

Sethupathi vs Vairava Kesu : 1St on 24 July, 2024

Crl.O.P.(MD)No.

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 19.09.2024

Delivered on : 04.10.2024

CORAM

THE HON'BLE MR.JUSTICE K.MURALI SHANKAR

Crl.O.P.(MD)No.14620 of 2024

and

Crl.M.P.(MD)No.9118 of 2024

Sethupathi : Petitioner/Respondent
3rd Accus

Vs.

1.Vairava Kesu : 1st Respondent/Petiti
P.W.

2.Balamurali Krishna @ Bala

3.Saravanan

4.Illayaraja @ Hasu

5.Mahendren

6.Karthik

7.Sathishkannan

8.Baskaran : Respondents 2 to 8/
Respondents 1, 2 & 4 to
A1, A2 & A4 to A8

1/12

<https://www.mhc.tn.gov.in/judis>

Crl.O.P.(MD)No

9.State rep.by

The Deputy Superintendent of Police,
Devipattinam Sub Division,
Devipattinam Police Station,
Ramanathapuram District.
Crime No.67 of 2020

... Respondents/Compla

PRAYER : Criminal Original Petition filed under Section 528 of BNSS to call for the records and duly set aside the order passed in Cr.M.P.No.184 of 2024 in S.C.No.12 of 2020 on the file of the learned Sessions Judge, Special Court for trial of Cases registered under S (POA) Act, Ramanathapuram and also to set aside the consequential proceeding and decide it on merits in the manner known to law.

For Petitioner : Mr.K.Jeya Mohan

For Respondents : Mr.P.Kottai Chamy,
Government Advocate (Crl. S
for R9.

: Mr.R.Anand, for R1

ORDER

The criminal Original Petition, invoking under Section 528 of BNSS, is directed against the order passed in Cr.M.P.No.184/2024 in Spl.S.C.No.12 of 2020, dated 24.07.2024 on the file of the Special court for trial of cases registered under SC/ST (POA) Act , Ramanathapuram.
<https://www.mhc.tn.gov.in/judis> Crl.O.P.(MD)No.14620 of 2024

2. The petitioner, who is the third accused, is facing the trial in S.C.No.12 of 2020 for the alleged offences under Sections 147, 307, 302, 109 IPC and under Sections 3(1)(f) and 3(2)(v) of SC/ST (POA)Act.

3. Pending examination of the prosecution witnesses, the defacto complainant /first respondent herein has filed two applications one to reopen the evidence of P.W.1 and another application under Section 311 of Cr.P.C to recall P.W.1 for the purpose of further examination in Cr.M.P.No.184 of 2024. The learned trial Judge, after conducting enquiry, has passed the impugned order, dated 24.07.2024 allowing the petition. Aggrieved by the order of recalling P.W.1 for further examination, the third accused has preferred the present petition.

4. The case of the first respondent/defacto complainant in his application under Section 311 of Cr.P.C, is that his son was murdered on 21.03.2020; that the defacto complainant came to know subsequently that his son cell phone No.63740 81939 had received calls from the petitioner/third accused from 11.58 am to 08.33 pm on the occurrence date; that the third accused had called the deceased 11 times for the <https://www.mhc.tn.gov.in/judis> Crl.O.P.(MD)No.14620 of 2024 purpose of finding out the whereabouts of the deceased as per instructions of the other accused, that the other accused, after coming to know that the deceased was with one Ameerkan, they went to that place and murdered the defacto complainant's son; that the complainant has received call register

and call voice records now only and that therefore, he has to produce those evidence before the Court and for that purpose, he has to recalled.

5. The learned counsel for the petitioner would comment, the way in which, the impugned order came to be passed by the learned trial Judge.

6. No doubt, as rightly pointed out by the learned counsel for the petitioner, in the first para of the impugned order, it has been shown that the petition was filed under Section 311 Cr.P.C., praying to recall P.W.1 for the purpose of cross examination. But the fact remains that the petition came to be filed by the defacto complainant to recall himself for further examination.

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7. It is evident from the impugned order that though the petition was posted for filing counter of the respondents 1 to 3, 6 to 8, the learned trial Judge, by recording the presence of the petitioners and the respondents 1 to 8, stated as “counter not filed”. Taking note of the 'No objection' stated by the learned counsel for respondents 4 and 5 and by observing that the evidence of P.W.1 is sought to be reopened to file the pendrive and other documents and that since the said pendrive and the other documents were already filed, the learned Sessions Judge allowed the petition.

8. No doubt, as rightly contended by the learned counsel for the petitioner that though the above petition came to be filed making allegations against the third respondent/accused, the learned trial Judge, without receiving any counter from the third accused and without hearing their side, has passed the impugned order. But at the same time, as rightly contended by the learned counsel for the first respondent, though the reopen and recall petitions came to be filed in January 2024 itself, the third accused side has not offered any reason or explanation for not filing the counter or objections for the said petitions for more than six months. <https://www.mhc.tn.gov.in/judis> Crl.O.P.(MD)No.14620 of 2024

9. Now turning to the main objections of the petitioner, the first respondent/defacto complainant alone has filed the above recall petition; that since the Public Prosecutor is conducting the prosecution, the defacto complainant has absolutely no right to file the above application by himself and that the learned trial Judge has committed grave error in entertaining the petition and allowing the same.

10. It is not in dispute that the defacto complainant has approached this Court in Crl.O.P(MD)No.3219 of 2023, seeking directions to the District Collector for appointment of Special Public Prosecutor and in pursuance of the directions of this Court, dated 01.09.2023, the District Collector has issued proceedings, dated 30.04.2024 appointing one Mr.Muruga Boopathi as Special Public Prosecutor for conducting the case in Spl.SC.No.12 of 2020 pending on the file of the Special Court, Ramanathapuram. But it is pertinent to note that the above petition in Crl.M.P.No.184 of 2024 came to be filed prior to the appointment of Special Public Prosecutor.

11. The learned counsel for the first respondent would submit that since the Public Prosecutor, who was conducting prosecution earlier, was <https://www.mhc.tn.gov.in/judis> CrI.O.P.(MD)No.14620 of 2024 relative of the accused and was not conducting the prosecution properly, he was constrained to send a representation to the District Collector for appointment of Special Public Prosecutor and since there was no action, he was constrained to file a petition before this Court and obtained orders.

12. The learned counsel for the defacto complainant would submit that as per Section 15(A) (3) of SC /ST (POA) Act, a victim or his dependent shall have the right to apply to the Special Court or the Exclusive Special Court to summon the parties for production of documents, materials, witnesses or examine the persons present.

13. No doubt, as rightly contended by the learned counsel for the first respondent, in other cases, when a Public Prosecutor is in-charge of the sessions case, the defacto complainant has absolutely no right to file an application by himself for recalling him or for examination of other witnesses or production of documents and he has to approach only through the Public Prosecutor. But as rightly pointed out, Section 15(A) give necessary power to the victim or the dependent to make an <https://www.mhc.tn.gov.in/judis> CrI.O.P.(MD)No.14620 of 2024 application to summon the witnesses or for production of documents or materials and as such, the filing of the petition under Section 311 of Cr.P.C., by the defacto complainant himself, cannot be found fault with.

14. At this juncture, it is necessary to refer the judgment of the Hon'bl Supreme Court in the case of Varsha Gard Vs. State of Madhya Pradesh and others reported in 2022 SCC Online SC 986 and the relevant passage is extracted hereunder :

“31. Having clarified that the bar under Section 301 is inapplicable and that the appellant is well placed to pursue this appeal, we now examine Section 311 of CrPC. Section 311 provides that the Court “may”:

(i) Summon any person as a witness or to examine any person in attendance, though not summoned as a witness; and

(ii) Recall and re-examine any person who has already been examined.

32. This power can be exercised at any stage of any inquiry, trial or other proceeding under the Cr.P.C. The latter part of Section 311 states that the Court “shall” summon and examine or recall and re-examine any such person “if his evidence appears to the Court to be essential to the just decision of the case”. Section 311 contains a power upon the Court in broad terms. The statutory provision must be read <https://www.mhc.tn.gov.in/judis> CrI.O.P.(MD)No.14620 of 2024 purposively, to achieve the intent of the statute to aid in the discovery of truth.

33. The first part of the statutory provision which uses the expression “may” postulates that the power can be exercised at any stage of an inquiry, trial or other proceeding. The latter part of the provision mandates the recall of a witness by the Court as it uses the expression “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”. Essentiality of the evidence of the person who is to be examined coupled with the need for the just decision of the case constitute the touchstone which must guide the decision of the Court. The first part of the statutory provision is discretionary while the latter part is obligatory.”

15. The learned counsel for the petitioner would further submit that the incident was occurred on 22.02.2020; P.W.1 was examined on 31.08.2023 and the Investigating Officer was examined on 01.11.2023 and that the defacto complainant has filed the present petition as an after thought with sole intention to fill up lacunae. He would further submit that the defacto complainant has not produced any certificate under Section 65 (B) of the Evidence Act along with pendrive and as such, the trial Judge ought not to have marked the documents.

16. The learned counsel for the complainant would submit that at <https://www.mhc.tn.gov.in/judis> Crl.O.P.(MD)No.14620 of 2024 the instance of the accused, some of the witnesses have tuned hostile and that the defacto complainant has come to know about the call details and call voice records only recently, which is vital material to prove the case of the prosecution. He would further submit that the first respondent has not produced the certificate under Section 15(B) of Evidence Act and only after receipt of the pendrive, he has to take necessary steps for getting forensic expert opinion and the certificate under Section 65 (B) of the Evidence Act.

17. He would further submit that in pursuance of the orders passed by the learned trial Judge in Crl.M.P.No.184 of 2024, P.W.1 was already recalled and he was also cross examined on behalf of the fourth accused and is pending for cross examination of the other accused.

18. The second part of Section 311 Cr.P.C. contemplates that the Court shall summon and examine or recall and re-examine any such person, if his evidence appears to it essential to the just decision of the case. The very purpose of Section 311 of Cr.P.C., is to prevent miscarriage of justice.

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19. No doubt, the way in which, the impugned order came to be passed cannot be appreciated. But, considering the facts and circumstances of the case and also the purpose of Section 311 of Cr.P.C., the impugned order allowing the petition filed under Section 311 of Cr.P.C., cannot be found fault with. Hence, this Court concludes that the present Criminal Original Petition is devoid of merits and the same is liable to be dismissed.

20. In the result, this Criminal Original Petition is dismissed. Consequently, connected Miscellaneous Petition is closed.

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Index : Yes / No
Internet : Yes / No
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Crl.O.P. (MD)No.14

K.MURALI SHANKAR,J.

To

- 1.The Sessions Judge, Special Court
for trial of Cases registered under
SC/ST (POA) Act, Ramanathapuram.
- 2.The Deputy Superintendent of Police,
Devipattinam Sub Division,
Devipattinam Police Station,
Ramanathapuram District.
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

Order made
Crl.O.P. (MD)No.14620 of 20
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Dated: 04.10.

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