

(1991) 09 MAD CK 0072
In the Madras High Court
Case No : Criminal M.P. 2649 of 1989

N. Lakshmanan

APPELLANT

Vs

The Tamil Nadu Electricity Board, Tiruttani

RESPONDENT

Date of Decision : 09-09-1991

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 311, 482
Penal Code, 1860 (IPC) — Section 379, 381, 406

Citation : (1991) LW(Cri) 475

Hon'ble Judges : Arunachalam, J

Bench : Single Bench

Advocate : T. Sudanthiram, for the Appellant; P. Chandrasekaran, for the Respondent

Judgement

Arunachalam, J.—Petitioner is the sole accused in C.C. No. 277 of 1983. pending on the file of the J.F.C.M., Tiruttani. He is being prosecuted in the aforesaid calendar case, at the instance of the Respondent, Tamil Nadu Electricity Board Tiruttani represented by its Executive Engineer, for alleged commission of offences u/s 379, 381 and 406 I.P.C. The Petitioner preferred CrI. M.P. No. 5457 of 1987 before this Court u/s 482 Code of Criminal Procedure to call for the records in the very same calendar case and quash the proceedings therein, on the ground of inordinate delay in the conduct of the prosecution. Padmini Jesudurai, J., while disposing of the said petition on 3.6.1987, observed as follows.

It is seen from the copy of the docket sheet that has been produced along with this petition that the progress of the trial is not as the interest of justice would require. The case had been taken on file in 1983 and as on date, only two witnesses have been examined. On several occasions, the complainant has been absent. The learned Counsel for the Petitioner contends that this harassment of the Petitioner would call for quashing the entire proceedings. However, to give the Respondent another chance to substantiate his complaint, a direction is given

to the trial court that the trial of the case be expedited without any avoidable delay. With this direction, this petition is dismissed.

2. Thereafter, prosecution witnesses were examined and cross-examined, before the matter was posted for arguments. It appears that the Respondent took a number of adjournments, to advance arguments. When the matter was thus pending, on 21.10.1988, the Advocate for the complainant, preferred a petition in Crl. M.P. No. 2923/88, before the learned Magistrate, u/s 311 Code of Criminal Procedure praying for permission to recall P.Ws.1 to 3 and to permit the Respondent to mark certain documents, already produced in court. This petition shows that these documents had been ordered to be received by the court, "after arguments." The learned Magistrate on the very same day passed a cryptic order which reads "Allowed". It is this order, that is challenged in this petition, contending that it is unsustainable in law and the learned Counsel pleads for quashing of the said order.

3. I have heard Mr. P. Chandrasekaran, learned Counsel appearing on behalf of the Respondent. I have carefully considered the ground urged, for quashing the impugned order. Section 311 Code of Criminal Procedure 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 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. 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.

4. The facts have already been narrated and the chequered history of this trial from 1983 to 1987, necessitated an observation from Padmini Jesudurai, J. that the progress of the trial was not as the interest of justice would require. Anyhow a chance was given to the Respondent to substantiate his complaint. At least after 3.6.1987, when Crl. M.P. No. 5457 of 1987 was dismissed with observations by this Court, the Respondent must have sprung into action and placed all the evidence available, before Court, properly and promptly, for consideration. It is apparent that the Respondent would not do such a thing, but would allow the prosecution and the defence to be closed, and after the matter was adjourned several times to advance arguments, very belatedly, would choose to file a petition on 21.10.1988, for recalling of prosecution witnesses, to mark some documents. It appears from the petition filed by the complainant, that the documents themselves had been elatedly produced in Court. Further, the learned Magistrate does not appear to have applied his mind, to the need or otherwise for recalling P.Ws.1 to 3 permitting the Respondent to mark some documents at that belated stage. The Magistrate must have considered this question and if he was of the opinion, that it appeared that such evidence was essential to the just

decision of the case, he must have so stated. The exercise of power, appears to be totally mechanical, without application of mind. Ratnavel Pandian, J., as he then was. in *Bhashyam v. State by the Drugs Inspector* 1975 L.W. (CrL.) 53 held as follows:

There was ample opportunity for the prosecution to file this document even at the earliest opportunity. If this kind of petitions are allowed at each and every stage, viz., either to take corroborative evidence or to let in rebutting evidence, there may be no end to these matters and the proceedings would be protracted which ultimately may prejudice the accused in a criminal trial, such kind of permissions to either party under the guise of Section 540 (present Section 311 will amount to enabling them to fill up the lacuna.

In *Mohanlal Shamji Soni Vs. Union of India and another*, Ratnavel Pandian, J., speaking for the Division Bench, stated as follows:

Though Section 540 (Section 311 of the new Code) is, in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the court should be exercised, or with regard to the manner in which they should be exercised, that power is circumscribed by the principle that underlines Section 540, namely, evidence to be obtained should appear to the court essential to a just decision of the case by getting at the truth by all lawful means. Therefore, it should be borne in mind that the aid of the section should be invoked only with the object of discovering relevant facts or obtaining proper proof of such facts for a just decision of the case and it must be used judicially and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undesirable results. Further it is incumbent that the care should be taken by the court while exercising the power under this section and it should not be used for filling up the lacuna left by the prosecution or by the defence or to the disadvantage of the accused or to cause serious prejudice to the defence of the accused or to give an unfair advantage to the rival side and further the additional evidence should not be received as a disguise for a retrial or to change the nature of the case against either of the parties. It is therefore clear that the Criminal Court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the Court must obviously be dictated by exigency of the situation, and fair play and good sense appear to be the only safe guides and that only the requirements of justice command the examination of any person which would depend on the facts and circumstances of each case.

Applying the law enunciated by the Supreme Court and this Court earlier, I am of the view that the impugned order allowing the petition filed by the complainant u/s 311 Code of Criminal Procedure cannot be sustained. The said order is set aside and this petition is allowed.

5. Since the Calendar Case is pending for several years, the trial Magistrate is directed to dispose of the same within four weeks, from the date of receipt of a

copy of this order.