

(2024) 04 KL CK 0102

In the High Court Of Kerala

Case No : Criminal Miscellaneous Petition No. 2574 Of 2024

Hemachandran Nair @ Ayyappan

APPELLANT

Vs

State Of Kerala

RESPONDENT

Date of Decision : 11-04-2024

Acts Referred:

Code of Criminal Procedure, 1973 — Section 311, 313, 482
Indian Penal Code, 1860 — Section 302, 308

Citation : (2024) 04 KL CK 0102

Hon'ble Judges : Bechu Kurian Thomas, J

Bench : Single Bench

Advocate : Jaison Joseph, Akhil S.Vishnu, T.R.Renjith, P.Anoop

Final Decision : Dismissed

Judgement

Bechu Kurian Thomas, J.

1. Petitioners challenge an order issued under section 311 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C') permitting persons who were never questioned by the Investigating Officer, to be examined as additional witnesses in a murder trial.

2. Petitioners are some of the accused in S.C. No.935/2017 on the files of the Additional Sessions Court-VII, Thiruvananthapuram, which arose out of Crime No.68/2012 of Ayiroor Police Station. As per the prosecution allegations, the accused had, on 24.07.2012, in furtherance of their common object armed with dangerous weapons, stabbed Sri. Rijesh, who later succumbed to his injuries, thereby committing the offences, including section 302 of the Indian Penal Code, 1860 (for short 'IPC'). A counter case was also registered against the deceased and other persons alleging offences, including section 308 IPC, as Crime No.81/2012. After completing the investigation into both crimes, final reports were filed. Petitioners are facing prosecution in S.C. No.935/2017 on the files of the Additional Sessions Court-VII, Thiruvananthapuram, and the counter case is

being prosecuted as S.C. No.24/2017 before the same court.

3. While so, when S.C. No.935/2017 was posted for taking the statement of the accused under section 313 Cr.P.C, the Public Prosecutor filed a petition as Crl.M.P. No. 1856/2024 under section 311 Cr.P.C to examine additional witnesses, who are accused 2, 4 and 5 in the counter case. By the impugned order dated 04-02-2024, the learned Sessions Judge found the examination of those witnesses essential and allowed the said petition. Petitioners assail the said order.

4. Sri. Sasthamangalam S. Ajith Kumar, the learned Senior Counsel duly instructed by Sri. Jaison Joseph, learned counsel for the petitioners, contended that the witnesses who are now sought to be examined as additional witnesses on behalf of the prosecution are persons who have never been questioned by the police earlier and that the same will cause serious prejudice to the defence case. It was also pointed out that the scope of section 311 Cr.P.C cannot be expanded to examine any person whom the prosecution wants, and the said provision cannot be intended to destroy the defence put up by the accused, especially when the witnesses now sought to be examined are persons who have never been questioned nor have their previous statement been recorded. Referring to an order dated 04.02.2024 in Crl.M.P. No.1761/2024 in the very same case, the learned Senior Counsel submitted that when an application for further investigation to question the same witnesses, now sought to be examined, was filed by a stranger to the prosecution, the learned Sessions Court had dismissed it. It was submitted that by the impugned order, those persons are now permitted to be examined on the application of the prosecutor, which causes serious prejudice and contradicts the earlier order of the court.

5. Sri.T.R.Renjith, the learned Public Prosecutor on the other hand, submitted that the powers under section 311 Cr.P.C are enormous and wide and, therefore no restriction can be put on the said power, especially when the court is satisfied that the evidence is essential, for a just decision of the case. The learned Public Prosecutor, after referring to the decision in Varsha Garg v. State of Madhya Pradesh and Others [2022 SCC Online SC 986] submitted that when the court deems it fit to exercise the powers, this Court ought not to interfere with such an order, unless there is any perversity. The learned Public Prosecutor also submitted that substantial reasons have been given by the learned Sessions Judge while allowing the application, and the same cannot be said to be perverse or improper, warranting an interference under section 482 of the Cr.P.C.

6. Sri.P.Anoop, the learned counsel appearing on behalf of the defacto complainant, submitted that the Investigating Officer's omission to question the witnesses cannot stand in the way of the Public Prosecutor examining those witnesses especially when the evidence are found to be essential. It was further submitted that if such an approach is permitted, the investigation could be scuttled by an Investigating Officer, and the investigation would be at the mercy of the whims and fancies of such an Investigating Officer.

7. I have considered the rival contentions.

8. S.C. No.935/2017 relates to the death of one Pachan @ Rijesh, who is alleged to have been murdered on 24.07.2012 by the petitioners herein and others. In the counter case filed, which is pending consideration as S.C. No.24/2017, the deceased Rijesh and other persons are alleged to have attacked the accused persons. The additional witnesses now sought to be examined by the prosecution are accused 2 to 5 in S.C. No.24/2017, i.e., the counter case, and they are persons who were allegedly with the deceased at the time of occurrence of the incident, and they claim to be the eyewitnesses to the attack against the deceased.

9. The trial court has, in the impugned order, observed that the witnesses now sought to be examined are material and natural eyewitnesses who were allegedly with the deceased at the time of occurrence. It was also observed that it was quite strange and astonishing that the Investigating Officer had omitted to question those occurrence witnesses, despite the prosecution having a case that both incidents amount to a case and counter case arising out of the same incident. The learned Sessions Judge has found that the Investigating Officer was duty bound under law to cite the proposed three witnesses and that the Investigating Officer could not have picked and chosen witnesses based on his surmises and conjectures, and if such an approach is permitted the same would amount to serious laches and irregularities in the investigation. The learned Sessions Judge went on to hold that the failure to examine the additional witnesses now sought to be examined would amount to omitting the best evidence to be tendered in the murder trial, and the omission of the Investigating Officer appears to be intentional amounting to material withholding of evidence. After analysing the aforesaid factual aspects, the learned Sessions Judge found that the fair trial being the objective of the criminal trial, it is the duty of the court to ensure that such fairness is neither tampered with nor threatened in any manner.

10. The power under section 311 Cr.P.C is wide, and when the court feels that a piece of evidence is essential, it is entitled to re-open and permit re-examination of any witness. It is not the mandate of law that only those witnesses who have been questioned by the Investigating Officer alone can be examined by the prosecution. If such an approach is adopted, then the criminal trial will be under the complete control of the Investigating Officer. A glance at the provisions of law will indicate that for the prosecution, it is the Public Prosecutor who decides who should be examined and who should not be examined. When the Public Prosecutor is of the opinion that a witness who is material to the prosecution case has not been questioned and his evidence is essential, it is certainly open for him to bring to the notice of the court. If the court feels that such evidence is essential, the power under section 311 Cr.P.C is available to the court.

11. In the decision in Ram Bihari Yadav v. State of Bihar and Others (1998) 4 SCC 517 it was observed that if the Investigating Officers have created a mess,

the interest of justice demands that such acts or omissions of the officers of the prosecution should not be taken in favour of the accused, for that would amount to giving premium for the wrongs of the prosecution designedly committed to favour the appellant. Similarly, in *Zahira Habibullah Sheikh and Another v. State of Gujarat and Others* (2006) 3 SCC 374, the Supreme Court had observed that the whole purpose behind section 311 Cr.P.C is to prevent a failure of justice on account of the mistake of either party in bringing a piece of valuable evidence on record or leaving ambiguity in the statement of witnesses from either side.

12. Yet again, in the recent judgment in Varsha Garg's case (*supra*), relied upon by the learned Public Prosecutor, it was observed that even if the prosecutor is remiss in some ways, the court can control the proceedings effectively so that the ultimate objective, that is, the truth, is arrived at. When the prosecuting agency or the prosecutor is not acting in the requisite manner, the court cannot afford to wishfully pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency.

13. Taking a cue from the above observations, it is certainly open for the court or for the Prosecutor to bring to the notice of the court an omission on the part of the Investigating Officer so that his evidence, if brought on record and if reliable, may prove the prosecution case beyond reasonable doubt.

14. In this context, it has to be borne in mind that the question of admissibility of evidence is different from the question of reliability of evidence. Nothing makes the evidence of a witness, who was not questioned earlier, inadmissible. However, the question about the reliability of his evidence is a matter that will have to be decided by the Court after trial. Merely because the Investigating Officer did not question a witness earlier does not make his evidence inadmissible.

In view of the above, I find no reason to interfere with the impugned order and this CrI.M.C is dismissed.