



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 04.09.2019

CORAM

THE HONOURABLE MR.JUSTICE N.ANAND VENKATESH

Crl.O.P. (MD)No.6208 of 2017

and

CRLMP (MD)Nos.4185 of 2017 & 664 of 2018

WEB COPY

1.Jeyaseelan
2.Wellington @ Pomma Kannan
3.Prabhakar
4.Gajith @ Darvin Kajith

.. Petitioners / Respondents /
Accused Nos. 1 to 4

Vs.

The State Represented by,
The Inspector of Police,
Uvari Police Station,
Tirunelveli District.
(Crime No.82/2015)

.. Respondent / Petitioner /
Complainant

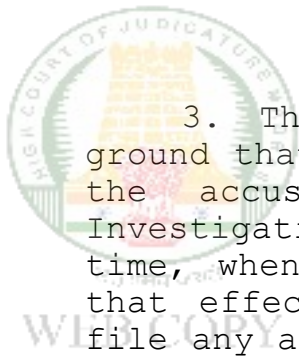
PRAYER:- Petition filed under Section 482 of Criminal Procedure Code, to call for the records and set aside the order passed by the learned IV- Additional Sessions Judge, Tirunelveli, dated 28.03.2017 in Crl.M.P.592/2016 in S.C.No.256 of 2016 and allow this Criminal Original Petition.

For Petitioners : Mr.S.Balamurugan
For respondent : Mr.M.Chandrasekaran
Additional Public Prosecutor

ORDER

This petition has been filed challenging the order passed by the Court below allowing the application filed under Section 311 of Cr.P.C., by the prosecution to examine a witness viz., the Sub-Inspector of Police, Uvari Police Station and to mark a complaint that was given to him by P.W.1.

2. The petitioners are facing trial before the Court below for an offence under Sections 294 (b), 342, 302 and 506 (ii) IPC., r/w 34 IPC. The prosecution had examined P.W.1 to P.W.20 and none of the witnesses were examined by the petitioners. At this stage, the prosecution had filed an application under Section 311 of Cr.P.C., to examine a new witness, not shown as a witness in the final report, in order to mark a complaint given to him by P.W.1 and this complaint also does not form part of the final report filed by the prosecution.



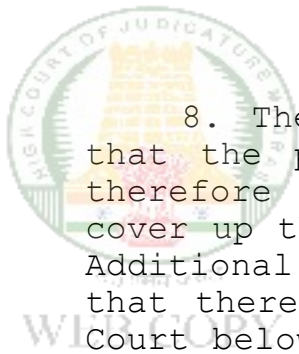
3. This application was opposed by the petitioners on the ground that P.W.1 has not spoken about giving any complaint against the accused persons, even in the statement given to the Investigating Officer under Section 161 of Cr.P.C. For the first time, when P.W.1 was in the witness box, she made a statement to that effect. The prosecution cannot introduce any new witness or file any additional document without the same being the part of the final report and the prosecution has to necessarily seek for further investigation and file a further report, wherein, the statement of the additional witness and the additional document can be brought before the Court and this will give an opportunity to the accused persons to exactly know the materials that are available against them. Without doing so, the attempt made by the prosecution is only to fill up lacunae and the accused persons will be put to irreparable loss and hardship, if the 311 application is allowed.

4. The Court below after considering the facts and circumstances of the case and also the reasons assigned by the prosecution for examination of the additional witness and marking of additional document, thought it fit to allow the application.

5. The learned counsel for the petitioners submitted that the accused persons have been exposed to a new fact, which was neither available in the complaint nor in the final report filed by the respondent police. Therefore, to that extent, the accused persons are prejudiced by the order of the Court below allowing the application filed by prosecution under Section 311 of Cr.P.C.

6. The learned counsel for the petitioners further placed reliance upon Section 173 (5) of Cr.P.C and submitted that it is the duty of the Investigating Officer to file along with the report all the documents that are relied upon by the prosecution and all the statements recorded under Section 161 of Cr.P.C, whom the prosecution proposes to examine as a witness. In this Case, the additional witness was not shown as a prosecution witness in the final report and the document that is relied upon was not filed along with the report. Therefore, the learned counsel submitted that the prosecution cannot be allowed to bring in additional evidence in an indirect manner.

7. The learned Additional Public Prosecutor appearing on behalf of the respondent police submitted that even as per the case of the prosecution, there was a previous motive behind the entire incident and it was spoken by P.W.1 when she was examined on the side of the prosecution. This previous motive is now sought to be substantiated by examining an additional witness and marking a document viz., the complaint. The learned counsel submitted that for this purpose, there is no requirement to file a further report under Section 173 (8) Cr.P.C and the language used under Section 311 of Cr.P.C., is wide enough to cover the contingency that has arisen in this case.



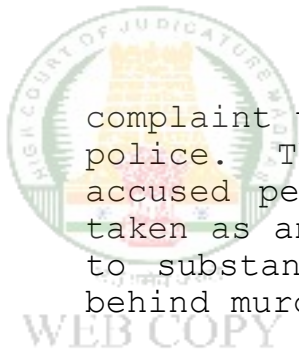
8. The learned Additional Public Prosecutor further submitted that the petitioners have not examined any of the witnesses and therefore there is no question of the prosecution attempting to cover up the lacunae as claimed by the accused persons. The learned Additional Public Prosecutor concluded his arguments by submitting that there is no ground to interfere with the order passed by the Court below and the accused persons will always have an opportunity to cross-examine the additional witness and no prejudice will be caused to them by the order passed by the Court below in allowing 311 application filed on behalf of the prosecution.

9. This Court has carefully considered the submission made on either side and the materials available on record.

10. Before going into the facts of the case, it is important to understand the scope of Section 311 of Cr.P.C. The language used under Section 311 of Cr.P.C is very wide and the Section uses expressions, which are in its widest possible terms and it does not limit the discretion of the Court in any manner. The prosecution in order to prove its case, can at any stage, examine any person as a witness and mark additional document. What is important to be noted is that such examination of additional witness or marking of additional document should not result in attempting to bring forth a new case by the prosecution. If a new case is projected, it will cause prejudice to the accused person and in a way it will also amount to permitting the prosecution to fill up the lacunae in the existing case that was brought forth in the final report. It must also be borne in mind that the accused person will also get an opportunity to cross-examine the additional witness and also put questions on the document that is sought to be marked through the additional witness. Keeping these fundamental principles in mind, this Court will have to now consider the facts of the present case.

11. The petitioners are facing trial before the Court below for an offence under Sections 294 (b), 342, 302 and 506 (ii) IPC., r/w 34 IPC. P.W.1 is the defacto complainant in this case. The case of the prosecution is that A1 was working abroad and his wife is said to have developed an illegal intimacy with the deceased. When this became a dispute, it was also interfered by the local panchayat and elders. Before the date of occurrence, the deceased is said to have again got in touch with the wife of A1 and this was seen and noticed by the local people and A1 and A3 having warned the deceased regarding the same. In spite of this warning, the deceased continued his illegal intimacy with the wife of A1. Ultimately, it ended up in the deceased being attacked by the accused persons and resulting in his death.

12. From the above said facts, it is clear that there was a previous enmity and motive that is sought to be projected by the prosecution in order to establish its case. When P.W.1 was examined



complaint that was given against A1, A3 and A4 before the respondent police. The fact that the complaint was given by P.W.1 against the accused persons cannot be taken as a new fact and it can only be taken as an additional material, which is sought to be used in order to substantiate the basic facts, viz., the previous enmity/motive behind murder.

13. The submission made by the learned counsel for the petitioner that this additional witness and the complaint that is sought to be marked through him, cannot be done by way of filing an application under Section 311 of Cr.P.C, is not acceptable to this Court. It is true that the prosecution has to place all the materials and the list of all witnesses, which it seeks to rely upon, along with the final report. However, this does not mean that the prosecution cannot examine any additional witness or mark any new document, which comes to surface at a later point of time, by taking aid of Section 311 of Cr.P.C.

14. At this stage, it will be beneficial to rely upon the judgment of this Court in **K.Ravichandran Vs The Inspector of Police, Thanjavur**, reported in **2018-2-L.W. (Cr1.) 944**. The relevant portions of the judgment is extracted here under:-

"7.The learned Government Advocate (Cr1.Side) would submit that Section 311 of Cr.P.C 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 **1991-1-L.W. (Cr1) 284=1991 SCC (Cri) 595**.*

*ii) **U.T of Dadar and Nagar Haveli and another Vs. Fatehsinh Mohansinh Chauhan**, reported in **2007-1-L.W. (Cr1) 7 = (2006) 7 SCC (Cri) 529** and*

*iii) **Rajarjm 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 Cr.P.C 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 Cr.P.C.

14.It is clear from the above said judgments that a very wide discretion has been given to the Court under Section 311 of Cr.P.C 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 Cr.P.C 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 Cr.P.C."

15. In the above judgment, this Court had considered in detail the scope of Section 311 Cr.P.C., in relation to examining additional witness, who are not shown as a witness in the final report. This Court categorically held that the prosecution in order to prove its case, can at any stage examine any person as a witness and ultimately, the accused persons will get an opportunity to cross-examine those witnesses and no prejudice will be caused by permitting the prosecution to examine the witness, who are not shown in the list of witnesses filed along with the final report.

16. This Court is of the considered view that the prosecution is not trying to introduce a new case and by examining the additional witness and marking the complaint, it is only trying to substantiate the basic issue regarding the previous enmity/motive of the accused persons. As and when the additional witness is examined, it is always open to the accused persons to cross-examine him and also put questions on the complaint that is sought to be marked through the additional witness. The accused persons will have all the opportunity to establish the defence and no prejudice will be caused to the accused persons, by allowing the 311 application filed by the prosecution.

17. This Court does not find any illegality or infirmity in the order passed by the Court below and the order passed by the Court below is hereby sustained.

18. In the result, this Criminal Original Petition is dismissed and the Court below is directed to complete the proceedings in S.C.No.256 of 2016, within a period of six months from the date of receipt of copy of this order. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar

// True Copy //

Sub Assistant Registrar(CS)



To

1. The IV-Additional Sessions Judge,
Tirunelveli.
2. The Inspector of Police,
Uvari Police Station,
Tirunelveli District.
3. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to Mr.S. BALAMURUGAN, Advocate SR-85267.

Crl.O.P. (MD)No.6208 of 2017
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