

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 25.08.2022

Pronounced on : 09.09.2022

CORAM

THE HONOURABLE MR.JUSTICE **K.MURALI SHANKAR**

CRL.O.P.(MD).No.15280 of 2022

and

CRL.M.P(MD)No. 10021 of 2022

S.Arumugam

: Petitioner/Accused

Vs.

State through
The Inspector of Police,
Vigilance and Anti Corruption,
Sivagangai.
Crime No.9 f 2010.

: Respondent/Defacto
Complainant

PRAYER : Criminal Original Petition filed under Section 482 of Cr.P.C, to call for the records relating to the impugned order in Crl.M.P.No.397 of 2022 in Spl.C.C.No.70 of 2014, dated 10.08.2022 on the file of the learned Special Court for Trial of Cases under Prevention of Corruption Act, Sivagangai and set aside the same.

For Petitioner : Mr.N.Mohideen Basha,

For Respondents : Mr.R.Meenakshi Sundaram,
Additional Public Prosecutor.

ORDER

The Criminal Original Petition is filed, invoking Section 482 of Cr.PC., seeking orders to call for the records relating to the impugned order in CrI.M.P.No.397 of 2022 in Spl.C.C.No.70 of 2014, dated 10.08.2022 on the file of the learned Special Court for Trial of Cases under Prevention of Corruption Act, Sivagangai, dismissing the petition filed under Section 311 of Cr.P.C and set aside the same.

2. The petitioner is the sole accused in Spl.C.C.No.70 of 2014 on the file of the learned Special Court for Trial of Cases under Prevention of Corruption Act, Sivagangai.

3. The petitioner is charged for the offence under Sections 7 and 13(1) r/w 13(1)(d) of Prevention of Corruption Act.

4. It is not in dispute that the trial has already been commenced and 15 witnesses have already been examined and that when the case stand posted for further evidence, the above petition in CrI.M.P.No.397 of 2022, came to be filed under Section 311 Cr.P.C, seeking permission to re-call P.W.8, P.W.9, P.W.11, P.W.12 and P.W.13 for cross examination.

5. The petitioner's case is that the witnesses P.W.8, P.W.9, P.W.11 to P.W.13 are occurrence witnesses; that due to non perusal of case records, the said witnesses were not cross examined, that the said failure to cross examine the said witnesses, is neither willful nor wanton; that the accused will be put in great prejudice, if the said witnesses are not cross examined and that therefore, the petitioner was constrained to file the re-call petition.

6. The respondent has raised serious objections for allowing the petition. The learned Special Judge, after enquiry, has passed the impugned order, dated 10.08.2022, dismissing the said petition. Aggrieved by the said dismissal order, the accused has now come forward with the present petition, invoking Section 482 Cr.P.C for setting aside the impugned order.

7. It is not in dispute that the witnesses P.W.8 and P.W.9 were examined in chief on 26.10.2018; that P.W.11 was examined in chief on 01.02.2019; that P.W.12 was examined in chief on 08.04.2019 and that P.W.13 was examined in chief on 10.06.2019.

8. It is pertinent to note that the petition for re-calling the said witnesses for the purpose of cross examination came to be filed on 15.07.2022. The learned Special Judge, by observing that the reason given

by the petitioner that due to non perusal of case records, the said witnesses could not be cross examined is neither convincing nor acceptable; that the re-call petition was filed almost four years from the date of examination of P.W.8 and three years after examination of P.W.13 and that the petitioner has not given any reason or explanation for such long delay, dismissed the petition.

9. It is pertinent to note that the latter part of Section 311 Cr.P.C, states that the Court shall summon and examine or re-call and re-examine any such person, if his appearance to the Court to be essential to the just decision of the case.

10. The learned Special Judge has rightly quoted the judgement of the Hon'ble Supreme Court in **Vinod Kumar Vs. State of Punjab** reported in **2015(1) MLJ (Crl) 288**; and that the learned Special Judge by observing that the Hon'ble Supreme Court has taken such a view even for the delay of one year and 8 months and that since the case on hand is still worse and as there was a delay of 3 to 4 years, he was not inclined to allow the petition.

11. The learned counsel for the petitioner has relied on the recent judgment of the Hon'ble Supreme Court in **Varsha Garg Vs. The State of Madhya Pradesh and others** reported in **2022 LiveLaw (SC) 662**.

28. Having clarified that the bar under [Section 301](#) is inapplicable and that the appellant is well placed to pursue this appeal, we now examine [Section 311](#) of CrPC. [Section 311](#) provides that the Court -may :

- (i) Summon any person as a witness or to examine any person in attendance, though not summoned as a witness; and
- (ii) Recall and re-examine any person who has already been examined.

This power can be exercised at any stage of any inquiry, trial or other proceeding under the [CrPC](#). The latter part of [Section 311](#) states that the Court shall summon and examine or recall and re-examine any such person “if his evidence appears to the Court to be essential to the just decision of the case. [Section 311](#) contains a power upon the Court in broad terms. The statutory provision must be read purposively, to achieve the intent of the statute to aid in the discovery of truth.

29. The first part of the statutory provision which uses the expression may postulates that the power can be exercised at any stage of an inquiry, trial or other proceeding. The latter part of the provision mandates the recall of a witness by the Court as it uses the expression “shall summon and examine or recall and re- examine any such person if his evidence appears to it to be essential to the just decision of the case”. Essentiality of the evidence of the person who is to be examined coupled with the need for the just decision of the case constitute the touchstone which must guide the decision of the Court. The first part of the statutory provision is discretionary while the latter part is obligatory.

12. In the said case, an Advocate was found brutally murdered outside of his Office and five accused were arrested; that the Sessions Court rejected the application under Section 311 Cr.P.C, seeking to summon the nodal officers of certain cellular entities along with the decoding register to trace the mobile location of accused and since the prosecution's application filed under Section 311 Cr.P.C was rejected by the trial Court and the same was confirmed by the High Court, the matter was taken up before the Supreme Court and the Hon'ble Apex Court by relying the latter part of the Section 311 Cr.P.C that the power under the said provision can be exercised, if the evidence to be adduced is essential for the just decision of the case, allowed the appeal and set aside the judgment of the High Court.

13. As rightly contended by the learned Additional Public Prosecutor in the case referred supra, the prosecution's application under Section 311 Cr.P.C was ordered to be allowed.

14. The learned Additional Public Prosecutor has then relied on decisions of the Hon'ble Supreme Court in **Ag Vs.Shiv Kumar Yadav and another** in **Crl.A.No.1187-1188 of 2015** and in **Ratanlal Vs. Prahlad Jat and others** reported in **(2017) 9 Supreme Court Cases 340**.

15. In **Ag Vs.Shiv Kumar Yadav's** case, the accused by engaging another counsel, filed an application under Section 311 Cr.P.C for re-calling of all the 28 witnesses and the said application was dismissed by the trial Court and that the High Court allowed the petition and challenging the same, criminal appeal came to be filed.

16. Moreover, in the said case, all the witnesses were duly cross examined by the defence counsel. The Hon'ble Supreme Court by observing that the High Court has not rejected the reasons given by the trial Court nor given any justification for permitting re-call of the witnesses, allowed the criminal appeal and set aside the order passed by the High Court and consequently, dismissed the application for re-call.

17. In the second case in **Ratanlal's** case, two witnesses have moved an application before the Sessions Court under Section 311 Cr.P.C for recording their statements on the ground that the previous statements were made under the influence of the Police; that the Sessions Court by taking note of the fact that the said witnesses were already cross examined at length and it cannot be said that they were in any kind of pressure, dismissed the petition for re-call and when the said dismissal was questioned before the High Court, the High Court allowed the petitions and permitted for

examination of the said two witnesses and that when the same was challenged before the Hon'ble Supreme Court, by observing that they have not assigned any reason for the delay in making the application and that the learned Sessions Judge was justified in rejecting the application, the Hon'ble Apex Court has allowed the appeal, setting aside the order of the High Court.

18. It is pertinent to note, in both the above cases, the witness sought to be re-called were already cross examined. But in the case on hand, the witnesses sought to be re-called, were not at all cross examined.

19. The learned Additional Public Prosecutor would mainly contend that there is every possibility of the witnesses turning hostile and that is why they have filed the above application, after such long delay. At this juncture, it is necessary to refer Section 154(2) of the Indian Evidence Act.

“154. Question by party to his own witness

(1) The Court may, in its discretion, permit the person who calls a witness to put any question to him which might be put in cross-examination by the adverse party.

(2) Nothing in this section shall disentitle the person so permitted under sub-section (1), to rely on any part of the evidence of such witness.”

20. No doubt, the word “Hostile witness” has not been defined anywhere in the Evidence Act or in the code of Criminal Procedure.

21. A hostile witness is the one who is undesirous of telling the truth at the instance of the party calling him. Section 154(1) states that it is the Courts discretion to permit such person to put up any questions which might be put by the adverse party during cross examination and Section 154(2) provides that the provisions of this section do not disentitle the party to rely upon any evidence of such witness.

22.In *Pandappa Hanumappa Hanamar and another Vs. State of Karnataka* reported in *(1997) 10 SCC 197*, the Supreme Court has held that the entire testimony of a prosecution witness, who turns hostile and is cross examined by the prosecutor with the leave of the Court, is not to be discarded altogether as a matter of law and that cross examination of a hostile witness does not completely efface his evidence.

23.At this juncture, it is necessary to refer the judgment of Hon'ble Supreme Court in *Gura Singh Vs. State of Rajasthan* in *Crl.A.No.1184 of 1998*, wherein, Hon'ble Apex Court, has held as follows:

“The terms "hostile", "adverse" or "unfavourable" witnesses are alien to the Indian Evidence Act. The terms "hostile witness", "adverse witness", "unfavourable witness", "unwilling witness" are all terms of English Law. The rule of not permitting a party calling the witness to cross examine are relaxed under the common law by evolving the terms "hostile witness and unfavourable witness". Under the common law a hostile witness is described as one who is not desirous of telling the truth at the instance of the party calling him and a unfavourable witness is one called by a party to prove a particular fact in issue or relevant to the issue who fails to prove such fact, or proves the opposite test. In India the right to cross-examine the witnesses by the party calling him is governed by the provisions of the Indian Evidence Act, 1872. Section 142 requires that leading questions cannot be put to the witness in examination-in-chief or in re- examination except with the permission of the court. The court can, however, permit leading question as to the matters which are introductory or undisputed or which have, in its opinion, already been sufficiently proved. Section 154 authorises the court in its discretion to permit the person who calls a witness to put any question to him which might be put in cross-examination by the adverse party. The courts are, therefore, under a legal obligation to exercise the discretion vesting in them in a judicious manner by proper application of mind and keeping in view the attending circumstances. Permission for cross-examination in terms of Section 154 of the Evidence Act cannot and should not be granted at the mere asking of the party calling the witness. Extensively dealing with

the terms "hostile, adverse and unfavourable witnesses" and the object of the provisions of the Evidence Act this Court in Sat Paul v. Delhi Administration [AIR 1976 SC 294] held: "To steer clear of the controversy over the meaning of the terms 'hostile' witness, 'adverse' witness, 'unfavourable' witness which had given rise to considerable difficulty and conflict of opinion in England, the authors of the Indian Evidence Act, 1872 seem to have advisedly avoided the use of any of those terms so that, in India, the grant of permission to cross-examine his own witness by a party is not conditional on the witness being declared 'adverse' or 'hostile'. Whether it be the grant of permission under Sec.142 to put leading questions, or the leave under Section 154 to ask questions which might be put in cross-examination by the adverse party, the Indian Evidence Act leaves the matter entirely to the discretion of the court (see the observations of Sir Lawrence Jenkins in Baikuntha Nath v. Prasannamoyi), AIR 1922 PC 409. The discretion conferred by Section 154 on the court is unqualified and untrammelled, and is apart from any question of 'hostility'. It is to be liberally exercised whenever the court from the witnesses's demeanour, temper, attitude, bearing, or the tenor and tendency of his answers, or from a perusal of his previous inconsistent statement, or otherwise, thinks that the grant of such permission is expedient to extract the truth and to do justice. The grant of such permission does not amount to an adjudication by the court as to the veracity of the witness. Therefore, in the order granting such permission, it is preferable to avoid the use of such expressions, such as 'declared hostile', 'declared

unfavourable', the significance of which is still not free from the historical cobwebs which, in their wake bring a misleading legacy of confusion, and conflict that had so long vexed the English Courts.

It is important to note that the English statute differs materially from the law contained in the Indian Evidence Act in regard to cross-examination and contradiction of his own witness by a party. Under the English Law, a party is not permitted to impeach the credit of his own witness by general evidence of his bad character, shady antecedents or previous conviction. In India, this can be done with the consent of the court under Section 155. Under the English Act of 1865, a party calling the witness, can cross-examine and contradict a witness in respect of his previous inconsistent statements with the leave of the court, only when the court considers the witness to be 'adverse'. As already noticed, no such condition has been laid down in Sections 154 and 155 of the Indian Act and the grant of such leave has been left completely to the discretion of the court, the exercise of which is not fettered by or dependent upon the 'hostility' or 'adverseness' of the witness."

24. Hence, the objections of the learned Additional Public Prosecutor that there is every chance for the witnesses turning hostile, considering the legal position above referred, cannot be given much weightage.

25. This Court in ***Panchavarnam and others Vs. State represented by the Sub-Inspector of Police, Narikudi Police Station, Virudhunagar***

District, reported in **CDJ 2017 MHC 1893**, has permitted the accused to cross examine the witnesses on payment of cost and the relevant passages is extracted hereunder :

“ In the case on hand, as already pointed out, all the witnesses now sought to be recalled, are occurrence witnesses and they were not at all cross examined. As already pointed out, the petitioner is facing trial for the offence under the Prevention of Corruption Act.”

26. No doubt, the petitioner has not offered any acceptable reason or explanation for the long delay in filing the application to recall the witnesses.

27. Considering the facts and circumstances of the case and also the fact that the witnesses sought to be re-called were not at all cross examined, this Court is of the view that the petitioner should be given one more opportunity to cross examine the witnesses, but at the same time, considering the length of delay and the conduct of the petitioner, this Court is of the further view that the petitioner must be mulcted with costs and with further condition that the petitioner/accused should cross examine the witnesses on the day, when the witnesses are produced before the Court and if for any reason, the petitioner fails to cross examine the said witnesses on that particular day, then he will forfeit his right to cross examine them.

28. In the result, the Criminal Revision Petition is allowed and the impugned order, dated 10.08.2022, in CrI.M.P.No.397 of 2022 in Spl.C.C.No.70 of 2014, on the file of the learned Special Court for Trial of Cases under Prevention of Corruption Act, Sivagangai is set aside and the petition to re-call the witnesses is allowed on payment of cost of Rs.10,000/- (Rupees Ten Thousand only) to the credit of Government of Tamil Nadu, CMPRF in IOB, Secretariat Branch, Chennai-9 (Account No.11720 10000 00070, IFSC Code: IOBA0001172) and on payment of process fee and batta to the said witnesses and on further condition that the petitioner side should cross examine the witnesses whenever the witnesses are produced before the Court and in case of the petitioner's failure to cross examine the particular witness, then he will forfeit his right to cross examine the witness. The trial Court is directed to summon the said five witnesses for the purpose of cross examination and complete the examination of the said witnesses within one month from the date of receipt of copy of this order. Consequently, connected Miscellaneous Petition is closed.

09.09.2022

Index : Yes/No
Internet : Yes/No
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K.MURALI SHANKAR, J.

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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 Inspector of Police,
Vigilance and Anti Corruption,
Sivagangai.
- 2.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

CRL.O.P.(MD).No.15280 of 2022
and
CRL.M.P(MD)No. 10021 of 2022

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