



Crl.O.P.No.23653 of 2022

WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.09.2022

CORAM:

THE HONOURABLE MR. JUSTICE **V.SIVAGNANAM**

Crl.O.P.No.23653 of 2022

Appuswamy

... Petitioner

Vs

State of Tamil Nadu
Rep.by
Inspector of Police
All Women Police Station
Coonoor.

... Respondent

PRAYER: Criminal Original Petition filed under Section 482 Cr.P.C. praying to set aside the order passed in CMP.No.328 of 2022 in Spl.C.C.No.3 of 2017 dated 18.08.2022 on the file of the Sessions Court, Magalir Neethimandram, (FTMC), Udthagamandalam.

For Petitioner : Mr.Dinuprashanth



Crl.O.P.No.23653 of 2022

ORDER

WEB COPY This Criminal Original Petition has been filed to set aside the order passed in CMP.No.328 of 2022 in Spl.C.C.No.3 of 2017 dated 18.08.2022 on the file of the Sessions Court, Magalir Neethimandram, (FTMC), Udhagamandalam.

2. The learned counsel appearing for the petitioner submitted that the petitioner is an accused in Spl.C.C.No.3 of 2017. The respondent police prosecuted the case against the petitioner/accused for having committed offence punishable under Sections 9(1), (m) (f) and 10 of the POCSO Act, 2012. After framing of charges, all the witnesses were examined. Thereafter during the course of examination of defence witnesses, the trial Court altered the charges for offences under Sections 9(1) r/w 10 (2 counts), 9 (m) r/w 10 (2 counts) and 9(f) r/w 10 (2 counts) of the POCSO Act. Thereafter during the stage of arguments the trial Court again altered the charges and framed additional charges under Section 5(1) r/w 6, S.5(m) r/w 6, 5 (f) r/w 6, 9(1) r/w 10, 9(m) r/w 10 and 9(f) r/w 10 of the POCSO Act. Thereafter the petitioner filed a petition in CMP.No.197 of 2020 under Section 311 of Cr.P.C. for cross



Crl.O.P.No.23653 of 2022

examining the prosecution witnesses PW9, 11, 19 and 20 and were cross examined. Again the trial Court altered the charges on 21.04.2022, after altering the charges the petitioner filed an application in CMP.No.328 of 2022 to recall P.W.2, 3, 11 and 16 for cross examination with regard to alteration of charges which was rejected by the trial Court. Hence challenging the same the petitioner had filed the present petition.

3. The learned Government Advocate (Crl.side) submitted that after framing of charges admittedly the trial Court altered the charges for the first time and added the additional charges. Thereafter the petitioner was permitted to cross examine the prosecution witnesses by recalling the witnesses. Again on 21.04.2022 for the second time charges have been further altered by adding additional charges and the application filed by the petitioner again for recalling the P.Ws.2, 3, 11 and 16 were dismissed on the ground that with regard to altered charges, already witnesses were enquired, deposed and cross examined, therefore objected to allow this petition.

4. Heard both sides and perused the materials available on record.



Crl.O.P.No.23653 of 2022

WEB COPY

5. On a perusal of the records, it reveals that the petitioner is an accused in Spl.C.C.No.3 of 2017 on the file of the Sessions Judge, Magalir Neethimandram (FTMC), Udhamandalam. Admittedly, the respondent police prosecuted the petitioner/accused for having committed an offence punishable under section 9(1), (m)(f) and 10 of the POCSO Act, 2012 on the file of the Sessions Court, Magalir Neethimandram (FTMC), Udhagamandalam initially after cross examining the prosecution witnesses, the trial Court during the stage of examining the defence witnesses altered the charges against the accused under Section 9 (1) r/w 10 (2 counts), 9 (m) r/w 10 (2 counts) and 9(f) r/w 10 (2 counts) of the POCSO Act for the first time. The petitioner filed a petition in CMP.No.197 of 2020 under Section 311 Cr.P.C. to recall the witnesses PWs. 9, 11, 19 and 20 in CMP.No.197 of 2020 which was allowed on 23.06.2020 and witnesses were cross-examined. The trial Court again altered the charges on 21.04.2020 and added the charges for the second time. Thereafter on altering the charges, the petitioner filed petition in CMP.No.328 of 2022 under Section 311 of Cr.P.C. to recall PWs.2, 3, 11 and 16 for cross examination with regard to altered charges. This petition was rejected on the



ground that already witnesses and other prosecution witnesses have been cross-examined in this aspect. Admittedly after altering and adding the charges no chance has been given to the petitioner for cross examining the prosecution witnesses with regard to the altered charges. Speedy trial is the spirit of Article 21 of the Constitution. At the same time, the accused had right to cross examine the witnesses. A fair trial is also assured by the Constitution. In this circumstances, the Hon'ble Apex Court in the case of **Rajaram Prasad Yadav /vs/ State of Bihar and others** reported in **Crl.A.No.830 of 2013** laid down the principles to be followed while considering an application under Section 311 Cr.P.C, which reads as follows:-

' (a) Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?

(b) 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.

(c) 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.



(d)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.

(e)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.

(f)The wide discretionary power should be exercised judiciously and not arbitrarily.

(g)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.

(h)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.

(i)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.

(j)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.



WEB COPY

(k)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.

(l)The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

(m)The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

(n)The power under Section 311 of 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 [Rajaram Yadav v State of Bihar, AIR 2013 SC 3081 : 2013 Cr LJ 3777 (SC) : (2013) 14 SCC 461].'



Crl.O.P.No.23653 of 2022

WEB COPY

6. A fair chance has to be given to the petitioner again after altering and adding the charges to place his defence effectively, therefore the order passed by the learned Sessions Judge, Magalir Neethimandaram (FTMC), Udthagamandalam in CMP.No.328 of 2022 in Spl.C.C.No.3 of 2017 is unsustainable and it is hereby set aside and the criminal original petition is allowed. However, the Trial Court is directed to recall PWs.2, 3, 11 and 16 for cross-examination and the petitioner is hereby directed to cross-examine the PWs.2, 3, 11 and 16 on the same day itself without any adjournment. Further, the Trial Court is also directed to dispose of the case as expeditiously as possible. Consequently, connected miscellaneous petition is closed.

7. With the above observation, this criminal original petition is allowed.

29.09.2022

Speaking/Non speaking order
dpq



WEB COPY



Crl.O.P.No.23653 of 2022

V. SIVAGNANAM, J.

dpq

To

1. The Inspector of Police
All Women Police Station
Coonoor.
2. The Sessions Court,
Magalir Neethimandram,
(FTMC), Udhagamandalam.
3. The Public Prosecutor
High Court of Madras.

Crl.O.P.No.23653 of 2022

29.09.2022