

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 27.09.2016

PRONOUNCED ON: 05.10.2016

CORAM:

THE HON'BLE MR. JUSTICE P.N. PRAKASH

Cr1.O.P. No.31505 of 2014 and M.P. No.1 of 2014

1.Kumar @ Pullikumar

2.Nithiyanandam @ Nithya

3.Shanmugam

4.Ganesh

5.Sekar @ Lottai Sekar

6.Babu

7.Jayakumar

8.Suresh

.... Petitioners/Accused

Vs.

The State represented by  
the Inspector of Police  
Ambattur Police Station  
Chennai

(Crime No.712 of 2010)

.... Respondent/Complainant

Criminal Original Petition filed under Section 482, Cr.P.C. seeking to withdraw and transfer the Sessions Case in S.C. No.320 of 2012 on the file of the III Additional District and Sessions Judge, Thiruvallur Division at Poonamallee to some other Sessions Court to secure the ends of justice.

For petitioners : Mr. R. Sankarasubbu

For intervener : Mr. S. Ramajayar

For respondent : Mr. C. Emalias  
Additional Public Prosecutor

## ORDER

The facts leading to the filing of the present Criminal Original Petition are that one Satish Babu was murdered on 19.09.2010, in connection with which, the respondent police registered a case in Crime No.712 of 2010 and after completing the investigation, filed a final report against 8 accused and the case is now pending trial in S.C. No.320 of 2012 before the III Additional District and Sessions Court, Thiruvallur at Poonamallee. Trial commenced after framing of charges. On 13.08.2014, the prosecution examined Raj @ Vimal Raj-P.W.1, Sridhar-P.W.2, Karthik-P.W.3, Surender-P.W.4 and Udaya Raj @ Udaya-P.W.5 and their cross was deferred on application. On 24.11.2014, the accused have filed the present petition, i.e., CrI.O.P. No.31505 of 2014 for transferring S.C. No.320 of 2012 from the file of the III Additional District and Sessions Court, Thiruvallur at Poonamallee to any other Sessions Court, making allegations against the judicial officer concerned.

2. In the affidavit of Babu (A6) filed in support of the application for transfer, he has stated that the accused had engaged one Jayaraj, a junior lawyer, who did not properly defend their case. He has further stated that he (A6) himself and Ganesh (A4) were detained under the Tamil Nadu Act 14 of 1982 as Goondas and were confined in Central Prison, Puzhal as detenus on 13.08.2014. Jayakumar (A7) was also confined in Central Prison, Puzhal as he was convicted and sentenced for an offence under Section 307 IPC and was a convict prisoner. It is alleged in the affidavit that P.Ws. 1 to 4 were examined on 13.08.2014 in the absence of Ganesh (A4), Babu (A6) and Jayakumar (A7), as they were taken out of Puzhal Prison only at 11 a.m. in escort van and were produced only at 12.30 p.m., by which time, the witnesses were examined-in-chief behind their back. Hence, the accused have prayed for transfer of case from the file of the III Additional District and Sessions Court, Thiruvallur at Poonamallee and for effacing the evidence of P.Ws.1 to 4 in toto.

3. Mr. R. Sankarasubbu, learned counsel for the accused strenuously contended that the entire trial is vitiated as it is a rudimentary principle of law that evidence should be recorded in the presence of the accused and not otherwise.

4. Per contra, the learned Additional Public Prosecutor appearing for the respondent State submitted that the accused were released on bail in this case and they were absconding one after the other and were not permitting the Trial Court to proceed further and ultimately, on 13.08.2014, P.Ws. 1 to 5 were

examined-in-chief in the presence of the accused and the counsel for the accused even filed a petition to defer the cross which has been allowed by the Trial Court.

5. Heard Mr. R. Sankarasubbu, learned counsel for the petitioners, Mr.S.Ramajayam, learned counsel for the intervener and Mr. C. Emalias, learned Additional Public Prosecutor appearing for the respondent State.

6. From the report dated 17.12.2014 called for by this Court from the III Additional District and Sessions Court, Thiruvallur at Poonamallee and the copies of documents received, it is manifest that that an advocate by name Jayaraj had entered appearance for all the accused by filing a memo of appearance on 13.12.2012, which has been taken on file as early as 2012. From 2012 to 2014, it was Jayaraj, M.A., B.L., Advocate and C. Rajasekar, Advocate, who were defending the accused. On 13.08.2014, when P.Ws.1 to 5 were present, Section 317, Cr.P.C. application appears to have been filed for A4 by the counsel. The report dated 17.12.2014 sent by the Trial Judge reads as under:

"On 13.08.2014, A1, A2, A3, A5 and A8 were present. A4 absent. 317 Cr.P.C. petition filed by the counsel for accused Mr.D.Jayaraj. A6, A7 produced on P.T. Warrant. L.W. 1 to L.W.5 present and examined as P.W.1 to P.W.5, Ex.P.1 and M.O.1 to 3 were marked. Petition u/s 231(2) filed by the counsel for the accused Mr. D. Jayaraj and the same was allowed and the case was adjourned to 21.08.2014 for examination of Lws. 6 to 11.

I further submit on the day of examination of P.W. 1 to 4, the defence counsel was present and filed a petition to defer cross examination of witnesses and on behalf of accused No.4. 317 Cr.P.C. petition allowed and accused Nos.6 and 7 were produced."

7. Only thereafter, Mr. Sankarasubbu and A. Stephen have filed the memo of appearance again on 04.12.2014 and they have taken a specious plea that witnesses were examined in the absence of the accused. In the deposition of P.W.s 1 to 5, after the chief examination has been recorded, it has been recorded that cross has been deferred on the petitions filed by the accused. In fact, in Vinoth Kumar vs. State of Punjab [2015 (1) MLJ Cr1.288], the Supreme Court has deprecated the practice of adjourning the case for the purpose of cross-examination and has held in clear cut terms that the accused should cross-examine the witnesses on the day they are examined-in-chief. The Trial

Court has shown indulgence to the accused by deferring the cross-examination of eye witnesses on the mere asking of the accused. Recently, in State of Haryana vs. Ram Mehar and Others [2016 (8) Scale 192], the Supreme Court has observed as under:

"38. . . . Suffice it to say, a criminal trial does not singularly centres around the accused. In it, there is involvement of the prosecution, the victim and the victim represents the collective. The cry of the collective may not be uttered in decibels which is physically audible in the court premises, but the Court has to remain sensitive to such silent cries and the agonies, for, the society seeks justice. . . . ."

8. In this case, much water has flown under the bridge, inasmuch as the prosecution has examined the following witnesses:

- P.W.6 - Thilakavathy - examined-in-chief on 12.09.2014 and cross-examined on the same day.
- P.W.7 - Moorthy - examined-in-chief on 30.10.2014 and cross-examined on the same day, however, turned hostile.
- P.W.8 - Surya - examined-in-chief on 30.10.2014 and cross-examined on the same day, however, turned hostile.
- P.W.9 - Jothivel - Head Constable - examined-in-chief on 17.11.2014 and not cross-examined.
- P.W.10 - Gokuldas, retired S.I. - examined-in-chief on 25.11.2014 and not cross-examined.
- P.W.11 - Umadevi, Assistant Director, Forensic Department - examined-in-chief on 04.12.2014 and not cross-examined.

9. Hence, the Trial Court is directed to proceed with the trial expeditiously and recall P.W.s. 1 to 5 for cross-examination by the accused. On the appearance of the witness, if the accused do not cross-examine him / her, they will forfeit their right to recall the witness under Section 311, Cr.P.C.

10. The Trial Court shall bear in mind that P.W.s 1 to 5 were examined-in-chief on 13.08.2014, which is 2 years back and therefore, they may not remember their deposition. Hence, the learned Assistant Public Prosecutor in charge of the case, shall interview the witnesses and permit them to refresh their memory

with their deposition-in-chief, before subjecting them to cross-examination. If the accused adopt any dilatory tactics, the Trial Court shall remand them to custody in the light of the law laid down by the Supreme Court in State of Uttar Pradesh vs. Shambhu Nath Singh [JT 2001 (4) SC 319]. It is made clear that if anybody jumps bail, a fresh FIR should be registered against them under Section 229-A IPC.

This Criminal Original Petition stands dismissed with the above directions. Connected M.P. is closed.

Sd/-  
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

cad

To

- 1.The Inspector of Police  
Ambattur Police Station  
Chennai
- 2.The III Additional District and Sessions Judge  
Thiruvallur Division at Poonamallee
- 3.Do- Through The Principal Sessions Judge,  
Thiruvallur.
- 4.The Section Officer,  
Criminal Section,  
High Court, Madras.
- 5.The Public Prosecutor  
Madras High Court  
Chennai 600 104

+1cc to Mr.S.Ramajayam, Advocate, S.R.No.57298

Cr1.O.P. No.31505 of 2014

SR(CO)  
CA(18/10/2016)