

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 17.06.2019

CORAM
THE HON'BLE MR.JUSTICE N.ANAND VENKATESH

Crl.O.P.No.15377 of 2019
and
Crl.MP.No.7570 of 2019

1. Karthikeyan

2. Jayavel

3. Rani ...Petitioner/Accused 1 to 3
-Vs-

State rep. by
Inspector of Police,
Kaveripattinam Police Station,
Krishnagiri District ... Respondent/Complainant

Prayer: Criminal Original petition filed under Section 482 of Code of Criminal Procedure, to set aside the order passed by the learned Sessions Judge, Fast Track Mahila Court, Krishnagiri in Crl.MP No.147 of 2019 in SC No.80 of 2018 dated 22.05.2019.

For Petitioner : Mr.P.Ezhilnilavan

For Respondent : Mr.Mohammed Riyaz,
Additional Public Prosecutor

ORDER

This petition has been filed challenging the order passed by the Court below allowing the application filed by the prosecution under Section 311 of Cr.PC to recall witnesses PW1 to PW5 for further examination.

2. The petitioners are facing trial before the Court below for an offence under Section 498A and 306 IPC. The prosecution had examined PW1 to PW5 and all of them were cross examined by the petitioners. At that point of time, the prosecution filed an application under Section 311 of Cr.PC to recall PW1 to PW5 for further examination. The reasons assigned in the petition to recall PW1 to PW5 is that some important questions were not asked to those witnesses and therefore, they have to be recalled and those questions should be put to them and recalling those witnesses is required to enable the Court to come to a just decision in the case. This petition was allowed

by the Court below and aggrieved by the same, this Criminal Original Petition has been filed before this Court.

3. The learned counsel for the petitioner submitted that what is now attempted to be done by the prosecution is to re-examine PW1 to PW5 and thereby a de novo trial is sought to be conducted by the prosecution. The learned counsel further submitted that the entire exercise is done only to fill up the lacuna and the Court below without considering the same has allowed the petition.

4. The learned counsel for the petitioner further submitted that the facts of this case is covered by the Judgment of this Court in [Gayes Vs. The State rep. by its, Inspector of Police, Kulasekaranpattinam Police Station, Thoothukudi District] reported in 2018 2 Law Weekly (Cr1) 721. The learned counsel further developed his arguments by submitting that the Court below was not sure with regard to the reasons assigned by it for allowing the petition. On the one hand, the Court below has stated that there are materials to alter the charges and add the offence under Section 304(B) of IPC. On the other hand, the Court has also stated that the witnesses will have to be recalled in order to determine the truth and in order to come to a just decision.

5. The learned counsel by pointing out to the finding of the Court below submitted that there is no clarity in the reasoning that was given by the Court below for allowing the petition.

6. Mr.Mohammed Riyaz, learned Additional Public Prosecutor appearing on behalf of the respondents submitted that the Court below has properly applied its mind and has given cogent reasons for allowing the recall petition and there are absolutely no grounds to interfere with the same. The learned counsel further submitted that the Criminal Court has ample powers to summon any person as a witness or to recall and re-examine any such persons even if evidence has been closed. The learned counsel further submitted that the scope and object of the provision under Section 311 of Cr.PC is to enable the Court to determine the truth and to render just decision in the case.

7. This Court has carefully considered the submissions made on either side and also the materials available on record.

8. The Court below while allowing the application did not given a clear finding on the reasons for which the application is being allowed. The Court had at one portion of the order stated that there are materials to alter the charges and add section 304(b) of IPC as an offence. In the other portion of the order, the Court below has held that PW1 to PW5 have to be

recalled for reexamination by the prosecution in order to come to a just decision. The Court below in order to come to such conclusion has relied upon the Judgment of the Hon'ble Supreme Court and this Court.

9. As rightly submitted by the learned counsel for the petitioner, once a witness has been examined by the prosecution and the said witness is also cross-examined, the prosecution cannot be allowed to recall all the witnesses for re-examination on the ground that certain important questions were not asked to the witnesses. Useful reference can be made to the Judgement of this Court in [Gayes Vs. The State rep. by its, Inspector of Police, Kulasekaranpattinam Police Station, Thoothukudi District] reported in 2018 2 Law Weekly (Cr1) 721.

10. The above judgment makes it clear that the prosecution should not be allowed to resort to filing petition under Section 311 of Cr.PC to fill up the lacuna in a prosecution case, unless the facts and circumstances of the case makes it apparent that non exercise of the power by the Court will result in serious prejudice and miscarriage of justice.

11. In this case, the Court below was swayed more by the fact that the materials that were collected also makes out a charge for an offence under Section 304(b) of IPC and therefore, the Court below wanted to recall PW1 to PW5 for further examination by the prosecution. This reasoning given by the Court below will not stand the test of law.

12. If the Court below wanted to alter the charges by adding the offence under Section 304(b) IPC, the Court below ought to have followed the procedure contemplated under Section 216 of Cr.PC. However, the Court below did not alter the charges except for making an observation to that effect and it has proceeded to recall PW1 to PW5 for further examination by the prosecution. Therefore, there is no clarity in the order passed by the Court below and the same requires interference of this Court.

13. The procedure to be followed for alteration of charges by adding the offence under Section 304 of IPC can be done only in accordance with Section 216 of Cr.PC. Useful reference can be made to the Judgment of this Court in [Jafferulla Vs.K.Rajendiran] reported in 2019 1 Madras Weekly Notes Cr1. (DCC) 54, wherein this Court has discussed in detail the procedure to be followed under Section 216 (2) Cr.PC for alteration of charges. The Court below can follow the said procedure before it ventures to alter the charges.

14. If ultimately, the Court below alters the charges in exercise of its jurisdiction Under Section 216 of Cr.PC, the

Court below can always recall the witnesses by virtue of the powers granted under Section 217 of Cr.PC. This should have been the proper procedure to be followed by the Court below while dealing with the petition and the Court below has mis-directed itself by following a wrong procedure due to lack of clarity.

15. In view of the above, the order passed by the Court below in CrI.MP No.147 of 2019 dated 22.05.2019 is hereby set aside. It is left open to the Court below to proceed further with the alteration of charges in accordance with the procedure indicated herein above and for that purpose, the Court below is also entitled to recall the witnesses after the alteration of charges under Section 217 of Cr.PC. It goes without saying that the petitioners can always put forth their contentions when the Court below proceeds to alter the charges.

16. In the result, this Criminal Original petition is allowed. It is made clear that the Court below shall independently consider the materials available before the Court without being influenced by any of the findings given by the Court below at the time of disposing of CrI. MP No.147 of 2019 or the findings given by this Court in this petition. Consequently, the connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (Insp.Cell)

//True Copy//

Sub Assistant Registrar

rka/msrm

To

1. The Sessions Judge, Fast Track Court, Mahila Court, Krishnakiri.
2. The Public Prosecutor, High Court, Madras.

+lcc to Mr.P.Ezhil Nilavan, Advocate, S.R.No.49305

VSN II (CO)

RRS (08/07/2019)

CrI.O.P.No.15377 of 2019
and CrI.MP.No.7570 of 2019