

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Criminal Jurisdiction)

Friday, the Twenty Seventh day of October Two Thousand Seventeen

PRESENT

The Hon`ble Mr Justice R. SURESH KUMAR

CRIMINAL MISCELLANEOUS PETITION No.9132 of 2017

AND CRL.MP.NO.10838 OF 2016

IN CRL A.426/2014

1 PRABHU,
2 SURESH,
3 KRISHNAMOORTHY,

[PETITIONERS
IN CRL.MP.NO.9132/2017]

TAMIZH MANI

[APPELLANT/ACCUSED 2
IN CRL MP.NO.10838/2016]

Vs

INSPECTOR OF POLICE
THE STATION HOUSE OFFICER,
GINGEE POLICE STATION,
VILLUPURAM DISTRICT.
CR.NO.115 OF 2011.

[RESPONDENT
IN BOTH THE PETITIONS]

Petition praying that in the circumstances stated therein and in the Memorandum of Grounds in Criminal Appeal No.426/2014 on the file of the High Court, the High Court will be pleased to suspend the sentence

[i]suspend the sentence made in S.C.No.185 of 2011 dated 01.08.2014 on the file of Asst.Sessions Judge, Gingee enlarge him pn bail, pending disposal of criminal Appeal.426/14 [CRL.MP.NO.10838/2016]

[ii]suspend the sentence imposed on the petitioners by order dated 01.08.2014 made in S.C.No.185 of 2011 on the file of Asst.Sessions Judge, Gingee and enlarge the petitioners on bail till the disposal of the above criminal appeal.

Order : This petition coming on for orders upon perusing the petition and the Memorandum of Grounds in Crl.Appeal No.426/2014 on the file of the High Court and upon hearing the arguments of M/S.J.C.DURAIRAJ, Advocate[IN CRL.MP.NO.9132/2017 IN A1,A3 & A4] AND M/S A.P.SATHYAMOORTHY Advocate[IN CRL.MP.NO.10838/2016 IN A2] for the petitioner and of MR.R.SEKAR, Govt. Advocate (Crl. Side) on behalf of the Respondent the court made the following order:-

The petitioners in these miscellaneous petitions have sought for a relief of suspension of sentence imposed against them by the Assistant Sessions Judge, Gingee in Judgment dated 01.08.2014 in S.C.No.185 of 2011 convicting all these petitioners (A1 to A4) by imposing a sentence of 10 years rigorous imprisonment and a fine of Rs.2000/- in default, 1 month imprisonment for the offences punishable under Section 395 r/w 398 of IPC.

2. In support of these petitions, Mr A.P.Sathyamoorthy learned counsel appearing for one of the petitioners submitted that, the entire case of the prosecution based on the alleged complaint said to have been given by P.W.1 and P.W.2, who are the alleged victims, had been shattered, as both P.W.1 and P.W.2, in their cross examination, have turned hostile and have deposed in detail that, they had not been the victim of any such incident and the complaint had been given and statements were made including the identification of the accused during identification parade, only in accordance with the directives issued by the police.

3. The learned counsel for the petitioners would also raise the following points:

That the alleged occurrence was dated 09.03.2011 whereas the complaint is said to have been given only on 11.03.2011. Therefore, there is a delay in lodging the complaint, for which, no plausible reason had been given by the prosecution side. Also the evidence of P.W.1 and P.W.2 have not supported the prosecution case. He also submits that, though the prosecution witnesses had not supported the case of the prosecution, they had not been treated as hostile witnesses. Therefore, the benefit of deposition of such witnesses will go in favour of the accused.

4. The learned counsel would also submit that, the identification parade claimed to have been conducted, has not been conducted properly, and there was no proper seizure mahazar. That apart, the learned counsel would state that, there are contradiction regarding the withdrawal of money from ATM. Therefore, all these reasons would go to show that the prosecution has not proved the case beyond doubt. Therefore, the petitioners are entitled to be acquitted.

5. In support of his argument, the learned counsel for the petitioner invited the attention of this Court on the deposition especially, the cross examination of P.W.1 and P.W.2.

6. Per contra, Mr.R.Sekar, learned Government Advocate would state that, based on the complaint given by P.W.1 and P.W.2, investigation was commenced and after following all procedural formalities, charge was laid against the petitioners, where, the accused had been clearly identified by both the victims i.e., P.W.1 and P.W.2 in front of the Judicial Officer and based on such identification and other supporting evidences, such as withdrawal of money from ATM by using the ATM card belongs to the petitioners, the prosecution has proved the case beyond doubt.

7. The learned Government Advocate would also state that merely because the P.W.1 and P.W.2 had deposed differently in their cross examination, their evidences given in the examination in chief cannot be brushed aside. In this regard, the learned Government Advocate would state that, the chief examination of P.W.1 was conducted on 05.3.2012 whereas the cross examination had taken place only on 18.11.2013. In between there is chance for influencing P.W.1 from the side of the accused and therefore, merely because, P.W.1 and P.W.2 had deposed in the cross examination against the prosecution theory, the entire evidence of the prosecution including the chief examination of P.W.1 and P.W.2 cannot lose its weightage. Therefore, the prosecution theory since had been proved beyond doubt, the petitioners are not entitled for acquittal and therefore, these petitions seeking suspension of sentence have to be dismissed.

8. In support of his contentions, the learned Government Advocate has cited a Judgment in **(2006) 9 SCC 386** in the matter of **Nisar Khan alias Guddu and others Vs State of Uttaranchal**. By relying upon the said Judgment, the learned Government Advocate would submit that the big time gap between the chief examination and cross examination of P.W.1 would have led to give a different version in the cross examination because of the influence, intimidation etc., inflicted on the witnesses and therefore, in these circumstances, it cannot be easily brushed aside the chief examination and other evidences given, on behalf of the prosecution, by the same witnesses. Therefore, the principle laid down in the said Judgment can squarely be applied in the case in hand and on that basis, the arguments advanced by the defence side before this Court seeking for suspension of sentence can very well be rejected.

9. I have considered the said submissions made by both sides and have perused the materials *prima facie* for the purpose of considering these two petitions for suspension of sentence.

10. As has been rightly pointed out by the learned counsel appearing for the petitioners, P.W.1 and P.W.2 have given a totally different version in their cross examination. Though they have turned hostile and given a different version completely against the prosecution theory, they had not been treated as hostile witnesses for the reason best known to the prosecution.

11. Moreover, the Judgment cited by the learned Government Advocate i.e., **(2006) 9 SCC 386 (cited supra)** is concerned, in that case, the P.W.1 and P.W.2, who deposed in support of the prosecution in chief examination have given a different version in the cross examination, are only eye witnesses, as they are not victims.

12. Here in the case in hand, P.W.1 and P.W.2 are not merely witnesses, as they are the alleged victims. Therefore, there is a vast difference in facts. In this case, the very alleged victims themselves deposed before the Court during the cross examination totally against the theory projected by the prosecution and therefore, *prima facie*, I am of the view that the said Judgment cited by the prosecution side cannot be applied to the facts of the present

case atleast at this juncture.

13. Sans, the versions made by P.W1 and P.W.2 in the cross examination, whether the prosecution theory has been proved beyond reasonable doubt by way of other evidences as has been accepted by the trial Court in the Judgment impugned, has to be looked into and this process can very well be made only at the time of full fledged final hearing of the criminal appeal.

14. Since it would take some reasonable time to take up the main criminal appeal and also taking into consideration of the fact that the petitioners have been in jail from 01.8.2014 i.e., more than 3 years, in view of the *prima facie* case that some gray area are *prima facie* found in the case, where detailed examination is required. I am of the considered view that at this juncture, the petitioners can be considered for grant of suspension of sentence as they have already undergone imprisonment of more than 3 years.

15. In view of the above said facts and circumstances, I am inclined to pass the following order:

(i) that the substantive sentence imposed against the petitioners in S.C.No.185 of 2011 dated 01.08.2014 made by the Assistant Sessions Judge, Gingee, alone is suspended, on condition that, the petitioners shall execute a bond for a sum of Rs.25,000/- each with two sureties for a likesum for each of them to the satisfaction of the Judicial Magistrate, Gingee and also the petitioners shall report before the said Court on the first working day of every English calendar month at 10.30 am until further orders.

17. The criminal miscellaneous petitions are accordingly disposed of.

-sd/-
27/10/2017

This order, on being produced, be punctually observed and carried into execution by all concerned

TRUE COPY

Sub-Assistant Registrar (Statistics/C.S.)
High Court, Madras - 600 104.

TO

1 THE ASSISTANT SESSIONS
JUDGE, GINGEE

2 THE CHIEF JUDICIAL MAGISTRATE
VILUPURAM[FOR INFORMATION]

3 THE PUBLIC PROSECUTOR
HIGH COURT, MADRAS.

4 STATE REP.BY
THE STATION HOUSE OFFICER,
GINGEE POLICE STATION,
VILLUPURAM DISTRICT.

+1 C.C. to M/S.J.C.DURAIRAJ Advocate on payment of necessary
charges SR.NO. 19939

Order

in
CRL MP.9132/2017

AND CRL.MP.NO.10838 OF 2016

in
CRL A.426/2014

Date :27/10/2017

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RD 30/10/2017