



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 28.06.2018

CORAM:

WEB COPY

THE HON'BLE MR.JUSTICE D.KRISHNAKUMAR

CRL.O.P.(MD)No.10661 of 2018
and
CrI.M.P.(MD)No.4781 of 2018

1.S.Rajamani @ Manikandan
2.R.Senthil Kumar
3.D.Robin
4.A.Neethu

... Petitioners

-vs-

The Sub Inspector of Police,
Nesamony Police Station,
Nagercoil,
Kanyakumari District.

... Respondent

PRAYER: Criminal Original petition is filed under Section 482 of Criminal Procedure Code, to set aside the order dated 15.05.2018 passed in CrI.M.P.No.1228 of 2018 in C.C.No.369 of 2012 on the file of the Judicial Magistrate II, Nagercoil.

For Petitioners : Mr.G.Cenil

For Respondent : Mr.K.K.Ramakrishnan,
Additional Public Prosecutor.

ORDER

This Criminal Original petition has been filed to set aside the order, dated 15.05.2018 passed in CrI.M.P.No.1228 of 2018 in C.C.No.369 of 2012 on the file of the Judicial Magistrate II, Nagercoil.

2. According to the petitioner, he has filed an application under Section 311 of Cr.P.C., to recall P.W.1 for cross examination. However, the said application was dismissed by the Court below and challenging the same, this petition has been filed.

3. The learned counsel appearing for the petitioner submitted based on the complaint given by one T.John Sener against the petitioners, a case was registered for the offences under Sections 147, 294(b), 323 of IPC in Cr.No.77 of 2010 and after the investigation, charge-sheet has been filed and the same was taken on



file in C.C.No.369 of 2012, before the learned Judicial Magistrate No.II, Nagercoil. He would further submit that as per the provision under Section 311 Cr.P.C., the petitioners, at any stage, can file application before the concerned Court to recall the witnesses.

4. The learned Counsel would further submit that though P.W.1 was examined in the year 2013, now, they came to know about some relevant facts and therefore, it is necessary to recall the said witness for cross examination and sufficient reasons have also been stated in the application to recall the witness. Despite the same, the Court below, without considering the said facts and also without giving any opportunity to the petitioner, has erroneously dismissed the application and therefore, he prays for interference at the hands of this Court.

5. Heard the learned Counsel appearing for the petitioners as well as the learned Additional Public Prosecutor appearing for the respondent and perused the documents placed on record carefully.

6. Perusal of records would show that P.W1 was cross examined wayback in the year 2013. It is also seen that the petitioner has filed Cr.M.P.No.1228 of 2018 to recall the P.W.1 in the year 2018 and the same was dismissed by the Court below, which is impugned herein. It is seen that the Court below, while passing the impugned order, has held that P.W.1 was examined in chief on 08.10.2013 and after a lapse of nearly 5 years, this petition to recall P.W.1 has been filed and no reason has been stated for belated filing of this application and Hence, dismissed the petition.

7. 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."

8. 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.

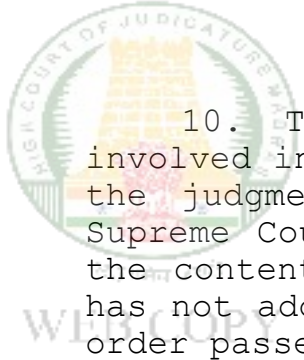
(ix) Exigency of the situation, fair play and good sense should be the safe guard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record 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."

9. 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."



10. This Court has already dealt with the similar issue involved in this petition in Crl.O.P.(MD)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.

11. 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.

12. In fine, this Criminal Original Petition is dismissed. Consequently, Crl.M.P(MD)No.4781 of 2018 is also dismissed.

Sd/-

Assistant Registrar(P&A)

/True copy/

Sub Assistant Registrar

To

- 1.The Judicial Magistrate II,
Nagercoil.
- 2.The Sub Inspector of Police,
Nesamony Police Station,
Nagercoil,
Kanyakumari District.
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

CRL.O.P. (MD)No.10661 of 2018

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Crl.MP. (MD) .No.4781 of 2018

28.06.2018

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