

IN THE COURT OF SESSION, ALAPPUZHA DIVISION AT CHERTHALA

Present: Ms.Lakshmy.S, Assistant Sessions Judge
Saturday the 19th day of October, 2024/ 27th day of Aswina, 1946

Crl.M.P.No. 357/2024 in S.C.No.113/2017

Crime No.450/2016 of Cherthala Police Station

C.P. No.39/2016 of JMFC-I, Cherthala

Complainant : State represented by the Sub Inspector of Police,
Cherthala Police Station.

(By Addl. Public Prosecutor)

Accused : A1. Kishore, S/o. Kunjumani, aged 20,
Chakkanattu Colony, Ward-VI,
Pallippuram Panchayath.

A3. Amal Sankar @ Appu, S/o. Vasavan,
Perumasserry Veedu, Pallippuram .P.O,
Ward No. VII, Pallippuram Panchayath,
(Abated).

A4. Sreejith @ Sreejesh, S/o. Sreenivasan,
aged 20, Kizhakkeveli Veedu, Pallippuram.P.O,
Ward-VII, Pallippuram Panchayath.

A5. Akhil, S/o. Asokan, aged 23,
Kulathinkalveli Veedu, Pallippuram.P.O,
Ward No. VII, Pallippuram Panchayath.

A6. Abijith @ Abhi, S/o. Asokan, aged 20,
Kulathinkalveli Veedu, pallippuram.P.O,
Ward No. VII, Pallippuram Panchayth.

(By Adv. P. Rajesh)

This case having been finally heard on 19.10.2024 and the Court on the same day passed the following

ORDER

This is an application filed by the prosecution under Section 311 of the Code of Criminal Procedure, 1973 (Cr.P.C. for short), to recall PW1 for the purpose of identifying certain weapons that were omitted from being identified during his examination-in-chief.

2. **Prosecution case:-** The accused No.1 to 6 stand prosecuted by the State represented by the Sub Inspector of Police, Cherthala Police Station in Crime No.450/2016. The allegations against the accused is that due to political rivalry to victim Shibu, the accused formed themselves into an unlawful assembly, with the knowledge that they were members of such assembly, the common object of which was to cause hurt to the victim, on 14.02.2016 at 9pm, criminally trespassed into his house with weapons and caused damage to the household articles. The 4th accused outraged the modesty of the wife of Shibu and destroyed the window panes of the house. On the way back, they wrongfully restrained Shibu on seeing him on the road and beat on his forehead with a hedge stake. The accused also voluntarily caused hurt to PW1, the informant and later Shibu died due to cardiac arrest. Thereby the accused committed the offences punishable u/S.143, 147, 148, 10B, 452, 354, 323, 341, 427, 304 r/w 149 IPC.

3. **Trial:** After the appearance of the accused, they were heard u/S.227 CrPC and charge was framed for the aforesaid offences as it was found that the accused was not entitled for discharge. The trial of the case was scheduled and the learned predecessor in office examined PW1. Thereafter PW2 and PW3 were examined.

4. **Background of CMP 357/24:** During the examination of PW1, after identifying the accused, PW1 testified that he could recognize the sticks used to assault him. He identified one such stick, described as having a length of 1 meter, with one side thickened and the other sharpened, which was marked as Material Object (MO)1. Another stick was also identified by PW1, but it was inadvertently marked again as MO1, instead of being marked as MO2. The remaining stick which PW1 testified that he could identify, was neither marked nor identified.

5. The prosecution, realizing this omission, has filed the application to recall PW1 to rectify the oversight and to have the remaining weapons identified and marked properly. The notice of the petition was served to the counsel for the accused. The application was opposed by the defence counsel, who contended that such recall is impermissible, as it amounts to filling lacunae in the prosecution case.

6. Heard both sides and perused the case records and materials. Thereafter on 06.09.2024, this Court allowed the application and recalled PW1.

7. The said order was challenged by the defence before the Hon'ble High Court in CrI.M.C 7977 of 2024. The Hon'ble High Court vide order dt.14.10.2024 found that the order of this Court was not exhaustive and set aside the same. This

Court was directed to pass a fresh detailed order after applying the principles to invoke S.311 CrPC within two weeks. Notice was issued to both sides and hear their counsel.

8. **Points for consideration:**

- (i) Whether the recalling of PW1 under Section 311 of Cr.P.C. for the purpose of identifying the weapons is essential for the just and fair adjudication of the case?
- (ii) What order should be passed?

9. **Point No.1:** In the present application, the primary objection raised by the defence is that recalling PW1 for the purpose of identifying the weapons omitted during the examination in chief amounts to filling a lacuna in the prosecution's case. However, Section 311 of the Cr.P.C. empowers the court at any stage of inquiry, trial, or other proceedings to summon and examine any person or recall and re-examine any person already examined if it appears to the court that the evidence is essential for a just decision of the case.

10. The Hon'ble Supreme Court in **State (NCT of Delhi) v. Shiv Kumar Yadav and Anr.; AIR 2015 SC 3501**, has laid down the guiding principles for invoking Section 311 Cr.P.C. Some of the key principles relevant to this case are:

- The court must determine if the new evidence is needed for a just decision.
- The recall should not be used to fill lacunae unless necessary to prevent a miscarriage of justice.
- The discretionary power under Section 311 must be exercised judiciously and not arbitrarily.

- The court has a duty to ascertain the truth, and if rectifying an omission would contribute to a just and fair trial, the recall is warranted.
- The object of recalling a witness is not to prejudice the accused but to ensure that all material facts are brought on record for a proper adjudication of the case.

11. In this case, PW1, during his examination, has already testified that he could identify the sticks used to assault him. Therefore, the failure to have all the weapons identified and marked during the examination was clearly an inadvertent mistake on the part of the prosecution. This failure to identify and mark these additional sticks cannot be deemed as lacuna in the evidence but rather an oversight in procedure, which the prosecution is seeking to rectify.

12. The recall of PW1 is essential to bring complete material evidence on record, as the weapons in question are directly linked to the crime alleged. The failure to identify these weapons would leave the evidence incomplete and could lead to an unjust decision.

13. The exercise of power under Section 311 is intended to secure the ends of justice and to ensure that judgments are not based on incomplete or inconclusive evidence. In this case, the identification of all weapons is germane to the issue at hand.

14. In view of the principles laid down by the Hon'ble Supreme Court in the decision cited above, and the factual background of this case, this court finds that recalling PW1 for the limited purpose of identifying the weapons that were omitted during his initial examination is necessary for the just and fair adjudication of the

case, as provided in the second limb of Section 311 Cr.P.C. The omission was not due to any fault or negligence on the part of the witness but was a procedural mistake by the prosecution, which ought to be corrected.

15. Considering all the above, this Court is of the view that allowing the application would not cause any prejudice to the accused, as the defence have the opportunity to cross-examine PW1 regarding the identification of weapons. Moreover, the identification of weapon in a criminal trial is not an empty formality by simply showing the weapon to the witness in the box. The same could only be done based on the testimony of witness on the point. The recall of PW1 is essential to ensure that the evidence is complete and to arrive at a just decision in this case. Hence, this point is found in favour of the petitioner.

16. Point No.2:

In the result, this CMP filed by the prosecution under Section 311 of the Cr.P.C. is hereby allowed and PW1 is recalled for the limited purpose mentioned in the application.

Dictated to the Confidential Assistant, typed by her, corrected and pronounced by me in open court on this the 19th day of October, 2024.

Sd/-
LAKSHMY. S,
Assistant Sessions Judge.

Appendix- NIL

Id/-
Assistant Sessions Judge.