



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 22.02.2021

CORAM :

THE HONOURABLE MRS. JUSTICE R. HEMALATHA

Crl.OP.(MD)Nos.2554 and 2555 of 2021
and
Crl.MP(MD)Nos.1328 and 1331 of 2021

1.Sanjeevi
2.Pakiyakumar
3.Sriram @ Sulagu

... Petitioners
(in Crl.O.P.(MD)No.2554 of 2021)

4.Marisamy
5.Parthiban

... Petitioners
(in Crl.O.P.(MD)No.2555 of 2021)

vs.

State Represented by,
The Inspector of Police,
Idol Wing CID, Chennai
(Crime No.65 of 2008
Udayarpalayam Police Station)

...Respondent in both petitions

COMMON PRAYER: Criminal Original Petitions filed under Section 482 of the Code of Criminal Procedure to set aside the orders dated 03.12.2020 passed in Crl.MP.Nos.659 and 658 of 2020 in C.C.No.01 of 2016 by the Additional Chief Judicial Magistrate, Special Court for Idol Theft Cases, Kumbakonam.

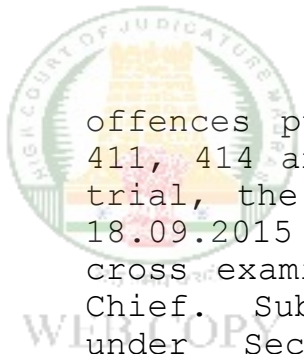
For Petitioners : Mr.B.Fazil kirmani
(in both petitions)

For Respondent : Mr.S.Chandrasekar
(in both petitions) Additional Public Prosecutor

COMMON ORDER

The present petitions have been filed to set aside the orders dated 03.12.2020 passed in Crl.M.P.Nos.658 and 659 of 2020 in CC.No.01 of 2016 by the learned Additional Chief Judicial Magistrate, Special Court for Idol Theft Cases, Kumbakonam.

2. The petitioners are Accused Nos.2 to 6 in CC.No.01 of 2016 on the file of the learned Additional Chief Judicial Magistrate, (Special Court for Idol Theft Cases), Kumbakonam, for the alleged



offences punishable under Sections 457(2), 380(2), 465, 468, 471, 411, 414 and 120(b) of the Indian Penal Code. During the course of trial, the prosecution examined 13 witnesses on various dates from 18.09.2015 to 15.10.2020 and the petitioners / accused did not cross examine the witnesses on the day when they were examined in Chief. Subsequently, the petitioners / accused filed an application under Section 311 of the Code of Criminal Procedure in Crl.M.P.Nos.658 and 659 of 2020 to recall PW1, PW12, PW15, PW21 to PW28, PW35 and PW36 and the said petitions were dismissed by the trial court vide orders dated 03.12.2020. Aggrieved over the same, the petitioners / accused have filed the present petitions.

3.Mr.B.Fazilkirmani, learned counsel appearing for the petitioners / accused contended that the order passed by the trial court is not sustainable since no opportunity was given to the petitioners / accused to cross examine all the witnesses.

4.Mr.S.Chandrasekar, learned Additional Public Prosecutor appearing for the respondent contended that the learned Additional Chief Judicial Magistrate, Special Court for Idol Theft Cases, Kumbakonam has passed a well considered order and that the petitioners / accused did not avail the opportunity to cross examine the witnesses at the time when they were examined in chief. It is also his contention that the case in C.C.No.01 of 2016 is posted for examination of foreign nationals on 28.04.2021 and therefore, prayed for dismissal of the present petitions.

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 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 Additional Chief Judicial Magistrate, Special Court for Idol Theft Cases, Kumbakonam clearly shows that the petition to recall the witnesses under Section 311 of the Code of Criminal Procedure was filed by the petitioners / accused on flimsy grounds. In view of the law laid down by the Hon'ble Supreme Court, this Court finds no infirmity in the order passed by the trial Court and accordingly, these petition are dismissed. Consequently, the connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar (Crl)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

SJI

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 Chief Judicial Magistrate,
Special Court for Idol Theft Cases, Kumbakonam.
- 2.The Inspector of Police,
Idol Wing CID, Chennai
(Crime No.65 of 2008 Udayarpalayam Police Station)
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

+2 CC to Mr.B.FAZIL KIRMANI, Advocate (SR-6642[F] & SR-6643[F] dated 23/02/2021)

Order made in
Crl.OP. (MD) Nos.2554&2555/2021 and
Crl.MP (MD) Nos.1328&1331/2021
22.02.2021

KG (CO)

SRS (10/03/2021) 5P : 6C