



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 15.02.2021

CORAM :

THE HONOURABLE MRS. JUSTICE R. HEMALATHA

Crl.OP.(MD)No.2300 of 2021
and
Crl.MP(MD)No.1170 of 2021

Chandrasekar

... Petitioner

Vs.

State Represented by,
The Inspector of Police,
Vadacherry Police Station,
Nagercoil,
Kanyakumari District.

... Respondent

PRAYER: Criminal Original Petition filed under Section 482 of the Code of Criminal Procedure, to set aside the Order dated 06.12.2017 passed in Crl.M.P.No.5270 of 2017 in C.C.No.234 of 2018 by the Additional Mahila Court (Magistrate Level), Nagercoil.

For Petitioner : Mr.G.Prabhu Rajadurai

For Respondent : Mr.A.Robinson
Government Advocate (Criminal side)

ORDER

The present petition has been filed to set aside the Orders dated 06.12.2017, passed by the Additional Mahila Court (Magistrate Level), Nagercoil, in Crl.MP.No.5270 of 2017 in C.C.No.234 of 2018.

2. The petitioner / accused is facing trial in CC.No.234 of 2018 on the file of the Additional Mahila Court (Magistrate Level), Nagercoil, for the alleged offences punishable under Sections 417, 420, 506(ii) of the Indian Penal Code and Section 4 of Tamil Nadu Prevention of Harassment of Women Act, 2002. During the course of trial, the prosecution examined four witnesses on various dates and the petitioner / accused did not cross examine the witnesses on the day when they were examined in Chief. Subsequently, the petitioner / accused filed an application under Section 311 of the Code of Criminal Procedure in Crl.M.P.(MD)No.5270 of 2017 in C.C.No.234 of 2018 for the purpose of cross examining PW1 and the said petition was dismissed by the learned Judicial Magistrate, Nagercoil, vide order dated 06.12.2017.



dated 16.12.2017. Aggrieved over the same, the petitioner/accused has filed the present petition.

3.Mr.G.Prabhu Rajadurai, learned counsel appearing for the petitioner / accused contended that subsequent to the examination of P.W.1, an agreement was entered into between the present petitioner and the defacto complainant on 28.09.2017 and therefore, he wanted to recall P.W.1 for the purpose of marking the said document through P.W.1.

4. *Per contra*, Mr.A.Robinson, learned Government Advocate (Criminal Side) appearing for the respondent would contend that the petition to recall PW1 was filed by the petitioner / accused on the ground that the petitioner's counsel could not cross examine P.W.1 as he had been to Australia when P.W.1 was examined in chief. However, in the present Criminal Original Petition a different reason is assigned.

5.In the instant case, four witnesses have been examined on various dates and perusal of the orders passed by the learned Judicial Magistrate, shows that after examination of P.W.1 in chief, the accused did not cross examine him and took three years to file a petition under Section 311 of the Code of Criminal Procedure, to recall P.W.1. The order passed by the learned Judicial Magistrate also shows that the reason assigned by the accused is that his counsel had gone to Australia and therefore, P.W.1 could not be cross examined on that date, when he was present before the Court.

6. 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 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."

7. 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.

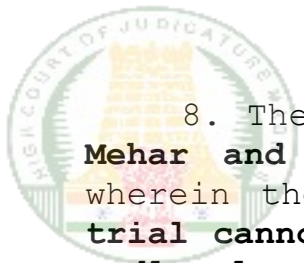
(viii) The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

(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."



8. The said decision has also been followed in **Haryana Vs. Ram Mehar and others reported in (2016) 8 Supreme Court Cases 762**, wherein 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."**

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9. In view of the law laid down by the Hon'ble Supreme Court and in view of the fact that the petitioner has not assigned any valid reason to recall P.W.1, this Court finds no infirmity in the order passed by the trial Court.

10. Accordingly, this Criminal Original Petition is dismissed. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (AE)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

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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 Inspector of Police,
Vadacherry Police Station,
Nagercoil,
Kanyakumari District.

2. The Additional Mahila Judge (Magistrate Level), Nagercoil.

3. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to Mr.G.PRABHU RAJADURAI, Advocate (SR-5416[F] dated 16/02/2021)

CrI.OP.(MD)No.2300 of 2021
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