



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : **05.03.2021**

CORAM :

THE HONOURABLE **Mrs.JUSTICE R.HEMALATHA**

Crl.O.P. (MD)No.3447 of 2021

and

Crl.M.P.(MD)No.1893 of 2021

C.Anithil

...Petitioner/Petitioner/Accused
/Vs./

The State represented by
The Inspector of Police,
Pettai Police Station,
Tirunelveli District.
(Crime No.243 of 2015)

...Respondent/Respondent/Complainant

Prayer: Criminal Original Petition filed under Section 482 of the Code of Criminal Procedure, to set aside the order passed by the Additional Mahila Court, Tirunelveli, in Cr.M.P.No.unnumbered of 2021, dated 20.01.2021 and consequently direct the trial Court to number and dispose the same.

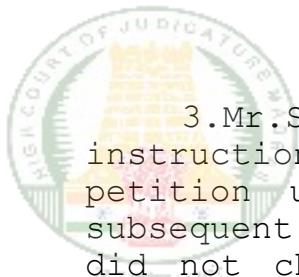
For Petitioner
For Respondent

: Mr.J.Jeyakumaran
: Mr.S.Chandra Sekar
Additional Public Prosecutor

ORDER

The present petition is filed seeking to set aside the order passed by the Additional Mahila Court, Tirunelveli, in Cr.M.P.No.unnumbered of 2021, dated 20.01.2021.

2.The petitioner is the accused in C.C.No.305 of 2016 and he is facing trial for the offences under Sections 341, 294 (b) and 506 (ii) of the Indian Penal Code, 1860 and Section 4 of the Tamil Nadu Prohibition of Harassment of Women Act, 2002. During the course of trial, the prosecution examined seven witnesses on various dates from 19.09.2017 to 13.11.2018. The petitioner did not cross examine the witnesses PW1 to PW7 on the date when they were examined in chief. Subsequently, he filed a petition under Section 311 of the Code of Criminal Procedure in Cr.M.P.No.3612 of 2017 and the Additional Mahila Judge, Tirunelveli, allowed the said petition on payment of necessary process fee. Since the present petitioner did not pay the process fee, the petition was dismissed. Subsequently, on 18.01.2021, the petitioner filed another application under Section 311 of the Code of Criminal Procedure to recall PW1 to PW7 and the Additional Mahila Judge returned the said petition as not maintainable, on the ground that the earlier petition filed by the petitioner under Section 311 of the Code of Criminal Procedure in Cr.M.P.No.3612 of 2017 was already dismissed by him.



3.Mr.S.Chandra Sekar, learned Additional Public Prosecutor, on instructions, would contend that though the petitioner filed a petition under Section 311 of the Code of Criminal Procedure, subsequent to the dismissal of the earlier petition, the petitioner did not choose to cross-examine the witnesses when they were in witness box and the calendar case is of the year 2016 and PW1 to PW3 were examined on the side of the prosecution on 19.09.2017 and PW4 and PW5 were examined on 10.10.2017. Thereafter, PW6 and PW7 were examined on 13.11.2018 and on all these dates, the counsel for the petitioner did not cross examine the witnesses.

4.Mr.J.Jeyakumaran, learned counsel for the petitioner contended that the erstwhile counsel, who appeared on behalf of the petitioner did not cross examine the witnesses and therefore, the petitioner engaged another counsel to cross examine all the witnesses.

5.Such a ground cannot be accepted for recalling the witnesses and 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



(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. Though the earlier petition filed by the petitioner cannot be a bar for filing a subsequent petition, it is seen that the petitioner without any valid reason has been filing petitions after petitions under Section 311 of the Code of Criminal Procedure for cross examining the witnesses. Though in the first instance the petition was allowed, the petitioner did not pay the process fee and ultimately, the petition was dismissed. Once again the petitioner filed another petition under Section 311 of the Code of Criminal Procedure to recall the witnesses. The main reason stated by the petitioner is that his erstwhile counsel did not cross examine the witnesses on the date when the witnesses were examined in chief. In fact on three different dates, PW1 to PW7 were examined. In the circumstance, it appears as if the petitioner is trying to protract the proceedings.

9. In the result, this petition is dismissed. However, the Judicial Magistrate, Additional Mahila Court, Tirunelveli, is directed to dispose of C.C.No.305 of 2016, within a period of two months from the date of receipt of a copy of this order / uploading of this order. Consequently, connected Miscellaneous Petition is dismissed.

Sd/-

Assistant Registrar (RTI)

// True Copy //

/ /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 Judicial Magistrate,
Additional Mahila Court, Tirunelveli.
2. The chief Judicial Magistrate,
Tirunelveli district.



3.The Inspector of Police,
Pettai Police Station,
Tirunelveli District.

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

WEB COPY

Copy to

The Registrar Judicial, (Soft Copy)
Madurai Bench of Madras High Court,
Madurai.

Crl.O.P. (MD) No.3447 of 2021
05.03.2021

TP (CO)
KB (24.04.2021) 6P 6C