

**Periyasamy Vs. State Rep. By,**

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**SooperKanoon Citation :** [sooperkanoon.com/63382](http://sooperkanoon.com/63382)

**Court :** Chennai

**Decided On :** Aug-11-2015

**Judge :** The Honourable Ms.Justice R.Mala

**Appellant :** Periyasamy

**Respondent :** State Rep. By,

**Judgement :**

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT DATED:

11. 08.2015 CORAM THE HONOURABLE MS.JUSTICE R.MALA Criminal Original Petition (MD) No.14645 of 2015 Periyasamy : Petitioner Vs. State rep. by, The Inspector of Police, All Women Police Station, Dindigul District. : Respondent PRAYER Criminal Original Petition is filed under Section 482 Cr.P.C to set aside the order passed in Cr.M.P.No.71 of 2015 on pending on the file of Mahila Court, Dindigul. !For Petitioner : Mr.G.Karuppasamy Pandian ^For Respondent : Mr.K.Anbarasan, Government Advocate (Crl.Side) :

ORDER

Challenging the order dated 07.04.2015, in Cr.M.P.No.71 of 2015, on the file of Mahila Court, Dindigul, dismissing the application filed by the petitioner under Section 311 of Code of Criminal Procedure, insofar as P.W.1 is concerned, the petitioner has come forward with the present petition.

2. Heard both sides.

3. The learned counsel for the petitioner would submit that the petitioner herein is facing the criminal trial for the offence punishable under Section 376(2)(h) IPC r/w Section 4 of Protection of Children from Sexual Offence Act, 2012. Already, the victim girl, who happens to be the daughter of the petitioner, was examined as P.W.1 and she was also cross-examined. The doctor who gave a certificate, was examined as P.W.10. When the matter was posted for further evidence, the petitioner filed the petition to recall P.W.1 and P.W.10. The Trial Court, after hearing both sides, allowed the petition in respect of P.W.10 alone, on payment of witness batta and dismissed the petition in respect of P.W.1. Aggrieved over the said order, the petitioner is before this Court with the present petition.

4. The learned counsel for the petitioner would further submit that the child witness, who is aged about 7 years now, is the daughter of the petitioner and there is a strained relationship between spouses and because of which, a false case has been foisted against the petitioner and on completion of investigation, the trial is going on. At the time of cross-examination of P.W.1- the victim girl, some vital questions are not posed to her and hence, he wants to recall the said witness and to prove his defence, he has also got some documents in his possession. Hence, he prayed for setting aside the impugned order.

5. To substantiate his argument, he relied upon a decision of the Supreme Court in *Natasha Singh v. CBI* [2013(5) SCC741 and submitted that fair opportunity must be given to the accused to prove his innocence.

6. Resisting the same, the learned Government Advocate (Criminal side) would submit that already prosecution evidence was over and the case was posted for evidence on the defence side. P.W.1 is none other than the daughter of the petitioner. She is aged about 7 years now. She was examined as early as on 30.05.2014. The petitioner has filed the petition with a view to harass the minor daughter and that factum was rightly considered by the Trial Court and as such, no interference is called for in the order impugned, at the hands of this Court.

7. It is an admitted case that P.W.1 is none other than the daughter of the petitioner. It is also admitted fact that she is only aged about 7 years and child witness cannot be tortured by recalling. It is true that as per the decision of the

Apex Court in Natasha Singh's case cited supra, fair opportunity must be given to the accused to prove his innocence. There is no quarrel over the proposition. It is appropriate to incorporate paragraph Nos.8,10,13 and 20, which read thus: "8.Section 311 Cr.P.C empowers the court to summon a material witness, or to examine a person present at "any stage" of "any enquiry", or "trial", or "any other proceedings" under Cr PC, or to summon any person as a witness, or to recall and re-examine any person who has already been examined if his evidence appears to it, to be essential to the arrival of a just decision of the case. Undoubtedly, Cr PC has conferred a very wide discretionary power upon the court in this respect, but such a discretion is to be exercised judiciously and not arbitrarily. The power of the court in this context is very wide, and in exercise of the same, it may summon any person as a witness at any stage of the trial, or other proceedings. The court is competent to exercise such power even suo motu if no such application has been filed by either of the parties. However, the court must satisfy itself, that it was in fact essential to examine such a witness, or to recall him for further examination in order to arrive at a just decision of the case.

10. In Mohanlal Shamji Soni v. Union of India this Court examined the scope of Section 311 Cr PC, and held that it is a cardinal rule of the law of evidence, that the best available evidence must be brought before the court to prove a fact, or a point in issue. However, the court is under an obligation to discharge its statutory functions, whether discretionary or obligatory, according to law and hence ensure that justice is done. The court has a duty to determine the truth, and to render a just decision. The same is also the object of Section 311 Cr PC, wherein the court may exercise its discretionary authority at any stage of the enquiry, trial or other proceedings, to summon any person as a witness though not yet summoned as a witness, or to recall or re-examine any person, though not yet summoned as a witness, who are expected to be able to throw light upon the matter in dispute, because if the judgments happen to be rendered on an inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated.

13. Similarly, in P.Sanjeeva Rao v. State of A.P., this Court examined the scope of the provisions of Section 311 Cr PC and held as under: (SCC pp.63-64 paras 20 & 23)

"0. Grant of fairest opportunity to the accused to prove his innocence is the object of every fair trial, observed this Court in Hoffman Andreas v. Inspector of Customs. The following passage is in this regard apposite: (SCC p.432, para 6) '6..... In such circumstances, if the new counsel thought to have the material witnesses further examined the court could adopt latitude and a liberal view in the interest of justice, particularly when the court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible.

23. We are conscious of the fact that recall of the witnesses is being directed nearly four years after they were examined-in-chief about an incident that is nearly seven years old..... we are of the opinion that on a parity of reasoning and looking to the consequences of denial of opportunity to cross-examine the witnesses, we would prefer to err in favour of the appellant getting an opportunity rather than protecting the prosecution against a possible prejudice at his cost. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to the prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself."

20. Undoubtedly, an application filed under Section 311 Cr PC must be allowed if fresh evidence is being produced to facilitate a just decision, however, in the instant case, the learned trial Court prejudiced the evidence of the witness sought to be examined by the appellant, and thereby caused grave and material prejudice to the appellant as regards her defence, which tantamounts to a flagrant violation of the principles of law governing the production of such evidence in keeping with the provisions of Section 311 Cr PC. By doing so, the trial court reached the conclusion that the production of such evidence by the defence was not essential to facilitate a just decision of the case. Such an assumption is wholly misconceived, and is not tenable in law as the accused has every right to adduce evidence in rebuttal of the evidence brought on record by the prosecution. The court must examine whether such additional evidence is necessary to facilitate a just and proper decision of the case. The examination of the handwriting expert may therefore be necessary to rebut the evidence of Rabi Lal Thapa (PW40, and a

request made for his examination ought not to have been rejected on the sole ground that the opinion of the handwriting expert would not be conclusive. In such a situation, the only issue that ought to have been considered by the courts below, is whether the evidence proposed to be adduced was relevant or not. Identical is the position regarding the panchnama witness, and the court is justified in weighing evidence, only and only once the same has been laid before it and brought on record. Mr. B.B.Sharma, thus, may be in a position to depose with respect to whether the documents alleged to have been found, or alleged to have been seized, were actually recovered or not, and therefore, from the point of view of the appellant, his examination might prove to be essential and imperative for facilitating a just decision of the case."

8. It is the settled proposition of law that fair opportunity must be given to the accused to prove his innocence. However, in the case on hand, we must consider the age of the child, since the child is aged about 6 years at the time of occurrence. Now, she is aged about 7 years and as such, child witness cannot be tortured by recalling. Furthermore, the petitioner's counsel would submit that the petitioner is having favourable documents to substantiate his case. I do not know as to what are the documents the petitioner possessed, to confront with the child witness, so as to prove the ingredients to make out the offence alleged. In such circumstances, I do not find any merit in the contentions taken by the petitioner and the petition was filed only with a view to harass the minor girl, who happens to be the daughter of the petitioner. Finding no merit, the Criminal Original Petition is dismissed. To 1.The Mahila Court, Dindigul. 2.The Inspector of Police, All Women Police Station, Dindigul District. 3.The Additional Public Prosecutor, Madurai Bench of Madras High Court, Madurai. .

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