be dismissed.

14. Accordingly, this Criminal Original Petition is dismissed.

Sd/-

Assistant Registrar (CS-II)

/True Copy/

Sub Assistant Registrar

To

1. The Judicial Magistrate No.I, Kulithurai.
2. The Sub Inspector of Police,
Kadayalumoodu Police Station,
Kanyakumari District,
3. The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.

+ 1 CC TO Mr.T.SELVAKUMARAN, ADVOCATE IN SR No. 70183

PNN

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