

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.06.2015

CORAM:

THE HON'BLE MR.JUSTICE R.S.RAMANATHAN

Crl.O.P.No.2589 of 2015

Pichaikkaran

... Petitioner

Vs.

The State Rep.by
Inspector of Police,
Thandampattu Police Station,
Thandampattu,
Tiruvannamalai District.

... Respondent

Prayer : Criminal Original Petition filed under Section 482 of the Code of Criminal Procedure praying to direct the Mahila Court, Tiruvannamalai to eschew the evidence of P.W.1 to P.W.8 and also M.O.1 to 4 in S.C.No.98 of 2011 and direct to take fresh trial with opportunity to the petitioner.

For Petitioner	: Mr.B.Jawahar
For Respondent	: Mr.R.Pratap Kumar
	Government Advocate (Crl.side)

ORDER

This petition is filed seeking for a direction to eschew the evidence of PW1 to PW8 regarding S.C.No.98 of 2011 and to direct the learned Mahila Judge, Thiruvannamalai to take chief examination of

PW1 to PW8 afresh. The petitioner is an accused in SC.No.98 of 2011 for the offence punishable under Section 302 IPC.

2. It is submitted by the learned counsel for the petitioner that the case was posed for trial on 11.11.2013 and on that date, the Legal Aid appointed counsel for him was present and earlier to that, the petitioner had discussion with the counsel appointed by the Legal Aid, and there was misunderstanding between him and legal aid counsel. When the case was called on 11.11.2013, the petitioner wanted to engage some other counsel and sought time. However, the trial Court did not grant time for engaging another counsel for the petitioner and examined PW1 and marked Ex.P1 and adjourned to next date viz., 12.11.2013 and on that date also, the petitioner requested time to engage a new counsel and that was not considered by the trial Judge and the trial judge examined PW2 to PW8 and marked Exs.MO 1 to 4 and adjourned the matter to 28.11.2013. Therefore, he submitted that when the accused has been charged for an offence under Section 302 IPC, the accused must have been given an opportunity to conduct the case and when the accused sought for time to engage a counsel to

defend his case, the trial Court ought to have given time and ought not to have proceeded with the examination of P.Ws.1 to 8 causing prejudice to the petitioner and the petitioner is denied fair trial and therefore, the evidence recorded from P.W.1 to P.W.8 on 11.11.2013 and 12.11.2013 ought to be eschewed and they may be permitted to be examined afresh. He also relied upon the judgment of this Court reported in **2013 (6) CTC 320 (S.Yuvaraj Vs. State, rep.by The Inspector of Police, Gobichettipalayam)** and **2014 (6) CTC 653 (S.Yuvaraj Vs. State, rep.by The Inspector of Police, Gobichettipalayam)** in support of his contention. It is submitted by the learned counsel for the petitioner that the right of observing demeanor of the witnesses during the Chief- examination was denied to the petitioner and therefore, the petition has to be allowed.

3. I am not inclined to accept the contention of the learned counsel for the petitioner.

4. The following diary extract will make the matter clear.

09.10.2013: Trial. Accused present. Listed to 11.11.2013 to 12.11.2013. Issue Trial Proceedings by then.

Sd/-C.P.,/SJ, TVM

11.11.2013: Trial. Accused present. PW1 Examined. Ex.P1 marked. At request petitioner counsel bind over the witness on payment of Batta to the witness 12.11.2013.

Sd/-C.P.,/SJ, TVM

12.11.2013: Accused present. This case was posted on 09.10.2013 for Trial and fixed the Trial on 11.11.2013. Then on 11.11.2013 Witness were present. The legal aid and counsel Mr.VMS was present of ready for Trial, but the accused was not accept the legal aid counsel and told he has appointed as not arunachal as his counsel and his Junior present. PW6 examined in chief at his request case adjourned to 12.11.2013 and the present

witnesses are bind over to 12.11.2013. But today the accused present counsel not present and simply asked 6 month time for engagement of counsel there for and to avoid in convenience to the witnesses for the past two days Examined PW2 to PW8 Examined. Ex.P2 to P8 & Mos 1 to 4 marked. F/P. By 28.11.2013.

Sd/-C.P.,/SJ,TVM

28.11.2013: For further Pws. Accused present. For F/Pws on 19.12.2013.

Sd//xxxxxSJ, TVM

19.12.2013: Prosecution side further evidence. Accused present. Prosecution side. Further evidence by 6/1/14.

Sd/-xxxxx SJ, TVM

06.01.2014: Prosecution side further evidence. Memo of appearance file accused present. Recall petition filed and allowed. Issue Summon 5 and 7,8. Recall PW1 to 7 by 27/1/14.

Sd/-C.P.,/SJ,TVM

27.01.2014: Prosecution side further evidence. Accused present. Recalled

witness present. At request of defence counsel call on 31/1/14 to paid to the witness b/o to 31/1/14.

Sd/-C.P.,/SJ,TVM

31.01.2014: Prosecution side further evidence absent. Petition allowed. Call on 13/2/14.

Sd/-C.P.,/SJ, TVM

13.02.2014: Prosecution side further evidece. Accused present. Recall witness PW2, PW4, PW5 absent. Summon served. Issue W/W. PW1, PW3, PW7, PW8 present. PW1 cross examined. At request of defence counsel adjourned 27/2/14, bind over the witness on batta.

Sd/-C.P.,/SJ,TVM

27.02.2014:Prosecution side further

evidence. Accused present PW2, PW4, 5,6 & 8 present not cross examined by the defence side. Petition filed u/s.309 of Cr.PC Petition allowed on payment of cost. Call on 20.03.2014.

Sd/-C.P.,/SJ, TVM

20.03.2014: Prosecution side further evidence. Accused present. Further Pws by 08.04.2014.

Sd/-xxx SJ, TVM

08.04.2014: Prosecution side further evidence. Accused present. Witness not present. Police absent, call on 02.06.2014.

Sd/-C.P.,/ SJ, TVM

02.06.2014:Prosecution side further evidence. Accused present, Witness absent. For Further evidence by 12.06.2014.

Sd/-xxx/SJ, TVM

12.06.2014:Prosecution side further evidence. Accused present. Witness

absent. For examination of remaining witness by 23.06.2014

Sd/-xxx SJ, TVM

23.06.2014: Prosecution side further evidence Recall of PW2 to 5, 7 and 8 petition allowed. Accused present. Witness absent. For examination of remaining witness by 07.07.2014

Sd/-C.R.,/SJ, TVM

07.07.2014: Prosecution side further evidence. Recall of PW2 to 5,7 and 8. Accused present. The accused murdered his wife under suspect of her character. The victim is the women and the crime is also against the women. Therefore, the case is transfer to Mahila Court, Tiruvannamalai as per G.O.217 Home (Cts.II) Dept., dated 02.04.2013 and G.O.Ms.No.514, dated 16.07.2013. Call on 11.08.2014.

Sd/-C.R.,/SJ, TVM

Entire case records received from District & Sessions Court, Tiruvannamalai as per

***the Proceedings of District Court,
Tiruvannamalai in Dis.No.2295/A/2014,
Dated 07.04.2014 .***

Sd/-C.R.,/SJ, TVM

Dis.No.276/14, Dated 02.08.2014

***11.08.2014: Prosecution side further
evidence. Recall of PW2 to 5, 7 & 8
Accused present. Police not present.
Issue F/S to PW2 to PW 5, 7, 8 by
01.09.2014.***

Sd/-A.M.,/SJ, TVM

***01.09.2014: PW2 to 5, LW7 and 8.
Accused present. PW2, 3, 4 witness 3,7
are present. At the request of Pws
Advocate adjourned. Call on 12.09.2014.***

Sd/-A.M.,/SJ, TVM

***12.09.2014: Accused Present. PW2, PW3,
PW4, Witness 3, 7 are present. Advocate
for file a petition u/s.309 Cr.P.C. For
adjourned the case for one month, stating
his petition he want to be file petition
before Hon'ble High Court for quash***

evidence already taken. Petition allowed, adjourned the case 15.10.2014.

Sd/-A.M.,/SJ,TVM

15.10.2014: PW2 to 5, LW7 & 8, Accused present. Advocate for accused stated petition filed before the Hon'ble High Court, Madras. Hence call on 17.11.2014.

Sd/-A.M.,/SJ, TVM

17.11.2014: PW2 to 5,7 & 8. Accused not present. Police not present. Both side counsel not present. Call on 19.12.2014.

Sd/-A.M.,/SJ, TVM.

5. It is seen from the diary extract dated 12.11.2013 that the petitioner informed the Court that he has appointed a counsel by name Arunachal and his junior was present and P.W.1 was examined and at the request of the petitioner, the case was adjourned to 12.11.2013 and the witnesses were bound over. On 12.11.2013 also, the counsel for the accused was not present and the petitioner/ accused asked six months time for engaging a counsel. Therefore, to avoid

inconvenience to the witnesses who were present for the past two days, they were examined as Exs.P2 to 8 and MOs 1 to 4 were marked.

6. These entries in the Court records dated 12.11.2013 is disputed by the petitioner stating that there was no advocate by name Arunachal in that Court and he never informed the Court that he engaged one Arunachal and his Junior was present. It is submitted by the learned counsel for the petitioner that the petitioner only sought for time to engage a counsel and he did not inform the court that he engaged one Arunachal and that the Senior counsel was not there and junior counsel was present. Even though, the entry dated 12.11.2013 is disputed by the petitioner, the conduct of the petitioner on subsequent days would prove that the petitioner was only interested in dragging on the proceedings. He was not interested in proceeding with the case. On 06.01.2014, the petitioner filed an application to recall the witnesses and that was allowed and P.Ws.1 to 7 were recalled and the case was adjourned to 27.01.2014. On 27.01.2014 the witnesses were present and at the request of the defence counsel, the case was

adjourned to 31.01.2014. On 31.01.2014, witnesses were absent and the case was adjourned to 13.02.2014 and on that date, P.W.1 was cross examined. P.W.2, P.W.4 and P.W.5 were absent. P.W.1, 3, 7 and 8 were present and at the request of the defence counsel, the case was adjourned to 27.02.2014. On 27.2.2014, though the witnesses P.W.2, 4, 5, 6 and 8 were present, they were not cross examined and the accused filed an application under Section 309 Cr.P.C and that petition was allowed and on 20.03.2014, 08.04.2014, 02.06.2014 and 12.06.2014, the witnesses were absent and on subsequent hearings also, the witnesses were absent and on 01.09.2014, P.Ws.2 to 4 and 7 were present and on 12.09.2014, they were present and at the request of the defence counsel, the case was adjourned. Therefore, it is seen from the above records that though opportunity was given to the petitioner to recall and examine P.Ws.1 to 8 and when the witnesses were also present, the accused did not cross examine them and he filed an application for adjournment and that was granted. Therefore, the argument made by the learned counsel for the petitioner that opportunity was not given to the petitioner during the examination in chief cannot be accepted as the petitioner filed an

application to recall witnesses and though it was allowed, the petitioner and his counsel were not prepared to argue the case and sought for adjournments.

7. In the judgment reported in **2013 (6) CTC 320 (S.Yuvaraj V. State, rep.by The Inspector of Police, Gobichettipalayam)**, the learned Single Judge eschewed the evidence of the witnesses recorded in the absence of the accused. It is seen from the judgment that the witnesses were examined on the date when there was a National wide Boycotts of advocates and after considering the various judgments of the Hon'ble Supreme Court and other High Courts, the learned single judge allowed the petition and eschewed the evidence.

8. In the judgment reported in **1980 Cri.L.J.789, (Sambhunath Bhattacharjee V. State of Sikkim)**, it was stated in para 23 (inner para 11) as follows;

"11. I should not, however, be understood to lay down as a blanket proposition, that adjournment should be granted to the Accused, whenever it is

prayed for on the ground of the absence of a Lawyer of his choice. If in a given case, the Court feels that the absence of the Defence Lawyer, is wholly unjustified and/or the Accused has not taken proper and diligent steps to secure or ensure his presence, an adjournment prayed on the ground of the absence of the Lawyer, may be refused. But, by and large, the Court must see that the Accused is not denied the right to be defended by a Legal Practitioner of his choice and is given reasonable opportunities to secure the presence of such lawyer and where, as here, the Lawyer chosen by the Accused has suddenly fallen ill, which has incapacitated him from attending the Court to defend the Accused, the Court, should not hesitate to grant adjournment. After all that has been said about speedy disposal of cases and arrears in Courts, one must not forget that, though speed is good and is very much desirable, it is depreciable when it amounts to rash speed and however good, speedy disposal

of a case may be, it can never be desired, if it is achieved at the cost of established notions of justice which cannot always be, administered by the hands of the clock."

9. In the Judgment reported in **2014 (6) CTC 653 (Yuvaraj Vs. State, through Inspector of Police, Gopichettipalayam Police Station)** the Hon'ble Division Bench, after considering the judgment reported in **2013 (6) CTC 320 (S.Yuvaraj Vs. State, rep.by the Inspector of Police, Gobichettipalayam)** referred to above held that the judgment reported in **2013 (6) CTC 320** cannot be misconstrued as laying down the law that, Trial Courts cannot record the examination-in-chief of witnesses, who are in attendance, in the absence of Defence Counsel, even when there is boycott of Courts and these aspects are left to the best discretion of the trial Court judges, who, would bear in mind the rights of the accused and the victim and would use their discretion judiciously. The Hon'ble Division Bench further observed as follows;

"19. We also cannot lose sight of the fact that Advocates of both sexes, become victims of crime and when they

come to the Court for giving evidence for the prosecution, can the Judge send them away on the score that the Defence Counsel is not present? The answer is an emphatic 'No' What applies to lawyers should apply to others too. If a Judge records evidence in chief even without ascertaining whether the Accused had engaged a Counsel or not, then the issue takes a different form and the Trial Court can be faulted if it is found that the Accused has not even engaged a counsel."

10. In **AIR 2012 SC 1485 (Rattiram V. State of Madhya Pradesh)** the Hon'ble Supreme Court held as follows;

" 14.

47. While delineating on the facets of speedy trial, it cannot be regarded as an exclusive right of the Accused. The right of a victim has been given recognition in Mangal Singh and anr. v. Kishan Singh and ors., AIR 2009 SC 1535, wherein it has been observed thus:

"Any inordinate delay in

conclusion of a Criminal trial undoubtedly has highly deleterious effect on the society generally and particularly on the two sides of the case. But it will be a grave mistake to assume that delay in trial does not cause acute suffering and anguish to the victim of the offence. In many cases the victim may suffer even more than the Accused. There is, therefore no reason to give all the benefits on account of the delay in trial to the Accused and to completely deny all justice to the victim of the offence."

11. In **AIR 2001 SC 2028 (N.G.Dastane v. Shrikant S. Shivde)**, the Hon'ble Supreme Court held as follows;

" 13.

20..... When Witnesses are present in Court for examination the Advocate concerned has a duty to see that their examination is conducted. We remind that Witnesses, who come to the Court, on being called by the Court, do so as they have no other option, and such

Witnesses are also responsible citizens, who have other work to attend for eking out livelihood. They cannot be treated as less respectables to be told to come again and again just to Suit the convenience of the Advocate concerned. If the Advocate has any unavoidable inconvenience it is his duty to make other arrangement for examining the Witnesses, who is present in Court. Seeking adjournments for postponing the examination of Witnesses, who are present in Court even without making other arrangements for examining, such Witnesses is a dereliction of Advocate's duty to the Court as that would cause much harassment and hardship to the Witnesses. Such dereliction if repeated would amount to misconduct of the Advocate concerned. Legal profession must be purified from such abuses of the Court procedures. Tactics of filibuster, if adopted by an Advocate, is also professional misconduct."

12. Considering all these aspects and considering the facts of the case as stated above, it cannot be stated that the accused has got a right to seek for adjournment when the witnesses were present and in this case, as stated supra, the witnesses were recalled at the instance of the accused and even after they were recalled and they were present, they were not cross examined by the petitioner. Hence, I am not inclined to show any indulgence to the petitioner and the petition is dismissed and the trial Court is directed to cooperate the trial and dispose of the matter within a period of four months from the date of receipt of copy of this order after giving one more opportunity to the petitioner to cross examine the witnesses already examined.

sms

12.06.2015

R.S.RAMANATHAN, J.

sms

To

Inspector of Police,
Thandarampattu Police Station,
Thandarampattu,
Tiruvannamalai District.

Crl.O.P.No.2589 of 2015

12.06.2015