



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 06.06.2017

CORAM:

THE HON'BLE MR. JUSTICE P.N. PRAKASH

Crl.O.P.(MD)No.5277 of 2017

and

Crl.M.P.(MD)No.3734 of 2017

Iyyankutty

Petitioner

vs.

State rep by
Sub Inspector of Police
Kulasekaram Police Station
Kanyakumari District.
Crime No.570 of 2011

Respondent

Criminal Original Petition filed under Section 482 Cr.P.C. to stay all further proceedings in C.C.No.383 of 2012 on the file of the Judicial Magistrate Court, Padmanabhapuram, pending disposal of the set aside petition.

For petitioner Ms.J.Anandhavalli

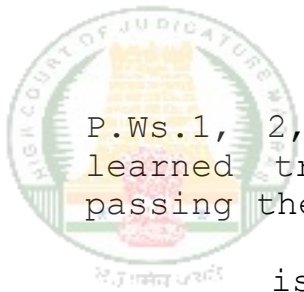
For Respondent Mr.A.P.Balasubramani
Government Advocate

RESERVED ON	27.04.2017
PRONOUNCED ON	06.06.2017

ORDER

This Criminal Original Petition is filed to stay all further proceedings in C.C.No.383 of 2012 on the file of the learned Judicial Magistrate, Padmanabhapuram, pending disposal of the set aside petition.

2. The petitioner is A1 in C.C.No.185 of 2011 on the file of the Judicial Magistrate Court, Padmanabhapuram and is facing prosecution for alleged offences under Sections 147, 148, 447, 47, 294(b) and 506(2) IPC. Trial began on 04.08.2016 with the appearance of P.Ws.1 to 6. At that juncture, the accused filed a petition under Section 309 Cr.P.C. seeking adjournment on the ground that the Advocates are boycotting Courts. The trial Judge did not accede to the request, but proceeded with examination-in-chief of the six witnesses. The accused filed Crl.M.P.No.4028 of 2016 in C.C.No.383 of 2012 under Section 311 Cr.P.C. to recall



P.Ws.1, 2, 5 and 6 for the purpose of cross-examination. The learned trial Judge allowed the application on 12.09.2016 by passing the following order:

"Upon considering all fact this 311 Cr.P.C. is allowed on payment of witnesses batta of Rs.500/- each with amount should be paid at the time of presence of witnesses."

3. The petitioner did not remit the witness batta and once again filed a second petition in CMP No.726 of 2017 in C.C.No.383 of 2012 for recalling P.Ws.1 and 2, which was dismissed by the trial Court on 13.04.2017, aggrieved by which the petitioner is before this Court.

4. Ms.J.Anandhavalli, learned counsel for the petitioner strenuously contended that a fair opportunity should be given to the petitioner/accused for cross-examining the aforesaid witnesses, otherwise, grave prejudice will be caused. She contended that a false case has been foisted on the accused and only if an opportunity to cross-examine the witnesses is afforded to the petitioner/accused, he can get justice.

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

6. It is seen that for an occurrence that had taken place on 31.10.2011, FIR was registered in the year 2011 and charge sheet was filed in the year 2012. When the witnesses came on 04.08.2016, the accused sought adjournment on the ground of boycott of Courts by Advocates. In Harish Uppal [Ex.Capt.] Vs Union of India [(2003) 2 SCC 45], the Supreme Court has held in unequivocal terms that boycott of Courts is illegal and unconstitutional. Therefore, neither the trial Court nor this Court can accommodate such request, as that would clearly amount to violation of the order of the Supreme Court. In this context, it is worth referring to the last Proviso to Section 309 (2), Cr.P.C., which reads as under:

"Provided also that--

a no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party;

b the fact that the pleader of a party is engaged in another Court, shall not be a ground for adjournment;

<https://hcservices.ecourts.gov.in/hcservices/> where a witness is present in Court but a party or his pleader is not present or the party or his pleader though present in Court, is



not ready to examine or cross-examine the witness, the Court may, if thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be."

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Therefore, when the witnesses were present, the trial Judge did not have any other option, but to examine them on 04.08.2016. Thereafter, when the petitioner filed CMP No.4028 of 2016 under Section 311 Cr.P.C., the same was allowed by the learned trial Judge on 12.09.2016 on terms. The accused did not deposit Rs.500/- as witness batta and therefore, the trial Court closed the petition on 09.11.2016. Subsequently, the prosecution examined other witnesses and even at that time also, the petitioner did not express any grievance with regard to he not cross-examining P.Ws.1 and 2.

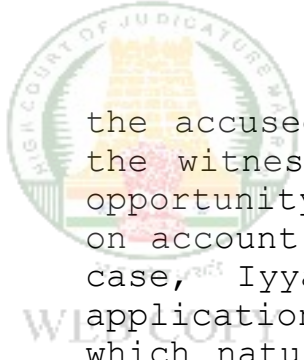
7. Learned counsel submitted that the petitioner/accused was under the impression that only when the witness comes to the witness box, he would have to pay Rs.500/- as batta and therefore, the accused was waiting for the witness to come. However, this explanation is not found in CMP No.726 of 2017 that has been filed by the accused under Section 311 Cr.P.C. In the said petition, the reason is as under:

"1. It is informed that PW1 and PW2 in this case were examined in Chief on 04.08.2016. There witnesses could be cross-examined the same day on the said of the defence as the counsel engaged in this case was out of station on that day.

2. The absence of counsel to court was neither wilful nor wanton.

3. It is essential to cross-examine these witnesses on the side of defence to the just decision of the case."

8. The averments in the petition proceed as if the accused has got an inviolable right to recall a witness at his whims and fancies. In Vinod Kumar vs. State of Punjab [2015 (1) MLJ (Cr1.) 288], the Supreme Court has very clearly stated that witnesses should be cross-examined on the day they are examined-in-chief and no indulgence should be shown to the accused in this regard. In A.G. Vs. Shiv Kumar Yadav and another [(2015) 9 Scale 649], the Supreme Court has held that a petition under Section 311 Cr.P.C. cannot be allowed on the mere asking of the accused, even if the accused is in judicial custody. In this case, on 04.08.2016, the witnesses were not cross-examined by the accused on the ground of boycott of Courts. The trial Judge allowed Cr1.M.P.No.4028 of 2016 on 12.09.2016 on terms, which was not complied with by the accused. Therefore, this is not a case where



the accused did not have sufficient opportunity to cross-examine the witness. On the contrary, the trial Judge had given enough opportunity to the accused to cross-examine the witness and only on account of his supine indifference, he missed the bus. In this case, Iyyankutty [A1/petitioner herein] alone has filed the application under Section 311 Cr.P.C. and not the other accused, which naturally means that they do not want to protract the trial unnecessarily or may be the other accused are adopting a wait and watch strategy to file similar petitions one after the other, which is impermissible. The High Court is aware that, today the accused have scant regard for trial Courts because they have all along been basking on the indulgence shown by the High Court. After Vinod Kumar's case, there is a paradigm shift in witness recall jurisprudence. The message should go loud and clear to the accused that, hereinafter they cannot take the Courts for granted and tire out witnesses.

In the result, this petition is dismissed as being devoid of merits. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS-I)

/True Copy/

Sub Assistant Registrar.

To

- 1.The Judicial Magistrate,
Padmanabhapuram.
- 2.The Sub Inspector of Police
Kulasekaram Police Station
Kanyakumari District.
- 3.The Additional Public Prosecutor
Madurai Bench of Madras High Court
Madurai.

+1CC to M/S.J.Anandhavelu, Advocate, SR.No. 58657

order in
Crl.O.P. (MD) No.5277 of 2017

gms

AM/SV MMS/SAR 1/07.06.2017/2P/5C