



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
ORDERS RESERVED ON : 17.09.2018
ORDERS PRONOUNCED ON : 19.09.2018
CORAM
THE HONOURABLE MR.JUSTICE N.ANAND VENKATESH

WEB COPY

CrIOP(MD)No.16031 of 2016 and
CrIMP(MD)No.7748 of 2016

K.Ravichandran

... Petitioner

Vs

The Inspector of Police,
TMCH Police Station,
Thanjavur.

... Respondent

PRAYER:- Petition filed under Section 482 of Criminal Procedure Code, to set aside the order dated 30.05.2016 passed in CrIMPNo.3248 of 2015 in CC No.187 of 2013, on the file of the learned Judicial Magistrate No.II Court, Thanjavur.

For Petitioner : Mr.G.Karan

For Respondent : Mrs.S.Bharathi,

Government Advocate(crl. side)

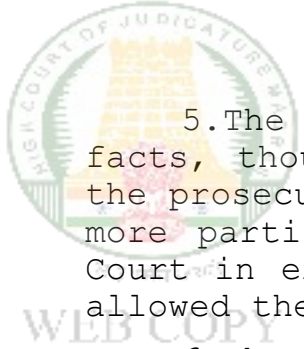
ORDER

This petition has been filed aggrieved by the order passed by the Court below in CrIMP No.3248 of 2015, allowing the petition filed by the prosecution under Section 311 of CrPC to recall certain witnesses and to mark certain documents.

2.The petitioner is arrayed as A-4 in CC No.187 of 2013. There are totally five accused persons, who are facing trial for the offence under Sections 120(b), 294(b), 467, 468, 471, 420 and 506 (ii) of IPC. In this case, the prosecution has completed examination of the witnesses and 313 questioning was also completed. At this stage, a petition was filed by the prosecution under Section 311 of CrPC.

3.In the petition filed before the Court below, the prosecution has submitted that the case involves proving of the charge of forgery and therefore, the Sub Registrar of Vallam, who was examined as PW.6 must be recalled and examined and apart from that the Treasury Officer of Sub Treasury, Thanjavur, which had issued stamp papers also to be examined. That apart, the prosecution wanted to mark two records showing the sale of stamp papers and also delivery of the stamp papers to the same vendor from the Treasury Office. The prosecution also wanted to compare the signature of PW.2 and Ex P.7 through an expert and therefore, wanted to send the documents for expert's opinion and to examine the Expert after the report is received.

4.The petitioner filed a counter affidavit and submitted that the recall petition has been filed by the prosecution only to fill up the lacuna and the witnesses as well as documents have no relevance to the case.



5. The learned Judicial Magistrate after considering the entire facts, thought it fit to allow the application on the ground that the prosecution must be given a fair opportunity to prove the case, more particularly since the case involves forgery. Therefore, the Court in exercise of its wide discretion under Section 311 of CrPC allowed the petition.

6. The learned Counsel for the petitioner would submit that the Court below had not taken note of the fact that the prosecution has come up with the application only to cover up the lacuna. The learned Counsel would further submit that the witness who was not examined by the Investigating Officer, cannot be examined as a witness before the trial Court. The learned Counsel also submitted that prosecution is trying to introduce a new case after the completion of trial. The learned Counsel would rely upon a judgment of this Court in the State Vs Tmt. Indirakumari and others, reported in 2003 (3) CTC 291, in order to support his contention that the witness, who has not been examined by the Investigating Officer, cannot be examined as a witness in the Court.

7. The learned Government Advocate (Crl Side) would submit that Section 311 of CrPC gives a very wide discretion to the Court to allow a petition to recall and re-examine any person, if his evidence appears to be essential in order to come to a just decision in the case. The learned Government Advocate would further submit that the petitioner will have sufficient opportunity to cross examine the witnesses and also to question the witnesses with regard to the documents sought to be filed by recalling the witnesses. The learned Government Advocate relied upon the following judgments of the Hon'ble Supreme Court;-

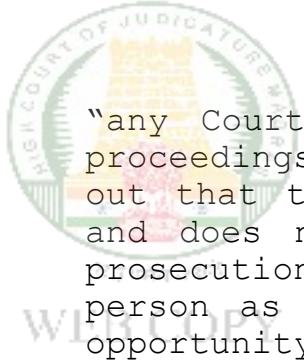
i. Mohanlal Shamji Soni Vs. Union of India and another, reported in 1991 SCC (Cri) 595

ii. U.T of Dadar and Nagar Haveli and another Vs. Fatehsinh Mohansinh Chauhan, reported in (2006) 7 SCC (Cri) 529 and

iii. Rajarajm Prasad Yadav Vs. State of Bihar and Another, reported in AIR 2013 SC 3081.

8. This Court has carefully considered the submissions made on either side and also the materials placed on record. It is seen that the charge against the accused persons in this case is that they have fabricated a bogus sale deed by impersonation and also by committing forgery. Therefore in order to substantiate this charge, the prosecution has to necessarily prove the case beyond reasonable doubts against the accused persons and the prosecution must be given sufficient opportunity in order to prove the case. A case of this nature is not a private dispute between the parties, but a crime involving moral turpitude which involves public interest.

9. The submission of the learned Counsel for the petitioner that any person, who has not been examined by the Investigating Officer, cannot be examined as a witness in the Court, in the considered view of this Court is totally unsustainable. The language used under Section 311 of CrPC is very wide and the very usage of the words



"any Court" " at any stage " of "any enquiry, trial or other proceedings" "any person" and " any such person", clearly spells out that the Section has expressions in the widest possible terms and does not limit the discretion of the Court in any way. The prosecution in order to prove its case, can at any stage examine any person as a witness. Ultimately, the accused persons will get an opportunity of cross examining the witness and therefore, they will not be put to any prejudice, if the prosecution examines any witness, who was not shown in the list of witnesses or who was not examined by the Investigating Officer in the course of investigation. Such a restricted interpretation will defeat the very object of Section 311 of CrPC.

10.It will be useful to refer to the judgment of the Supreme Court in this regard.

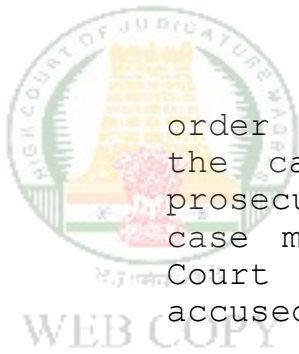
11.The Hon'ble Supreme Court in Mohanlal Shamji Soni Vs. Union of India and another, reported in 1991 SCC (Cri) 595, has held as follows:

27. The principle of law that emerges from the views expressed by this Court in the above decisions is that the Criminal Court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the court must obviously be dictated by exigency of the situation, and fair-play and good sense appear to be the only safe guides and that only the requirements of justice command and examination of any person which would depend on the facts and circumstances of each case.

30. The views expressed in the above judgments of the various High Courts have been approved by this Court in Rameshwar Dayal's case. We are in full agreement with the above view of Fazal Ali, J and hold that whenever any additional evidence is examined or fresh evidence is admitted against the accused, it is absolutely necessary in the interest of justice that the accused should be afforded a fair and reasonable opportunity to rebut that evidence brought on record against him.

12.It will be useful to extract the findings in U.T of Dadar and Nagar Haveli and another Vs. Fatehsinh Mohansinh Chauhan , reported in (2006) 7 SCC (Cri) 529, hereunder:

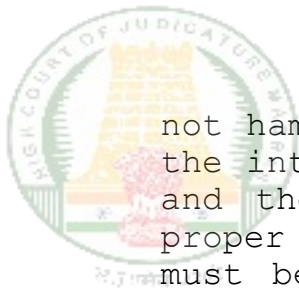
15.A conspectus of authorities referred to above would show that the principle is well settled that the exercise of power under Section 311 Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof of such facts which lead to a just and correct decision of the case, this being the primary duty of a criminal court. Calling a witness or re-examining a witness already examined for the purpose of finding out the truth in



order to enable the Court to arrive at a just decision of the case cannot be dubbed as "filling in a lacuna in 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.

13. The relevant portions of the judgment in *Rajarjm Prasad Yadav Vs. State of Bihar and Another*, reported in AIR 2013 SC 3081, are extracted hereunder:

14. A conspicuous reading of [Section 311](#) Cr.P.C. would show that widest of the powers have been invested with the Courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "any" has been used as a pre-fix to "court", "inquiry", "trial", "other proceeding", "person as a witness", "person in attendance though not summoned as a witness", and "person already examined". By using the said expression "any" as a pre-fix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the Court was only in relation to such evidence that appears to the Court to be essential for the just decision of the case. [Section 138](#) of the Evidence Act, prescribed the order of examination of a witness in the Court. Order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of [Section 311](#) Cr.P.C. and [Section 138](#) Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under [Section 138](#), will have to necessarily be in consonance with the prescription contained in [Section 311](#) Cr.P.C. It is, therefore, imperative that the invocation of [Section 311](#) Cr.P.C. and its application in a particular case can be ordered by the Court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any Court at any stage in any inquiry or trial or other proceeding initiated under [the Code](#) for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined, the Court must necessarily consider and ensure that such recall and re-examination of any person, appears in the view of the Court to be essential for the just decision of



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.)"

23. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr.P.C. read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

a) 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?

b) 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.

c) 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.

d) 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.

e) 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.



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

g) 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.

h) 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.

i) 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.

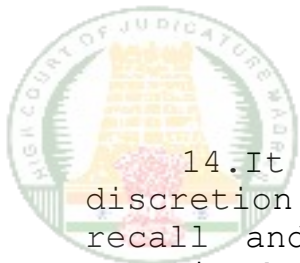
j) Exigency of the situation, fair play and good sense should be the safe guard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.

k) 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.

l) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

m) 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.

n) 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.



14. It is clear from the above said judgments that a very wide discretion has been given to the Court under Section 311 of CrPC to recall and re-examine the witness. The Court below has rightly exercised its discretion by allowing the petition filed by the prosecution. Ultimately, the accused person will not be put to any prejudice since they will have opportunity to cross examine the witness and also rebut the documents sought to be relied upon by the prosecution.

15. To restrict the examination of the witnesses only to a witness who was examined by the Investigating Officer and the statements taken under Section 161 of CrPC and to restrict the reliance upon any other materials, not forming part of the final report, will go against the very principle of fair trial. After all procedure is only the handmaid of justice and it cannot curtail any attempt on the side of the prosecution to prove the case beyond reasonable doubts with all available records and with all available witnesses. The process of trial conducted before the Court of law must unravel the entire truth to enable the Court to come to a just decision in a case. As held by the Hon'ble Supreme Court the accused person will have fair and reasonable opportunity to rebut the evidence brought on record against them. This right is not taken away by allowing a petition under Section 311 of CrPC.

16. No party in a trial can be foreclosed from correcting errors. When proper evidence was not adduced or the relevant material was not placed on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified. After all the function of the criminal Court is administration of criminal justice and not to count the errors committed by the parties.

17. This Court does not find any illegality or infirmity in the order passed by the Court below. In the facts and circumstances of the case, the order of the Court below in CrI MP No. 3248 of 2015, dated 30.05.2016 is hereby confirmed. The criminal original petition is dismissed. Consequently, connected CrI MP (MD) No. 7748 of 2016 is closed. Since, the CC is of the year 2013, there shall be a direction to the Court below to complete the proceedings within a period of four months from the date of receipt of a copy of this order and report compliance to this Registry immediately after completion of the proceedings.

Sd/-

Assistant Registrar (T&P)

/True Copy/

Sub Assistant Registrar (CS-IV)

To



2. The Inspector of Police,
TMCH Police Station,
Thanjavur.

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

4. The Section Officer,
Criminal Section,
Madurai Bench of Madras High Court,
Madurai. **(2 Copies)**

+1CC to Mr.G.Karan, Advocate, SR.No.85152

Cr1OP(MD)No.16031 of 2016
19.09.2018

DSK
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