

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 15.02.2018

DELIVERED ON : 29.10.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

Crl. R.C.No.1466 of 2017

Murugan

... Petitioner

Vs

State,
rep. by The Deputy Superintendent of Police,
Q Branch CID,
Dharmapuri.

... Respondent

PRAYER : Criminal Revision Case is filed under Sections 397 and 401 of Cr.P.C. against the order dated 18.09.2017 in Crl.M.P.No.45 of 2017 in S.C.No.71 of 2017 on the file of Assistant Sessions Judge, Dharmapuri.

For Petitioner : Mr.R.Sankarasubbu

For Respondent : Mr.G.Harihara Arun Somsankar
Government Advocate (Crl. Side)

ORDER

This Criminal Revision Case has been filed by the petitioner against the order dated 18.9.2017 passed in Crl.M.P.No.45 of 2017 in S.C.No.71 of 2017 on the file of the learned Assistant Sessions Judge, Dharmapuri.

2. The petitioner herein has filed Crl.M.P.No.45 of 2017 under Section 227 of Cr.P.C. praying to discharge him from S.C.No.71 of 2017 pending on the file of the learned Assistant Sessions Judge, Dharmapuri.

3. The case of the petitioner is that he is a practising Advocate and he has been impleaded in S.C.No.71 of 2017 only on the strength of the confession statement given by the first accused, in which, the first accused alleged to have confessed

during the police custody on 14.1.2017 that the petitioner handed DVD player, tape recorder, modem and some pamphlets and booklets to him at Madurai Mattuthavani Bus stand for the use of banned CPI (Maoist) party.

4. According to the petitioner, he used to practice before various Courts in Tamil Nadu and in particular, he defended the false cases foisted against innocent persons branding them as Maoist, including the co-accused person in the present case. Only with an ulterior motive to prevent the petitioner from defending the innocent Maoists, he has been falsely implicated in the case on hand. According to the petitioner, the final report failed to attribute and/or make out prima facie case against the petitioner. Hence, he filed the petition under Section 227 of Cr.P.C. to discharge him from S.C.No.71 of 2017.

5. Resisting the discharge petition, the respondent filed counter stating that the incriminating materials, electronic items, pamphlets seized on the basis of the confession statement of the first accused would clearly reveal the common object and intention of the petitioner. It is stated that the petitioner was a member of the banned CPI (Maoist) organization. The prosecution has made out a prima facie case against the petitioner. There were no valid grounds to discharge the petitioner and the grounds stated in the discharge petition were untenable and unsustainable in law and prayed for dismissal of the petition.

6. Upon consideration of the rival submissions, the learned Assistant Sessions Judge, dismissed the discharge petition. Assailing the same, the petitioner has filed the present Criminal Revision Case.

7. I heard Mr.R.Sankarasubbu, learned counsel for the petitioner and Mr.G.Harihara Arun Somasankar, learned Government Advocate (Criminal Side) for the respondent and also perused the materials available on record.

8. Challenging the order of the learned Assistant Sessions Judge, in his revision, the petitioner has raised the following grounds:

- (1)The petitioner is a practising advocate who defended Maoist accused in Sessions trial and, therefore, with an ulterior motive he was put behind bars nearly for one year.
- (2)The confession of co-accused is not admissible as admitted by the trial court.
- (3)Having held there is no material against the petitioner that he is a member of gang under Section 20 of the Act and the whole case falls

flat on the said ground.

- (4) The trial Court having held the alleged materials seized from the first accused were not incriminating in any manner leading to violence or terrorist activities or unlawful activities and there is no evidence showing the involvement of the petitioner in the case, the petitioner ought to have been discharged.
- (5) Taking totality of the circumstances, there is no evidence against the petitioner.

9. Resisting the Criminal Revision Case, the respondent has filed the counter stating that even after knowing that co-accused Mahalingam @ Nondi Palani was an absconding CPI (Maoist) cadre, the petitioner had facilitated financial support and other sorts of help to him through other accused persons A1 and A4 and thereby has indulged in furthering the activities of the banned CPI (Maoist) organization which has been declared as a terrorist organization as per the provisions of the Unlawful Activities (Prevention) Act, 1967. It is stated that the petitioner had handed over electronic materials and pamphlets containing the ideologies of the banned CPI (Maoist) to the first accused. This act of the petitioner was unbecoming of an Advocate and beyond legal ethics. It is also stated that the petitioner had been actively participating in the activities of banned CPI (Maoist) organizations and had been intentionally helping them in their unlawful activities. Apart from the case on hand, yet another case in Crime No.1 of 2016 under Sections 18A, 18B, 20, 38 of the Unlawful Activities (Prevention) Act, 1967 read with Section 120B I.P.C. was pending against the petitioner and therefore, the trial Court was right in dismissing the discharge petition filed by the petitioner.

10. Assailing the impugned order, the learned counsel for the petitioner submitted that the petitioner, who is a practising Advocate, defended Maoists accused in the Sessions Case trial and in order to tarnish his profession, the respondent falsely implicated the petitioner in this case. The learned counsel would submit that only based on the alleged confession statement of first accused, the petitioner has been falsely implicated in the case and the confession of co-accused was not admissible. The learned counsel further submitted that the learned Assistant Sessions Judge having held that there was no material against the petitioner, erred in saying that the petitioner was a member of gang under Section 20 of the Unlawful Activities (Prevention) Act, 1967. In fact, the prosecution has prima facie failed to show the involvement of the petitioner in the case on hand.

11. Per contra, the learned Government Advocate (Criminal

Side) for the respondent contended that having found that prima facie case has been made out against the petitioner, the trial Court has rightly dismissed the petition and the order of the trial Court is well considered one and there is no need to interfere with the same.

12. The case of the prosecution, as could be seen from the materials on record, is that on an information, the Inspector of Police, NSD Wing, Dharmapuri arrested one Srinivasan, who was arrayed as first accused in this case. During enquiry, the first accused admitted that he was working in naxal organization and thereafter, the Inspector of Police, seized incriminating documents, electronic devices from the first accused. Based on the confession statement given by the first accused, pamphlets, books, pen drives and memory cards were recovered.

13. The allegation against the petitioner is that he gave some portable DVD player, tape recorder, modem to the first accused and also gave some incriminating documents viz., pamphlets, booklet of front organizations of banned CPI (Maoist) party to the first accused on 7.8.2016 at Mattuthavani Bus Stand in Madurai with an intent to further the activities of the banned CPI (Maoist) organization. Further allegation against the petitioner is that he financially helped one Nondi Mahalingam, CPI (Maoist) cadre.

14. The undisputed facts are that the petitioner is a practising Advocate in Madurai Bench of Madras High Court. Initially, the present case was registered by Mathikondapalayam Police Station and thereafter, as per the orders of the Director General of Police, Tamil Nadu, the case was transferred to the "Q" Branch CID, Dharmapuri and the Deputy Superintendent of Police, "Q" Branch CID, Dharmapuri re-registered the case in Crime No.1 of 2017 under Sections 13(1)(b), 20 and 38 of the Unlawful Activities (Prevention) Act and took up further investigation. During investigation, the respondent obtained confession statement of the first accused on 12.1.2017 and based on the confession statement of the first accused, the petitioner has been implicated in Crime No.1 of 2017 as fifth accused and charge sheet was filed. After committal to the Sessions Court, now the case is pending before the learned Assistant Sessions Judge, Dharmapuri and the petitioner is facing trial.

15. The law is well settled that if there was no materials on record to attract ingredients of the offences alleged, the accused is entitled to get discharge in the case.

16. In the case on hand, admittedly, the petitioner was not named in the FIR. He was arrayed as accused (A5) at a later stage based on the confession statement of the first accused

said to be given on 12.1.2017.

17. It is the say of the respondent that the petitioner was arrayed as accused in this case not only based on the confession statement of the first accused, but also the statement of the corroborating witnesses viz., Muthu, Ramesh and Siva and the fact that incriminating materials said to have been handed over by the petitioner to the first accused were subsequently seized from the possession of the first accused at his residence at Bangalore.

18. On a perusal of the statements of so called witnesses viz., Muthu, Ramesh and Siva, it is seen that they have been examined by the respondent police on 14.4.2017 and 15.4.2017 respectively. In their statements, they have stated about the incident that took place on 7.8.2016. Nothing has been produced to show that how the respondent police would be able to rely upon the said statements to the present case that too against the petitioner after a prolonged period.

19. It is pertinent to point out that the learned Assistant Sessions Judge while dismissing the discharge petition observed that though the petitioner has been implicated on the basis of the confession statement of the co-accused, namely Srinivasan (A1), the prosecution alleged to have seized many number of materials of documents as stated above.

20. At this juncture, the learned counsel for the petitioner vehemently submitted that absolutely there was no materials to show that the petitioner was a member of terrorist gang or terrorist organization or involved in terrorist act to constitute the offence. In this connection, it would be appropriate to extract the relevant portion of the order of the learned Assistant Sessions Judge, which reads as under:

"6. But this court feels there are materials and ingredients for the other offences alleged to have been committed by the petitioner. But the involvement of the petitioner only would be decided at the conclusion of the trial. Though there is no clinching evidence as prima facie for the petitioner being the member of the terrorist gang or organization as per Section 20 of the Unlawful Activities (Prevention) Act, 1967, the petitioner at the stage cannot be absolved for the other offences. Therefore, this court feels there are materials and the documents for the prima facie case as against the petitioner/A5 in this case. Hence, this court feels the petitioner is not entitled for discharge at the stage in this case."

Thus, as per the version of the trial Court, prima facie, there was no clinching evidence for the petitioner being the member of the terrorist gang or organization as per Section 20 of the Unlawful Activities (Prevention) Act, 1967.

21. The main contention of the petitioner is that he was not arrayed as named accused as per the FIR and subsequently, he was arrayed as accused No.5 and that there was no identification parade by any eye witness. In the aforesaid circumstances, the Court has to consider whether there is any prima facie case or no prima facie case is made out against the petitioner to decide that he is entitled to be discharged.

22. In the instant case, it is clear that the petitioner herein was originally not arrayed as accused as per the FIR registered against other accused. Subsequently, on the confession statement said to have been given by the first accused, the petitioner was arrayed as fifth accused.

23. Learned counsel for the petitioner submitted that there are no other materials available against the petitioner except the confession statement given by the co-accused and that the statement given by the first accused was used against the petitioner, which would not be trustworthy to frame the charges and/or prosecute against him.

24. Learned Government Advocate though submitted that lot of materials are available to implicate the petitioner in the case on hand, nothing has been produced either before the trial Court or before this Court except the copy of confession statement of co-accused, first accused. Learned Government Advocate further submitted that in the statement recorded by the respondent police under Section 161(3), Cr.P.C., there are certain allegations against the petitioner.

25. It cannot be disputed that the statement recorded under Section 161 (3), Cr.P.C. can be taken supportive of complaint and the FIR registered pursuant to the complaint by the police. When admittedly, the name of the petitioner was not available in the FIR, nothing can be incorporated in the statement recorded under Section 161(3), Cr.P.C, without any other supporting materials against the newly added accused.

26. The respondent recorded the confession statement of the first accused on 12.1.2017 and the statements of Muthu, M.Ramesh and Siva were recorded on 14.4.2017 and 15.4.2017 respectively, wherein they have spoken about the meeting of the petitioner with the first accused during August 2016 at Mattuthavani Bus Stand at Madurai. Since there was huge delay in recording the confession statement of the first accused and the statement of

other witnesses, supra, in respect of the petitioner, the same cannot be used against the petitioner for implicating him in the present case. Of course, it is a matter of evidence, but at least the prosecution prima facie should show some reliable materials to implicate the petitioner in this case. Absolutely, there was total absence as far as petitioner is concerned.

27. The Hon'ble Supreme Court has categorically held in the decision reported in P.Vijayan v. State of Kerala and others, reported in 2010 (2) MWN (Cr.) 379 (SC), relying on various decisions of the Apex Court that a Judge is not a mere post office to frame the charge at the behest of the prosecution, but has to exercise his judicial mind.

28. In Mohd. Chand Hussain v. State of Maharashtra, reported in 1980 CrL. L.J. 860, it has been held that the statement of the accused leading to the discovery cannot be used as against the co-accused. It has also been held that informatory statement amounting to confession of the accused cannot be used against the co-accused with the aid of Section 30 of the Indian Evidence Act.

29. On the facts and material available on record, in the instant case, the Court has to consider whether there was subsequent material available on record so as to implicate the petitioner in this case. However, as stated supra, it is the duty of the prosecution to establish prima facie case against the petitioner based on the materials since he was subsequently arrayed as accused in this case. Admittedly, except the confession statement given by the co-accused/A1, there was no other material available against the petitioner/A5 and there was no identification parade conducted and the petitioner was not identified by any eyewitness.

30. In the instant case, based on the confession statement said to have given by the first accused, on 1.1.2017 the petitioner has been implicated in this case and without identification parade being conducted by the Magistrate, he had been added as fifth accused in the case. Therefore, it is not possible for the respondent to improve the case against the petitioner without any supporting materials against him and hence, the Court below erred in dismissing the discharge petition filed by the petitioner. When the Court below itself in its order held that there was no clinching evidence as prima facie for the petitioner being member of terrorist gang or organization as per Section 20 of the Act, it ought not to have come to the conclusion that at this stage, the petitioner cannot be absolved for the other offences.

31. At this juncture, it is apposite to mention that the petitioner is a practising Advocate and he was appearing for the Maoists. Appearing for a Maoist is not a crime. On the other hand, if a Maoist accused of an offence seeks the professional assistance of a lawyer, it is his duty to defend. Therefore, as rightly submitted by the learned counsel for the petitioner, with an ulterior motive to prevent the petitioner from defending the innocent Maoists, he has been implicated in this case. As a lawyer, the petitioner is said to have contacted the accused persons and during meeting some conversations took place between them. For example, meeting of an accused person in the prison by a lawyer, would not mean that there was criminal conspiracy between them.

32. Absolutely, there was no materials to show that the petitioner is a member of terrorist gang or terrorist organization or involved in terrorist Act to constitute the offence said to have been committed by him in the case on hand. But, the trial Court erred in coming to the conclusion that there were materials and ingredients for the other offences alleged to have been committed by the petitioner. Admittedly, the trial Court failed to narrate what are all the materials available to implicate the petitioner in this case.

33. In order to implicate the petitioner subsequently as accused in the case, as stated supra, there must be materials to show that there is prima facie case made out against him. In the instant case, as stated supra, except the confession statement said to have been given by the co-accused/A1, there is no iota of material available on record to attract ingredients of the offence alleged against the petitioner and the learned Assistant Sessions Judge erred in dismissing the discharge petition filed by the petitioner. Accordingly, I am of the view that the petitioner is entitled to get discharge.

34. In the result, the Civil Revision Case is allowed and the impugned order dated 18.09.2017 passed in CrI.M.P.No.45 of 2017 in S.C.No.71 of 2017 by the learned Assistant Sessions Judge, Dharmapuri is set aside and the petitioner is discharged from S.C.No.71 of 2017. It is made clear that the views expressed by this Court in this order are only in relation to the petitioner/A5.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

vs

To

1. The Assistant Sessions Judge, Dharmapuri.
2. The Deputy Superintendent of Police,
"Q" Branch CID,
Dharmapuri.
3. The Public Prosecutor,
High Court, Chennai-104.

+1cc to Mr.R.Sankarasubbu, Advocate, S.R.No.73705

Cr1.R.C.No.1466 of 2017

SS(CO)
CS/01/11/2018



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