



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
ORDERS RESERVED ON : 09.10.2018
ORDERS PRONOUNCED ON : 11.10.2018
CORAM
THE HONOURABLE MR.JUSTICE N.ANAND VENKATESH

WEB COPY

CrI.O.P. (MD)Nos.20154 and 21863 of 2016
and
CrI.MP(MD)Nos.10114 and 11264 of 2016

Rajendran ...Petitioner/ Respondent/Accused
in both CrIOPs

Vs

The Inspector of Police,
Papanasam Police Station,
Thanjavur District.

[Crime No.105 of 2010] ... Respondent/Petitioner/Complainant
in both CrIOPs

PRAYER in CrIOP(MD)No.20154 of 2016:- Petition filed under Section 482 of Criminal Procedure Code, to call for the records of the order dated 31.08.2016 passed by the Learned II Additional District and Sessions Judge, Thanjavur in CrMP No.106 of 2016 in SC No.118 of 2012 and set aside the same as illegal and eschew the evidence of PW-43 in respect of the material objects other than the material object not permitted by the Court in CrMP No. 37 of 2015.

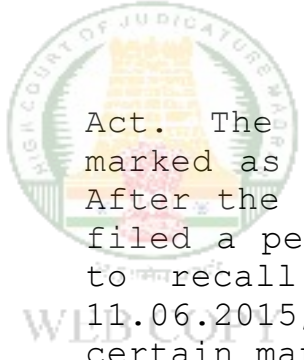
PRAYER in CrIOP(MD)No.21863 of 2016:- Petition filed under Section 482 of Criminal Procedure Code, to withdraw the S.C.No. 118 of 2012 on the file of the Learned II Additional District and Sessions Judge, Thanjavur and Transfer the same to the file of any other competent court in any other District.

For Petitioner : Mr.J.Selvam
For respondents : Mrs.S.Bharathi,
Government Advocate
in both CrIOPs

COMMON ORDER

The petition in CrIOP(MD)No.20154 of 2016 has been filed seeking to set aside the order passed by the Court below in CrMP No.106 of 2016 in SC No.118 of 2012, wherein the Court below dismissed the application filed by the petitioner to eschew the evidence of PW.43.

<https://hcservices.ecourts.gov.in/jcservices/>
2. The petitioner has been arrayed as an accused and he is facing trial before the Court below for the alleged offence under Sections 324, 326, 307 and 302 IPC r/w Section 25(1b) of the Arms



Act. The prosecution had examined 43 witnesses and had also marked as many as 32 exhibits in order to substantiate its case. After the closure of the evidence of PW.43, the respondent Police filed a petition in CrMP NO.37 of 2015, under Section 311 of CrPC to recall PW.43. The Court below passed an order dated 11.06.2015, allowing the petition to recall PW.43 and to mark certain material objects through him.

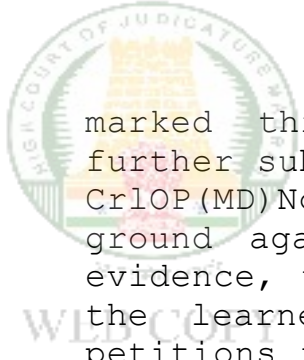
3.This order was challenged by the petitioner before this Court in CrIOP(MD)No.11238 of 2015 and this Court gave liberty to the petitioner to raise all the contentions before the trial Court and refused to interfere with the order of the trial Court to recall PW.43 and to mark certain material objects.

4.Subsequent to the order passed by this Court, PW.43 was examined and MO.15 to MO.25 were marked through PW.43. Thereafter, the petitioner filed another petition in CrMP No.106 of 2016 seeking to eschew the evidence of PW.43.This petition was dismissed by the Court below by an order dated 31.08.2016. Aggrieved by the same, this petition has been filed seeking to set aside the order.

5.The learned Counsel for the petitioner would submit that the respondent Police wanted to recall PW.43 only for the purpose of marking a Gun as a material object. However, the prosecution proceeded to mark many new material objects, which were not shown in the list of material objects filed along with the final report. Therefore, the petitioner had no other alternate, except to file a petition to eschew the evidence of PW.43, insofar as marking of the new material objects are concerned. The learned Counsel for the petitioner would further submit that the entire procedure followed by the Court below is illegal and the trial has not been conducted in a fair manner. The learned Counsel would further submit that the accused person should be given an opportunity in order to know the materials that are being placed against him and in this case that opportunity has been denied and various material objects, which do not form part of the list, were marked through PW.43.

6.On this ground the petitioner has also sought for transfer of the proceedings from the file of the learned II Additional District and Sessions Judge, Thanjavur by filing CrIOP(MD)No.21863 of 2016. According to the learned Counsel for the petitioner, the trial Judge is acting in a biased manner and is allowing the prosecution to introduce new material objects, behind the back of the petitioner.

7.The learned Government Advocate would however submit that the petitioner is dragging the proceedings, which started in the year 2012. The learned Government Advocate would further submit that no new material objects were marked through PW.43 and all those material objects, which were shown in the list at the time of filing of the recall petition in CrMP No.37 of 2015, were only



marked through PW.43. The learned Government Advocate would further submit that pursuant to the orders passed by this Court in CrIOP(MD)No.11238 of 2015, the petitioner cannot raise the same ground again and there is no provision in law to eschew the evidence, which has already been given by the witness. Therefore, the learned Government Advocate sought for dismissal of the petitions filed before this Court.

8.This Court has carefully considered the submissions made on either side.

9.It is seen from records that even when CrMP No.37 of 2015 was filed by the prosecution to recall PW.43, the prosecution had given a list of material objects that was sought to be marked through PW.43. At the time of filing of the Counter, the petitioner had objected to the marking of only the Gun and he did not state anything with regard to other material objects, which were shown in the list. After the Court below allowed the petition filed by the prosecution to recall PW.43 and to mark the material objects, the petitioner filed CrIOP(MD)No.11238 of 2015 before this Court, challenging the said order. This Court has passed the following order in the said CrIOP.

"4.Admittedly, 43 witnesses have been examined. Seeking to recall PW 43 a petition has been filed under Section 311 of CrPC for the purpose of producing certain material objects. Though it was opposed by the petitioner it was allowed by the Court below.

5.The learned Counsel for the petitioner submitted that the prosecution shall not be allowed to fill up the lacuna. This Court does not find any merit in his submission. What the prosecution wants, it seeks to produce the material objects which have not been marked under Section 311 of CrPC. The discretion has been given to the Court below. Such a discretion will have to be exercised to find out the truth. This Court shall not intervene in the discretion only a pervious in the affairs which is followed in the case or not.

6.Ultimately the petitioner will have a change to put forth cross-examine on the said witness, who is recalled and challenge the material objects.

7.Accordingly, this petition shall stand dismissed. However, the petitioner is at liberty to raise all the contentions before the trial Court. Consequently, connected miscellaneous petition is closed."

<https://hcservices.ecourts.gov.in/hcservices/> 10.7.2015 orders were passed, the prosecution recalled PW.43 and had also marked material objects MO.15 to MO.25. As per the directions given by this Court, the petitioner ought to have



availed the opportunity to cross examine PW.43 and to question him with regard to the material objects that were marked through him. The petitioner instead of doing that, proceeded to file a petition to eschew the evidence of PW.43

11.The petitioner has filed this petition under Section 136 of the Indian Evidence Act. This Court is not able to read such a power under Section 136 of the Indian Evidence Act. The provision merely states that the Judge has to decide as to the admissibility of the evidence, by providing three cardinal rules as to the admissibility of the evidence. It is not possible to read the power to eschew the evidence, which had already been taken by the Court, under Section 136 of the Indian Evidence Act. Therefore, the petition filed by the petitioner before the Court below is not maintainable.

12.Even on merits, this Court is not able to find any ground in favour of the petitioner. The Court below while, dismissing, the petition has given the findings as follows:

" The accused himself clearly and categorically admitted in 3rd paragraph of this petition in CrMP No.106 of 2016 that " the counter to CrMP No.37 of 2015 is confined only to those documents referred in the petition in CrMP No.37 of 2015.". So, the accused while filing counter confined with regard to documents referred in the petition CrMP NO.37 of 2015. In the above said petition, above said order four documents were proposed to be marked. PW.43(LW49) Annadurai deposed with regard to the Mos.16 and 17, which are the blood stained Khaki Uniform. In the above said uniform a portion was peeled off which is mentioned in S.No.2, in the list of properties, which is marked as MO.18. The remaining uniform attached materials namely, star, name board rope with cutting position and banyan with cut of shape. The above said items were separately marked as MO.15 and used bullets and unused bullets were marked as MO.24 and MO.25 which is mentioned in the list of properties as Item No.1. So, all the Mos marked through the PW43 (LW49) by way of recalling him are all only permitted properties as per order in CrmP(MD)No.37 of 2015. The above said items sought to be marked by way of separate petition and after hearing both sides speaking order was passed and sufficient was given to the accused. Since he sought for preferring revision. Only after ascertaining from the counsel for the accused that Cr.R.P was dismissed and then the prosecution was permitted to further examine the PW43 (LW49). While marking the material objects, the accused has not raised any objection. Further more, the PW43 was examined during the Advocate boycott period. Hence, after the appearance of the Counsel, the petitioner now came



forward with this petition to eschew the evidence of PW43. The prosecution was permitted to recall and examine the PW.43 to mark relevant documents, which were disclosed to the accused. As per Section 136 of Indian Evidence Act, this Court came to a conclusion that the facts sought to be proved are relevant fact. Hence, this court has permitted the prosecution to mark the documents. The marking of MO.15 to MO 25 are no way be prejudice the accused, since all the documents were already produced before the learned Magistrate and the relevant seizure mahazar were also produced along with charge sheet".

13.The findings of the trial Judge, clearly point out the fact that the petitioner was never put to any surprise by the prosecution. The petitioner was well aware about the material objects that were sought to be marked through PW.43.

14.This Court has already rejected the petition filed by the petitioner questioning the order of the Court below passed under Section 311 of CrPC. After having suffered an order before this Court, the petitioner cannot file a petition before the Court below to eschew the evidence of PW43. To interfere with the order passed by the Court below at this stage will amount to reviewing the earlier order passed by this Court.

15.It is not as if the petitioner has lost all his rights. The petitioner always had an opportunity to cross examine PW.43 and also to put question on the material objects that were marked through PW.43. For reasons best known to the petitioner, the petitioner did not want to avail the opportunity. Rather, the petitioner filed a frivolous petition to eschew the evidence of PW.43.

16.This Court does not find any ground to interfere with the order passed by the Court below and the order passed by the Court below is perfectly correct and in accordance with law.

17.In the result, CrIOP(MD)No.20154 of 2016 is dismissed. The Court below is directed to continue with the proceedings and complete the same within a period of three months from the date of receipt of copy of this order.

18.In view of the above order, this Court does not find any merits in the transfer petition filed by the petitioner and accordingly CrIOP(MD)No.21863 of 2016 is also dismissed. Consequently, CrI.MP(MD)Nos.10114 and 11264 of 2016 are closed.

Sd/-

Assistant Registrar(Records)

/True Copy/



1. The II Additional District and Sessions Judge,
Thanjavur.

2. The Inspector of Police,
Papanasam Police Station,
Thanjavur District.

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

+1cc to Mr.C.Arul Vadivel @ Sekar, Advocate Sr.No.90146

DSK

VB/SV/SAR4/08.11.2018/6P/5C

**order made in
Crl.O.P. (MD) Nos.20154 and
21863 of 2016
11.10.2018**