

**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

DATED: 07.03.2017

CORAM:

WEB COPY

THE HONOURABLE MR.JUSTICE P.N.PRAKASH**Crl.O.P. (MD)No.2414 of 2017****and****Crl.M.P. (MD)No.1900 of 2017**

Rajkumar @ Raja : Petitioner/Accused No.1

Vs.

State rep. by,
Inspector of Police,
Thanjavur Medical College Police Station,
Thanjavur District.
(Crime No.326 of 2007).

: Respondent/Complainant

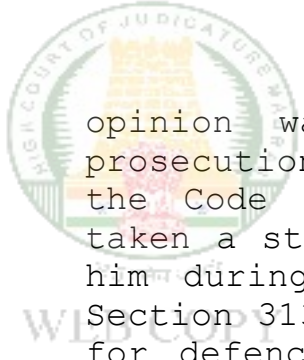
Prayer : Criminal Original Petition is filed under Section 482 of the Code of Criminal Procedure praying to call for the records of the docket order dated 15.02.2017 passed by the learned First Additional District and Sessions Judge (PCR), Thanjavur, in S.C.No.280 of 2007 and set aside the same as illegal.

For Petitioner : Mr.C.Arul Vadivel Alias Sekar

For Respondent : Mr.A.P.Balasubramani,
Government Advocate (Crl.side)

O R D E R

The petitioner is facing trial in S.C.No.280 of 2007 for offences under Sections 120-B, 147, 148, 302 and 382 of the Indian Penal Code r/w Section 149 of the Indian Penal Code. Admittedly, this is a case of circumstantial evidence. It is the case of the prosecution that the accused had gone in a particular car for attacking the deceased and commit his murder. During the course of investigation, the Investigating Officer requisitioned the services of P.W.14 to lift chance finger prints from the car that was said to have been used by the accused, on 30.09.2007. Thereafter, on 01.10.2007, the first accused was arrested and the police had taken his finger prints. The police had sent the finger prints of the accused to the Finger Print Expert for comparison with the chance finger print that was lifted from the car. The opinion was obtained and the same was marked as Ex.P.7. The trial in the case commenced and 25 witnesses were examined including the finger print Expert, who was examined as P.W.14 through when the



opinion was marked as Ex.P.7. After the completion of the prosecution case, the accused were questioned under Section 313 of the Code of Criminal procedure, wherein the first accused had taken a stand that the police had not taken any finger print from him during investigation. After the accused was examined under Section 313 of the Code of Criminal Procedure, the case was posted for defence evidence and since no defence witness was examined, the case was repeatedly posted for arguments. The learned Sessions Judge heard the arguments of both sides and written arguments were also filed. The matter was posted for judgment on the following dates:

"30.11.2016, 14.12.2016, 19.12.2016, 26.12.2016, 02.01.2017 and 23.01.2017."

2. Since the learned Sessions Judge had some doubts, he wanted to examine P.W.14, the Finger Print Expert and called upon him to produce the finger print comparison materials and report. Therefore, the case was adjourned to 06.02.2017 and 13.02.2017. On 15.02.2017, the learned Judge passed the following order:

15.2.17: A6 present. Other Accused absent. S.317 petition filed and allowed. P.W.14 present and reported that the chance prints and Admitted prints are compared on its Original size. The reasoning sheet is not prepared. The enlarged Fr.print will be done only on requisition. Hence this court directs P.W.14 to compare the chance prints with the FPS lifted by I.O. from the Accused by enlarging the same and produces further report along with reasoning sheets. While passing such an order the learned counsel for A1 and A3 objects that such an order cannot be passed at this stage as its amounts to further investigation and to fill up lacunae in the case of the prosecution. However the said objection is not sustainable for two reasons 1) that this court did not order any further investigation that this stage and directing an expert to render opinion u/s 73 Indian Evidence Act did not amount to further investigation. 2) Lacuna in a case of prosecution means inherent defect in the case of the prosecution. But getting opinion from Expert by the court in the Interests of Justice is not amounting to fill up the lacuna of the prosecution case. Hence this court rejects the above objection of the learned counsel for the defence. For producing report, call on 13.03.17."

Challenging the above said order, this petition has been filed.

3. Heard Mr.C.Arul Vadivel Alias Sekar, learned counsel for the petitioner and Mr.A.P.Balasubramani, learned Government Advocate (Crl.side) appearing for the respondent.



4. Mr.C.Arul Vadivel Alias Sekar, learned counsel for the petitioner contended that when once P.W.14 was examined and had deposed, the learned Judge ought not to have passed the order on 15.02.2017, as that would amount to filling up the *lacunae*. He also contended that the provisions of Section 73 of the Evidence Act ought not to have been invoked in this case. It is his submission that the Expert was extensively cross-examined and after the accused had taken a specific stand in the 313 Cr.P.C., questioning, that no finger print was ever drawn from him, the learned Judge ought not to have resorted to this exercise. In support of his submission, he relied upon a judgment of the Hon'ble Supreme Court in **Chandran v. State of Kerala [1991 Supp (1) SCC 39]**.

5. Per contra, the learned Government Advocate (Criminal side) refuted the said submissions.

6. This Court paid its anxious consideration to the rival submissions.

7. The admitted fact is that the Expert was examined as P.W.14 during trial. The moot question is - can a Judge exercise powers under Section 311 of the Code of Criminal Procedure to recall a witness after having reserved the judgment?

8. The issue is no more *res integra*, in the light of the judgment of the Hon'ble Supreme Court in **Rajendra Prasad v. The Narcotic Cell through its Officer-in-Charge [1999(3) Crimes 106 (SC)]**, wherein the Supreme Court has held that in every case where the prosecution files an application under Section 311, the defence will raise the issue of filling up the *lacunae* and that should not deter the Court from exercising the powers under Section 311 of the Code of Criminal Procedure, if the same warrants. In this case, on a reading of the evidence of P.W.14, it is seen that he has not even explained to the Court as to the reasons for his conclusions. The opinion of an Expert is relevant under Section 45 of the Evidence Act and it can be accepted by the Court or rejected by the Court. When once the Court accepts the opinion of the Expert, the opinion gets elevated to the status of the Court's opinion. Therefore, it is the duty of the Court to see that the opinion is supported by valid reasons. In matters relating to comparison of finger prints, it is the duty of the Expert to produce before the Court the enlarged versions and satisfy the Court that the chance finger print lifted from the scene of occurrence is that of the accused. In this case, the evidence of P.W.14 is in a very perfunctory fashion. Only in those circumstances, the learned Sessions Judge appears to have exercised his powers under Section 311 of the Code of Criminal Procedure, calling upon the witness to justify his opinion.



9. It is trite that the Court can exercise powers under Section 311 of the Code of Criminal Procedure *suo motu*, if the Court is of the opinion that the same is essential to the just decision of the case. Under ordinary circumstances, the Public Prosecutor, who was dealing with the case, must have been diligent enough to have properly examined the Expert in chief. For the failure of the Public Prosecutor to bring on record the relevant facts, the Court cannot remain silent and refuse to be proactive, especially in a case of this nature.

10. In **Chandran's** case relied upon by the learned counsel for the petitioner, the Supreme Court was dealing with an appeal against conviction and sentence. On facts, the case differs from the case at hand.

11. As regards Section 73 of the Evidence Act, this Court is of the view that the learned Judge has invoked a wrong provision of law and that cannot be a good reason to say that his decision to recall P.W.14 is vitiated.

12. In the result, this Court does not find any serious infirmity in the order passed by the Trial Court. This petition is devoid of merits and the same is dismissed accordingly. However, if any documents are to be marked, the Trial Court shall ensure that the copies of the same are furnished to the accused in advance and the accused be given sufficient opportunity to cross-examine P.W.14. Consequently, the connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS-II)

/True Copy/

Sub Assistant Registrar

To

- 1.The First Additional District and Sessions Judge
(PCR), Thanjavur.
- 2.The Inspector of Police,
Thanjavur Medical College Police Station,
Thanjavur District.
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

+1cc to Mr.C.Arul Vadivel @ Sekar, Advocate Sr.No. 12903

SML

AE/SKN/RSK/21.03.2017/4P/5C