



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Orders reserved on : 10.04.2018
Orders pronounced on : 06.07.2018

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THE HON'BLE MR.JUSTICE D.KRISHNAKUMAR

CrI.O.P.(MD) No.4969 of 2018
and
CrI.MP(MD)No.2431 of 2018

1.Muthuraman
2.Manikanda Raja
3.Johnson Dinesh
4.Chermadurai

.. Petitioners

vs.

State rep.by
The Inspector of Police,
Thirukurunkudi P.S.
Earvadi Taluk, Earvadi,
Cr.No.139 of 2015,
Tirunelveli District.

.. Respondent

Petition is filed under Section 482 of Code of Criminal Procedure to call for the records and set aside the orders passed in Cr.M.P.No.252 of 2018 in S.C.No.592/2016 dated 21.03.2018 by the IV Additional Sessions Judge Tirunelveli, Tirunelveli District.

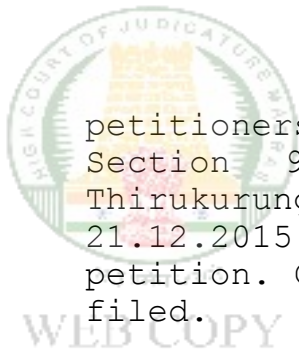
For Petitioners : Mr.V.Kathirvelu
Senior Counsel for Mr.K.Prabhu

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

O R D E R

This Criminal Original Petition has been filed to set aside the order dated 21.03.2018 passed in Cr.M.P.No.252 of 2018 in S.C.No.592 of 2016 by the IV Additional Sessions Judge, Tirunelveli, Tirunelveli District.

2.According to the petitioners, they have been arrayed as accused Nos.5 to 8 in S.C.No.592 of 2016 on the file of the IV Additional Sessions Judge, Tirunelveli, for the offences punishable under Sections 120-B (1), 148, 153-A (1)(b), 364, 302, 302 r/w 149 IPC. The prosecution has examined 40 witnesses and at the stage of examining the accused under Section 313 Cr.P.C, the



petitioners/accused Nos.5 to 8 have filed the application under Section 91 Cr.P.C., to send for the General Diaries of Thirukurugudi and Earvadi Police Stations for the period from 21.12.2015 to 31.12.2015. The Court below has dismissed the said petition. Challenging the order of dismissal, this petition has been filed.

3.The learned Senior Counsel appearing for the petitioners submitted that the petitioners are giving cooperation to complete the examination of the prosecution witnesses in the aforesaid criminal case. At one instance, after examination of the Investigating Officer, the prosecution wanted to mark the document relates to sanction under Section 153(A) IPC and another instance, the prosecution has recalled the Investigating Officer and relevant document has been marked on their side. On the said two occasions, the defence has raised only formal objection, instead of dragging on the proceedings. The General Diaries sought to be sent for by the petitioners are essential and necessary to prove the case of the defence. But, the said fact was not taken into account by the trial Court and the trial Court has lost sight in considering the case of the petitioners. Hence, the order passed by the Court below is liable to be set aside.

4.The present application has been filed under Section 91 Cr.P.C. and the same reads as follows:

"91.Summons to produce document or other thing.

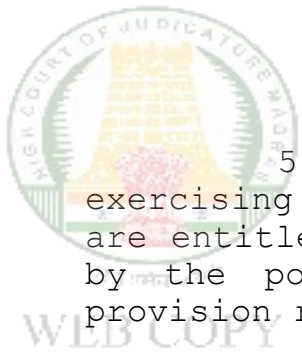
(1) Whenever any court or any officer in charge of a police station considers that the production of any document of or other thing is necessary or desirable for the purposes of any investigation, inquiry, may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be requiring him to attend and produce it or to produce it at the time and place stated in the summons or order.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed -

(a) To affect, sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), or the Bankers, Books Evidence Act, 1891(13 of 1891), or

(b) To apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority."



5.The learned Senior Counsel further submitted that by exercising power under Section 91 Cr.P.C., the petitioners/accused are entitled to send for the relevant documents which are possessed by the police officer under section 172 Cr.P.C. The aforesaid provision reads as follows:

"172.Diary of proceeding in investigation.

(1) Every police officer making an investigation under this Chapter shall day by day enter his proceeding in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation.

(2) Any Criminal Court may send for the police diaries of a case under inquiry or trial in such court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial.

(3) Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the court; but, if they, are used by the police officer who made them to refresh his memory, or if the court uses them for the purpose of contradicting such police officer, the provisions of section 161 or section 145, as the case may be, of the Indian Evidence Act, 1872 (1 of 1872), shall apply."

6.According to the learned Senior Counsel, the documents sought to be sent for by the petitioners are required to substantiate the case of the defence and to disprove the case of the prosecution. The documents sought for by the petitioners can be produced by permitting the petitioners to summon the witnesses and to mark relevant documents and the same will not cause prejudice to the respondent police. The respondent police can also cross examine the witnesses and raise their objections at the time of marking the documents as evidence. Further, it is submitted that relevant information relating to occurrence has been entered in the General Diaries and only on the production of the said documents before the Court, the petitioners can prove their case.

7.In support of his contention, the learned Senior Counsel has placed reliance on an unreported decision of this Court in **Crl.O.P(MD)No.3903 of 2013 dated 12.04.2013 [Ilayaraja Vs. State rep.by the Inspector of Police, Thanjavur]** wherein, at paragraph 11, it is held read as follows:

<https://hcservices.ecourts.gov.in/hcservices/>

"This Court considering the reasons set out in the



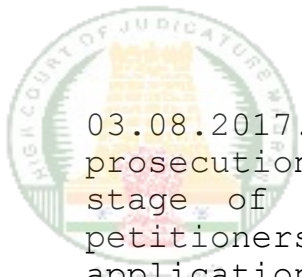
petition filed under Section 91 Cr.P.C. and considering the nature of the documents sought for and the designation of the officer summoned is of the view that the relief can be granted to the accused to give him due opportunity to put forth his case and substantiate his case. However, the respondent is at liberty to raise all objections available to the same in this regard as and when the document will be sought to be marked as evidence in the course of cross examination of the witness. No prejudice at all will be caused to the respondent police by permitting the petitioner to summon the witness and to mark the documents as evidence."

8.The learned Senior Counsel has also relied upon a decision of this Court reported in **2015 4 MLJ (Cri) 493 [State vs. Murugan]**, wherein paragraph - 18 reads as follows:

"18.Next comes the admission made by PW6. According to the lower Court, PW6, during the cross examination, has stated that she received an intimation over phone that there was a murder at 9.00 a.m. itself and the trial Court has held that the said information has been suppressed. We have considered the above submission very seriously. But, a close reading of the evidence of PW6 would go to show that though she said that she received such an information at 9.00 a.m., in the next sentence, she has corrected the same by saying that she received the information only at 10.00 a.m. and she also made entries in the general diary. If really such an entry made in the general diary was favourable to the accused, nothing would have prevented the accused from summoning the same to prove his defence."

9.The learned Senior Counsel appearing for the petitioners would further submit that if the documents, sought to be marked on the side of the petitioners/accused are ordered to be produced, no prejudice will cause to the prosecution and it is useful for the petitioners/accused 5 to 8 to disprove the case of the prosecution. When such a plea has been raised by the petitioners/accused, if the documents as sought by the petitioners are not produced, adverse inference can be drawn in favour of the petitioners/accused 5 to 8. Under such circumstances, the order passed by the Court below is liable to be quashed.

10.The learned Additional Public Prosecutor vehemently opposed the contentions raised on the side of the petitioners/accused 5 to 8. According to the learned Additional Public Prosecutor, the petitioners and other accused are charged for the offence under Sections 120-B (1), 148, 153-A (1)(b), 364, 302, 302 I/P, 149 IPC. The occurrence took place on 21.12.2015. The Additional Sessions Judge, Tirunelveli commenced trial on



03.08.2017. On that day, the prosecution has examined PWs.1 to 6 and prosecution side evidence was closed on 01.03.2018. Now, at the stage of examination of accused under Section 313 Cr.P.C, the petitioners/accused Nos.5 to 8 have preferred the present application before the trial Court.

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11.The learned Additional Public Prosecutor, considering the scope of Section 172 Cr.P.C, has relied upon the decision reported in **2017 - 2 - L.W. (Cr1.) 533 [Balakram vs. State of Uttarakhand and others]**, wherein, at paragraphs - 17, 18, 20 and 21, it has been held as follows:

17. This Court in the case of *Mukund Lal vs. Union of India and Anr[2].*, while considering the question relating to inspection of the entries made in the case diary by the accused has observed thus:-

"We are of the opinion that the provision embodied in sub-section (3) of Section 172 of the CrPC cannot be characterised as unreasonable or arbitrary. Under sub-section (2) of Section 172 CrPC the court itself has the unfettered power to examine the entries in the diaries. This is a very important safeguard. The legislature has reposed complete trust in the court which is conducting the inquiry or the trial. It has empowered the court to call for any such relevant case diary; if there is any inconsistency or contradiction arising in the context of the case diary the court can use the entries for the purpose of contradicting the police officer as provided in sub-section (3) of Section 172 of the CrPC. Ultimately there can be no better custodian or guardian of the interest of justice than the court trying the case. No court will deny to itself the power to make use of the entries in the diary to the advantage of the accused by contradicting the police officer with reference to the contents of the diaries. In view of this safeguard, the charge of unreasonableness or arbitrariness cannot stand scrutiny. The petitioners claim an unfettered right to make roving inspection of the entries in the case diary regardless of whether these entries are used by the police officer concerned to refresh his memory or regardless of the fact whether the court has used these entries for the purpose of contradicting such police officer. It cannot be said that unless such unfettered right is conferred and recognised, the embargo engrafted in sub-section (3) of Section 172 of the CrPC would fail to meet the test of reasonableness. For instance in the case diary there might be a note as regards the identity of the informant who gave some information which



resulted in investigation into a particular aspect. Public interest demands that such an entry is not made available to the accused for it might endanger the safety of the informants and it might deter the informants from giving any information to assist the investigating agency, as observed in *Mohinder Singh v. Emperor*:

"The accused has no right to insist upon a police witness referring to his diary in order to elicit information which is privileged. The contents of the diary are not at the disposal of the defence and cannot be used except strictly in accordance with the provisions of Sections 162 and 172. Section 172 shows that witness may refresh his memory by reference to them but such use is at the discretion of the witness and the judge, whose duty it is to ensure that the privilege attaching to them by statute is strictly enforced." The public interest requirement from the standpoint of the need to ensure a fair trial for an accused is more than sufficiently met by the power conferred on the court, which is the ultimate custodian of the interest of justice and can always be trusted to be vigilant to ensure that the interest of accused persons standing the trial, is fully safeguarded."

18. From the afore-mentioned, it is clear that the denial of right to the accused to inspect the case diary cannot be characterized as unreasonable or arbitrary. The confidentiality is always kept in the matter of investigation and it is not desirable to make available the police diary to the accused on his demand.

19. Since we are not called upon to decide the question as to whether the copy of the case diary or a portion thereof can be provided to the accused under the provisions of the Right to Information Act, we are not deciding the said question in the matter on hand. In the case of *Sidharth etc. etc. vs. State of Bihar*[3], the entire case diary maintained by the police was made available to the accused by the trial Court. In that context certain observations were made by this Court which read thus:-

"...But if the entire case diary is made available to the accused, it may cause serious prejudice to others and even affect the safety and security of those who may have given statements to the police. The confidentiality is always kept in the matter of criminal investigation and it is not desirable to make available the entire case diary to the accused. In the instant case, we have noticed that the entire case diary was given to the accused and

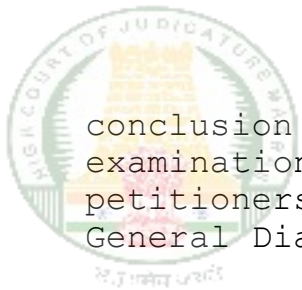


the investigating officer was extensively cross-examined on many facts which were not very much relevant for the purpose of the case. The learned Sessions Judge should have been careful in seeing that the trial of the case was conducted in accordance with the provisions of CrPC."

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20. Since in the matter on hand, neither the police officer has refreshed his memory with reference to entries in the police diary nor has the trial court used the entries in the diary for the purposes of contradicting the police officer (PW-15), it is not open for the accused to produce certain pages of police diary obtained by him under the provisions of Right to Information Act for the purpose of contradicting the police officer.

12. The learned Additional Public Prosecutor further contended that the General Diary is only for the purpose of refreshing the memory of the Investigating Officer and production of such document should not be allowed without any material particulars by the the Court. In the case on hand, the petitioners have not stated sufficient reasons in the application to send for the documents and the said application is bereft of particulars and vague and with an intention to prolong the trial and that too, without making any foundation in the cross examination of the Investigating Officer, the present application has been filed. Further, evidence on the side of the prosecution was closed on 01.03.2018 and the case was posted for examination of the accused under Section 313 Cr.P.C. At this stage, the present petition has been filed without adducing sufficient reason and the General Diary cannot be ordered to be produced in a routine manner. However, if the trial Judge ascertained that it is relevant for the limited purpose laid down under Section 172(3) Cr.P.C., ie., for the purpose of drawing the attention of a witness to contradict any witness, then relevant documents may be called for. To the said extent also, there is no pleading regarding relevancy, necessity and desirability in the present petition. Hence, in the absence of any specific pleading, the trial Court has rightly rejected the application. Further, in the light of the decision rendered by the Hon'ble Supreme Court reported in **2000 (5) SCC 679 [Om Prakash Sharma Vs. CBI, Delhi]** as well as by this Court in **2004(5) CTC 568 [Md. Muzam Vs. Intelligence Officer]**; **2016 Cr1.L.J 470 [Mukesh Kumar Vs. State of Uttarkhand & another]** and **2006 Cr1.L.J 3873 [Dhananjay Kumar Singh Vs. State of Rajasthan]**, mandatory requirement of 'desirability' and 'necessity' have not been established by the petitioners. Therefore, the relief sought by the petitioners cannot be granted and this Criminal Original Petition deserves to be dismissed.



conclusion of prosecution side evidence and at the stage of examination of the petitioners/accused 5 to 8. Further, the petitioners have not stated any satisfactory reason to send for the General Diaries of the respondent police.

14.As stated above, the learned Senior Counsel appearing for the petitioners, in support of his contention, has relied upon the decision of this Court in Cr1.O.P(MD)No.3903 of 2013 dated 12.04.2013. A perusal of the said case reveals that the accused therein has made an application under Section 91 Cr.P.C., after the material witnesses were examined on the side of the prosecution and the accused has also assigned satisfactory reasons for the production of the documents mentioned therein. When the said contention was not appreciated by the trial Court, this Court has interfered with the dismissal order of the trial Court and allowed the application filed by the petitioner therein, calling for the general diary of the respondent police. In the present case, the petitioners have not adduced any satisfactory reason to send for the documents. Therefore, the decision relied upon by the petitioners is not applicable to the present case.

15.Further, the learned Senior Counsel has relied upon the judgment of this Court reported in **2015 4 MLJ (Cri) 493 [State vs. Murugan] (Supra)**, wherein, it is the specific case of the accused that as per the evidence of PW6, the information was received at 09.00 am, in the next sentence, she has corrected the same by saying that she received the information only at 10.00 am and she also made entries in the general diary. Therefore, this Court has observed that if really such an entry is made in the general diary, the accused can very well summon the said witness to prove the defence. But, in the case on hand, no ground is established on the side of the petitioners to produce the general diaries. Therefore, the said decision is also not helpful to the petitioners.

16.As stated above, the learned Additional Public Prosecutor has relied upon the decision reported in **2017 - 2 - L.W. (Cr1.) 533 (Supra)**, in which, scope of Section 172 Cr.P.C. has been dealt with. In the said decision, the Hon'ble Apex Court has held that the accused cannot force police officer to refresh his memory during his examination in the Court by referring to the entries in the police diary. It is also observed that denial of right to the accused to inspect the case diary cannot be characterised as unreasonable or arbitrary. The confidentiality is always kept in the matter of investigation and it is not desirable to make available the police diary to the accused on his demand. Further it is held that it is not open for the accused to produce certain pages of police diary obtained by him under the provisions of Right to Information Act for the purpose of contradicting the police officer. Under the said circumstances, the Hon'ble Apex Court has set aside the order passed by the High Court holding that the High Court is not justified in permitting the accused to produce certain pages of police diary at the time of cross examination of PW15/Investigating



Officer.

17. At this juncture, the learned Senior Counsel appearing for the petitioners contended that the said judgment is with regard to production of police diary. In the present case, the petitioners have requested to produce general diary of the respondent police for the above said period.

18. In reply to the said contention of the learned Senior Counsel, the learned Additional Public Prosecutor has relied upon a decision of this Court reported in **2004 (5) CTC 568 [Md. Muzam @ Thambi Vs. The Intelligence Office, N.C.B. Chennai]** wherein, this Court at paragraph - 15 has held as follows:

"Section 91 Cr.P.C., does not give an absolute right for the accused to ask for summoning any document and it is only when the Court on a consideration of the facts and circumstances, considers that the production of the document or thing sought for is necessary or desirable for the purpose of the trial, enquiry or proceedings, would summon the same but not otherwise. At this stage, when the defence was closed and the matter is posted for arguments, the accused cannot insist upon production of the document viz., log book, which was not available with the department. No reasonable or valid grounds are put forth by the accused warranting interference in the impugned order."

19. The learned Additional Public Prosecutor further relied upon a decision reported in **2016 Cri.L.J. 470 [Mukesh Kumar Vs. State of Uttarkhand and another]**, wherein it is held that "necessary" and "desirable" are the two necessary ingredients for summoning documents. Therefore, in the absence of the said two ingredients, the relief sought by the petitioners cannot be granted.

20. In view of the aforesaid facts and circumstances, it is seen that as per the decisions relied on by the learned Additional Public Prosecutor reported in **2000 (5) SCC 679 [Om Prakash Sharma Vs. CBI, Delhi, 2004 (5) CTC 568 [Md. Muzam Vs. Intelligence Officer]; 2016 Cri.L.J. 470 [Mukesh Kumar Vs. State of Uttarkhand & another]** and **2006 Cri.L.J. 3873 [Dhananjay Kumar Singh Vs. State of Rajasthan]**, mandatory requirement of 'desirability' and 'necessity' have not been established by the petitioners in the present case to invoke Section 91 Cr.P.C.

21. In the light of the decisions cited supra and also in the absence of the pleadings in respect of the said two ingredients in the petition filed by the petitioners under Section 91 Cr.P.C., this Court is of the view that there is no error or irregularity in the order passed by the Court below. Hence, this Criminal Original Petition is liable to be dismissed.



22. In fine, this Criminal Original Petition is dismissed. Consequently, CrI.MP(MD)No.2431 of 2018 is also dismissed.

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Sd/-
Assistant Registrar (CS-III)

/True Copy/

Sub Assistant Registrar

To:

1. The IV Additional Sessions Judge, Tirunelveli,
Tirunelveli District.
2. The Inspector of Police,
Thirukurunkudi P.S.
Earvadi Taluk, Earvadi,
Tirunelveli District.
3. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

+ 1 CC TO Mr.K.PRABHU, ADVOCATE IN SR No. 71555

MJ

TE/SV/SAR-2 : 18/07/2018 : 10P/5C

order made in
CrI.O.P.(MD) No.4969 of 2018
06.07.2018