



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
(Criminal Jurisdiction)

Date : 08.02.2021

PRESENT

WEB COPY

THE HONOURABLE MRS .JUSTICE R.HEMALATHA

CRL OP(MD) . No.1773 of 2021
and
Crl.M.P(MD) .No.881 of 2021

Abdul Latheef ... Petitioner/Petitioner/Sole Accused

Vs

The State of Tamil Nadu,
rep., by the Sub-Inspector of Police,
Kottar Police Station, Kottar,
Nagercoil, Kanyakumari District.
(Crime No.359 of 2016) ... Respondent/Respondent/Complainant

Prayer: Criminal Original Petition filed under Section 482 of the Code of Criminal Procedure to set aside the order dated 16.11.2018 passed in Crl.M.P.No.3579 of 2018 in CC.No.70 of 2017 by the Judicial Magistrate No.II, Nagercoil, Kanyakumari District.

For Petitioner : Mr.N.Pragalathan
For Respondent : Mr.S.Chandrasekar
Additional Public Prosecutor

ORDER

The present petition has been filed to set aside the order dated 16.11.2018 passed by the Judicial Magistrate No.II, Nagercoil in Crl.M.P.No.3579 of 2018 in CC.No.70 of 2017.

2.The petitioner is the sole accused in CC.No.70/2017 on the file of the Judicial Magistrate No.II, Nagercoil for the alleged offences punishable under Sections 451, 294(b), 324 and 506(ii) of the Indian Penal Code. During the course of trial, the prosecution examined 4 witnesses on 29.05.2018 and 2 witnesses on 24.07.2018 and the petitioner / accused did not cross examine P.W.1 to P.W.6 on the ground that his counsel was indisposed. Subsequently, the petitioner filed a petition under Section 311 of the Code of Criminal Procedure in Crl.M.P.No.3579 of 2018 to recall P.W.1 to P.W.4 and the said petition was dismissed by the Judicial Magistrate No.II, Nagercoil, vide his orders dated 16.11.2018. Aggrieved over the same, the petitioner/accused has filed the present petition.



3.Mr.N.Pragalathan, learned counsel appearing for the petitioner contended that the order passed by the trial Court is not sustainable since no opportunity was given to the petitioner to cross-examine P.W.1 to P.W.4. His further contention is that though it was contended before the trial Court that the counsel who appeared on behalf of the petitioner, was indisposed, the trial Court failed to consider the same and dismissed the petition filed under Section 311 of the Code of Criminal Procedure.

4.Mr.S.Chandrasekar, learned Additional Public Prosecutor, who accepts notice on behalf of the respondent, would submit that the Judicial Magistrate No.II, Nagercoil has passed a well considered order and that the petitioner/accused did not avail the opportunity to cross-examine the witnesses at the time when the witnesses were present before the Court. He therefore prayed for dismissal of the present petition.

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;

<https://hcservices.ecourts.gov.in/SCS/>



(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."

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.

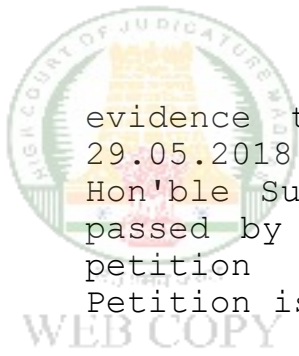
(x) The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than 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 orders passed by the learned Judicial Magistrate No.II, Nagercoil clearly shows that the petition to recall P.W.1 to P.W.4 under Section 311 of the Code of Criminal Procedure was filed by the petitioner/accused on flimsy grounds. It is also relevant to point out that the petition in Cr.M.P.No.3579 of 2018 was filed only to recall P.W.1 to P.W.4 and the accused did not choose to recall P.W.5 and P.W.6, eventhough they were examined in chief on 24.07.2018. The petitioner did not adduce any acceptable



evidence to show that his counsel was laid up with fever on 29.05.2018 and 24.07.2018. In view of the law laid down by the Hon'ble Supreme Court, I do not find any infirmity in the orders passed by the trial Court and accordingly, the Criminal Original petition is dismissed. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(RTI)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

rmk

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 Judicial Magistrate No.II,
Nagercoil, Kanyakumari District.
- 2.The Sub-Inspector of Police,
Kottar Police Station, Kottar,
Nagercoil, Kanyakumari District.
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.N.PRAGALATHAN, Advocate (SR-3854[F] dated 08/02/2021)

ORDER IN
CRL OP(MD) . No.1773 of 2021
Date : 08.02.2021

MJ(CO)
TR(01.03.2021) 5P 5C