

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 27.07.2016

DELIVERED ON : 03.08.2016

CORAM:

THE HONOURABLE MR.JUSTICE P.N.PRAKASH

Crl.O.P. No.31504 of 2014 & M.P. No.1 of 2014
Crl.O.P. No.6439 of 2015 & M.P. No.1 of 2015
Crl.O.P. No.6941 of 2016 & Crl.M.P. No.3606 of 2016
Crl.O.P. No.7356 of 2016 & Crl.M.P. No.3862 of 2016

1 Natesan

2 Poosari @ Arunachalam Petitioners/Accused 1&7 in
Crl.O.P. No.31504/2014 & 6439/2015

vs.

State represented by
The Inspector of Police
Veeranam Police Station
Salem District
(Crime No.538 of 2003)

Respondent in
Crl.O.P. No.31504/2014 & 6439/2015

1 Natesan

2 Poosari Arunachalam

3 Vijaya

Petitioners/Petitioner/Accused in Crl.O.P.
No.6941 & 7356/2016

vs.

State represented by
The Inspector of Police
Veeranam Police Station
Salem District

Respondent/Respondent/Complainant in
Crl.O.P. No.6941 & 7356 /2016

सत्यमेव जयते
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Prayer in CrI.O.P. No.31504 of 2014:

Criminal Original Petition filed under Section 407 Cr.P.C. to direct the First Additional District and Sessions Judge, Salem, to efface the evidence recorded on 05.03.2013 and 06.03.2013 in S.C. No.34 of 2005.

Prayer in CrI.O.P. No.6439 of 2015:

Criminal Original Petition filed under Section 407 CrI.P.C. to withdraw and transfer the case in S.C. No.34 of 2005 on the file of the I Additional District and Sessions Judge, Salem to any other District Sessions Judge.

Prayer in CrI.O.P. No.6941 of 2016:

Criminal Original Petition filed under Section 482 Cr.P.C. to set aside the order in C.M.P. No.19 of 2016 in S.C. No.34 of 2005 on the file of the I Additional Sessions Judge, Salem, to secure the ends of justice.

Prayer in CrI.O.P. No.7356 of 2016:

Criminal Original Petition filed under Section 482 Cr.P.C. to set aside the order dated 16.03.2016 in C.M.P. No.53 of 2016 in S.C. No.34 of 2005 on the file of the I Additional Sessions Judge, Salem, to secure the ends of justice.

For petitioners in Mr. R. Sankarasubbu
all the petitions

For respondent in Mr. C. Emalias
all the petitions Additional Public Prosecutor

COMMON ORDER

While Criminal Original Petition No. 31504 of 2014 has been filed to direct the First Additional District and Sessions Judge, Salem, to efface the evidence recorded on 05.03.2013 and 06.03.2013 in S.C. No.34 of 2005, Criminal Original Petition No.6439 of 2015 has been filed to withdraw and transfer the case in S.C. No.34 of 2005 on the file of the I Additional District and Sessions Court, Salem, to any other District and Sessions Court. Criminal Original Petition Nos. 6941 and 7356 of 2016 have been filed to set aside the common order in C.M.P. Nos.19 and 53 of 2016 respectively in S.C. No.34 of 2005 on the file of the I Additional Sessions Court, Salem.

2 Heard the learned counsel appearing for the petitioners and the learned Additional Public Prosecutor appearing for the respondent State.

<https://hcservices.courts.gov.in/hcservices/>

3 On 22.06.2016, this Court passed the following

order:

"While Criminal Original Petition No. 31504 of 2014 has been filed to direct the First Additional District and Sessions Judge, Salem, to efface the evidence recorded on 05.03.2013 and 06.03.2013 in S.C. No.34 of 2005, Criminal Original Petition No.6439 of 2015 has been filed to withdraw and transfer the case in S.C. No.34 of 2005 on the file of the I Additional District and Sessions Court, Salem to any other District and Sessions Court. Criminal Original Petition Nos. 6941 and 7356 of 2016 have been filed to set aside the common order in C.M.P. Nos.19 and 53 of 2016 respectively in S.C. No.34 of 2005 on the file of the I Additional Sessions Court, Salem.

2 Heard the learned counsel appearing for the petitioners and the learned Additional Public Prosecutor appearing for the respondent State.

3.1 This is a double murder case, the deceased being Sundarrajan and Kuppusamy.

3.2 On the complaint lodged by one Natesan alleging that he was attacked with deadly weapons by one Sundarrajan and Kuppusamy, a case in Veeranam P.S. Crime No.537 of 2003 under Section 147, 148 and 307 IPC was registered. On the complaint lodged by one Shankar that Natesan and others had caused the death of Sundarrajan and Kuppusamy, a case in Veeranam P.S. Crime No.538 of 2003 under Section 302 IPC was registered.

3.3 After completing the investigation, the police came to a definite conclusion that the case in Crime No.537 of 2003 is a false case instituted by Natesan, in order to set up a defence in the murder in Crime No.538 of 2003. The police completed the investigation in Crime No.538 of 2003 and filed a final report on 24.11.2003 against Natesan and 22 others and thereafter, further investigation was conducted under Section 173(8), Cr.P.C.. after obtaining due permission from the Magistrate. The police filed supplementary final report against Natesan and 23 others. The case was committed to the Court of Sessions, Salem in S.C. No.34 of 2005 and was made over to the I Additional District and Sessions Court, Salem, for trial.

3.4 Though the case is of the year 2005, the accused were effectively stalling the trial by adopting various dilatory tactics. Hence, Ayyammal, mother of the deceased Sundarrajan filed Cr1.O.P. No. 759 of 2012 before this Court under Section 482, Cr.P.C. for a direction to the Trial Court to complete the trial in S.C. No.34 of 2005. This

Court, by order dated 14.08.2012 in Crl.O.P. No.759 of 2012, directed the I Additional District and Sessions Judge, Salem to conduct the trial in S.C. No.34 of 2005 and dispose of the same expeditiously. Only thereafter, the trial commenced with the examination of Ayyammal as P.W.1 on 05.03.2013.

3.5 As on 08.07.2014, the prosecution had examined 25 witnesses. Thereafter, the trial came to a grinding halt when Natesan (A1) and another filed Crl.O.P. No.31504 of 2014 under Section 482 Cr.P.C. to efface the entire evidence recorded on 05.03.2013 and 06.03.2013 in S.C. No.34 of 2005 on the reasoning that the witnesses were examined, notwithstanding the adjournment sought by the counsel Mr.Haribabu on the ground that he had taken over the case only on that day.

3.6 Natesan (A1) and another filed Crl.O.P. No.6439 of 2015 making certain allegations against the Presiding Officer of the I Additional District and Sessions Court and prayed for transfer of the case to any other Court.

3.7 Not stopping with that, Natesan (A1) and two others filed C.M.P. Nos.53 and 19 of 2016 in S.C. No.34 of 2005 under Section 311 Cr.P.C., to reopen the case and recall P.Ws.1 to 25 for cross-examination, which were dismissed by the Trial Court on 16.03.2016, challenging which, they have preferred Crl.O.P. Nos.6941 of 2016 and 7356 of 2016 respectively.

3.8 Since the accused had made certain serious allegations against Mr. K. Rajasekar, I Additional District and Sessions Judge, a report was called for from the said learned Judge. Mr.K.Rajasekar, learned I Additional District and Sessions Judge, Salem, has sent a report on 02.08.2014, a reading of which would clearly demonstrate that the petitioners have been literally holding the trial Court to ransom, by adopting every conceivable method to prevent the Trial Judge from complying with the direction issued by this Court to expeditiously complete the trial. It may be apposite to extract verbatim, the relevant portion from the report of the learned Judge.

"I submit that totally 23 accused are facing trial for offences u/s 147,148,149 r/w 302 (2 counts) IPC in S.C. No.34/2005 on the file of this Court and the petitioner in Crl.O.P. No.3706 of 2014 on the file of Honble High Court, Madras namely Natesan and Poosari @ Arunachalam have been ranked as Accused No.1 and 7

respectively.

I submit that, mother of the deceased namely Ayammal has filed CrI.O.P. No.759 of 2012 dated 14.08.2012 before Hon'ble High Court, Madras and the Hon'ble High Court was pleased to direct this court to dispose of the trial of the S.C. No.34/2005 at the earliest by taking necessary steps. On 14.08.2012, Non Bailable Warrants against the Accused No.4 and 5 were pending and subsequently the warrants were recalled. After appearance of all the Accused, this court has fixed the trial date and posted the matter for examination of L.Ws.2 to 8 to 4.12.2012. On that day the Accused No.3 and 5 have absented themselves and witnesses were present, hence Non Bailable Warrant was issued against Accused No.3 and 5 and the case was adjourned to 7.12.12. On 12.12.2012 Accused No.3 and 5 surrendered and Non Bailable Warrant recalled. Thereafter, trial of the case was posted on 5.3.2013.

On 5.3.2013 witnesses were present and Accused No.1 and 7 were absent and on behalf of the Accused No.1 and 7, Mr.G.Haribabu filed a Memo of Appearance and informed this court that he has been engaged by Accused No.1 and 7 to conduct the trial and he has also represented before this court that the trial may be adjourned. Another advocate namely Mr.M.Jageer Ahamed filed a petition under section 317 CrI.P.C. to dispense with the appearance of the Accused No.1 and 7 and permit them to represent the accused and request for adjournment was denied. The petition was allowed and P.W.1 was examined. After examination of P.W.1, accused were called to cross examine P.W.1 for which the counsel for accused No.1 and 7 have filed a petition seeking deferment of the cross examination of prosecution witnesses. Citing the same reasons, other advocates who were appeared for other Accused represented that without cross-examination of P.W.1 by Accused No.1 they could not cross-examine the P.W.1. Accordingly, P.Ws.1 to 3 were chief-examined on the same day, and P.Ws 4 to 7 were chief-examined on the next day.

I submit that I deny the allegations

that without presence of the Advocates, the evidence of P.Ws.1 to 7 recorded on 5.3.2013 and 6.3.2013. I submit that the Accused No.2,12,14,17 and 22 is being represented by Ms/ M.Muthusamy, Advocate, Accused No.6, 9, 10, 11, 13, 15, 18 and 21 is being represented by M/s A.S.Anbu, Advocate, Accused No.8, 16, 19, 23 is being represented by M/s Vanthematharam. Accused No.1 and 7 were represented by M/s G.Haribabu and M/s M.Jageer Ahamed. Accused No.3 to 5 were also represented by M/s M.Jageer Ahamed and evidence was recorded in the presence of the above said Advocates. Since, the Accused No.1 and 2 have not appeared on 6.3.2013 also, this Court has issued Non Bailable Warrant against Accused No.1 and 2 and they have absconded for a very long time.

I submit that, on 8.11.2013 Accused No.1 and 7 were surrendered before this Court and filed a petition to recall the Non-bailable Warrant since the Accused have absconded for very long period, this Court has refused to recall the Non-bailable Warrant and remanded the Accused till 9.12.2013. After remanding the Accused No.1 and 7, again the trial date was fixed and posted for cross-examination of P.Ws 1 to 7. On 11.11.2013 both the Accused No.1 and 7 have filed a bail petition in C.M.P.228/2013 before this court and this court has dismissed the same on 25.11.2013. Thereafter both the Accused No.1 and 7 approached before the Hon'ble High Court seeking bail in CrI.O.P.No.32083/2013 and the same was dismissed by Hon'ble High Court on 10.12.2013 with observation that both the accused are not entitled for bail till the conclusion of trial.

I submit that, on 12.12.2013, the trial date was fixed for cross-examination of P.Ws 1 to 7 by 27.1.2014. On 27.1.2014, Accused No.1 filed a adjournment petition and this court has dismissed the same and P.Ws 1 to 4 were cross-examined and cross-examination of P.Ws 5 to 7 was adjourned to 28.1.2014. On 28.1.2014, all the Accused have appeared before this Court and Accused No.1 and 7 have also produced before this court. Accused No.1 and 7 submitted before this court that they have to engage

new counsel and prays time to cross-examine the witnesses. This court has after hearing the Accused has recorded as follows in the notes paper.

"In this case already all the other Accused represented by Advocates and trial date is fixed several times each and every hearing the Accused are not co-operating for trial. To-day also wantonly the counsels appearing on behalf of Accused No.1 and 7 not appearing before this court. When the court enquired Accused No.1 and 7 regarding engaging legal aid counsel, Accused No.1 and 7 refused to accept the same and submitted that their counsel will be appearing before this court whenever it is necessary. Hence, this court has no other way except to proceed with the trial. This case is pending for the past 9 years before this court. For speedy disposal of the case and to protect the rights of other accused this court further proceeded with the trial. To-day P.Ws.5 and 7 cross-examined, P.W.8 examined and adjourned the case to 29.1.2014 for examination of L.Ws.15 to 18."

I submit on 29.1.2014 this court has recorded its proceedings in the notes paper as follows:

"To-day the case posted for the examination of L.Ws.15 to 29, witnesses also present to-day. Accused No.1 and 7 produced, all the other accused appeared. Advocate for Accused No.1 and 7, 20 and 23 not appeared before this court. Counsel for Accused No.2,4,5,6,8 to 19, 20 to 23 appeared before this court. Accused No.1 and 7 stated that they had engaged on Advocate namely Mr.B.Mohan on their behalf and seeks adjournments. Other advocates who appeared before this court submitted that the trial of the case is pending for the past 10 years, the Accused have right to speedy trial, hence prays for examination of witnesses before this court. In this case, except the counsel for Accused No.1,

3, 7 and 20 and other Advocates appeared to-day and seeking examination of witnesses citing their right of speedy trial."

Hence, this court was constrained to proceed with the trial and examined the P.Ws.9 to 11 and subsequently the trial of the case was continuously taken up on each and every hearing. On 11.2.2014 Mr.M.Jageer Ahamed, Advocate filed a memo of appearance for Accused No.1 and 7 in the place of Mr.Haribabu. Thereafter, this court has completed the prosecution side evidence. Totally 25 witnesses were examined and the case was posted for examination of Accused under section 313(1)(b) Crl.P.C., on 1.8.2014 and from 1.8.2014 examination of Accused has been adjourned to 8.8.2014.

I humbly submit that the allegations made in the transfer petition are baseless and this court after recording entire events taken place on 5.3.2013 and 6.3.2013 in the notes paper and after receiving petition for deferring the cross-examination from the Accused No.1 and 7 and after receiving petition under section 317 Crl.P.C. this court has recorded the evidence of P.Ws.1 to 7 on 5.3.2013 and 6.3.2013. I am submitting herewith the copy of defer petition filed on behalf of Accused No.1 and 7 in C.M.P.55/2013 and petition filed under section 317 Cr.P.C in CMP 53/2013 and both petitions would clearly support my submission that both M/s G.Haribabu and M/s Jageer Ahamed appeared on behalf of Accused No.1 and 7 during the examination of witnesses.

I humbly submit that from the beginning of the trial, Accused No.1 and 7 have not co-operated with trial but all the other Accused who are facing the trial for the past 9 years and want to complete the trial at the earliest point of time and by considering the right of speedy trial of the Accused and to comply the direction of Hon'ble High Court passed in Crl.O.P.No.759/2012 dated 14.8.2012 and Crl.O.P.No.32083/2013 dated 10.12.2013, this court in the presence of the above said Advocates who are appearing on behalf of Accused all the witnesses of the prosecution side evidence were examined and the prosecution side evidence was also closed. Now the case is pending for examination of

Accused under section 313(1)(b) Crl.P.C.
Hence, I request the Hon'ble High Court to
accept my remarks and render justice."

3.9 In the meantime, Mr. K. Rajasekar, was transferred during routine reshuffle and in his place, Mr.M.Jothiraman had assumed office as the I Additional District and Sessions Judge, Salem.

4 Mr. R. Sankarasubbu, learned counsel for the accused relied upon the following judgments to drive home the point that the accused is entitled to a fair trial and that the Trial Court ought not to have examined the witnesses when his counsel had sought adjournment.

i Bashira vs. State of U.P., AIR 1968 SC 1313;

ii Thyagu alias Thyagarajan vs. State, 1993 LW Crl. 326;

iii Mohd. Hussain alias Julfikar Ali vs. State (Govt. of NCT), Delhi, 2012 Cri. L.J. 1069; and

iv S. Yuvaraj vs. State, (CrI.O.P.No.7142/2013)

5 This Court has no quarrel with the proposition of law laid down in the aforesaid judgments, inasmuch as in the facts and circumstances of those cases, it was observed that failure of justice had ensued therein. Section 309 Cr.P.C. mandates that trial should be continued on a day-to-day basis. It is true that Natesan jumped bail and he was arrested by the police with great difficulty and is now in judicial custody. That by itself is no reason to recall the witnesses as demanded by him in the light of the recent judgment of the Apex Court in A.G. Vs. Shiv Kumar Yadav and others, [(2015) 9 Scale 649]. It may be necessary to state here that no witness was examined by the Trial Court in the absence of the accused. The accused were physically present in the Court and were refusing to cross-examine the witnesses on specious reasonings.

6 Fourth proviso to Section 309 (2) Cr.P.C., as amended by Code of Criminal Procedure (Amendment) Act, 2008, reads as follows:

"Provided also that--

a no adjournment shall be granted at the

request of a party, except where the circumstances are beyond the control of that party;

b the fact that the pleader of a party is engaged in another Court, shall not be a ground for adjournment;

c where a witness is present in Court but a party or his pleader is not present or the party or his pleader though present in Court, is not ready to examine or cross-examine the witness, the Court may, if thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be."

7 In fact, the Apex Court, in State of Uttar Pradesh vs. Shambhu Nath Singh, [JT 2001(4) SC 319] has held that the accused can be remanded to custody and his bail cancelled, if he protracts the trial.

8 In Dr. Rajesh Talwar and another vs. CBI and another (2014) 1 SCC 628, the Supreme Court has held that a victim also has got a right to speedy trial.

9 In Vinoth Kumar vs. State of Punjab, [2015 1 MLJ (Crl.)288], the Apex Court has held that the witnesses who are examined-in-chief should be cross-examined on the same day. Pursuant to the direction of the Apex Court in Vinoth Kumar's case, the Registrar General of this Court has issued a Circular dated 18.12.2015 to all the subordinate courts to comply with the direction of the Apex Court in Vinoth Kumar's case, strictly.

10 Notwithstanding the above, this Court called for the depositions of all the witnesses from the Trial Court and on a reading of the same, this Court observed that witnesses were cross-examined exhaustively by all the co-accused and that this is not a case of no cross-examination. In fact, it is only these petitioners who have been putting spokes in the smooth conduct of the trial. This Court deprecates the attitude adopted by the accused in making frivolous allegations against Mr. K. Rajasekar, Presiding Officer, who had no other option but to follow the edicts of Section 309 Cr.P.C. and also the direction issued by this Court vide order dated 14.08.2012 in Crl.O.P. No.759 of 2012.

11 Therefore, this Court does not find any infirmity in the common order dated 16.03.2016 passed by the Trial Court in C.M.P. Nos.19 and 53 of 2016 in S.C. No.34 of 2005. However, to subserve

the interest of justice, the Trial Court is directed to recall P.Ws.1,6,14,21 and 24 for further cross-examination by the petitioners/accused on a date fixed by the Trial Court.

12 It is made clear that on the appearance of the witnesses, the petitioners/accused have to cross-examine them and boycott of courts can be no excuse in the light of the law laid down by the Supreme Court in Harish Uppal vs. Union of India and another [(2003) 2 SCC 45], wherein, the Apex Court has declared boycott of courts as unconstitutional. It is further made clear that if the petitioners/accused fail to cross-examine the witness on the day he / she appears, their right to cross-examine that witness would stand forfeited.

13 The Trial Court is directed to complete this exercise within a period of one month from the date of receipt of a copy of this order and send a report to this Court on or before 27.07.2016 and in the process of the said exercise, the Trial Court shall ensure that the petitioners/accused do not make any attempt to suborn or intimidate the witnesses. If, for any reason, the post of I Additional District & Sessions Judge, Salem, falls vacant, the in-charge Judge shall carry out the above direction, in view of the fact that the case is of the year 2005 and one of the accused is in judicial custody.

Post on 27.07.2016 for orders at 2.15 p.m."

4 The Trial Judge has sent a report dated 25.07.2016, in which, he has stated that pursuant to the aforesaid order passed by this Court, the police produced P.W.1, P.W.6 and P.W.14 on 19.07.2016 for the purpose of cross-examination by the accused. The petitioners/accused did not cross-examine the witnesses on the ground of boycott of Courts by lawyers. The report further states that on 22.07.2016, P.W.21 was produced and he was also not cross-examined by the petitioners/accused on the same ground.

5 P.W.24 is the Investigation Officer and permission was granted by this Court for further cross-examination of P.W. 24 in order to confront him with any contradiction that may arise during the cross-examination of P.W.1, P.W.6, P.W.14 and P.W. 21. When the petitioners/accused did not even choose to cross-examine P.W.1, P.W.6, P.W. 14 and P.W. 21, there is no necessity to recall P.W.24, the Investigating Officer. That apart, the report of the Trial Judge states that P.W. 24 has retired from service and has gone abroad.

(Government of NCT of Delhi) [(2012) 9 SCC 408] and contended that the entire evidence of the prosecution witnesses should be struck down and a de nova trial should be ordered, as the witnesses were examined in the absence of the petitioners/accused.

7 In this case, as could be seen from the report dated 02.08.2014 sent by the Trial Judge, which has been extracted in extenso above, it is clear that the petitioners/accused were represented by two advocates, viz. G. Haribabu and M. Jageer Ahmed. Those advocates did not cross examine the witnesses for reasons best known to them after the witnesses were examined-in-chief. In spite of that, this Court had directed the Trial Court to recall P.Ws.1,6,14,21 and 24 for further cross-examination by the petitioners/accused. Yet, the petitioners/accused have not cross-examined the petitioners/accused.

In view of the above, the Criminal Original Petitions fail and are accordingly dismissed. Connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(J)

//True Copy//

Sub Assistant Registrar

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To

- 1 The I Additional District & Sessions Judge
Salem.
2. The Inspector of Police,
Veeranam Police Station, Salem.
- 3 The Public Prosecutor
High Court of Madras
Chennai 600 104.

CrI.O.P. Nos.31504 of 2014
CrI.O.P. No.6439 of 2015
CrI.O.P. No.6941 of 2016 and
CrI.O.P. No.7356 of 2016

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