



WEB COPY



Crl.O.P.(MD) Nos.5119 & 5121 of 2020

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 17.06.2022

CORAM

THE HONOURABLE MR. JUSTICE V.SIVAGNANAM

CRL.O.P (MD) Nos.5119 & 5121 of 2020

Pappa

... Petitioner in both cases

Vs

**The Inspector of Police,
District Crime Branch,
Nagercoil.**

... Respondent in both cases

COMMON PRAYER: Criminal Original Petitions filed under Section 482 of Cr.P.C, praying to set-aside the orders passed in C.M.P. NO.1240 of 2020 in C.C. No.274 of 2006 dated 26.02.2020 and C.M.P. NO.1241 of 2020 in C.C. No.275 of 2006 dated 26.02.2020, on the file of the Judicial Magistrate Court NO.I, Nagercoil.

For Petitioner : Mr. S.Sankar

**For Respondent : Mr.R.Sureshkumar
Government Advocate (Crl.Side)**



Crl.O.P.(MD) Nos.5119 & 5121 of 2020

3.The learned Government Advocate (Crl.Side) has submitted that sufficient opportunity has been given to the petitioner for cross examining those witnesses. Since the petitioner has not cross examined the witnesses, the prosecution has proceeded further. Now, the cases are posted for arguments on 01.08.2022.

4. I have considered the submission of the both the learned counsel appearing on either side and perused the materials available on records.

5. On perusal of records, it is seen that the petitioner is an accused/A2 in C.C.Nos.274 and 275 of 2006, on the file of Judicial Magistrate Court, Nagercoil. The petitioner was prosecuted by the respondent police for the offences under Sections 409, 477(A), 420 r/w 120(b) IPC. After examination of witnesses, the cases were posted for argument. At this stage, the petitioner has filed petitions under Section 311 of Cr.P.C for recalling PW1, PW3, PW4, PW7, PW8, PW9 and PW11 in CC No.274 of 2006 and PW1, PW3, PW4, PW7, PW11, PW12, PW14, PW15, PW16, PW17 and PW28 in CC No.275 of 2006. However, both the petitions were dismissed by the trial Court.



Crl.O.P.(MD) Nos.5119 & 5121 of 2020

WEB COPY

6. In the case on hand, the petitioner has been prosecuted by the respondent police for the offences under Sections 409, 477(A), 420 r/w 120(b) IPC, for misappropriation of the amount collected on various dates from various persons. The petitioner was working as a Collecting Agent in the Post Office and she collected the amount from the depositors. According to the prosecution, she failed to remit the same with the collusion of another Post Master, who is arrayed as A1. Under these circumstances, an opportunity has to be given to this petitioner to place her defence effectively.

7. In **Rajaram Prasad Yadav vs. State of Bihar and another (AIR 2013 SC 3081)**, the Hon'ble Supreme Court has summed up the legal position relating to Section 311 Cr.P.C and has enumerated the following principles which will have to be borne in mind by the Courts:

(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.

WEB COPY

(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.

(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



Crl.O.P.(MD) Nos.5119 & 5121 of 2020

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].'

8. Admittedly, the petitioner has failed to cross examine those witnesses, when chief examination was conducted. The Hon'ble Supreme Court and this Court repeatedly held that both the chief examination and cross examination have to be conducted on the same day itself. But unfortunately, in these cases, the petitioner has failed to cross examine those witnesses on the same day.

9. Therefore, considering the nature of offence, I am inclined to give an opportunity to the petitioner to place her defence by way of cross examining those witnesses. Accordingly, the impugned orders dated 26.02.2020 in C.M.P. Nos.1240 and 1241 of 2020 in C.C. Nos.274 and 275 of 2006, passed by the learned Judicial Magistrate No.I, Nagercoil are hereby set aside, on condition that the witnesses viz., PW1, PW3, PW4, PW7, PW8, PW9 and PW11 in CC No.274 of 2006 and PW1, PW3, PW4, PW7, PW11, PW12, PW14, PW15, PW16, PW17 and PW28 in CC No.275



Crl.O.P.(MD) Nos.5119 & 5121 of 2020

of 2006 have to be cross examined on the same day, without seeking any adjournments and the petitioner has to pay the day cost for all the witnesses to come back to the Court for giving evidence. The learned Judicial Magistrate No.I, Nagercoil is hereby directed to recall PW1, PW3, PW4, PW7, PW8, PW9 and PW11 in CC No.274 of 2006 and PW1, PW3, PW4, PW7, PW11, PW12, PW14, PW15, PW16, PW17 and PW28 in CC No.275 of 2006, to enable the petitioner to cross examine the witnesses on the same day and further to collect the day cost for all the witnesses, from the petitioner and to pay the same to the witnesses.

10. With the above direction, these Criminal Original Petitions are allowed.

17.06.2022

Internet:Yes./No
Index:Yes/no
pnm



WEB COPY



Crl.O.P.(MD) Nos.5119 & 5121 of 2020

V.SIVAGNANAM, J.

pnm

To

1. The Judicial Magistrate No.I, Nagercoil

2.The Inspector of Police,
District Crime Branch,
Nagercoil,

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

COMMON ORDER IN
CRL.O.P (MD) Nos.5119 & 5121 of 2020

17.06.2022