

CRL.A(MD).No.1133 of 2024

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED: 21.01.2025

CORAM

THE HONOURABLE MR.JUSTICE K.K.RAMAKRISHNAN

CRL.A(MD).No1133 of 2024

and

CrI.MP(MDPNo.14122 of 2024

1.Pandi

2.Vijay

... Appellants/Petitioners/Accused

Vs.

1.The State of Tamil Nadu represented by its,
The Deputy Superintendent of Police,
Uthamapalayam Sub Division,
Gudalur South Police Station,
Theni District.

(In Crime No.56 of 2018)

... st Respondent/1st Respondent/

Complainant

2.Pandidurai

...2nd Respondent/2nd Respondent/

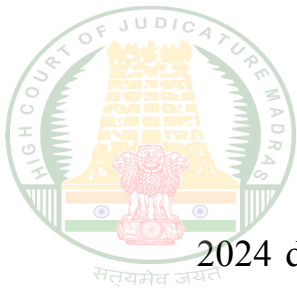
Complainant

3.Natarajan (Died)

4.Pandeeswaran

... Respondents 3 & 4/ Respondents 3 & 4/
Victim

Prayer : This Criminal Appeal is filed under Section 14(A)(2) of Scheduled Caste/Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015, to call for the records relating to the order in Cr.M.P.No.858 of



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2024 dated 16.10.2024 on the file of the Special Court for trial of Cases under SC/ST (POA) Act, Theni, and set aside the same and allow the appellants to cross examine P.W.1 to P.W.9 by allowing this appeal.

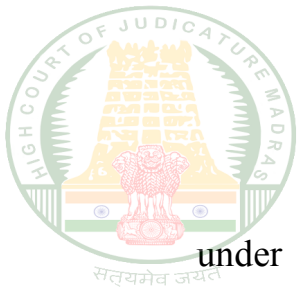
For Appellants	: Mr.C.Susikumar
For R1	: Mr.M.Sakthi Kumar, Government Advocate (Crl.Side)
For R2	: Mr.R.Senthilkumar
For R3	: Died
For R4	: Mr.R.Gowri Sankar, Legal Aid Counsel

JUDGMENT

This appeal has been filed against the order passed in Cr.M.P.No.858 of 2024 in Spe.S.C.No.150 of 2020, dated 16.10.2024 on the file of the Special Court for trial of Cases under SC/ST (POA) Act, Theni, dismissing the petition filed under Section 311 of Code of Criminal Procedure.

2. The appellants are the accused in Spe.S.C.No.150 of 2020, facing charges under Sections 294(b), 323, 324, 506(ii) of IPC and 3(1)(r)(s) of SC/ST (Prevention of Atrocities) Act, 1989.

3. In Spe.S.C.No.150 of 2020, the appellants/accused have filed an application in Cr.M.P.No.858 of 2024 under Section 348 of BNSS (Old Act



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under Section 311 Cr.P.C.,) for recalling some of the witnesses namely, P.W.1 to P.W.9 on the ground that the above said witnesses have been examined during the period of Covid-19. During that period, the earlier counsel on record was admitted to the hospital for treatment and hence, he could not cross-examine the above said witness. But, by the order dated 16.10.2024, the learned trial Judge dismissed the said application rejecting the said ground. Challenging the same, present appeal has been filed.

4. The learned counsel for the appellants submitted that the most of the witnesses have been examined during the Covid-19 period. During that period, their previous counsel on record was admitted to the hospital for treatment. Hence, he could not cross examine the witnesses. Hence, he prayed to allow this appeal by setting aside the dismissal order passed by the learned trial Judge.

5. The learned Additional Public Prosecutor appearing for the State, the learned counsel for the second respondent/defacto complainant and the learned counsel for the fourth respondent have objection to allow this appeal on the ground that there are totally 15 witnesses. Among 15 witnesses, P.W.1 to P.W.8 have been examined during the period between



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2020 – 2021. But, the re-call petition was filed before the trial Court after a lapse of 3 years. According to them, even though sufficient opportunity was given, their previous counsel on record failed to cross examine the witnesses. Hence, they prayed for dismissal of the appeal by confirming the dismissal order passed by the learned trial Judge.

6. This Court considered the rival submissions and also perused the records available on record.

7. A cursory perusal of Section 311 Cr.P.C., would show that where the evidence appeared to be essential for the just adjudication of a case, a witness could be recalled at any stage of the trial and the Hon'ble Supreme Court in the case of **Satbir Singh Vs. State of Haryana** reported in **2023 SCC OnLine SC 1086** has held as follows:-

“9. Section 311 of the Criminal Procedure Code, 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:



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‘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 where under 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 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



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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 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



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witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind.”

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 un-called for hardship to the witnesses and un-called 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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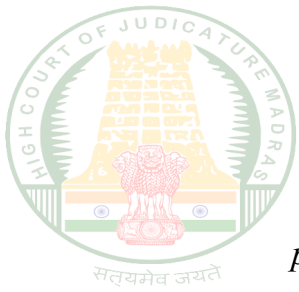


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[Umar Mohammad v. State of Rajasthan, (2007) 14 SCC 711 : (2009) 3 SCC (Cri) 244], this Court has held as under : (SCC p. 719, para 38)

“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 there against 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.”

'10. In Manju Devi v. State of Rajasthan, (2019) 6 SCC 203, this Court emphasized that a discretionary power like Section 311, CrPC is to enable the Court to keep the record straight and to clear any ambiguity regarding the evidence, whilst also ensuring no



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prejudice is caused to anyone. A note of caution was sounded in Swapan Kumar Chatterjee v. Central Bureau of Investigation, (2019) 14 SCC 328 as under:

‘10. The first part of this section which is permissive gives purely discretionary authority to the criminal court and enables it at any stage of inquiry, trial or other proceedings under the Code to act in one of the three ways, namely, (i) to summon any person as a witness; or (ii) to examine any person in attendance, though not summoned as a witness; or (iii) to recall and re-examine any person already examined. The second part, which is mandatory, imposes an obligation on the court (i) to summon and examine or (ii) to recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.

11. It is well settled that the power conferred under Section 311 should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has vide power under this section to even recall witnesses for re-examination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law.



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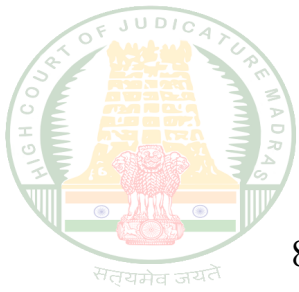
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12. Where the prosecution evidence has been closed long back and the reasons for non-examination of the witness earlier are not satisfactory, the summoning of the witness at belated stage would cause great prejudice to the accused and should not be allowed. Similarly, the court should not encourage the filing of successive applications for recall of a witness under this provision.'

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

12. Having considered the matter and surveyed the law supra, the Court finds that a case for interference has been made out. Under the peculiar facts of the present case, the request for recall of the appellant under Section 311, CrPC was justified, as at the relevant point of time in his initial deposition, there was no occasion for him to bring the relevant facts relating to similarity of data before the Court, which arose after the CFSL expert was examined.

13. Further, we find that if opportunity is given for reexamination, respondents no. 2 to 9 will not be prejudiced as they will have ample opportunity to cross-examine the appellant. We have noted their apprehension apropos delay and issued appropriate direction infra."



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8. No doubt, the appellants/accused cannot be allowed to recall and cross-examine the witnesses at their whims and fancies, but at the same time, considering the serious allegation against the appellants and most of the witnesses have been examined during Covid period, taking note of the fair trial concept, this Court is inclined to give an opportunity to cross examine the material witness namely, P.W.1 to P.W.9.

9. But at the same time, this Court is also of the view that the appellants must be mulcted with costs and further condition that the appellants/accused should cross-examine the witnesses on the day when the witnesses are produced before the Court and if for any reason the appellants fail to cross-examine the said witnesses on that particular day, then they will forfeit their rights to cross-examine them.

10. Accordingly, the dismissal order passed in Cr.M.P.No.858 of 2024 in Special S.C.No.150 of 2020, dated 16.10.2024 on the file of the Special Court for trial of Cases under SC/ST (POA) Act, Theni, is hereby set aside and the appeal is allowed on the following terms of conditions:-

(i) The appellant shall pay a total amount of
Rs.15,000/- (Rupees Fifteen Thousand) to P.W.1 to P.W.



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9 within a period of four weeks from the date of receipt of copy of this order.

(ii) On receipt of payment, the trial Court shall permit the appellants to cross examine the witnesses P.W. 1 to P.W.9. If the appellants fails to pay the amount, the trial Court shall proceed further with the materials available, and pass suitable orders.

(iii) The appellants should cross-examine the witnesses whenever the witnesses are produced before the Court.

(iv) In case of the appellants' failure to cross-examine the particular witnesses, then they will forfeit their right to cross-examine the witnesses.

(v) The Special Court for trial of Cases under SC/ST (POA) Act, Theni, is directed to summon the said witnesses for the purpose of cross examination and complete the examination of the said witnesses within a period of six weeks from the date of receipt of a copy of this order.

- Consequently, the connected miscellaneous petition is closed.

21.01.2025

NCC : Yes/No
Index : Yes / No
Internet : Yes / No
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To

- 1.The Special Court for trial of Cases under SC/ST (POA) Act,
Theni.
2. The Deputy Superintendent of Police,
Uthamapalayam Sub Division,
Gudalur South Police Station, Theni District.
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.
- 4.The Section Officer,
Criminal Section(Records),
Madurai Bench of Madras High Court, Madurai.



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K.K.RAMAKRISHNAN,J.

dss

Order made in
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