

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 30.08.2018

PRONOUNCED ON : 05.10.2018

CORAM :

THE HONOURABLE MR.JUSTICE P.N. PRAKASH

Criminal Original Petition No.27851 of 2017

and CrI.M.P.No.15942 of 2017

G.Senguttuvan ... Petitioner

Vs.

1.The Inspector General of Police
Trichy & District.

2.The Superintendent of Police
Thiruvarur & District.

3.The Inspector of Police
Paravakottai Police Station
Thiruvarur District.

4.Kayalvizhi Respondents

[R4 impleaded as per order of this Court dated 30.08.2018]

Prayer:- Petition filed under Section 482 Cr.P.C., to direct the respondents to secure A-1, Poyyamozi S/o Palayam in S.C.No.18/2017 and to produce him before the learned Sessions Judge Exclusively for Bomb Blast Cases, Chennai at Poonamallee in view of the judgment of the Hon'ble Apex Court in [2014 (10) SCC Page 406, K.Saravana Karuppasamy vs. State of Tamil Nadu]

For Petitioner : Mr.P.Vijendran

For R1 to R3 : Mrs.M.Prabhavathi
Additional Public Prosecutor

For R4 : Mr.Veerasekaran

O R D E R

This petition has been filed to direct the respondents 1 to 3 to secure A-1, Poyyamozhi S/o Palayam in S.C.No.18/2017 and to produce him before the learned Sessions Judge Exclusively for Bomb Blast Cases, Chennai at Poonamallee.

2. The short point that falls for consideration in this petition is, whether a prosecution witness take a stand before a trial Court that he would give evidence only if the absconding accused is secured.

3. The facts of the case at hand have been graphically set out in the order dated 27.03.2012 of a learned single Judge of this Court, viz., K.CHANDRU, J. (as he then was) in W.P.No.15779 of 2008 and therefore, it may not be necessary to repeat the same. However, to appreciate the contention of the petitioner, it may be necessary to give a brief details of the case.

4. Poyyamozhi [A1] and the deceased Tamilselvan appeared to have had a quarrel earlier, in which, it is alleged that Tamilselvan had held Poyyamozhi [A1] by his shirt collar. To avenge this, on 25.12.2005, Tamilselvan was hacked by a gang allegedly led by Poyyamozhi [A1] in broad day light and his right hand was severed. The gang collected the right hand of Tamilselvan and displayed it to the public as a trophy, thereby sending a message that anyone who dares to touch them would become handless. The Police registered a case in Cr.No.204 of 2005 on 25.12.2005 and after completing the investigation, filed a final report in PRC No.9 of 2006 before the Judicial Magistrate, Mannarkudi, for the offences under Sections 302 r/w 109, 34 and 120-B IPC and Section 4(1)(b) of the Explosive Substances Act, 1908 against nine accused, including Poyyamozhi [A1] and Elangovan [A2]. Elangovan [A2] was an Advocate and was the President of the local Bar Association. At his instance, every possible step was taken by the accused to torpedo the committal proceedings. The decks were cleared only when Senguttuvan, the petitioner herein and the brother of the deceased Tamilselvan filed W.P.No.15779 of 2008, which was disposed of by this Court on 27.03.2012 with a direction to the Judicial Magistrate No.II, Mannargudi, to proceed further with the committal proceedings in PRC No.9 of 2006. The case was committed to the Court of Sessions and now, the case stands trial in S.C.No.18 of 2017 before the Sessions Judge for the exclusive trial of Bomb Blast Cases, Chennai at Poonamallee. While so, Senguttuvan, the petitioner herein, has filed the present petition with the above prayer.

5. Heard Mr.P.Vijendran, learned counsel for the petitioner, Mr.Veerasekaran, learned counsel for the accused and Mrs.M.Prabhavathi, learned Additional Public Prosecutor appearing for the State.

6. Mr.Vijendran, learned counsel for the petitioner submitted that Poyyamozhi [A1] who had masterminded and executed the brutal attack is in abscondence from 2016 onwards and that the police have not taken any effective steps to secure him. He submitted that no useful purpose would be served if the trial as against the other accused proceeds, as, in the event of the other accused being acquitted, Poyyamozhi [A1] would go scot-free. He placed strong reliance on the following judgments to contend that the actual perpetrators of a crime should not go unpunished.

1. Dinubhai Boghabhai Solanki vs. State of Gujarat and others [(2018) 11 SCC 129]

2. Anil Kumar Yadav vs. State (NCT of Delhi) and another [(2018) 12 SCC 129]

7. Per Contra, Mr.Veerasekaran, learned counsel for the available accused submitted that the case has been hanging fire from 2005 and the trial cannot be kept in abeyance on the ground that Poyyamozhi [A1] is in abscondence.

8. On the directions of this Court, Mr.V.Vikraman, IPS, Superintendent of Police, Tiruvarur District, appeared before this Court on 28.08.2018 and filed a detailed status report, wherein, it is stated as follows:

"10. It is submitted that during the course of pending trial, since A-1 is absconding and NBW has been issued against him. Whiles, the case was split up against A-1 in SC No.7 of 2017, dated 10.01.2017 on the file of the Hon'ble District Principal Sessions Judge, Thiruvarur.

11. It is submitted that the above said three S.C. cases vide No.43/2014, 114/2015 and 7/2017 pending on the file of the Hon'ble District Principal Sessions Judge, Thiruvarur were transferred to the Hon'ble Sessions Judge for exclusively trial for Bomb Blast Cases, Poonamallee, based on the ROC No.1999/C/2015-G-1, dated 03.04.2017 and renumbered as Spl.S.C.No.16/2017 17/2017 and 18/2017 respectively and the same were pending. The next hearing date is 30.08.2018 for examination of PWs41 to P.W.50.

12. It is submitted that, the investigation officers conducted the investigation in a fair, free and impartial manner in accordance with law.

All the mandatory provisions have complied. The Inspector of Police registered a case and investigated and the investigation officers after completion of investigation laid a charge sheet against A-1 to A-9. Further, then Inspector of Police took sincere and effective steps to arrest A-1 in order to comply the order of trial court dated 01.11.2016. It is submitted at present the whereabouts of A-1 is not known.

13. It is submitted that the Inspector of Police/Respondent 2 initiated action against A-1's surety. Accordingly, the Hon'ble Judicial Magistrate No.II, Mannargudi took action in M.C.No.39 of 2016, dated 23.12.2016 and fined Rs.5,000/- from one of the surety Tr.Balayyan, while other surety Tr.Kaliyaperumal died on 26.10.2013. Further, then Inspector of Police/Respondent 2 initiated action u/s 82 & 83 Cr.P.C. by getting property details in the name of A-1/Poyyamozhi from the Tahsildar, Mannargudi in O.M.No.11636/2016/B-1, dated 09.12.2016 and the same is pending. Further, the then Inspector of Police/Respondent 2 requested to issue Look Out Circular (LOC) in C.No.8/D8/DCRB/TVR/2017, dated 30.01.2017 to the Foreigners Regional Registration Officer, BOI, Government of India, Chennai through the Superintendent of Police, Thiruvarur District. Further, the Inspector of Police/Respondent 2 formed a special team under lead of one the, team Sub Inspector of Police, Paravakottai P.S. comprising of one Tr.Dinesh Kumar, then Special Sub Inspector of Police and Tr.Senguttuvan, then Special Sub Inspector of Police to execute warrant against A-1 Poyyamozhi. Accordingly, a case was registered in Paravakottai P.S. Cr.No.39 of 2017, u/s 229(A) IPC and the same is under investigation.

14. It is further submitted that the proceeding u/s 82 Cr.P.C. for obtaining proclamation order is pending in the trial court vide Crl.M.P.357/18 for A1, Poyyamozhi and vide or 1 M.P.356/18 for A-3, Aasaithambi. The proclamation order (Form IV) was obtained from the trial court on 27.08.2018, and further proceedings will be taken by the prosecution side."

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

10. On a reading of the status report filed by the police, it is apparent that Poyyamozhi [A1] was arrested during investigation and was released on bail. He absconded some time in 2016 and the police have been taking steps to secure him and bring him to trial. Surety action has also been taken and proclamation has been issued under Section 82 Cr.P.C.

11. Records called for from the trial Court make certain startling disclosure.

12. The petitioner appeared before the trial Court on 25.01.2018 and stated that since Poyyamozhi [A1] is in abscondence, he is scared to give evidence. This was recorded and he was once again recalled on 08.02.2018. On 08.02.2018, he reiterated his earlier stand by stating that he is scared to give evidence and that he will give evidence only if Poyyamozhi [A1] is secured. Therefore, chief-examination was stopped. Again, on 05.04.2018, he appeared before the trial Court and stated that he will give evidence only if Poyyamozhi [A1] is secured and that he is scared to give evidence. The Public Prosecutor has explained to the witness that the case against Poyyamozhi [A1] has been split up and that there is a direction by the High Court to expeditiously complete the trial, despite which, Senguttuvan [P.W.1] did not give his testimony. Since he did not speak anything about the other accused who are facing trial, he was not cross-examined by the defence.

13. Manjula [P.W.2] the wife of the deceased Tamilselvan, appeared before the trial Court on 19.04.2018. In her examination-in-chief, she spoke about the role played by Poyyamozhi [A1], Elangovan [A2], Asaithambi [A3] and Selvam [A4]. In the course of her testimony, she complained of giddiness and her further examination-in-chief was stopped by the Public Prosecutor. She was recalled on 03.05.2018 and on that date, she stated that she will continue with her testimony only if Poyyamozhi [A1] is secured. The Public Prosecutor has explained to her that the case against Poyyamozhi [A1] has been split up and has advised her to proceed further with the testimony. She refused to testify and therefore, her examination-in-chief was stopped. All this has been recorded by the trial Court in the deposition of the witness. Since in her examination-in-chief on 19.04.2018, she had implicated Elangovan [A2], Asaithambi [A3] and Selvam [A4], their counsel wanted to cross-examine her. To the questions posed by the counsel, Manjula [P.W.2] has stated that she will not answer the questions until Poyyamozhi [A1] is secured. Therefore, cross-examination of Manjula [P.W.2] did not proceed further.

14. Similarly, Anbazhagan [P.W.3], Devadoss [P.W.4], Selvam [P.W.5] and Chellapandian [P.W.6] who were all examined on 03.05.2018 have stated in their examination-in-chief that they are scared of giving evidence, since Poyyamozhi [A1] is in abscondence.

15. Likewise, Sekar [P.W.8], Chidambara Thevar [P.W.10], Pandian [P.W.11], Sreenivasan [P.W.12], Muthuvel [P.W.13], Tamizharasan [P.W.14], Shankar [P.W.15] and Veerakumar [P.W.16] have all stated in their examination-in-chief that they are scared to testify and that they will testify only if Poyyamozhi [A1] is secured.

16. This Court expressed its unhappiness in no uncertain terms to Mr.Vijendran, learned counsel for the petitioner and explained to him that the witnesses cannot take a stand that they will depose only if Poyyamozhi [A1] is secured. This Court also explained that under Section 299 Cr.P.C., evidence against an absconding accused can be recorded and that the Court can also record the testimony of the witnesses qua the absconding accused and the same can be treated as substantive evidence, if the conditions enumerated in the said provision are satisfied. This Court also explained that on account of the unreasonable conduct of the prosecution witnesses, the accused who are available may go scot-free, because the trial cannot be put on hold till Poyyamozhi [A1] is secured. Despite such exhortation in English and Tamil, the petitioner struck to his stand.

17. Manjula [P.W.2] has filed an affidavit dated 30.08.2018, wherein, she has stated that Poyyamozhi [A1] is very much available and that if they give evidence in his absence, there is every possibility of he annihilating her family. This apprehension of Manjula [P.W.2] cannot be said to be totally unfounded taking into consideration the antecedents of Poyyamozhi [A1]. But, in law, that cannot be a justification for issuing a direction to the trial Court not to proceed with the trial unless Poyyamozhi [A1] is secured. The law is very clear inasmuch as no witness can refuse to give evidence on oath and such refusal would make him liable under Sections 178 and 179 IPC. Of course, the prosecution for the offences under Sections 178 and 179 IPC can be only initiated by the Court via Section 195 Cr.P.C..

18. To balance the conflicting interest, this Court issues the following directions:

[a] The trial Court shall recall Senguttuvan [P.W.1], Manjula [P.W.2], Anbazhagan [P.W.3], Devadoss [P.W.4], Selvam [P.W.5], Chellapandian [P.W.6], Sekar [P.W.8], Chidambara Thevar [P.W.10], Pandian [P.W.11], Sreenivasan [P.W.12], Muthuvel [P.W.13], Tamizharasan [P.W.14], Shankar [P.W.15] and Veerakumar [P.W.16].

[b] If the witnesses testify, their testimony should be recorded in duplicate and signatures obtained in both.

[c] One set of testimony shall form part of the split up case as against the absconding accused for its use in terms of Section 299 Cr.P.C. The other set of testimony shall form part of S.C.No.18 of 2017.

[d] If the witnesses refuse to avail this opportunity, the trial Court shall proceed further with the trial, in respect of the available accused in accordance with law.

[e] The Superintendent of Police, Thiruvarur, shall provide sufficient security and protection to the witnesses and their families when they came to the Court to give evidence and ensure that no harm befalls them.

Accordingly, this petition is ordered. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS IX)

//True Copy//

Sub Assistant Registrar

सत्यमेव जयते

To

1.The Inspector General of Police
Trichy & District.

2.The Superintendent of Police
Thiruvarur & District.

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3.The Inspector of Police
Paravakottai Police Station
Thiruvavarur District.

4.The Sessions Judge Exclusively for Bomb Blast Cases,
Chennai at Poonamallee.

5.The Public Prosecutor
High Court, Madras.

+1cc to Mr.D.Veerasekaran, Advocate Sr.68668

Crl.O.P.No.27851 of 2017

srg 24/10/2018



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