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Crl.O.P.Nos.27579 & 27593 of 2



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 11.12.2023

CORAM :

THE HONOURABLE Dr. JUSTICE G.JAYACHANDRAN

Crl.O.P.Nos.27579 & 27593 of 2023
and Crl.M.P. No.19087 of 2023

1.Udhayakumar

2.Siva @ Karthick

... Petitioners in both Crl.O.Ps.

-VS-

State through,
The Inspector of Police,
Palladam Police Station,
Tiruppur.
(Crime No.175 of 2022)

...Respondent in both Crl.O.Ps

COMMON PRAYER : Criminal Original Petition has been filed under Section 482 of Criminal Procedure Code, to call for the records of the impugned order dated 31.10.2023 in Cr.M.P. No.1 of 2023 in S.C. No.79 of and the impugned order dated 01.11.2023 in Cr.M.P. No.2 of 2023 in S.C. No.79 of 2023 on the file of the Principal District and Sessions Judge, Tiruppur and set aside the same and permit the petitioners to conduct cross examination of prosecution witnesses P.W.12, P.W.14 and P.W.15.

For Petitioners
For Respondent

: Mr.S.Loganathan
:Mr.Leonard Arul Joseph Selvam
Government Advocate (Crl.Side)



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COMMON ORDER

The petitioners are the accused in the case tried for the offence under Section 302 IPC. Application was filed under Section 311 of Cr.P.C to recall P.W12 (Postmortem Doctor) and P.W.14 (Witness to the Confession Statement) who were examined in Chief on 23.08.2023 and 13.09.2023. The trial Court perusing the facts of the recall petition, finds that this Application filed on the day prior to the Investigation Officer supposed to be examined was rejected, recording that the Application does not contain any satisfactory reason to recall the witnesses and it is not a hallow procedure, the power to recall the witness has to be exercised judiciously to prevent failure of justice and not arbitrarily. This order of rejection came to be passed on 31.10.2023.

2. The day on which, the Investigation Officer was examined in Chief, the Investigation Officer as P.W.15 was also not cross examined by the petitioner and an Application to recall him for cross examination came to filed by the accused/petitioner. That Application was also dismissed on 01.11.2023 stating that the Application filed under Section 311 Cr.P.C without sufficient cause deserves to be dismissed in the light of the Hon'ble Supreme Court judgment rendered in the case of *State of NCT of Delhi vs. Shiv Kumar*

Yadav and another reported in 2016(2) SCC 406.



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3. The learned counsel for the petitioner submitted that the petitioners are facing grave charge punishable with capital sentence, these two witnesses whom they want to recall and cross examination are crucial witnesses who have to speak about the injury found on the body of the victim, the alleged confession statement of the accused and the manner in which, the investigation was conducted. If the valuable right of cross examination of these three key witnesses is deprived, it may lead to grave injustice.

4. The learned counsel also submitted that the petition to recall of those witnesses was within a month and the accused never delayed the trial, it can be seen from the date of registering the FIR (16.02.2022) and the progress so far made in the trial.

5. The learned Government Advocate (Crl.Side) submitted that the right to recall witnesses who were already cross examined and present before the Court cannot be invoked at the whims and fancies of the accused and there is no sufficient cause mentioned in the petition to recall them. Therefore, the trial Court following the dictum of the Hon'ble Supreme Court had declined to entertain the petition filed under Section 311 of Cr.P.C.

6. This Court, have come across Application under Section 311 of Cr.P.C filed belatedly without any cause and purely with intend to delay the process or



to purchase the witnesses to derail the process and precisely for the said reason, the Hon'ble Supreme Court has also condoned and heavily deprecating such directions. Unless the Court feels that if the Application under Section 311 of Cr.P.C not entertained, it may lead to failure of justice, the cavalier manner of conducting criminal trial by not cross examination of witnesses present on the call of Court through summons should not be entertained causing inconvenience to the witnesses through with all reverence to assist the Court, but in this case, this Court finds that the grave charge faced by these two accused, need to be tested by giving adequate opportunity to the accused to establish their innocence by cross examining the witnesses.

7. No doubt, without any palpable reason, the key witnesses namely P.W.12, P.W.14 and P.W.15 not been cross examined, however, in view of this Court, if right to cross examination of these three vital witnesses is denied, then even the trial Court cannot be in a position to appreciate the evidence properly and if such difficulty arise, there is possibility of injustice caused to the accused. Hence, these two petitions are ***allowed*** on condition that the trial Court shall summon all the three witnesses and on that day without any excuse accused shall cross examine them and if for any reason the accused fails to cross examine these three witnesses, the trial Court can proceed further without affording any further opportunity to the petitioner to cross examine those three



witnesses.

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8. It is now reported by the learned Government Advocate (Crl.Side), this matter is posted on 13.12.2023, for questioning the accused under Section 313 of Cr.P.C. The trial Court shall proceed with the process but after recalling the three witnesses, if any other incriminating material available, shall put additional questions under Section 313 of Cr.P.C and proceed further. The trial Court shall summon these three witnesses within a period of 10 days from today.

11.12.2023

Internet : Yes/No
Index : Yes/No
rkp

To

1.The Principal District and Sessions Judge,
Tiruppur.

2.The Inspector of Police,
Palladam Police Station,
Tiruppur.

3.The Public Prosecutor,
Madras High Court, Madras.



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Dr.G.JAYACHANDRAN, J.

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