

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
(Criminal Jurisdiction)

Tuesday, the Twelfth day of February Two Thousand Nineteen

PRESENT

The Hon`ble Mr Justice P.N.PRAKASH
and
The Hon`ble Mr Justice B.PUGALENDHI

CRL A(MD) No.274 of 2011
and
CRL RC(MD)No.310 of 2014

STATE REPRESENTED BY
THE INSPECTOR OF POLICE,
CBI/SCB/CHENNAI.

... APPELLANT/COMPLAINANT
IN CRL A(MD) No.274/2011

POONGODI

... PETITIONER/PW-55
IN CRL RC(MD)No.310/2014

Vs

1 V.P.PANDI @ ATTACK PANDI
2 M.THIRUCHELVAM
3 AROCKIYUAPRABU @ PRABHU
4 M.SARAVANAMUTHU
5 M.MURUGAN @ SORI MURUGAN
6 VIJYA PANDI
7 P.KANDASAMY
8 M.RAMESH PANDI @ ROBERT
9 G.RAMAIHA PANDIAN
10 M.VALLIVITTAN
11 M.THAYAMUTHU
12 V.SUDHAKAR
13 T.RAMESH KUMAR @ MECHANIC RAMESH
14 THIRUMURUGAN @ KATTUVASI MURUGAN
15 I.RUBAN
16 MALIK BATCHA
17 SH.V.RAJARAM

... 1 TO 17 RESPONDENTS/ACCUSED
IN BOTH THE PETITIONS

18 STATE REPRESENTED BY
THE INSPECTOR OF POLICE,
CBI/SCB/CHENNAI.

... 18th RESPONDENT/COMPLAINANT
IN CRL RC(MD)No.310/2014

PRAYER IN CRL A(MD) No.274/2011:

<https://hcservices.ecourts.gov.in/hcservices/> Petition praying that in the circumstances stated therein
and in the petition filed therewith the High Court will be pleased
to set aside the Judgment dated 09.12.2009 in SC.No.3/2009 on the

file of the Hon'ble Principal District and Sessions Judge, Madurai and evidence let in by the prosecution in the trial court may please be considered and the accused persons be dealt in accordance with law.

PRAYER IN CRL RC (MD) No.310/2014:

Petition praying that in the circumstances stated therein and in the petition filed therewith the High Court will be pleased to allow the above Criminal Revision and set aside the order passed by the learned Principal District and Sessions Judge, Madurai in s.C.No.3 of 2019 and dated 09.12.2009.

Order : These petitions coming on for orders upon perusing the petitions filed in support thereof and upon hearing the arguments of MR.R.SUDEVKUMAR, Special Public Prosecutor for CBI case for the petitioner in CRL A (MD) No.274/2011 and 18th Respondent in CRL RC (MD) No.310 of 2014 AND MR.P.ANDIRAJ, Advocate for the Petitioner in CRL.RC. (MD) No.310/2014 and of MR.RUPERT J.BARNABAS, Advocate for R1, MR.R.VENKADESHWARAN, Advocate for R2, MR.R.ALAGUMANI, Advocate for R3, MR.BALASUNDARAM, Advocate for R4, MR.P.BALASUBRAMANIAN, Advocate for R5, MR.T.J.EBENEZER CHARLES, Advocate for R7, MR.G.KARUPPASAMY PANDIAN, Advocate for R8, MR.CHARLIN CHRISTOPHER, Advocate for R9 & R10, MR.J.ANANDKUMAR, Advocate for R12, MR.SENTHIL KUMARAIAH, Advocate for A14, MR.NATARAJAN, Advocate for R15, MR.JINNAH, Advocate for R16, and MR.SUGADEV, Advocate for R17 in both the petitions, the court made the following order:-

When these cases were taken up for final hearing today, Mr. R. Sudev Kumar, learned Special Public Prosecutor for C.B.I. submitted that he does not know to read and write Tamil and a Prosecutor, who is conversant with Tamil, will place his submissions.

2 Mr. Rupert J. Barnabas, learned counsel for V.P. Pandi, @ Attack Pandi/first respondent in Crl.RC. No.310 of 2014 raised preliminary objections by questioning the very competency of this Court to hear the criminal appeal at hand on the following grounds:

a) the very appointment of the Special Public Prosecutor by the C.B.I. is under question.

b) a co-ordinate Bench of this Court has passed an order on 07.08.2017 to post Crl. A. (MD) No.274 of 2011 after two of the accused are secured by the C.B.I.

3 In support of the aforesaid two contentions, he placed reliance on the following portion of the judgment of the Division Bench of this Court in **Lyca Productions vs. J. Manimaran and others**¹:

"42 Judicial discipline demands consistency in rendering judgments. A Bench of the High Court cannot take a view contrary from the one taken by another Bench of co-ordinate strength of the same High Court."

4 In view of the aforesaid two contentions put forth by Mr. Rupert J. Barnabas, it became imperative for this Court to examine the previous adjudications in this case.

5 On perusal of the previous adjudications, it appears that this case has had a chequered history. This case relates to the alleged death of two persons on 09.05.2007 in the office of "Dinakaran", a Tamil daily. The C.B.I. took over the investigation of the case and filed final report and the case was tried in S.C. No.3 of 2009 by the Principal District and Sessions Judge, Madurai, who, by judgment dated 09.12.2009, acquitted all the 17 accused. Assailing the acquittal, the C.B.I. preferred an appeal with a delay of 118 days, to condone which, Crl.M.P. No.1 of 2010 in Crl.A. (MD) SR. No.14670 of 2010 was filed. A Division Bench of this Court comprising S. Rajeswaran and G.M. Akbar Ali, JJ, by order dated 14.03.2011, condoned the delay. The C.B.I. also preferred Crl.O.P. No.3617 of 2011 in Crl. A. (MD) SR. No.14670 of 2010, seeking special leave. A Division Bench of this Court comprising S. Rajeswaran and G.M. Akbar Ali, JJ, after hearing the C.B.I. and the respondents, by a detailed order dated 29.06.2011, granted leave. After the grant of leave, the appeal against acquittal was numbered as Crl. A. (MD) No.274 of 2011. While so, Poongodi, the mother of one of the two deceased, filed a criminal revision challenging the acquittal of the accused together with an application for condonation of delay of 1,434 days in M.P. (MD) No.1 of 2014 in Crl.R.C. (MD) SR No.3917 of 2014. The delay was condoned by Brother Justice G.M. Akbar Ali on 12.06.2014, pursuant to which, the criminal revision was numbered as Crl.R.C. (MD) No.310 of 2014, which was directed to be listed along with the appeal against acquittal preferred by the C.B.I., viz., Crl.A. (MD) No.274 of 2011.

6 Since then, the criminal appeal and criminal revision at hand were getting listed before various Benches from time to time and were getting adjourned primarily on the ground that the counsel for one or the other parties were withdrawing their appearance.

7 When things stood thus, a Division Bench of this Court comprising S. Nagamuthu and V.S. Ravi, JJ, passed the following order on 19.08.2015:

"Mr. M. Karunanidhi, learned counsel, who was on record for the respondents 1 to 5, 8 to 11, 13, 15 and 16, has filed a memo withdrawing his appearance.

Similarly, Mr. Veera Kathiravan, learned counsel for the respondents 6,7,12 and 14 has also filed a memo withdrawing his appearance.

For R17, Mr. Sugadev, learned counsel undertakes to file memo. But, this appeal has been pending from the

year 2011.

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

The revision has been pending from the year 2014.

Since these matters have been pending for the past 5 years, we cannot afford to adjourn the matter simply. We are inclined to appoint a legal aid counsel. Accordingly, Mr. N. Anandakumar is appointed as a legal aid counsel for all the respondents, except R1. The Registry shall supply papers to him.

Post on 03.09.2015."

8 Thereafter, the same Division Bench passed the following order on 27.10.2015:

"Mr. S. Jeyakumar, learned Special Public Prosecutor, is ready to argue the matter. According to him, one technique or the other is adopted by one accused or the other to simply drag on the case from the year 2011. Therefore, he wants the matter to be disposed of as early as possible, as almost, appeals up to the year 2012 have been disposed of by this Bench.

2 Mr. P. Andiraj, learned counsel for the petitioner in Crl.R.C. (MD) No.310 of 2014, would submit that he is also ready to argue the matter and he also wants disposal of this appeal at the earliest point of time.

3 Mr. M. Ajmal Khan, learned Senior Counsel, who has been engaged for the 17th respondent would submit that he needs time to go through the papers.

4 Mr. R. Alagumani, learned counsel, would submit that he has been engaged for accused no.3. But he is not ready to argue the matter, as he has not gone through the papers.

5 Mr. F. Deepak, learned counsel for the 13th respondent, would submit that he is also not ready to argue the matter, though he assured this Court in the last hearing that he would be ready to argue the matter, today. Therefore, there is justification on the part of the learned Special Public Prosecutor Mr. S. Jeyakumar that one technique or the other is being adopted to drag on the proceedings by the accused from the year 2011 onwards. Anyhow, considering the fact that this Bench is going to break after 30.10.2015, we are unable to post this appeal before this Bench and therefore, we are inclined to adjourn the same to 17.11.2015.

6. Mr.N. Anandkumar, learned counsel appearing as legal aid counsel for some of the accused, Mr. M. Ajmal Khan, learned Senior Counsel for R17, Mr. F. Deepak, learned counsel for R13 and Mr. R. Alagumani, learned counsel, who entered appearance for R3, would assure this

Court that they would be ready to argue the case without fail on 17.11.2015. The learned Special Public Prosecutor for the appellant and Mr. P. Andiraj, learned counsel for the revision petitioner would also submit that they would be ready to argue the matter on that day. Therefore, the matter is adjourned to 17.11.2015."

9 Following the aforesaid order, another Division Bench comprising P.R. Shivakumar and V.S. Ravi JJ, passed the following order on 12.01.2016:

"From a perusal of records, it is seen that the respondents had entered appearance through various counsel. Subsequently, the respondents failed to continue their appearance and the advocate engaged by them were directed to report "no instruction". This Court chose to pass an order appointing a legal aid counsel for the accused at the cost of the State.

2. In view of the same, it cannot be said that the accused persons were not served with notice and they were not aware of the pendency of the appeal. They simply adopt the practice of keeping away from the Court with ulterior motive of having the case postponed indefinitely. If such tactics on the part of the accused can be allowed to succeed, there cannot be any other better example of the mockery of justice displayed in the Court. Under the said circumstances, if the appellant has genuine interest in prosecuting the appeal, the appellant should have come forward with a petition for the issuance of warrant under Section 390 of the Code of Criminal Procedure, 1973. Hence, the matters are adjourned to 19.01.2016 to find out whether the appellant is prepared to file such a petition for the issuance of the warrant."

10 On 07.08.2017, a Division Bench comprising M.M. Sundresh and N. Sathish Kumar JJ, passed the following order:

"The learned Special Public Prosecutor appearing for the respondents would submit that efforts have been made to secure the two accused of which one is living abroad.

In such view of the matter, Registry is directed to post this appeal, after the two accused are secured by the appellant."

11 After we were assigned the current portfolio from 04.02.2019, we directed the Registry to prepare an advance list of cases year-wise and publish the same, so that advocates are not taken by surprise and can get ready for disposal. Accordingly, an advance list of Division Bench Criminal Appeals, year-wise, was prepared and published on 08.02.2019, a perusal of which, reveals that CrI.A. (MD) No.274 of 2011 is the oldest pending criminal appeal and therefore, it has been listed as item no.1 in the advance

list. The advance list bears the caption "*Advocates are requested to be ready to argue the case without seeking adjournment*".

12. Under such circumstances, when the cases at hand were taken up for hearing today, Mr. Rupert J. Barnabas, learned counsel for the first respondent in CrI.A. (MD) No.274 of 2011 and CrI.R.C. (MD) No.310 of 2014, made the submissions delineated in para 2 supra.

13. From a perusal of the records, it is seen that notice has not been served on Thayamuthu, 11th respondent in CrI. A. (MD) No.274 of 2011 preferred by the C.B.I. It is the contention of the C.B.I. that the said Thayamuthu is abroad and therefore, they have not been able to serve notice on him till date.

14. The question that now arises for the consideration of this Court is whether this Court should wait eternally for service of notice on the said Thayamuthu and thereby cause prejudice to the case of the prosecution and also the case of the respondents who have entered appearance.

15. Guidance given by the Supreme Court on this aspect are a legion. Suffice it to refer to two judgments of the Supreme Court, viz., **K.S. Panduranga vs. State of Karnataka**² and **L.Laxmikanta vs. State**³, wherein, it has been held in unequivocal terms that the Court can proceed with the matter by appointing a counsel for the accused and after perusal of the records.

16. Further, be it noted that the powers of the Appellate Court under Section 386 Cr.P.C. would apply to an appeal against acquittal under Section 378 Cr.P.C. also. Therefore, this Court appoints Mr. N. Ananthapadmanaban (Enrolment No.208/1985), an advocate having more than three decades of standing in the Criminal Bar, as counsel for not only Thayamuthu, but also for the other accused, in the event of any of them directing their existing counsel to withdraw their memo of appearance, whenever the matter is taken up for hearing.

17. Now, advertent to the preliminary objections raised by Mr. Rupert J. Barnabas on the competency of the Public Prosecutor, it may be apposite to state here that the following three objections were raised by the respondents in the Special Leave Petition in CrI.O.P. No.3617 of 2011:

"12 There are three contentions raised by the respondents to reject the present application seeking leave to file an appeal:

"i) the appellant, viz., the Inspector of Police CBI/SCB/Chennai is not a competent person to file an

ii) The Special Public Prosecutor, CBI, is also not the competent person to present the appeal as there was no authorisation by the Central Government.

iii) The subsequent authorisation will not cure the defect. Therefore, the appeal is non-est."

18 The Division Bench of this Court comprising S. Rajeswaran and G.M. Akbar Ali, JJ, rejected the aforesaid contentions by order dated 29.06.2011, which has not been appealed against, before the Supreme Court till now and as such, has attained finality.

19 Now, it is Mr. Rupert J. Barnabas' contention that the Prosecutor has not got legal authority to argue the appeal before this Division Bench. However, Mr. R. Sudev Kumar, learned Special Public Prosecutor for C.B.I. represented that the C.B.I. wants to bring in a Prosecutor who is conversant with Tamil. Therefore, the competency of the person who is going to appear before us on behalf of the C.B.I. can be decided at the time of passing final orders in the appeal, inasmuch as, there is no provision in the Cr.P.C. to raise this as a preliminary issue for adjudication. Even if the C.B.I. adopts delaying tactics, this Court is not helpless, because, Section 386 Cr.P.C. clearly states that even if the Public Prosecutor does not appear, this Court can peruse the records and pass appropriate orders, as enumerated in Section 386(a) Cr.P.C.

20 Coming to the second contention of Mr. Rupert J. Barnabas that this Court has no competency to hear the appeal in the light of the order dated 07.08.2017 passed by the Division Bench of this Court which has been extracted in para 10 supra, we find little substance in the said contention for the following reasons:

(a) The Chief Justice is the master of the roster.

The roster assigned to us by the Hon'ble Chief Justice is as under:

Sl. No.	Hon'ble Judges	Subject
2	P.N. Prakash, J. and B. Pugalendhi, J.	Habeas Corpus Petitions - (All stages) Criminal Appeals to be heard by a Division Bench, including cases relating to Crime against Women and any other criminal matters to be heard by a Division Bench (All Stages) Criminal Contempt and Appeals relating to orders in Contempt Proceedings (All Stages)

includes Criminal Appeals to be heard by a Division Bench, including cases relating to crime against women and any other criminal matters to be heard by a Division Bench (all stages).

(b) The order dated 07.08.2017 passed by the Division Bench of this Court is not an order on merits of the case or a final order on a question of fact or law for a co-ordinate Bench to follow. The said order dated 07.08.2017 passed by the Division Bench is only an usual adjudication order, which has no binding force on us. In fact, it is worth pointing out at this juncture that, at paragraph no.45 in **Lyca Productions** (supra), relied on by Mr. Rupert J. Barnabas himself, it has been held as follows:

"45. According to settled theory of Precedents, every decision contains three basic postulates, - (i) finding of facts, direct and inferential; (ii) statements of the principles of law applicable to the legal problems that arise in the facts of the case; and (iii) judgment based on the combined effect of the above."

The order dated 07.08.2017 passed by the Division Bench does not pass muster the three basic postulates laid down in paragraph no.45 of **Lyca Productions** extracted above and the said order cannot be elevated to the status of a judgment of a co-ordinate Bench, much less a binding precedent, for this Court to follow.

21 Now, qua fixing a date for the final hearing of the cases at hand, we asked the convenience of the prosecution and the defence. The prosecution and the defence, including Mr. Rupert J. Barnabas, stated that 26.02.2019 would be convenient for them for making their submissions.

Accordingly, both the matters stand adjourned to 26.02.2019 (Tuesday) for final hearing.

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12/02/2019

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Sub-Assistant Registrar (C.S.)
Madurai Bench of Madras High Court,
Madurai - 625 023.

TO

1 THE PRINCIPAL DISTRICT AND SESSIONS JUDGE,
MADURAI.
<https://hcservices.ecourts.gov.in/hcservices/>

2 THE INSPECTOR OF POLICE, CBI/SCB, CHENNAI.

3 THE SUPERINTENDENT,
CENTRAL PRISON, MADURAI.

4 THE SUPERINTENDENT OF POLICE
CENTRAL BUREAU OF INVESTIGATION,
SPECIAL CRIME BRANCH,
BESANT NAGAR, CHENNAI -600 090.

5 THE SUPERINTENDENT,
CENTRAL PRISON, PALAYAMKOTTAI.

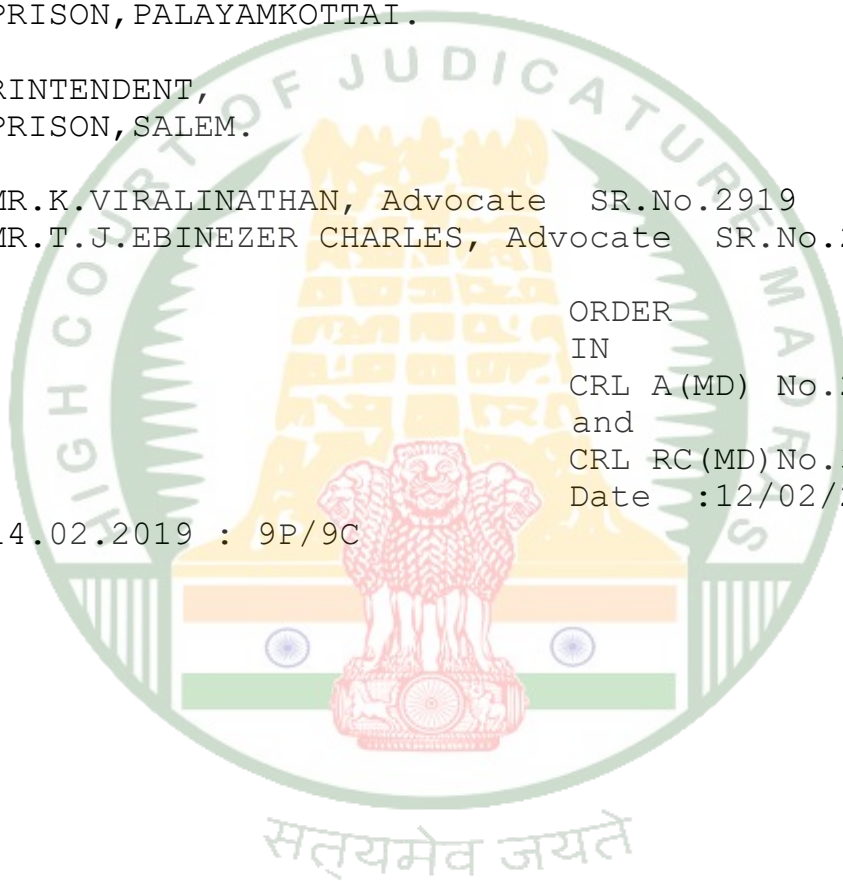
6 THE SUPERINTENDENT,
CENTRAL PRISON, SALEM.

+1. C.C. to MR.K.VIRALINATHAN, Advocate SR.No.2919

+1. C.C. to MR.T.J.EBINEZER CHARLES, Advocate SR.No.2918

ORDER
IN
CRL A(MD) No.274 of 2011
and
CRL RC(MD)No.310 of 2014
Date :12/02/2019

PK/VR/SAR-3/14.02.2019 : 9P/9C



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