



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 05.04.2018

CORAM:

THE HONOURABLE MR.JUSTICE D.KRISHNAKUMAR

CRL.O.P.(MD)No.5252 of 2018
and CRL MP(MD)No.2544 of 2018

1.Sankar @ Sankar Ganesh
2.Esakki
3.Arumugakani
4.Essakiammal

... Petitioners/Accused Nos.1,2,4 & 5

-Vs-

The State through,
The Sub Inspector of Police,
Radhapuram Police Station,
Tirunelveli District.
In Crime No.2 of 2015.

...Respondent/Complainant

PRAYER: Petition is filed under Section 482 of the Criminal Procedure Code to set aside the order passed in Cr.M.P.No.271 of 2018 in S.C.No.502 of 2015 on the file of the Learned 4th Additional Sessions Judge, Tirunelveli dated 19.03.2018 and to recall the witness of the P.W.1, P.W.21 and P.W.23 for further cross-examination and pass such further or other orders as this Hon'ble Court.

For Petitioners
For Respondent

: Mr.P.T.Ramesh Raja
: Mr.K.K.Ramakrishnan,
Additional Public Prosecutor

O R D E R

This petition has been filed to set aside the order passed in Cr.L.M.P(MD)No.271 of 2018 in S.C.No.502 of 2015 on the file of the IV Additional Sessions Judge, Tirunelveli, dated 19.03.2018.

2.The petitioner has filed an application under Section 311 of Cr.P.C., to recall the witnesses P.W.1, P.W.21 and P.W.23 for further cross-examination.

3.According to the petitioner, P.W.1, P.W.21 and P.W.23 were ~~services by the defence counsel~~ by the defence counsel. This application has been filed by the petitioner for further cross-examination of the above witnesses.



4.The learned counsel for the petitioner would submit that sufficient reason has been stated in the application to recall the witnesses and omission on the part of the petitioners to cross-examine the aforesaid witnesses is neither willful nor wanton.

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5.In support of his case, the learned counsel for the petitioner relied on the decision in **Ram Chander vs. State of Haryana** reported in **AIR 1981 Supreme Court 1036** and relevant paragraph is extracted hereunder:-

"2.The adversary system of trial being what it is, there is an unfortunate tendency for a judge presiding over a trial to assume the role of a referee or an umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable distortions flowing from combative and competitive elements entering the trial procedure. If a Criminal Court is to be an effective instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth. As one of us had occasion to say in the past:

"Every Criminal trial is a voyage of discovery in which truth is the quest. It is the duty of a presiding Judge to explore every avenue open to him in order to discover the truth and to advance the cause of justice. For that purpose he is expressly invested by Section 165 of the Evidence act with the right to put questions to witnesses. Indeed the right given to a Judge is so wide that he may ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact, relevant or irrelevant. Section 172(2) of the Code of Criminal Procedure enables the Court to send for the police-diaries in a case and use them to aid it in the trial. The record of the proceedings of the committing Magistrate may also be perused by the Sessions Judge to further aid him in the trial" (Sessions Judge, Nellore v. Intra Ramana Reddy, ILR (1972) Andh Pra 683)."

6.The learned Additional Public Prosecutor appearing for the respondent submitted that the petitioner has not adduced sufficient reason in the application to recall the witnesses. He would further submit that the petitioner has already cross-examined the witnesses viz., P.W.1, P.W.21 and P.W.23 in the year 2016 and after cross-examination, it has been adjourned time to time on the side of the defence. At this stage, the present application is not at all maintainable. In support of his contention, the learned Additional Public Prosecutor relied on the judgment in **Vinod Kumar v. State of Punjab reported in (2015) 3 Supreme Court Cases 220**, wherein, at paragraph Nos.57.1 and 57.2 the Hon'ble Apex Court has held as follows:-



"57.1. Adjournments are sought on the drop of a hat by the counsel, even though the witness is present in court, contrary to all principles of holding a trial. That apart, after the examination-in-chief of a witness is over, adjournment is sought for cross-examination and the disquieting feature is that the trial courts grant time. The law requires special reasons to be recorded for grant of time but the same is not taken note of.

57.2. As has been noticed earlier, in the instant case the cross-examination has taken place after a year and 8 months allowing ample time to pressurise the witness and to gain over him by adopting all kinds of tactics."

7. The learned Additional Public Prosecutor further relied upon the judgment in the case of **State (NCT of Delhi) v. Shiv Kumar Yadav** reported in (2016) 2 Supreme Court Cases 402, wherein the Hon'ble Apex Court 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;

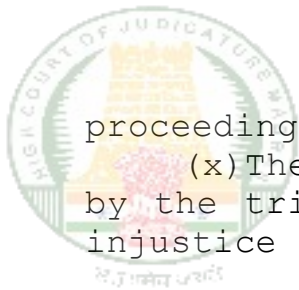
(v) The Court has to keep in mind not only the need for giving fair opportunity to the accused but also the need for ensuring that the victim of the crime is not unduly harassed;

(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."

8. In the case on hand, the petitioner has not stated any satisfactory reason to recall P.W.1, P.W.21 and P.W.23 and the said application has been filed nearly after two years from the date of cross-examination of the said witnesses.

9. Considering the above said facts and circumstances and also considering the fact that the said three witnesses have been examined in the year 2016 itself and thereafter, the case was posted for defence side evidence as last chance and at this stage, this application has been filed at the fag end of the trial, only to drag on the proceedings. Further, the reasons stated by the court below for dismissing the application do not warrant any interference of this Court.

10. In the result, this Criminal Original Petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (AD-II)

/True copy/

Sub Assistant Registrar

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To

1. The Sub Inspector of Police,
Radhapuram Police Station,
Tirunelveli District.

2. The IV Additional Sessions Judge,
Tirunelveli.

3. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

Order made in
CRL.O.P. (MD) No.5252 of 2018
and CRL MP (MD) No.2544 of 2018
05.04.2018

SMA/CM/SAR-2/15.05.2018:4P/4C