

Adham Rowther Vs. Sub-inspector of Police, Central Crime Branch and Another

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Court : Chennai

Decided On : Jul-09-1996

Reported in : 1997CriLJ529

Judge : N. Arumugham, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 467; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 311, 313 and 397(3)

Appeal No. : Crl. Revn. Case No. 937 of 1995, Cri. Revn. Petn. No. 936 of 1995 and Cri. Misc. Petn. No. 4696 of 1

Appellant : Adham Rowther

Respondent : Sub-inspector of Police, Central Crime Branch and Another

Advocate for Def. : A.N. Rajan, Govt. Adv. and ;T. Sudanthiram, Adv.

Advocate for Pet/Ap. : M. Hameed Ismail, Adv.

Judgement :

ORDER

1. By consent of parties, both the Criminal Revision and the Criminal Miscellaneous Petition are taken up together for final disposal.

2. This Criminal Revision Case is directed against the order passed by the learned Judicial Magistrate V. Tirunelveli in CrI.M.P. 3501 of 1994 dated 30-12-1994 which was one filed under Section 311 of the Code of Criminal Procedure Code to recall P.W. 1 and which has been allowed by the learned Judicial Magistrate V. Tirunelveli. The impugned order is extracted as hereunder :

'This petition coming on for final hearing before me under Section 311 of recall : Heard as the witness not been cross-examined and the petition is allowed. Issue process on payment of Rs.'

The prosecution proceeded with the registration of the complaint in Crime No. 307 of 1992 and a final report has been forwarded to the Court and taken to the file after investigation in C.C. No. 118 of 1993 for the alleged offence under Section 467 of Indian Penal Code and the trial Court commenced the trial after adopting the procedural laws. It appears from the case records that P.W. 1 has been examined in chief on 27-1-1993, however, he has not been cross-examined and upon a petition filed, the cross-examination of the first witness has been deferred, then followed by another petition filed before this Court, which ended in dismissal after consumption of some considerable time. The trial Court started the examination of P.W. 2 on 29-2-1994 followed by the examination of the other witnesses, viz., P.Ws. 3 and 4. Subsequently the other two witnesses were also examined. However, on 22-9-1994 a petition under Section 311 of the Code of Criminal Procedure has been filed keeping a direction to recall P.W. 1 to mark certain documents. Even so, another witness, P.W. 7 was examined followed by the examination of the Investigating Officer on 14-12-1994. Thus, all the prosecution witnesses have been examined. When the accused was questioned under Section 313 of the Code of Criminal Procedure with regard to the incriminating circumstances and the portion of the evidence made available against him, the accused examined the defence witnesses on 26-10-1995.

3. In the meantime, a petition was filed under Section 311 of the Code of Criminal Procedure and the impugned order came to be passed in that petition, as indicated above. The revision petitioner claims that he had the knowledge of the passing of the said order only on 30-12-1995 and that only at a later stage, efforts

were taken by him to get the mistake by him rectified, including the filing of the Writ Petition No. 15236 of 1995. Therefore there present Criminal Revision Case had been filed only at the later stage.

4. Though the summons issued by the learned Judicial Magistrate, Tirunelveli was sought to be challenged by the petitioner, the relief sought for by the petitioner in the present Criminal Revision Petition pertains to the impugned order passed by the learned Judicial Magistrate (V), Tirunelveli. The preamble portion of the memorandum of grounds and the prayer in this revision claim the relief of only setting aside the summons issued already and not the legality and propriety of the order passed by the learned Magistrate, Tirunelveli in CrI.M.P. No. 3501 of 1994 dated 30-12-1994. But, however, it was stated that such a mistake is only an accidental one and for want of legal sanctity. I am not inclined to give any extent of importance to this sort of mistake committed by the Bar appearing for and on behalf of the petitioner or to the objection raised by the Bar appearing for the respondents. I take every pain to say that each and every one of the members of the Bar is bound and expected to follow the procedure provided therefor with all solemnity and dignity in order to vindicate the rights of every citizen of this country, but instead, the petitioner's counsel has adopted the most hide and seek method to which I am not inclined to affix my seal of approval. The members of the Bar should be very careful and diligent at least hereafter in following the procedures contemplated in law, while prosecuting the case.

5. I have heard Mr. Hameed Ismail learned counsel appearing for the petitioner and Mr. T. Sudanthiram learned counsel appearing for the second respondent, against and for the impugned order. It was also the grievance of the learned counsel for the second respondent that the matter may be reopened by recalling P.W. 1, so as to give a finality to the proceedings. It appears that on 27-1-1993 P.W. 1 has been examined in full and upon a petition, his cross-examination was deferred. On 23-6-1994, he was recalled and cross-examined by the defence in full, as is evident from the recorded evidence of P.W. 1. This was followed by the examination of other witnesses in full let in by the prosecution and it appears that at the fag end of the trial, the present Application under Section 311 of the Code of Criminal Procedure has been filed and was opposed. In the light of the above

factual aspects in all probabilities the order passed by the Judicial Magistrate, Tirunelveli is wrong in saying that P.W. 1 has not been examined at all. Further, the order dated 30-12-1994 passed by the said Judicial Magistrate, Tirunelveli is a non-speaking order, which clearly demonstrates that while passing the impugned order, the learned Judicial Magistrate has not all looked into the case records nor the deposition recorded in his presence on 23-6-1994. So, it has become crystal clear that without looking into the case records the learned Judicial Magistrate has passed the order deliberately and inadvertently. For a Judicial Magistrate, who is expected to conduct the trial in a fair manner, is not expected or bound to adopt such an approach, which will not be allowed to be sustained hereafter. For this serious lach, an explanation from the Magistrate concerned is directed to be called for from him within fifteen days from today and appropriate action has got to be taken against him.

6. In Crl.R.C.S.R. No. 7474 of 1995, I had occasion to consider the scope of Section 311 of the Code of Criminal Procedure Code in the following words :

In the light of this, it is notice that the legislature have not chosen to indicate the limits of the power discretionary and obligatory under both clauses which are very wide in its scope and that in exercising such power, the discretion is conferred on Courts in summoning any person to be examined or recalling any person to be re-examined. Any order under this section must be a judicial one, based on principles of equity. If not, the very exercise of the jurisdiction by the Court must obviously be deemed to be dictated by the exigency of the situation and fair play and good conscience have to be the only safeguards. It is thus, therefore, made a clear, that while exercising such wider discretionary power, the Court must exercise it with great caution and care so as to render adequate justice to the parties concerned without any unnecessary protraction of the case.

In Lakshmanan v. The Tamil Nadu Electricity Board, 1991 Mad LW (Crl) 475, a learned single Judge of this Court has also observed as follows :

'Section 311, Crl.P.C. permits the Court at any stage of the enquiry or trial or other proceeding to summon any person as a witness or examine any person in attendance, though not summoned as a witnesses, 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. It has been often emphasized that the very width of the power under this Section, required corresponding caution, before exercise of the power. The only criterion for exercise of this power is that it should appear to the Court that the evidence sought to be placed was essential to the just decision of the case.'

Quoting the above observation, I had my preference also to add with regard to the facts of the instant case, which are extract as hereunder :

'A careful reading of the above section in the context of the legal ratios enunciated by the learned Judges in the citations above mentioned that the primordial condition to summon or recall or re-examine any person present or not present in Court at any stage of the trial or enquiry, is the purpose for which such examination was sought for, which appears to be very essential and became essential for rendering justice; that means to adjudicate the whole matter in hand in the proper legal perspective and for the just decision of the case. The above ingredients is patently in built in the section itself as it shall be essential to the just decision of the case, and that therefore, only if the Court gets satisfied fully of the need for marking of such document for the proper justice to be rendered or adjudication of the matter in hand is identified, the wider discretionary power given to the Court has to be exercised. If not, such petition as held by the learned single Judge, only as a dilatory tactics, cannot at all be allowed.

It is rather disturbing to note that though the higher Court have often and often repeatedly held so and settled the legal principle in this regard, the Subordinate Judiciary have no inclination at all to follow the legal norm and guidance and to this extent, I have no hesitation to hold that it is not only unfortunate but also it requires strict implementation of the legal norms set out by the higher Courts.'

7. The legal thesis enunciated by the Apex Court and in the above quoted decision of this Court had been totally overlooked by the learned Judicial, Magistrate. That apart, I take every pain to note that Section 311 of the Code of Criminal Procedure mandated with wider power should be exercised with utmost caution. In the instant

case, the learned Judicial Magistrate took it lightly and passed the impugned order. It is rather unfortunate and disheartening to note that the learned Judicial Magistrate has not passed any speaking order, which in fact, cannot at all be digested for a single movement. Enough for my at this juncture to say, on the facts and circumstances of this case, the order passed, by the learned Judicial Magistrate is without reasoning and not in accordance with the procedural law and same is therefore liable to be set aside.

8. One more objection raised by Mr. T. Sundanthiram, learned counsel for the second respondent is with regard to the maintainability of this Criminal Revision, in view of the fact that the order impugned in this Criminal Revision Case is in utter violation of the principles of natural justice and this Revision falls within the teeth of Section 397(3) of the Code of Criminal Procedure. Since I am equipped with power to provide ways and means to the parties aggrieved to get redressal, I am inclined to allow this Criminal Revision case and permit the learned counsel for the second respondent to reopen the matter before the Magistrate concerned for a fresh consideration of the matter, if he is otherwise interested in requiring P.W. 1 for further examination and if he does so, the learned Magistrate shall dispose of the matter afresh in the light of the direction given above, as expeditiously as possible. This direction, in my view will provide ample remedy to the second respondent and equally to the revision petitioner.

9. In the result, for all the foregoing reasons, this Criminal Revision succeeds and it is allowed. Consequently, the order passed by the learned Magistrate V, Tirunelveli in Crl.M.P. No. 3501 of 1994, dated 30-12-1994 is set aside. Consequently, Crl.M.P. No. 4696 of 1995 is also dismissed.

10. Petition allowed.