

**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT****DATED: 22.08.2016****CORAM:****THE HONOURABLE DR.JUSTICE P.DEVADASS****Crl.O.P.(MD) Nos.14889 and 15234 of 2016**

Vincent ... Petitioner/A1 in Crl.O.P.(MD) No. 14889 of 2016
Sikanthar Mohideen ... Petitioner/A2 in Crl.O.P.(MD) No. 15234 of 2016
-vs-

The State represented by
The Inspector of Police,
Vigilance and Anti-Corruption Wing,
Tirunelveli.
(Crime No.6 of 2010)

... Respondent/Complainant in
both petitions

COMMON PRAYER: Criminal Original Petitions are filed, under Section 482 Cr.P.C., praying to call for the records pertaining to the order dated 30.05.2016 made in Crl.MP.No.268 of 2016 and Crl.M.P.No.267 of 2016 in Spl.C.C.No.57 of 2014 on the file of the Special Judge for Cases under Prevention of Corruption Act, Tirunelveli and set aside the same.

For Petitioners : Mr.P.Samuel Gunasingh

For Respondent : Mr.P.Kandasamy
Govt.Advocate (Crl.Side)

COMMON ORDER

As these two petitions are connected on factual matrix and legal issues, they are tagged together, heard together and are being disposed of by this common order.

2.In the Court of Special Judge under Prevention of Corruption Act, Tirunelveli in Spl.C.C.No.57 of 2014, A1/Vincent/petitioner in Crl.O.P.(MD) No.14889 of 2016 and A2/Sikinthar Mohideen/petitioner in Crl.O.P.(MD) No.15234 of 2016 are being prosecuted for offence under Sections 7 and 13(2) r/w 13(1)(D) of the Prevention of Corruption Act, 1988.

3.In this case, charges were framed. Recording of prosecution evidence is going on. So far 9 prosecution witnesses were examined.



4. On 17.02.2016, P.W.5, an Assistant Engineer in the Tamilnadu Electricity Board has been examined to speak about his accompanying the defacto complainant to the place where trap is to be conducted. So, P.W.5 is a trap operation witness.

5. Both A1 and A2, have not cross-examined P.W.5. Subsequently, each have filed separate petitions in CrI.M.P.(MD) Nos.267 and 268 of 2016, before the learned Special Judge for recalling P.W.5 for their cross-examination. It was opposed to by the prosecution.

6. The learned Special Judge, mainly referring to **VINOD KUMAR V. STATE OF PUNJAB [(2015) 1 MLJ (CrI.) 288 (SC)]**, dismissed their petitions. That is how A1 and A2 are before us.

7. The learned counsel for the petitioners submitted that in **VINOD KUMAR** (supra), the Hon'ble Supreme Court did not say that recalling of witness shall not be permitted at all. The trial Court misunderstood **VINOD KUMAR** (supra).

8. The learned counsel for the petitioners further submitted that under Section 311 Cr.P.C. power has been given to the Court to recall a witness, who has been already examined or to summon a fresh witness. It is intended to bring forth relevant evidence to the notice of the Court to enable it to render a correct finding. When it is essential to recall, the Court is bound to recall it.

9. The learned counsel for the petitioners further submitted that the Court cannot foreclose the constitutional right of the accused to defend himself effectively, which is part and parcel of concept of fair trial. Merely citing **VINOD KUMAR** (supra), the trial Court ought not to have denied them opportunity to test the veracity of the evidence of P.W.5 by cross-examining them.

10. The learned counsel for the petitioners further submitted that the Court must consider the need, necessity in subjecting P.W.5 to cross examine him and whether not cross-examining him will result in causing serious, incalculable, irreparable injury to the accused and their basic right of defence. Of course the trial Court has every right to reject such a prayer, if an attempt is made to fill up the lacunae. The Court must adjudicate the reason given for recalling the witness and also consider whether it is necessary, essential to recall him for the purpose of obtaining further evidence through cross-examination. In this case, such an exercise has not at all been done by the Trial Court.

11. The learned counsel for the petitioners further submitted that in the facts and circumstances, when incriminating evidence has been adduced by the prosecution through P.W.5, it becomes necessary for the accused to cross-examine him. The trial Court has simply assumed that if P.W.5 is recalled he will be gained

over, turn hostile to prosecution case and the incriminating evidence already recorded will be washed out. This approach and assumption of the trial Court is not correct. The trial Court has completely overlooked the principles governing exercise of its judicial discretion under Section 311 Cr.P.C.

12.To drive home his point of view, the learned counsel for the petitioners also cited the following decisions:

(i) **U.T. OF DADRA & NAGAR HAVELI V. PATESHSINH MOHANSINH CHAUHAN [2006 (7) SCC 529].**

(ii) **P.SANJEEVA RAO V. STATE OF A.P. [2012 (7) SCC 56].**

(iii) **NATASHA SINGH V. CBI [2013 (5) SCC 741].**

(iv) **VINOD KUMAR V. STATE OF PUNJAB [2015 (1) MLJ (Cr1) 288 (SC)] .**

(v) **STATE (NCT OF DELHI) V. SHIV KUMAR YADAV [2016 (2) SCC 402].**

(vi) **SURESH 2 DHANASEKAR V. THE STATE REP. BY INSPECTOR OF POLICE, SULUR POLICE STATION, COIMBATORE DISTRICT [CRL.O.P.NO.21762 OF 2013 DATED 02.09.2013].**

(vii) **ARUMUGAM AND ANOTHER V. THE STATE REP. BY ITS STATION HOUSE OFFICER, VIGILANCE ANTI-CORRUPTION POLICE STATION, PUDUCHERRY [2015-1-L.W. (Cr1.) 607].**

13.On the other hand, the learned Government Advocate (Criminal side) submitted that rightly placing its reliance on **VINOD KUMAR** (supra), the trial Court has dismissed the recall petition. Petitioners have taken their own time and thereafter they have filed the recall petitions. No proper reason has been given. In such circumstances, the trial Court has rightly dismissed their petitions to recall P.W.5.

14.I have anxiously considered the rival submissions, perused the impugned common order and the decisions cited at the bar.

15.Too much insistence on the right of the accused, forgetting the plight of the victim is not a correct approach. On the one hand there is right of defence constitutionally guaranteed to the accused under Article 22(1) of Constitution of India and statutorily under Section 303 Cr.P.C. On the other hand the duty of the State to prosecute the offenders. None can be allowed to enjoy at the cost of others. At every stage of a criminal case it must be kept in mind. And balance has to struck to advance of justice and not miscarriage of justice.

16.The essential function of a Court is delivery of justice. There is no magic wand to deliver it. Contested matters have to be adjudicated on the evidence adduced and conclusions are drawn thereon. Parties shall produce the Court the essential and necessary evidence to assist the Court to render justice. Evidence which is relevant shall not be held back. Evidence which is



required shall be brought forward. This is also one of the objective behind Section 311 Cr.P.C.

17.Examination of a witness consists of his chief-examination, cross-examination and re-examination, if the need arises. This has been envisaged in Section 138 of the Evidence Act. Section 311 Cr.P.C. and Section 138 of Evidence Act must be read together.

18.Section 311 Cr.P.C. is in two parts. It's 1st part is discretionary in nature. However, its second part is mandatory in nature. If the Court finds that it is just and necessary that the evidence have to be produced before the Court then it has to be done. It may be also through the cross-examination of witness, also has been already examined in chief.

19.A Court cannot forget victims of crime, the duty of the State and the interest of the State to prosecute the offenders. The victims have suffered already at the hands of the accused. Their agony prolongs during the trial also. Harassing of witnesses under the pretext of cross examination has become order of the day. In certain circumstances, during the trial, practically victims suffers more than the accused. When the victims/witnesses attend the Court they must be treated as guest, as they have come to assist the Court to render correct finding on a disputed facts. Making the witnesses to wait till the close of the day and asking them to come on some other day for their examination has become a routine ordeal in the trial Courts. Sometimes, the accused employ some tricks to dilute or efface the evidence already recorded, either by bargaining or browbeating the witnesses. In one way or other the witnesses are being gained over. Major gain is to the accused. Net result is failure of justice and collapsing of the trial.

20.In this scenario, in **VINOD KUMAR** (supra) the Hon'ble Supreme Court expressed its anguish on this appalling situation prevailing in the trial Courts and advised them to discourage indiscriminate and indefinite deferring of the cross examination of the witnesses and also adjourning of the cases for no reason or for flimsy reasons. But, in **VINOD KUMAR** (supra) the Hon'ble Supreme Court did not say never recall any witness for his cross examination, whatever might be the reason. Referring to Section 309 Cr.P.C. the Hon'ble Supreme Court, advised the trial Courts to avoid unnecessary adjournments and try to finish the cross-examination of the witnesses on the same day or atleast on the next day. Thus **VINOD KUMAR** (supra) cannot be used to turn the table even when there is a genuine case for recalling the witnesses for cross-examination.



of Corruption Act. It is a trap case. P.W.5, a public servant has been examined to speak about he having accompanied the defacto complainant and witnessed the alleged greasing of the palms of the accused and he had also spoken in extenso in his chief examination as to certain vital aspects of the prosecution version of the case. If his such testimony is not tested on the altar of cross-examination it will result in causing incalculable damage to the defence. The accused will be greatly prejudiced.

22. There was a delay of about 3 months since P.W.5 has been examined in chief. In his recall petition, A1 stated that when the chief examination of P.W.5 was over, he was advised that there are certain important documents and they have to be ascertained and perused, so that P.W.5 could be properly cross-examined. A2 has been defended by an elderly member of the bar aged about 72 years. It is to the misfortune of A2 the said counsel fell sick. After his recovering, A2 has filed the recall petition, stating the reason. With respect to A2 the trial Court noted that the counsel has not produced any medical certificate. That cannot be a sole criteria to dismiss the recall petition.

23. In **(2006) 7 SCC 529** (supra), the Hon'ble Supreme Court has remarked that the Court could be magnanimous in these matters, but at the same time it should not be at the cost of the victim and witnesses. Magnanimity should not become an headache for others.

24. As regards the apprehension of the trial Court that if P.W.5 is recalled he will prevaricate, he will turn hostile cannot be a reason to deny an opportunity to the accused to test the veracity of incriminating evidence adduced as against the petitioners as nobody including the trial Court, knows what is his (P.W.5) mind and how he react when he comes to the witness box.

25. In the facts and circumstances, this Court is of the view that it is very much essential that the incriminating evidence of P.W.5 has to be tested through his cross-examination by A1 and A2. Otherwise the trial Court also will be deprived of relevant evidence. It will also result in prejudice being caused to the accused. In the circumstances, an opportunity could have been given to the petitioners to recall P.W.5 for their cross-examination.

26. In this view of the matter, the impugned common order passed by the learned Special Judge under the Prevention of Corruption Act, Tirunelveli dated 30.05.2016 in Cr.M.P.Nos.267 and 268 of 2016 in Spl.C.C.No.57 of 2014 is set aside. The trial Court will recall P.W.5 for the cross-examination of A1 and A2. Prosecution has every right to re-examine him, if the situation so warrants. When P.W.5 is present in Court, his cross-examination shall be conducted on the same day, if not atleast on the next day. Under no circumstance, deferring of his cross examination shall be permitted.



27. Accordingly, these petitions are disposed of.

Sd/-

Assistant Registrar (W)

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/True Copy/

Sub Assistant Registrar

sj

To:

1. The Special Judge under Prevention of Corruption Act,
Tirunelveli.

2. The Inspector of Police,
Vigilance and Anti-Corruption Wing,
Tirunelveli.

3. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

+2CC to Mr. P. Samuel Gunasingh, Advocate Sr.No. 46776, 46777

CSL/SKS/RR/7.9.16-6p-6c

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22.08.2016