
(2016) 04 MAD CK 0117
In the Madras High Court
Case No : CrI. O.P. (MD) No. 5173 of 2016

Kali

APPELLANT

Vs

Inspector of Police, Puliyarai

RESPONDENT

Date of Decision : 01-04-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 311, 482
Penal Code, 1860 (IPC) — Section 294(b), 302

Citation : (2016) 3 MLJ Criminal 353

Hon'ble Judges : Mr. P.N. Prakash, J.

Bench : Single Bench

Advocate : Mr. S. Xavier Rajini, Advocate, for the Appellant; Mr. A.P. Balasubramani, Govt. Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Mr. P.N. Prakash, J.—This petitioner has been filed to set aside the order dated 17.12.2015 in Cr.M.P.No. 7149 of 2015 in S.C.No. 134 of 2015 on the file of the Principal Sessions Judge, Tirunelveli Tirunelveli District.

2. The petitioner is facing prosecution in S.C.No. 134 of 2015 before the learned Principal Sessions Judge, Tirunelveli for offences under Sections 294(b) and 302 IPC. During the course of trial, the prosecution filed a petition in Cr.M.P.No. 7149 of 2105 in S.C. No. 134 of 2015 under Section 311 Cr.P.C. for examining Dr.Radhna Pethmurugan and Dr.Nirmalkumar as additional witnesses. The accused strongly objected to the examination by filing a counter. The Trial Court considered the rival submissions and allowed the petition on 17.12.2015, challenging which, the accused is before this Court.

3. Learned counsel for the petitioner/accused relied upon the judgment of the Supreme Court in the case of Rajaram Prasad Yadav v. State of Bihar and another reported in (2013) 14 SCC 461 in support of his contention that the prosecution cannot be allowed to fill up the lacuna. He also submitted that those witnesses were not cited in the memo of evidence and their 161 statements were

also not recorded.

4. This Court gave its anxious consideration to the submissions made by the learned counsel for the petitioner.

5. The prosecution in the petition under Section 311 Cr.P.C. has stated that Dr. Radhna Pethmurugan had admitted the victim in the hospital at Shencottah and gave him first aid and thereafter, he referred him to Tirunelveli Medical College Hospital, where the victim died. Dr. Nirmalkumar, who was at the relevant point of time in the Medical College Hospital, Tirunelveli, had informed the death of the victim to the Police. These witnesses have been inadvertently left out in the memo of evidence and their examination is essential for the just decision of the case.

6. It is trite that the power under Section 311 Cr.P.C. can be invoked at any point of time before final judgment is delivered. The only consideration that should weigh in the mind of the Court is whether examination of the witnesses is for the just decision of the case. Even in the judgment relied upon by the learned counsel for the petitioner in *Rajaram Prasad Yadav v. State of Bihar* (supra), this principle has been reiterated and the contours of Section 311 Cr.P.C. has been catalogued in Paragraph Nos.17.12 and 17.13 as follows:

"17.12. The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

17.13. The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party."

7. In this case, these two Doctors had examined the victim in the Government Hospital and they are not private witnesses, but speak about the actual occurrence. The treatment given to the victim is borne out by Government records, which have to be proved in the manner known to law only by examining them as witnesses. The defense will always make the complaint that the prosecution is attempting to fill up the lacuna, whenever an application under Section 311 Cr.P.C. is filed. The question of filling lacuna came up for consideration before the Supreme Court in *Rajendra Prasad v. The Narcotic Cell* through its Officer in-Charge, Delhi, [1999 (3) Crime 106 (SC)], wherein the Supreme Court has held that whenever an application is filed by the prosecution to examine a witness, the defence will always raise the plea that the witness is being examined to fill up the lacuna and on that ground alone, a petition under Section 311 should not be rejected.

8. In the result, this Criminal Original Petition, being devoid of merits, is dismissed. Consequently, connected miscellaneous petition is closed.