



Crl.O.P.(MD) No.15292 of 2023

WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 12.09.2023

CORAM:

THE HONOURABLE DR.JUSTICE **D.NAGARJUN**

Crl.O.P.(MD) No.15292 of 2023

P.K.Shanmugasundaram

... Petitioner

Vs.

1.The state rep. by Sub Inspector of Police,
District Crime Branch,
Sivagangai District.
(Crime No.34 of 2014)

...1st Respondent

2.A.Sivasankaran

...2nd Respondent/
Defacto complainant

PRAYER : Criminal Original Petition is filed under Section 482 of Cr.P.C, to call for the records of the order in Crl.M.P.No.9080 of 2023 in C.C.No.163/2015 on the file of the learned Judicial Magistrate Court No.2, Sivagangai and set aside the same and consequently direct the learned Judicial Magistrate No.2, Sivagangai to recall and cross-examine PW1.

For Petitioner	: Mr.V.Sivakumar
For R1	:Mr.S.S.Madhavan
	Government Advocate (Crl.side)



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ORDER

This Criminal Original Petition is filed under Section 482 of the Code of Criminal Procedure seeking to set aside the orders passed in Crl.M.P.No. 9080 of 2023 in C.C.No.163 of 2015, dated 08.08.2023 by the learned Judicial Magistrate No.II, Sivagangai.

2. The facts and brief as per the records are as under:-

The petitioner is accused in C.C.No.163 of 2015 registered under Sections 420 and 406 of IPC. On 25.07.2023 P.W.1 could not be cross-examined by the accused as his counsel was away from the court on account of his ill-health. On the next date of hearing i.e., on 08.08.2023 the petitioner has filed an application in Crl.M.P.No.9080 of 2023 under Section 311 Cr.P.C., and on hearing both sides, the learned trial judge dismissed the said application. Aggrieved against the order of dismissal, the petitioner has filed the present petition.

3. It is submitted by the learned counsel for the petitioner that non-examination of P.W.1 is not an intentional one and in case, the P.W.1 is not cross-examined, he will put to lot of prejudice and thereby sought for permitting the



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petitioner to recall P.W.1 for the purpose of cross-examination.

4. The learned Government Advocate (Crl.side) appearing for the first respondent has opposed it stating that the trial court has rightly dismissed the application and that there are no valid grounds for the petitioner to seek for the relief.

5. P.W.1 could not be cross-examined on 25.07.2023 as the petitioner counsel was away from the court on account of his ill-health. The said contention of the petitioner has not been disputed by the prosecution. The petitioner is not a learned person to cross-examine the P.W.1. Once the reason for non-examination of P.W.1 is ill-health of the Advocate, the trial Court should have considered as petition to recall P.W.1 was filed on the very next date of hearing i.e., on 08.08.2023.

6. The trial Court has observed in his order that the examination-in-chief and cross-examination should be completed on the same day and the cross-examination should not be deferred for a long time. While observing the same



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unfortunately the trial Court has failed to appreciate the fact that on the very next date of hearing itself i.e., on 08.08.2023 the petitioner has filed an application under Section 311 Cr.P.C., for recalling of P.W.1. Further, the explanation offered by the petitioner for non-examination of P.W.1 on 25.07.2023 also very reasonable thereby recorded by the trial Court are not satisfactory.

7. Section 311 of Cr.P.C., gives an ample powers to the Court to recall the witnesses at any time, provided, recalling of the witnesses shall be for just decision of the case. In the case, before the trial Court charges have been framed against the petitioner for the offences under Sections 420 and 406 of IPC, the prosecution has produced P.W.1, who has deposed against the accused. The court during the course of trial is expected to analyse the evidence of the witnesses and the documents filed and determine the veracity of the witnesses and conclude whether there is any material before the court to conclude that the accused has committed the offence for which they are charged. The veracity of the witnesses can be assessed only after considering the examination-in-chief and cross-examination and comparing the said evidence with his previous statement recorded under Section 161(3) Cr.P.C., Therefore, cross-examination of witnesses



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is a very crucial part of the trial. The principle of natural justice requires the accused person shall be allowed to cross-examine the prosecution witnesses.

8. In the case of *Satbir Sing vs. State of Haryana and others* in *SLP(Crl.)No.1258/2022* the Hon'ble Supreme Court has held as follows:-

“9. Section 311 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the “CrPC”) has engaged this Court’s attention before. We will advert to a few decisions of recent vintage. While overturning an order of the High Court allowing an application for recall of a witness, which was rejected by the trial Court, this Court held as under, in Ratanlal v Prahlad Jat, (2017) 9 SCC 340:

‘17.In order to enable the court to find out the truth and render a just decision, the salutary provisions of Section 311 are enacted whereunder any court by exercising its discretionary authority at any stage of inquiry, trial or other proceeding can summon any person as witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person already examined who are expected to be able to throw light upon the matter in dispute. The object of the provision as a whole is to do justice not only from the point of view of the accused and the prosecution but



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also from the point of view of an orderly society. This power is to be exercised only for strong and valid reasons and it should be exercised with caution and circumspection. Recall is not a matter of course and the discretion given to the court has to be exercised judicially to prevent failure of justice. Therefore, the reasons for exercising this power should be spelt out in the order.

18. In Vijay Kumar v.State of U.P.[Vijay Kumar v.State of U.P., (2011) 8 SCC 136 : (2011) 3 SCC (Cri) 371 : (2012) 1 SCC (L&S) 240], this Court while explaining scope and ambit of Section 311 has held as under: (SCC p. 141, para 17)

“17.Though Section 311 confers vast discretion upon the court and is expressed in the widest possible terms, the discretionary power under the said section can be invoked only for the ends of justice. Discretionary power should be exercised consistently with the provisions of [CrPC] and the principles of criminal law. The discretionary power conferred under Section 311 has to be exercised judicially for reasons stated by the court and not arbitrarily or capriciously.”

19.In Zahira Habibullah Sheikh (5) v. State of Gujarat [Zahira Habibullah Sheikh (5) v.State of Gujarat, (2006) 3



WEB COPY SCC 374 : (2006) 2 SCC (Cri) 8] , this Court has considered the concept underlying under Section 311 as under: (SCC p. 392, para 27)

“27.The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the court to summon a witness under the section merely because the evidence supports the case of the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers the Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is “at any stage of any inquiry or trial or other proceeding under this Code”. It is, however, to be borne in mind that whereas the section confers a very wide power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind.”



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20.*In State (NCT of Delhi) v. Shiv Kumar Yadav [State (NCT of Delhi) v. Shiv Kumar Yadav, (2016) 2 SCC 402 : (2016) 1 SCC (Cri) 510], it was held thus: (SCC pp. 404g-405a)*

“... Certainly, recall could be permitted if 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, there is no ground to justify the recall of witnesses already examined.”

21.*The delay in filing the application is one of the important factors which has to be explained in the application. In Umar Mohammad v. State of Rajasthan*



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[Umar Mohammad v.State of Rajasthan, (2007) 6 14 SCC 711 : (2009) 3 SCC (Cri) 244] , this Court has held as under: (SCC p. 719, para 38)

“38. Before parting, however, we may notice that a contention has been raised by the learned counsel for the appellant that PW 1 who was examined in Court on 5-7-1994 purported to have filed an application on 1-5-1995 stating that five accused persons named therein were innocent. An application filed by him purported to be under Section 311 of the Code of Criminal Procedure was rejected by the learned trial Judge by order dated 13-5-1995. A revision petition was filed thereagainst and the High Court also rejected the said contention. It is not a case where stricto sensu the provisions of Section 311 of the Code of Criminal Procedure could have been invoked. The very fact that such an application was got filed by PW 1 nine months after his deposition is itself a pointer to the fact that he had been won over. It is absurd to contend that he, after a period of four years and that too after his examination in-chief and cross-examination was complete, would file an application on his own will and volition. The said application was, therefore, rightly dismissed.”

11. In Harendra Rai v State of Bihar, 2023 SCC OnLine SC



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1023, a 3-Judge Bench of this Court was of the opinion that Section 311, CrPC should be invoked when ‘... it is essential for the just decision of the case.’

9. In view of the above, this Criminal Original Petition is allowed. The trial Court is directed to recall the P.W.1 by fixing the specific date for cross-examination of P.W.1 and on the date, the petitioner/accused is directed to cross-examine the P.W.1 without seeking any adjournment.

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

12.09.2023

To

- 1.The Sub Inspector of Police,
District Crime Branch,
Sivagangai District.
- 2.The Judicial Magistrate Court No.2,
Sivagangai.
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

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DR.D.NAGARJUN. J.

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