



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 10.02.2021

CORAM :

THE HONOURABLE MRS. JUSTICE R. HEMALATHA

Crl.OP.(MD)No.523 of 2021 &

Crl.MP(MD)No.256 of 2021

WEB COPY

Rajeshkannan

... Petitioner

vs.

State Represented by,
The Inspector of Police,
Allinagaram Police Station,
Theni District.
Crime No.385 of 2018

... Respondent

PRAYER: Criminal Original Petition filed under Section 482 of the Code of Criminal Procedure to set aside the order dated 03.12.2020 passed in Crl.MP.No.666 of 2020 in Special SC.No.7 of 2019 by the Mahila Fast Track Court (Additional District and Sessions Judge), Theni.

For Petitioner : Mr.R.Manickam

For Respondent : Mr.A.Robinson

Government Advocate (Criminal side)

ORDER

The present petition has been filed to set aside the order dated 03.12.2020 passed by Mahila Fast Track Court (Additional District and Sessions Judge), Theni in Crl.M.P.No.666 of 2020 in Special SC.No.7 of 2019.

2. The petitioner is an accused in Special SC.No.7 of 2019 on the file of the Mahila Fast Track Court (Additional District and Sessions Judge), Theni for the alleged offences punishable under Section 366(A) of Indian Penal Code and Section 4 of the Protection of Children from Sexual Offences Act, 2012. During the course of trial, the prosecution examined 15 witnesses on various dates from 04.04.2019 to 02.11.2020. The petitioner did not cross examine the witnesses when they were examined in chief. Subsequently, the petitioner / accused filed an application under Section 311 of the Code of Criminal Procedure in Crl.MP(MD)No.666 of 2020 to recall PW1 to PW3, PW6, PW7, PW14 and PW15 and the said petition was dismissed by the trial court vide orders dated 03.12.2020. Aggrieved over the same, the petitioner / accused has filed the present petition.

3. Mr.R.Manickam, learned counsel appearing for the petitioner / accused contended that the orders passed by the trial court is not sustainable since no opportunity was given to the petitioner / accused to cross examine the witnesses.

4. Mr.A.Robinson, learned Government Advocate (Criminal Side)

appearing for the respondent contended that the petitioner / accused did not cross examine the witnesses on the day when they were examined in chief by the Court and that the petition in CrI.MP(MD) No.666 of 2020 was filed after a long gap and that too on the ground that the defence counsel was suffering from Chikungunya and was bedridden for six months. His further contention is that no documentary evidence was adduced before the trial court to substantiate this contention of the petitioner / accused.

5. In the decision in State (NCT of Delhi) vs. Shiv Kumar Yadav reported in (2016) 2 SCC 402, the Hon'ble Supreme Court has held thus:

"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



(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."

6. 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., which read 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.

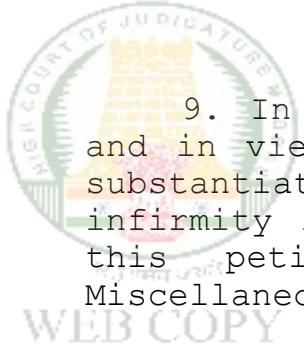
(x) The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than 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."

7. 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."**

8. A perusal of the records shows that the main reason for not cross examining the witnesses when they were in witness box is that the counsel appearing for the defence was suffering from Chikungunya fever and was bedridden for more than six months from 30.11.2018. The trial court after considering the materials on record, dismissed the said petition on 03.12.2020 on the following grounds, (i) As per Section 5 of the Protection of Children from Sexual Offences Act, 2012, the trial court has to ensure that the child is not called repeatedly to testify (ii) The trial in the Protection of Children from Sexual Offences Act, 2012 has to be completed as far as possible within a period of one year from the date of taking cognizance of offences as per the provisions contained under Section 35(2) of the Protection of Children from Sexual Offences Act, 2012 (iii) In the decision in Vinod Kumar vs. State of Punjab reported in 2015 (3) SCC 220 it is held that, it is not at all appreciable to call a witness for cross examining after a long span of time and that the duty of the Court is to see that not only the interest of the accused as per law is protected but also the societal and collective interest is safeguarded.



9. In view of the law laid down by the Hon'ble Supreme Court and in view of the fact that there is no documentary evidence to substantiate the contention of the petitioner, this Court finds no infirmity in the order passed by the trial Court and accordingly, this petition is dismissed. Consequently, the connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar ()

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/ /2021

Sub Assistant Registrar(CS)

Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

- 1.The Additional District and Sessions Judge,
Mahila Fast Track Court, Theni.
- 2.The Inspector of Police,
Allinagaram Police Station,
Theni District.
- 3..The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

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