



CrI.O.P.(MD) No.15086 of 2023

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 29.08.2023

CORAM:

THE HONOURABLE DR.JUSTICE D.NAGARJUN

CrI.O.P.(MD) No.15086 of 2023

and

CrI.M.P.(MD) No.11949 of 2023

Baburaj @ Dinkal

... Petitioner

Vs.

The Inspector of Police,
Keerathurai Police Station,
Madurai City.
Crime No.97 of 2021

..Respondent

PRAYER : Criminal Original Petition is filed under Section 482 of Cr.P.C, to set aside the order passed in Cr.M.P.No.1396 of 2023 in CC.No.324 of 2021 dated 18.07.2023 on the file of the Special Ist Additional District Court for NDPS Cases, Madurai and allow the petitioner to cross-examine the witnesses.

For Petitioner :Mr.J.Vijayaraja

For Respondent :Mr.S.Ravi
Additional Public Prosecutor



Crl.O.P.(MD) No.15086 of 2023

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ORDER

This Criminal Original Petition is filed under Section 482 of the Code of Criminal Procedure challenging the order passed in Cr.M.P.No.1396 of 2023 in CC.No.324 of 2021 dated 18.07.2023 on the file of the Special 1st Additional District Court for NDPS Cases, Madurai, where the application filed by the petitioner/A2 to recall P.W1 to P.W4 was partly allowed.

2.It is the case of the petitioner that the accused was charged for the offences punishable under Sections 8(c), 20(b)(ii)(C) and 29(1) of the Narcotic Drugs and Psychotropic Substances Act, 1985 in CC.No.324 of 2021 on the file of the learned I Additional Special Court for Trial of NDPS Cases, Madurai and from the date of arrest, ie., on 04.02.2021, the petitioner has been in judicial custody. The petitioner has addressed a letter to the Presiding Officer of the trial Court that his advocate has not updated him with the day to day trial proceedings and that he would proceed with new counsel.

3.It is further submitted that P.W1, P.W2 and P.W4 were examined on 28.09.2022, 08.11.2022 and 10.01.2023 respectively and P.W3 was examined in



Crl.O.P.(MD) No.15086 of 2023

WEB COPY

chief on 23.12.2022 and thereafter, the prosecution evidence was closed. When the matter was posted for examination under 313 Cr.P.C., the petitioner has filed an application in Crl.M.P.No.1396 of 2023 under Section 311 Cr.P.C., seeking to recall of P.W1 to P.W4 for cross-examination. The trial Court, by way of impugned order, dated 18.07.2023, has allowed the petition partly insofar as recalling of P.W3 as P.W.3 was not cross-examined at all and dismissed insofar as recalling of P.W1, P.W2 and P.W4. Aggrieved by the same, this Petition is filed.

4.It is submitted by the learned counsel for the petitioner that the petitioner has addressed a letter to the Presiding Officer of the trial Court that when he was at a place called Kangeyam, he was taken by the Special Police and foisted false case against him and that during the course of cross-examination of P.W1, P.W2 and P.W4, the petitioner could not get the information about his false implication in the case, thereby sought for further cross-examination of P.W.1 to P.W.4 thereby the petitioner will get a chance to cross-examine the witnesses in respect of contradictions of seizure, arrest, collection of sample, packing of contraband etc., It is submitted further that the trial Court has permitted the prosecution to produce the report under Section 57 of the NDPS Act with the delay of 602 days



Crl.O.P.(MD) No.15086 of 2023

WEB COPY

and the said document was marked as additional document and therefore submitted that further cross-examination of P.W.1, P.W.2 and P.W.4 is mandatory hence sought for setting aside the orders passed in Cr.M.P.No.1396 of 2023 in CC.No.324 of 2021 by the learned Special 1st Additional District Court for NDPS Cases, Madurai by directing the trial Court to recall P.W1 to P.W4 for cross-examination.

5.The learned Additional Public Prosecutor vehemently submits that the petitioner has already cross-examined P.W1, P.W2 and P.W4 and the reasons for recalling them are not valid. The petitioner should have cross-examined P.W1, P.W2 and P.W4 in respect of his defence, when they were cross-examined earlier and after taking 26 adjournments and after completion of 313 examinations, this petition is filed for recalling of the witnesses at a belated stage and that the change of advocate is not a ground for recalling of the witnesses and therefore, sought for dismissal of this petition.

6.Section 311 of Cr.P.C. permits the Court to direct any witness to be examined or/and re-examine at any time during the course of trial. Section 311 of



Crl.O.P.(MD) No.15086 of 2023

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"Power to summon material witness, or examine person present.

Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court 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 "

7. In the case on hand, P.W1, P.W2 and P.W4 were already cross-examined and that it is not a case of the petitioner that he was not given proper opportunity or sufficient time to cross-examine P.W1, P.W2 and P.W4. As long as the petitioner was being represented by earlier advocate, the petitioner has not raised any issue in respect of further cross-examination of P.W1, P.W2 and P.W4, however, after the change of advocate, this application is filed for recalling of P.W1 to P.W4.



Crl.O.P.(MD) No.15086 of 2023

WEB COPY

8. It is settled legal position that the change of advocate cannot be a ground for recalling of the witnesses. The learned Additional Public Prosecutor has relied upon the judgment reported in ***(2016) 2 Supreme Court Cases 402 (State (NCT of Delhi) Vs. Shiv Kumar Yadav and another)***, wherein the Hon'ble Apex Court has held as under:-

“27. It is difficult to approve the view taken by the High Court. Undoubtedly, fair trial is the objective and it is the duty of the court to ensure such fairness. Width of power under [Section 311 Cr.P.C.](#) is beyond any doubt. Not a single specific reason has been assigned by the High Court as to how in the present case recall of as many as 13 witnesses was necessary as directed in the impugned order. No fault has been found with the reasoning of the order of the trial court. The High Court rejected on merits the only two reasons pressed before it that the trial was hurried and the counsel was not competent. In the face of rejecting these grounds, without considering the hardship to the witnesses, undue delay in the trial, and without any other cogent reason, allowing recall merely on the observation that it is only the accused who will suffer by the delay as he was in custody could, in the circumstances, be hardly accepted as valid or serving the ends of justice. It is not only matter of delay but also of harassment for the witnesses to be recalled which could not be justified on the ground that the accused was in custody and that he would only suffer by prolonging of the proceedings. Certainly recall could be permitted if



Crl.O.P.(MD) No.15086 of 2023

WEB COPY

essential for the just decision but not on such consideration as has been adopted in the present case. Mere observation that recall was necessary “for ensuring fair trial” is not enough unless there are tangible reasons to show how the fair trial suffered without recall. Recall is not a matter of course and the discretion given to the court has to be exercised judiciously to prevent failure of justice and not arbitrarily. While the party is even permitted to correct its bona fide error and may be entitled to further opportunity even when such opportunity may be sought without any fault on the part of the opposite party, plea for recall for advancing justice has to be bona fide and has to be balanced carefully with the other relevant considerations including uncalled for hardship to the witnesses and uncalled for delay in the trial. Having regard to these considerations, we do not find any ground to justify the recall of witnesses already examined.

28.It will also be pertinent to mention that power of judicial superintendence under [Article 227](#) of the Constitution and under [Section 482](#) Cr.P.C. has to be exercised sparingly when there is patent error or gross injustice in the view taken by a subordinate court. A finding to this effect has to be supported by reasons. In the present case, the High Court has allowed the prayer of the accused, even while finding no error in the view taken by the trial court, merely by saying that exercise of power was required for granting fair and proper opportunity to the accused. No reasons have been recorded in support of this observation. On the contrary, the view taken by the



Crl.O.P.(MD) No.15086 of 2023

WEB COPY

trial court rejecting the stand of the accused has been affirmed. Thus, the conclusion appears to be inconsistent with the reasons in the impugned order.

29. We may now sum up our reasons for disapproving the view of the High Court in the present case:

(i) The trial court and the High Court held that the accused had appointed counsel of his choice. He was facing trial in other cases also. The earlier counsel were given due opportunity and had duly conducted cross- examination. They were under no handicap;

(ii) No finding could be recorded that the counsel appointed by the accused were incompetent particularly at back of such counsel;

(iii) Expeditious trial in a heinous offence as is alleged in the present case is in the interests of justice;

(iv) The trial Court as well as the High Court rejected the reasons for recall of the witnesses;

(v) The Court has to keep in mind not only the need for giving fair opportunity to the accused but also the need for ensuring that the victim of the crime is not unduly harassed;

(vi) Mere fact that the accused was in custody and that he will suffer by the delay could be no consideration for allowing recall of witnesses, particularly at the fag end of the trial;

(vii) Mere change of counsel cannot be ground to recall the witnesses;



Crl.O.P.(MD) No.15086 of 2023

WEB COPY

(viii) There is no basis for holding that any prejudice will be caused to the accused unless the witnesses are recalled;

(ix) The High Court has not rejected the reasons given by the trial court nor given any justification for permitting recall of the witnesses except for making general observations that recall was necessary for ensuring fair trial. This observation is contrary to the reasoning of the High Court in dealing with the grounds for recall, i.e., denial of fair opportunity on account of incompetence of earlier counsel or on account of expeditious proceedings;

(x) There is neither any patent error in the approach adopted by the trial court rejecting the prayer for recall nor any clear injustice if such prayer is not granted.

30. Accordingly, we allow these appeals, set aside the impugned order passed by the High Court and dismiss the application for recall.”

9. Considering the above, it is clear that change of advocate cannot be a ground for the petitioner seeking for recalling of the witnesses for cross-examination thereby on this ground recalling of witnesses for further cross-examination is not permitted.

10. Further, it is to be noted that when P.W1, P.W2 and P.W4 was examined



Crl.O.P.(MD) No.15086 of 2023

WEB COPY

on the earlier occasion, the petitioner could have questioned the witnesses about all the issues raised by the petitioner now and no explanation is offered as to why the issues, which the petitioner intends to raise, could not be raised during the course of their cross-examination. Further, it is mentioned in the petition that in case if P.W1, P.W2 and P.W4 are recalled, the petitioner will get an opportunity to cross-examine the witnesses in respect of certain contradictions with regard to seizure, arrest, collection of sample, packing of contraband etc., that means, the petitioner is intending to cross examine the witnesses in respect of all the issues pertaining to the charge as if it is a *denova* trial.

11. Recalling of witnesses under 311 Cr.P.C., can be permitted only in exceptional circumstances, where there is strong reason for not cross-examination on certain aspects, which happens subsequent to earlier cross-examination.

12. Further, the learned counsel for the petitioner submitted that the trial Court after examination of the witnesses under 313 Cr.P.C., without posting the matter for defence evidence has straight away posted the case for arguments. There is no basis for the submissions of the learned counsel for the petitioner.



Crl.O.P.(MD) No.15086 of 2023

WEB COPY

During the course of the examination of the accused under 313 Cr.P.C., the accused will be asked as to whether the accused is intending to produce defence witnesses. In case if the accused reports that he has defence witness, then the case will be posted for defence evidence. Further, even after reporting that he has no defence evidence, the petitioner/accused No.2 can still file an application under Section 315 of Cr.P.C. seeking permission to examine the defence witnesses, however after taking 26 adjournments and after 313 examination, the petitioner has not filed any application seeking permission of the Court to examine the defence witnesses.

13. Further, it is submitted by the learned Additional Public Prosecutor that the matter is posted for arguments. Once the entire trial is over after 313 Cr.P.C., examination, the petitioner has filed this application at a belated stage and the trial Court has rightly considered the same and allowed the application insofar as P.W3 is concerned, who was not cross-examined earlier by the accused. In view of the above, there is no infirmity in the orders passed by the trial Court, thereby the order passed in Cr.M.P.No.1396 of 2023 in CC.No.324 of 2021 by the Special 1st Additional District Court for NDPS Cases, Madurai cannot be interfered with.



Crl.O.P.(MD) No.15086 of 2023

WEB COPY

The petitioner at the fag end of his submissions has submitted that the petitioner may be given an opportunity to approach the trial Court with a petition seeking permission of the trial Court for examining the accused as defence witnesses.

14. Considering the discussions above, this Petition is dismissed however, considering the request made by the counsel for the petitioner, he is at liberty to file an appropriate application under 315 Cr.P.C., before the trial Court on filing of which the trial Court is directed to consider and dispose of the same as quickly as possible by following due process of law. Consequently, connected Miscellaneous Petition is closed.

Speaking : Yes / No
NCC : Yes / No
Internet : Yes / No
Index : Yes / No

29.08.2023

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To

1.The Judge,
Special Ist Additional District Court for NDPS Cases,
Madurai.

12/14



Crl.O.P.(MD) No.15086 of 2023

- 2.The Inspector of Police,
Keerathurai Police Station,
Madurai City.
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.



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Crl.O.P.(MD) No.15086 of 2023

DR.D.NAGARJUN. J.

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Crl.O.P.(MD)No.15086 of 2023

29.08.2023