

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CRIMINAL PETITION No. 9992 OF 2018

ORDER:

This petition is filed under Section 482 of the Code of Criminal Procedure (for short, "Cr.P.C.") by the petitioner-accused to quash the order dated 05-09-2018 in Criminal M.P.No. 6627 of 2018 in C.C.No. 159 of 2013 on the file of the Court of Chief Metropolitan Magistrate at Hyderabad (for short, 'the Court below'), whereby the Court below dismissed the above miscellaneous petition filed under Section 311 of Cr.P.C. to recall P.Ws.1 to 3 and 6.

2. The petitioner filed the abovementioned M.P. to recall P.Ws.1 to 3 and 6 alleging that on the date of examination of P.Ws.1 to 3, learned counsel appearing for the petitioner before the Court below was out of station and therefore he could not cross-examine them; that 24-08-2018 being an optional holiday, learned counsel performed puja, due to which he could not cross-examine P.W.6 and that cross-examination of P.Ws.1 to 3 and 6 is essential for the purpose of appreciation of evidence and just decision in the main case and requested to recall P.Ws.1 to 3 and 6. The Court below by the order under challenge dismissed the petition. Aggrieved thereby, the present petition is filed.

3. From the allegations made in the petition, learned counsel was out of station when P.Ws.1 to 3 were examined in chief and on the date of examination of P.W.6, he was performing annual ceremony of his father as it was an optional holiday and therefore he could not cross-examine P.Ws.1 to 3 and 6. Though P.Ws.1 to 3 were examined long back, no steps were taken to recall them and leisurely filed the abovementioned M.P. at his convenience inventing a ground that his counsel was out of station but he cross-examined P.W.5 without filing

any application to recall P.Ws.1 to 3. The petitioner lacks *bona fides* and filed the petition at the end of trial and therefore such cause cannot be accepted as sufficient cause to recall P.Ws.1 to 3. Optional holiday is meant for employees and not for learned counsel and performing puja without attending the Court by learned counsel to defend his client is not a ground to recall P.W.6. During hearing, it is submitted that learned counsel performed annual ceremony of his father on the date of examination of P.W.6 but in fact, that was not his case in the petition filed before the Court below and such invention during argument cannot form the basis to exercise power under Section 311 of Cr.P.C. by this Court. Section 311 of Cr.P.C. deals with powers of Court to summon material witness or examine person present and according to it, any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case. The present case would fall within the first limb of Section 311 of Cr.P.C. and performing puja on the ground that 24-08-2018 was an optional holiday for the Court is not a ground to exercise power under the first limb of Section 311 of Cr.P.C. and in the absence of any explanation for failure to cross-examine P.Ws.1 to 3 accepting the allegation that learned counsel was out of station, such discretionary power cannot be exercised in favour of such person who is not diligent in prosecuting the proceedings.

4. In **A.G. Vs. Shiv Kumar Yadav**¹, the Apex Court laid down certain guidelines to exercise power under Section 311 of Cr.P.C. and they are extracted hereunder:

- "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 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.

If these guidelines are applied to the present facts of the case, the cause shown by the petitioner is not a sufficient cause to exercise power under Section 311 of Cr.P.C. and this Court cannot interfere with such discretionary order. Hence, I find no ground to quash the impugned order and the petition is liable to be dismissed.

¹ AIR 2015 (SC) 3501

5. The criminal petition is accordingly dismissed. Pending miscellaneous petitions, if any, shall stand dismissed in consequence.

Date: 20-09-2018.

M.SATYANARAYANA MURTHY, J.

JSK

