



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 20.03.2018

CORAM:

THE HONOURABLE MR. JUSTICE P.N. PRAKASH

Crl.O.P. (MD) No.4386 of 2018

and

Crl.M.P. (MD) No.2145 of 2018

V.Malaichamy

: Petitioner

-Vs-

The Inspector of Police,
Vigilance and Anti-Corruption,
Madurai,
In Crime No.4 of 2010.

: Respondent

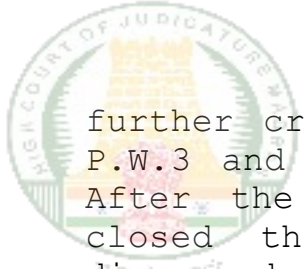
PRAYER: Petition is filed under Section 482 of the Criminal Procedure Code praying to set aside the order passed in Cr.M.P.No.80 of 2018 in Special Case No.70 of 2011 on the file of the learned Special Judge for the Trial of Prevention of Corruption Act Cases, Madurai, dated 06.03.2018.

For Petitioner : Mr.S.J.Chakkaravarthy

For Respondent : Mr.K.K.Ramakrishnan,
Additional Public Prosecutor

O R D E R

The accused is facing a prosecution in Special Case No.70 of 2011 before the Special Court for the Trial of Prevention of Corruption Act Cases, Madurai. It is the case of the prosecution that on 22.01.2010, the accused had demanded and accepted bribe of Rs.1,500/- from P.W.2. It is the further case of the prosecution that the Trap Laying Officer had sent one Mr.Ravi Kumar (P.W.3) as shadow witness to accompany P.W.2. P.W.2 was examined in chief on 18.01.2013 and in the course of the chief examination, he has stated that the Trap Laying Officer had called one Munusamy and one Ravi Kumar as independent witnesses and that Munusamy accompanied him at the time of demand and acceptance by the accused. After the chief-examination, the cross-examination was deferred and P.W.2 was cross-examined by the accused two years later, namely 28.10.2015. He was once again recalled and was



further cross-examined on 15.04.2016. Ravi Kumar was examined as P.W.3 and he gave evidence corroborating the evidence of P.W.2. After the Investigating Officer was examined, the prosecution closed their evidence and the examination of Munusamy was dispensed with. The accused was questioned under Section 313 of the Code of Criminal Procedure and he has also filed his written explanation. Thereafter, the Public Prosecutor observed that P.W.2 had wrongfully given the name as 'Munusamy' instead of 'Ravi Kumar'. Hence, the Public Prosecutor filed an application in CrI.M.P.No.80 of 2018 in Special Case No.70 of 2011 to recall P.W.2 and Munusamy (L.W.4) to clarify this aspect. The Trial Court heard the objections of the accused and by the impugned order dated 06.03.2018, allowed the petition, challenging which, the accused is before this Court.

2. Heard Mr.S.J.Chakkaravarthy, learned counsel for the accused and Mr.K.K.Ramakrishnan, learned Additional Public Prosecutor appearing for the respondent.

3. Mr.S.J.Chakkaravarthy, learned counsel for the accused submitted that the prosecution is attempting to fill up the *lacunae* by recalling P.W.2, especially, after the accused had given his explanation under Section 313 of the Code of Criminal Procedure. Mr.S.J.Chakkaravarthy, learned counsel for the accused placed strong reliance on the judgment of the Rajasthan High Court in **Balwant Singh v. State of Rajasthan [1986 Cri.L.J.1374]**, wherein it has been held that the prosecution cannot be permitted to recall a witness for the purposes of filling up the *lacunae*.

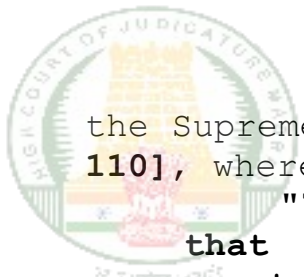
4. Per contra, the learned Additional Public Prosecutor submitted that the prosecution is not seeking to recall P.W.2 to fill up any *lacuna*, but, only to clarify as to whether Munusamy was there or Ravi Kumar was there. The learned Additional Public Prosecutor further submitted that the Trial Court Public Prosecutor should have been more vigilant and should have clarified this aspect in re-examination. But, whereas, he did not do that, because, the chief-examination was in the year 2013 and the cross-examination was two years later, namely in 2015.

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

6. It is true that Section 311 of the Code of Criminal Procedure cannot be invoked in such a manner as to cause prejudice to the defence of the accused. In this case, the Trap Mahazar and the evidence of Ravi Kumar (P.W.3) are to the effect that it was he (P.W.3) who had accompanied P.W.2 at the time of the trap and Munusamy, the other witness, was with the police party watching from a distance.

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7. The question of prejudice came up for consideration before



the Supreme Court in **Rajendra Prasad v. Narcotic Cell [1999(6) SCC 1101]**, wherein the Supreme Court has stated as follows:

"7. It is a common experience in criminal courts that defence counsel would raise objections whenever courts exercise powers under Section 311 of the Code or under Section 165 of the Evidence Act, 1872 by saying that the court could not "fill the lacuna in the prosecution case". A lacuna in the prosecution is not to be equated with the fallout of an oversight committed by a Public Prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage "to err is human" is the recognition of the possibility of making mistakes to which humans are prone. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as a lacuna which a court cannot fill up.

8. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better."

8. In the opinion of this Court, the prosecution is not attempting to fill up any *lacuna*, because they are not seeking to admit any new evidence by springing a surprise. They are only attempting to reconcile the names. In such view of the matter, this Court does not find any infirmity in the order passed by the Court below warranting interference.

9. In the result, this Criminal Original Petition is dismissed. However, the accused is at liberty to cross-examine the witness and also recall the Investigating Officer for the purpose of confronting him with the evidence of P.W.2. Consequently, the connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(W)

/True Copy/



To

1. The Special Judge for the Trial of Prevention
of Corruption Act Cases,
Madurai.

2. The Inspector of Police,
Vigilance and Anti-Corruption,
Madurai.

3. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

+ 1 cc TO Mr.S.J.Chakkaravarthy , Advocate in SR No. 56601

SML

AE/SV MMS/SAR4/11.04.2018/4P/5C

Order made in
Cr1.O.P. (MD) No.4386 of 2018
Dated: **20.03.2018**