**Ramamoorthy Vs. the State**

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**SooperKanoon Citation** : sooperkanoon.com/821083

**Court** : Chennai

**Decided On :** Feb-26-1999

**Reported in** : 1999CriLJ4444

**Judge** : B. Akbar Basha Khadiri, J.

**Acts** : Evidence Act - Sections 114; Code of Criminal Procedure (CrPC) , 1974 - Sections 311; Code of Criminal Procedure (CrPC) - Sections 540

**Appeal No.** : Cri. R.C. No. 1328 of 1998, Cri. Revn. Petn. No. 1328 of 1998 and Cri. M.P. No. 10107 of 1998

**Appellant** : Ramamoorthy

**Respondent** : The State

**Advocate for Def.** : M. Babu Muthu Meeran, Govt. Adv.

**Advocate for Pet/Ap.** : V. Gopinath, Sr. Adv. for ;K. Salvarangam, Adv.

**Disposition** : Revision allowed

**Judgement** :
ORDER

**B. Akbar Basha Khadiri, J.**

1. This revision has arises in this way :-

The respondent has registered a case in Crime No. 351 of 1992 against the petitioner and others which after investigation has culminated in S.C. No. 30 of 1995. The case of the prosecution is that the occurrence took place on 3-7-1992 at 6.30 a.m. Some of the accused in this case are arrayed as accused in Crime No. 350 of 1992 which after investigation culminated in sessions case in S.C. No. 8 of 1994. In that case, the occurrence is said to have taken place on the same day, i.e. on 3-7-1992 at 5.30 a.m. The F.I.R. in Crime No. 350 of 1992 was at the instance of one Ganapathy. Ganapathy was also examined as a witness in that case and in the cross-examination he had admitted that there had been a clash between the two rival groups on the previous day, i.e., on 2-7-1992 and the police visited the village on that date and when the incident to Crime No. 350 of 1992 was in progress, the second accused herein was chased by a police constable by name Sowry and taken into custody, S.C. No. 8 of 1994 ended into acquittal after trial.

2. Now in the instant Sessions case in S.C. No. 30 of 1995, the prosecution sought to mark the F.I.R. in Crime No. 350 of 1992 through the Sub-Inspector of Police who was examined as P.W. 12 to prove the motive for the present occurrence. According to the petitioner, Ganapathy must be examined as Court witness in the interest of justice.

3. In the counter, the respondent had stated that there had been no material suppression of fact and that Ganapathy had not been cited as a witness for the prosecution in the instant case and therefore, he need not be examined as a witness. The respondent had also contended that Section 311, Cr.P.C. is not intended for invoking powers to examine the witness at the instance of the either party and if the accused is desirous, he may examine Ganapathy as his defence witness. The learned Chief Judicial Magistrate-cum-Addl. Sessions Judge, Tiruvannamalai enquired into the matter and held that the prosecution has adduced enormous evidence for the purpose of proving its case and it was not necessary for the Court to examine Ganapathi as Court witness.

4. Heard both the sides, Section 311 of Criminal Procedure Code recites as under :-

311. POWER TO SUMMON MATERIAL WITNESS OR EXAMINE PERSON PRESENT.- Any Court may, at any stage of any inquiry, trial or other proceedings 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.

5. In Jamatraj v. State of Maharashtra : 1968 CriLJ231 , the Supreme Court have clearly pointed out as under :-.The section is in two parts. The first part gives a discretionary power but the latter part is mandatory. The use of the word 'may' in the first part and of the word 'shall' in the second firmly establishes this difference. Under the first part, which is permissive, the Court may act in one of three ways: (a) summon any person as a witness; (b) examine any person present in Court although not summoned and (c) recall or re-examine a witness already examined. The second part is obligatory and compels the Court to act in these three ways or any one of them, if the just decisions of the case demands it....

This has been reiterated in Mohanlal Shamji Soni v. Union of India 1991 MLW 284 : : 1991 CriLJ1521 .

6. So far as the first part of this section is concerned, the Court has discretion to examine a witness as Court witness. It is settled that the discretionary power should be exercised judicious with circumspection and it should be exercised as a reasonable and prudent person. The powers given to the Court under Section 311, Cr. P. C. being discretionary, the Court cannot be forced to exercise them at the bidding of any of the parties. As far as summoning of Court witness is concerned, it is entirely a matter for the Court to decide and it is not for the accused to insist upon. It is even open to the accused to summon the witness in his defence, if so advised. The object of the first part of the section (is) fair trial.

7. So far as the second part of the section is concerned, it does not allow any such discretion but it binds and compels the Court to take any of the aforementioned two steps, if the fresh evidence to be adduced is essential to the just decision of the case. In other words, it becomes the duty of the Judicial Magistrate to examine

witness for a just decision in the case. The object of this part of the section is to arrive at a just decision.

In Mohanlal Shamji Soni v. Union of India : 1991 CriLJ1521 , the Apex Court have held as under :-

It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue. But it is left either for the prosecution or for the defence to establish its respective case by adducing the best available evidence and the Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their sides. None the less if either of the parties withholds any evidence which could be produced and which, if produced, would be unfavourable to the party withholding such evidence, the Court can draw a presumption under illustration (g) to Section 114 of the Evidence Act. In such a situation a question that arises for consideration is whether the Presiding Officer of a Court should simply sit as a mere umpire at a contest between two parties and declare at the end of the combat who has won and who has lost, or is there not any legal duty of his own, independent of the parties, to take an active role in the proceedings in finding the truth and administering justice? It is a well accepted and settled principles that a Court must discharge its statutory functions- whether discretionary or'obligatory- according to law in dispensing justice because it is the duty of a Court not only to do justice but also to ensure that justice is being done. In order to enable the Court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the new Code) are enacted whereunder any Court by exercising its discretionary authority at any stage of enquiry, trial or other proceedings can 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 who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated.

8. In Jamatraj v. State of Maharashtra : 1968 CriLJ231 the Apex Court has observed in paragraph No. 14 as under :-

It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in Court or to recall a witness already examined and makes this the duty and obligation of the Court provided the just decision of the case demands it.

9. With this legal background, let us now turn to challenge posed by the petitioner herein. Some of the accused are involved in two cases, i.e. S.C. No. 8 of 1994 and S.C. No. 30 of 1995, S.C. No. 8 of 1994 has arisen out of first information given by Ganapathy. Some of the accused who are involved in this case were acquitted in S.C. No. 8 of 1994. In S.C. No. 8 of 1994, Ganapathy has deposed that one of the accused, namely, the second accused in the instant case was chased and arrested on 3-7-1992 at 5-30 a.m. The incident relating to this case took place on the same day at 6.30 a.m. The contention of the prosecution is that Ganapathy has not been cited as a witness herein. It is not necessary that a person who is cited as a witness and not examined by the prosecution, should be called as a Court witness. The Court has to consider whether the evidence of Ganapathy is necessary to arrive at a just decision in the case, especially when it is alleged by the petitioner that there is material in the shape of evidence of Ganapathy available to show that the second accused might not have participated in committing the crime No. 30 of 1995.

The learned Chief Judicial Magistrate has applied the first part of the Section 311, Cr.P.C. and exercised his discretion and held that it is not necessary to examine Ganapathy as a witness. Even there, the learned Chief Judicial Magistrate had not exercised his discretion properly, because he has held that the prosecution has let in enormous evidence which is sufficient to consider whether or not they have proved their case. Ganapathy is sought to be examined as a witness not to strengthen the prosecution case, but to weaken the prosecution case and that one of the accused could not be present at the scene of the occurrence, when the occurrence took place. The evidence of Ganapathy has a bearing to arrive at a

just decision in the case.

It is needless to point out that witness can be examined at any time, i.e., at any stage under Section 311, Cr.P.C. in criminal proceedings. The first part of the section applied for conduct of a fair trial and the second part to arrive at a just decision. Regarding the first part of the section, the learned Chief Judicial Magistrate has a discretion, but regarding the second part, of the section, the learned Chief Judicial Magistrate is duty bound to examine the witness for a just decision. Ganapathy's evidence being material to arrive at the just decision of the case, the learned Chief Judicial Magistrate ought to have allowed the petition. The petitioner cannot be directed to examine Ganapathy as his defence witness. The learned Chief Judicial Magistrate has also not held so. The learned Chief Judicial Magistrate was satisfied that the prosecution has let in enormous evidence to prove their case, which is beyond the scope of Section 311 of Cr.P.C.

This revision is therefore, allowed and the order passed by the learned Chief Judicial Magistrate is set aside. The learned Chief Judicial Magistrate is directed to examine Ganapathy within ten days from the date of receipt of this order and permit both the parties to cross-examine him.

10. In view of the orders passed in Crl. R.C. No. 1328 of 1998, Crl. M.P. No. 10107 of 1998 is closed.