

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 02.12.2016
CORAM
THE HONOURABLE MR.JUSTICE P.N.PRAKASH
Crl.O.P.No.25706 of 2016

State rep by
The Inspector of Police
CBCID, Cyber Crime Cell
Chennai-8

.. Petitioner

vs.

1.Senthilkumar
2.Suganandan
3.Muralidharan
4.Prakash

.. Respondents

Criminal Original Petition filed under Section 482 Cr.P.C. to call for the records in Crl.M.P.No.3295/2016 in C.C.No.904 of 2015 on the file of XI Metropolitan Magistrate Court, Saidapet, Chennai and set aside the order passed therein on 17.11.2016.

For petitioner : Mr.C.Emalias
Additional Public Prosecutor
For R1 : Mr.K.N.Nataraja
For R2 to R4 : Mr.T.Mohan

RESERVED ON	PRONOUNCED ON
25.11.2016	02.12.2016

O R D E R

This petition has been filed to call for the records in Crl.M.P.No.3295/2016 in C.C.No.904 of 2015 on the file of XI Metropolitan Magistrate Court, Saidapet, Chennai and set aside the order passed therein on 17.11.2016.

2.There appears to be a chequered history to this case. The factual matrix is as under:

On 27.05.2013, the "Q" Branch CID, Chennai apprehended one Mohammed Imran [A1] and Senthil Kumar [A2], when they were attempting to draw money using fake ATM cards from the Canara Bank ATM Centre situated inside the Domestic Airport, Chennai and registered a case in Cr.No.3 of 2013 against them for offences u/s 120-B, 420, 465, 468, 471, 380 and 511 IPC r/w 66, 66-C and 66-B of the Information Technology Act, 2000.

3. During the course of investigation, the names of Suganandan [A3], Muralidharan [A4], Chandra Mohan [A5] and Prakash [A6], who are Canadian nationals of Tamil origin, surfaced and they were arrested by the police on 29.05.2013. Pursuant to the confession statement of Suganandan [A3], the police recovered 14 items, of which, we are concerned with item no.8, viz.,

- (i) Skimmer Machine - 1,
Model No.MSR 606
- (ii) AC Adapter - 1
Model No. A360517R-U
- (iii) I.D. Tech-EZ Writer
Software & User manual CD-1

4. The accused were produced before the Judicial Magistrate, Alandur for remand and the seized properties were also produced before the Magistrate, vide P.I.No.293 of 2013. On the orders of the Director General of Police, the case was transferred from the file of the "Q" Branch to the CB CID, Cyber Crime on 28.09.2013. The Inspector of Police, CB CID gave a requisition dated 06.11.2013 to the Judicial Magistrate, Alandur, for sending the seized items, including the Skimmer Machine, to the Tamil Nadu Forensic Sciences Department, Chennai for analysis and report, pursuant to which, the Judicial Magistrate, Alandur, despatched the articles to the Tamil Nadu Forensic Sciences Department on 19.11.2013. After analysing the articles, the Deputy Director, Computer Forensic Science Division, Forensic Sciences Department, sent a report dated 03.02.2015 to the Judicial Magistrate, Alandur. In the said report, it is clearly stated that a further report will be sent after examination of the other items, like laptop, mobile phone, card readers etc. Thus, from the above, it is evident that the Skimmer Machine was retained by the Tamil Nadu Forensic Sciences Department for further study.

5. In the meantime, the accused were released on bail and they were detained in the Foreigners Camp in Chengalpattu, as they were foreigners. They filed a petition for expediting the investigation, on which, this Court directed the police to file a Final Report within six months. In compliance with the order passed by this Court, the CB CID completed the investigation and filed the charge sheet in C.C.No.904 of 2015 on 03.02.2015

before the XI Metropolitan Magistrate, Saidapet, Chennai against Mohammed Imran, Senthil Kumar, Suganandan, Muralidharan, Chandra Mohan and Prakash for the offences u/s 120(B), 420, 465, 468, 471, 380, 511 IPC & 66, 66(C), 66(B) of Information Technology Act, 2000 @ Sec.474 IPC r/w 465 IPC & 120(b) IPC.

6. At this juncture, it may be relevant to narrate briefly certain parallel events that took place in connection with the bail and abscondance of the accused herein. Though this Court has discussed the entire facts on this aspect in the order dated 23.09.2015 in CrI.O.P.No.18138 of 2013 batch, suffice it to say that after release on bail, Suganandan [A3], Muralidharan [A4], Chandra Mohan [A5] and Prakash [A6] attempted to flee to Bangladesh via Kolkata and they were arrested by 24 Parganas North Police, Bangoan District, West Bengal in FIR No.720 of 2014 u/s 14 of the Foreigners Act and were lodged in Kolkata Prison. Chandra Mohan [A5] was enlarged on bail in Kolkata and thereafter, his whereabouts are not known. Suganandan [A3], Muralidharan [A4] and Prakash [A6] pleaded guilty before the Additional Chief Judicial Magistrate, Bangoan in G.R.No.2160/2014 on 17.04.2015 and they were convicted and sentenced for the offence u/s 14 of the Foreigners Act and the period of pre-trial detention undergone by them was set off.

7. The learned Additional Chief Judicial Magistrate, Bangoan, had further stated in his order that "after completion of their sentence, they be pushed back to Canada". They were detained in Dum Dum Central Correctional Home, Kolkata, awaiting deportation to Canada. At that juncture, the CB CID issued a look-out notice for their apprehension and also filed petitions before this Court for cancellation of their bail. On coming to know that they are lodged in Dum Dum Central Correctional Home, Kolkata, this Court cancelled their bail and directed the CB CID to arrest them in Dum Dum Central Correctional Home, Kolkata and after producing them for transit before the local Magistrate, directed their production before the XI Metropolitan Magistrate, Saidapet, Chennai. With great difficulty, the CB CID brought Suganandan [A3], Muralidharan [A4] and Prakash [A6] from Dum Dum Central Correctional Home and produced them before the XI Metropolitan Magistrate, Saidapet on 09.10.2015.

8. After the charge sheet was filed on 03.02.2015, the Tamil Nadu Forensic Sciences Department sent the second report along with the material objects to the XI Metropolitan Magistrate, Saidapet, Chennai and the same was received on 08.06.2015.

9. The accused were furnished copies u/s 207 Cr.P.C. and charges were framed against them on 22.12.2015. The prosecution examined 11 witnesses and after the closure of the prosecution

case, the accused were questioned u/s 313(1)(b) Cr.P.C. on 19.10.2016 and arguments commenced on 03.11.2016. On 14.11.2016, the prosecution filed a petition in CrI.M.P.No.3295 of 2016 u/s 311 Cr.P.C. to recall P.W.1 for the purpose of marking the Skimmer Machine. The accused filed their objection and strongly opposed the prayer of the prosecution. The trial Court, by the impugned order dated 17.11.2016, dismissed the petition filed by the prosecution, challenging which, this petition has been filed by the police.

10. Heard Mr.C.Emalias, learned Additional Public Prosecutor appearing for the State and M/s K.N.Nataraj and T.Mohan, learned counsel for the accused.

11. Mr.C.Emalias, learned Additional Public Prosecutor submitted that, when P.W.1 was examined, the Assistant Public Prosecutor, in-charge of the case had marked all the material objects that were seized from Suganandan [A3] and had inadvertently failed to mark the Skimmer Machine and when this was noticed by the prosecution, a petition was filed for recalling P.W.1 for the purpose of marking the Skimmer Machine, which ought not to have been dismissed by the trial Court, especially in the peculiar facts and circumstances of the case at hand.

12. Per contra, M/s K.N.Natrajan and T.Mohan, learned counsel appearing for the accused submitted that the prosecution cannot be permitted to fill the lacuna by marking the Skimmer Machine and that the contention of the prosecution that it was inadvertently not marked cannot be accepted, inasmuch as P.W.1 was examined-in-chief on two dates, viz., 25.02.2016 and 02.03.2016 and that he had chosen to mark all the material objects seriatim as found in the property list, but had consciously failed to mark the Skimmer Machine and therefore, he cannot be permitted to be recalled. The learned counsel also submitted that in the cross-examination of all the witnesses, the accused had questioned them about the Skimmer Machine and therefore, it cannot be stated that the prosecution had inadvertently failed to mark the same.

13. In support of his contention, Mr.T.Mohan, learned counsel placed strong reliance on the recent judgment of the Supreme Court in State of Haryana v. Ram Mehar and others [(2016) 8 Scale 192], wherein, the Supreme Court had reversed the order passed by the High Court ordering recall of the witness in that case by holding that the power u/s 311 Cr.P.C. should not be exercised by the Court on the mere asking of a party.

14. This Court gave its anxious consideration to the rival submissions.

15. At the outset, this Court wanted to know as to where the Skimmer Machine was, during trial. Therefore, this Court called for a report from the XI Metropolitan Magistrate, Saidapet, in this regard. The XI Metropolitan Magistrate, Saidapet has sent a report dated 25.11.2016 stating that the properties were produced before Judicial Magistrate, Alandur, vide P.I. No.293/2013 and they were sent to the Tamil Nadu Forensic Sciences Department for analysis by the Judicial Magistrate, Alandur. The Tamil Nadu Forensic Sciences Department conducted various tests and sent its first report to the Judicial Magistrate, Alandur on 05.02.2014. The Tamil Nadu Forensic Sciences Department sent their second report dated 31.03.2015 along with case properties, including the Skimmer Machine, directly to the XI Metropolitan Magistrate, Saidapet on 08.06.2015. Thus, from the report of the learned XI Metropolitan Magistrate, dated 25.11.2016, it is clear that the Skimmer Machine in question was produced before the Judicial Magistrate, Alandur, who had sent the same to the Tamil Nadu Forensic Sciences Department for testing and after testing the property, along with the second test report dated 31.03.2015, it has been handed over by the Tamil Nadu Forensic Sciences Laboratory to the XI Metropolitan Magistrate, Saidapet, on 08.06.2015, in whose custody, the Skimmer Machine has been since then.

16. Mr.T.Mohan, learned counsel for the accused fairly admitted this position and stated that the Skimmer Machine was always available in the Court and that the Assistant Public Prosecutor in charge of the case did not choose to mark the Skimmer Machine when P.W.1 was examined-in-chief. He further contended that after the receipt of the second report dated 31.03.2015 from Tamil Nadu Forensic Sciences Department, the learned Assistant Public Prosecutor filed a petition u/s 311 Cr.P.C. to examine additional witnesses from Tamil Nadu Forensic Sciences Department, which was allowed by the trial Court on 02.09.2016 and the additional witnesses were also examined. Even at that time, the learned Assistant Public Prosecutor did not choose to mark the Skimmer Machine through the expert, who had conducted the test.

17. This Court perused the deposition of P.W.1 and found that, to a specific question put in the cross examination, P.W.1 has clearly stated that he had seized the Skimmer Machine from Suganandan [A3]. When P.W.1 is so clear, the learned Assistant Public Prosecutor must have been a little diligent to mark the Skimmer Machine through him.

18. At this juncture, it may be relevant to quote the following passage from the judgment of the Supreme Court in *Rajendra Prasad v. Narcotic Cell* [(1999) 6 SCC 110]:

"Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trail of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better."

The aforesaid judgment has been considered by the Supreme Court in *Ram Mehar's case* (supra), wherein, it is stated as follows in para no.37:

"37. There is a definite purpose in referring to the aforesaid authorities. We are absolutely conscious about the factual matrix in the said cases. The observations were made in the context where examination-in-chief was deferred for quite a long time and the procrastination ruled as the Monarch. Our reference to the said authorities should not be construed to mean that Section 311 CrPC should not be allowed to have its full play. But, a prominent one, the courts cannot ignore the factual score."

19. In the opinion of this Court, the prosecution is not seeking to introduce the Skimmer Machine afresh, but is only seeking to mark the

Skimmer Machine, which the learned Assistant Public Prosecutor had, for some reasons, good or bad, failed to mark through P.W.1. The evidence of P.W.1 and the evidence of the expert who had tested the Skimmer Machine is already on record and the failure of the prosecution to formally mark the Skimmer Machine as a material object, when the same has always been available before the trial Court, cannot and should not be taken advantage of by the accused. The accused cannot cry foul by saying that they are in prison and that the trial is being unnecessarily delayed because, as narrated above, the accused attempted to flee to Bangladesh and were brought here after they were caught in the border.

20. Though in a criminal prosecution, the State represents the collective will of the people, it is more or less an orphan in trial Courts, where the State is left to fend for itself without able legal assistance unlike the accused.

In the result, this petition is allowed and the order passed by the XI Metropolitan Magistrate, Saidapet, Chennai in CrI.M.P.No.3295 of 2016 in C.C.No.904 of 2015 is set aside. The prayer of the prosecution in CrI.M.P.No.3295 of 2016 is allowed.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

To

1.The Inspector of Police
CBCID, Cyber Crime Cell
Chennai-8.

2.XI Metropolitan Magistrate Court,
Saidapet, Chennai.

3.The Public Prosecutor,
High Court,
Madras 600 104.

4.The XI Metropolitan Magistrate Saidapet
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+1 cc to M/s.K.N.Nataraja Advocate sr 71069

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