

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.02.2016

CORAM

THE HONOURABLE MS.JUSTICE R. MALA

CRL.O.P.No.4207 of 2016

and

CrI.M.P.No.2190 of 2016

Kanaka Petitioner/Accused No.4

... Vs ...

State rep. by
The Inspector of Police,
Veraiyur Police Station,
Tiruvannamalai District. Respondent/Complainant

Prayer:- Criminal Original Petition filed under Section 482 of the Code of Criminal Procedure, praying to call for the records relating to the order dated 10.02.2016 made in CrI.M.P.No.144 of 2016 in S.C.No.6 of 2008 on the file of the Mahila Court, Tiruvannamalai and set aside the same and permit the petitioner to cross examine the witnesses P.Ws.9 to 18 at any date as fixed by this Court.

For Petitioner : Mr.Shankar
for Mr.S.Kumara Devan

For Respondent : Mr.C.Emalias,
Additional Public Prosecutor

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ORDER

The petitioner has come forward with the present petition seeking to call for the records relating to the order dated 10.02.2016 made in CrI.M.P.No.144 of 2016 in S.C.No.6 of 2008 on the file of the Mahila Court, Tiruvannamalai, and set aside the same and permit the petitioner to cross examine the witnesses P.Ws.9 to 18 at any date as fixed by this Court.

2. The petitioner, who is the fourth accused in S.C.No.6 of 2008, on the file of the Mahila Court, Tiruvannamalai,

facing charges for the offences punishable under Sections 120 (B), 364 and 302 r/w. 34 of IPC. The charge sheet has been levelled against four accused and trial has been commenced and all the prosecution witnesses have been examined and when the matter was posted for arguments of the defence, the petitioner has filed a petition in CrI.M.P.No.144 of 2016 before the Mahila Court, Tiruvannamalai, for recalling P.W.1, P.Ws.4 to 7, P.W.9, P.W.13 and P.W.18 stating that she has not cross-examined the said witnesses. After hearing both sides, the learned Judge of the Mahila Court, dismissed the said petition. As against the said dismissal order, the present petition has been filed.

3. The learned counsel appearing for the petitioner would submit that the petitioner is facing severe criminal charge for the offences under Sections 364 and 302 r/w. 34 of IPC and therefore, an opportunity must be given to her to put forth her defence. But that factum was not considered by the learned trial Judge and hence, the learned counsel prayed for setting aside the impugned order dated 10.02.2016 passed by the learned Judge of the Mahila Court, Tiruvannamalai, in CrI.M.P.No.144 of 2016 in S.C.No.6 of 2008 and permit the petitioner to cross examine the witnesses P.Ws.9 to 18 by allowing this petition.

4. Resisting the same, the learned Additional Public Prosecutor would submit that sufficient opportunity has been given to the accused to cross examine the witnesses and the accused have also cross-examined the witnesses. But, they have not filed any application to defer the cross. After the questioning under Section 313 of Cr.P.C., and when the matter was posted for arguments, the petition was filed which shows the mala fide intention of the petitioner to drag on the proceedings. The learned Additional Public Prosecutor further submitted that the trial Court has correctly considered the petition filed for recalling the witnesses and passed order and hence, he prayed for dismissal of this petition.

5. On a perusal of the petition filed for recalling the witnesses, it is seen that the petitioner is the fourth accused and some of the witnesses were not cross-examined by the petitioner independently. The chief examination of the witnesses has been done in the presence of the petitioner/A.4. But the petitioner has not requested time for cross examination. The petitioner kept quiet all along. In paragraph Nos.3 and 4 of the petition, the petitioner has not stated that she was present on the date of examination of the witnesses and it was not her case that no opportunity has been given to her to cross examine the witnesses and it was also not stated that the counsel appearing on behalf of the petitioner has not appeared before the Court. In paragraph No. 5 of the affidavit, the petitioner has simply stated that

she is ready to pay batta for the witnesses. It is true that a common cross examination has been made.

6. The occurrence is said to have taken place in the year 2006 and charge sheet was filed in the year 2007 and the same was taken on file in the year 2008 and the case is pending for more than eight years which shows the mala fide intention of the petitioner to drag on the proceedings.

7. While considering the decision of the Hon'ble Supreme Court reported in 2013 CrI. L.J. 3777 [Rajaram Prasad Yadav Vs. State of Bihar and another] that if a new counsel has been appointed and if he thought that it is necessary for further examination, the Court should have given an opportunity to the petitioner to cross examine. It is useful to extract paragraph No.20 of the said decision which reads as follows:-

"20. In P. Sanjeeva Rao v. State of A.P., AIR 2012 SC 2242 : (2013 AIR SCW 492), the scope of Section 311 Cr.P.C. has been highlighted by making reference to an earlier decision of this Court and also with particular reference to the case, which was dealt with in that decision in paragraphs 13 and 16, which are as under:

"13. Grant of fairest opportunity to the accused to prove his innocence was the object of every fair trial, observed this Court in Hoffman Andreas v. Inspector of Customs, Amritsar (2000) 10 SCC 430. The following passage is in this regard apposite:

"In such circumstances, if the new counsel thought to have the material witnesses further examined, the Court could adopt latitude and a liberal view in the interest of justice, particularly when the court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible."

16. We are conscious of the fact that recall of the witnesses is being directed nearly four years after they were examined-in-chief about an incident that is nearly seven years old. Delay takes a heavy toll on the human memory apart from breeding cynicism about the efficacy of the judicial system to decide cases within a reasonably foreseeable time period. To that extent the apprehension expressed by Mr Rawal, that the prosecution may suffer

prejudice on account of a belated recall, may not be wholly without any basis. Having said that, we are of the opinion that on a parity of reasoning and looking to the consequences of denial of opportunity to cross-examine the witnesses, we would prefer to err in favour of the appellant getting an opportunity rather than protecting the prosecution against a possible prejudice at his cost. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself."

8. In the present case, on a perusal of the petition filed for recalling the witnesses, it is seen that there is no mentioning about the fact that when the new counsel has been appointed. The petitioner was kept quiet all along which shows her mala fide intention to drag on the proceedings. Since there is laches on the part of the petitioner, she has been penalized by imposing cost of Rs.10,000/-.

9. Hence, the petitioner is directed to pay cost of Rs.10,000/- (Rupees Ten Thousand only) to the District Legal Services Authority, Tiruvannamalai, on or before 09.03.2016, failing which, this petition stands dismissed automatically without further reference to this Court. The petitioner is also directed to pay batta, day costs and travelling expenses to the witnesses P.W.1, P.Ws.4 to 7, P.W.9, P.W.13 and P.W.18. Further, the respondent police is directed to produce the witnesses viz., P.W.1 and P.Ws.4 to 7 on 14.03.2016 and P.W.9, P.W.13 and P.W.18 on 15.03.2016 before the trial Court. On that dates, the petitioner is directed to cross examine the said witnesses, otherwise, the petitioner will not be permitted to cross examine the witnesses.

10. With the above directions, this Criminal Original Petition is disposed of. Consequently, the connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-IV)

//True Copy//

Sub Assistant Registrar

Jrl

To

1. The Judge,
Magalir Neethimadram,
Tiruvannamalai.
2. The Inspector of Police,
Veraiyur Police Station,
Tiruvannamalai District.
3. The District Legal Services Authority,
Tiruvannamalai.
4. The Public Prosecutor,
High Court, Madras.

1 CC to S.Kumara Devan, Advocate SR.No.11897

CRL.O.P.No.4207 of 2016

TEJ(CO)
CA(25.02.2016)



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