



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 21.06.2022

CORAM:

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

Crl.O.P. (MD) No.10986 of 2022

WEB COPY

1. M.Velladurai,

2. Maridurai, : Petitioners/Accused Nos.1 & 2

Vs

State represented by
The Inspector of Police,
Meignanapuram Police Station,
Thoothukudi District.

(Crime No. 167 of 2012). : Respondent/Complainant

PRAYER: Criminal Original Petition filed under Section 482 Cr.P.C. praying this Court to set aside the order passed in the recall petition in Cr.M.P. No. 1263/2022, Dated. 12.04.2022 on the file of the Principal District Court, Thoothukudi within stipulated period and proceed with case further.

For Petitioner : M/s.Suyambilinga Bharathi K,
For Respondent : Mr.R.Suresh Kumar,
Government Advocate (Crl.Side)

ORDER

This criminal original petition has been filed challenging the order passed in Cr.M.P. No. 1263/2022, dated 12.04.2022, on the file of the Principal District Court, Thoothukudi.

2.The learned Counsel appearing for the petitioners submitted that the petitioners were prosecuted by the respondent police for the offences under Sections 294(b), 302 and 506(2) of IPC, in S.C.No.240 of 2015, on the file of the learned II Additional District and Sessions Judge, Thoothukudi. In this Case, totally twenty prosecution witnesses had been examined. The petitioners have filed an application under Section 311 of Cr.P.C in Crl.M.P.No.1263 of 2022 to recall the evidence of PW-3 to PW-5 and PW-8 to PW-19 for cross-examination. But, the said application was dismissed by the trial Court, on the ground that the petition has been filed after three years from their examination regime. All the witnesses were examined on 14.08.2018 and 17.09.2018. On the ground of delay in filing the said application for recalling the witnesses and sufficient opportunities have been given to the accused persons,



but they failed to cross-examine them. Hence, the petitioner pleaded to allow this petition to give a fair chance to the petitioners to defend their case.

3.The learned Government Advocate (Crl.Side) appearing for the respondent submitted that all the witnesses were examined. Now, the case is posted for examination of the defence witnesses, on 27.06.2022. Already, sufficient time had been granted to the petitioners, but they failed to cross-examine the witnesses. Apart from this, the petitioners were absent from appearance before the Court. Hence, Non-Bailable Warrant had been issued on 08.10.2018. Thereafter, A1 and A2 surrendered before the Court below, on 23.11.2018 and then, the warrant was recalled. But, the non-bailable warrant, which was issued against the third accused is pending. Therefore, the case was split up on 03.01.2022 and split up the case in S.C.No.1 of 2022. Under these circumstances, the petitioners filed the said application to recall the above said witnesses. Since, there is no merit in this case, he pleaded to dismiss this petition.

4.Considering the matter in the light of the submissions made by both the counsels and on a perusal of the records, reveal the fact that the petitioners along with one Sivakumar were prosecuted for having caused murder of Velathurai, for the offences under Sections 294(b), 302 and 506(2) IPC by the respondent police in S.C.No.240 of 2015, on the file of the learned II Additional District and Sessions Judge, Thoothukudi. Further, one another juvenile accused also involved in this Case, for whom criminal proceeding is conducted before the Juvenile Court. In this case, charges have been framed against the petitioners for the offences under Sections 294(b), 302 and 506(2) IPC. After framing of charges, witnesses PW-1 to PW-5 were examined on 14.08.2018. Then, the remaining witnesses PW-8 to PW-19 were examined on 17.09.2018. On that date, since the petitioners' Advocate is not available, they have not cross-examined the witnesses. Further, the record reveals that the petitioners were absent from appearance on 08.10.2018. Hence, the trial Court issued a non-bailable warrant for securing the accused persons. Then, the case was posted on 29.10.2018 and thereafter, on 23.11.2018. After that, the petitioners surrendered before the Court below and the Non-Bailable Warrant issued against them, has been recalled. But, the third accused did not surrender before the Court below. Therefore, the case as against the third accused was split up in S.C.No.1 of 2022, as per the order of the learned Principal District and Sessions Judge, on 03.01.2022. Thereafter, the trial has been conducted against the petitioners alone and further, witness LW-12, who conducted the post-mortem and LW-14 to LW-16, LW-19 were examined as PW-16 to PW-19. Now, after completion of prosecution witnesses, the case is posted for defence witnesses, on 27.06.2022.



5.No doubt, the petitioners have not cross-examined the witnesses, even after completion of chief examination for want of their learned Counsel. Thereafter, they have also not immediately taken any steps to recall the prosecution witnesses for cross-examination. Only after completion of the prosecution witnesses alone, they have filed a petition before the trial Court.

6.Admittedly, in criminal proceedings, a fair opportunity has to be given to the accused to defend his case to arrive at a just decision. But, in this case, the petitioners were not cross-examined the prosecution witnesses. Under these circumstances, to defend their case, they have to cross-examine the witnesses.

7.With regard to the recalling of witnesses for cross-examination, the Hon'ble Supreme Court laid down the principles as follows:

'In Rajaram Yadav's case the 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, constituting 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.

(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].'

8. Considering the factual and legal position of this case, in order to give a fair chance to the accused persons to cross-examine the witnesses to arrive at a just decision and also the Constitution of India guaranteed a fair opportunity for the accused person in criminal proceedings to cross-examine the witnesses on a condition that all the witnesses have to be recalled in a single day and the petitioners without getting any adjournment, has to cross-examine all the witnesses on a single day.

9. Therefore, the learned Counsel appearing for the petitioner restricted to recall the witnesses PW-3 to PW-5, PW-8, PW-10, PW-12 to 16, PW-18 and PW-19 and not willing to examine PW-6, PW-7, PW-11 and PW-17. Under these circumstances, the impugned order passed in Cr.M.P. No. 1263/2022, dated. 12.04.2022 is set aside and the petitioners are directed to cross-examine the witnesses PW-3 to PW-5, PW-8, PW-10, PW-12 to 16, PW-18 and PW-19, in the same day and also have to pay a day cost to all the witnesses. Further, the trial Court is also directed to recall the PW-3 to PW-5, PW-8, PW-10, PW-12 to 16, PW-18 and PW-19, for the purpose of cross-examination by the petitioners and collect the day cost amount from the petitioners and pay the same to the witnesses.

10. With the above directions, this criminal original petition stands allowed.

Sd/-

Assistant Registrar(CS-III)

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/06/2022

Sub Assistant Registrar(CS)

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1. The Principal District Judge, Thoothukudi.

2. The Additional Sessions Judge, Thoothukudi.

3. The Inspector of Police,
Meignanapuram Police Station,
Thoothukudi District.

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

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nsn(CO)
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