



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: 23.03.2021

CORAM:

THE HONOURABLE MRS.JUSTICE R. HEMALATHA

CrI.OP(MD)No.4258 of 2021 &

CrI.MP(MD)No.2387 of 2021

Vinoth Kumar

... Petitioner

vs.

1.The Inspector of Police,
Thalaiyuthu Police Station,
Thalaiyuthu,
Tirunelveli District.
(Crime No.328 of 2016)

2.Poornavalli

... Respondents

PRAYER: Criminal Original Petition filed under Section 482 of the Code of Criminal Procedure to set aside the orders dated 24.02.2021 passed by the Judicial Magistrate, Additional Mahila Court, Tirunelveli in CrI.MP.No.404 of 2021 in CC.No.93 of 2017.

For Petitioners

:Mr.G.Radhakrishnan

For Respondents

:Mr.A.Robinson,

Government Advocate (Criminal Side)

O R D E R

The present petition has been filed to set aside the impugned orders dated 24.02.2021 passed by the Judicial Magistrate, Additional Mahila Court, Tirunelveli in CrI.MP.No.404 of 2021 in CC.No.93 of 2017.

2.The petitioner is an accused in CC.No.93 of 2017 on the file of the Judicial Magistrate, Additional Mahila Court, Tirunelveli for the alleged offences punishable under Sections 341, 294(b) and 506(ii) of the Indian Penal Code and Section 4 of the Tamil Nadu Prohibition of Harassment of Women Act, 1988. During the course of trial, the prosecution examined 3 witnesses on 30.08.2017 and 2 witnesses on 09.01.2019 and thereafter, the present petitioner was questioned under Section 313 of the Code of Criminal Procedure. The present petitioner did not cross-examine witnesses on the ground that there was an attempt to murder him, for which, a complaint was also lodged by him in Crime No.166 of 2019 of Melapalayam Police Station. Subsequently, the petitioner filed a petition under Section 311 of the Code of Criminal Procedure in CrI.M.P.No.404 of 2021 to recall P.W.1 to P.W.6 for cross-examination and the said petition was dismissed by the learned Judicial Magistrate, Additional Mahila Court, Tirunelveli, vide orders dated 24.02.2021, wherein, it is observed thus.



"4. On going through the records, on 30.08.2017 PW1 to PW3 chief examination were taken by this Court. On 30.08.2017, this Court made the docket entry stating that "A1, A2 present. LW2, LW4, LW5 examined as PW1, PW2, PW3. Ex.P1 to Ex.P3 marked. Issue summons to further LW3 call on 06.09.2017." After 30.08.2017, this case came up before this Court for 51 hearings from that time the counsel for accused never came forward to cross examine PW1 to PW3. This clearly shows that counsel for accused wantonly evade to cross examine PW1 to PW3 on that date and not to proceed the case further. After this, heard 313(1)(b) of the Code of Criminal Procedure questioning Accused and posted for defense. The counsel for accused came forward now to cross examine PW1 to PW6. It is not acceptable that for change in counsel for Accused, the petitioner has right to recall the witness. After examination of PW1 to PW3, both the accused wants to drag on the case. Accused No.2 was absent and NBW was issued against him and remanded to Judicial custody on 19.10.2016. After A1 released on bail again he remained absent from the Court and NBW was issued against him. Further it was recalled on 27.11.2020. Also PW5 and PW6 was cross examined on 09.01.2019 the above fact was suppressed by this petitioner. Since PW5 and PW6 were already cross examined, in order to fill the lacunae, this petitioner again filing petition to recall PW5 and PW6 is not acceptable."

3.Mr.A.Robinson, learned Government Advocate (Criminal Side) who accepts notice on behalf of the first respondent, would submit that the learned Judicial Magistrate, Additional Mahila Court, Tirunelveli passed a well considered order and that there is no good ground to set aside the impugned order since, the case was adjourned for more than 51 hearings and 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.

4. 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."

5. 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."

6. 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.**"

7. In the facts and circumstances of the present case and 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 (Crl Side)

// 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 Additional Mahila Court,
Tirunelveli.
- 2.The Inspector of Police,
Thalaiyuthu Police Station,
Thalaiyuthu,
Tirunelveli District.
- 3.The Judicial Magistrate,
Additional Mahila Court,
Tirunelveli.
- 4.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai

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