

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.09.2020

CORAM:

THE HONOURABLE MR.JUSTICE G.K.ILANTHIRAIYAN

CRL.O.P.No.12200 of 2020
and Crl.M.P.No.4853 of 2020

Mariyaselvam
S/o.Ramasamy

...Petitioner

Vs.

The State Rep by
The Deputy Superintendent of Police,
Mannargudi,
Thiruvarur District.

...Respondent

PRAYER: Criminal Original Petition filed under Section 482 of Cr.P.C. praying to call for the records made in C.M.P.No.140 of 2020 in S.C.No.75 of 2018 dated 16.03.2020 on the file of the Subordinate Court, Mannargudi, and set aside the same as illegal.

For Petitioner : Mr.R.Sankarasubbu

For Respondent : Mr.S.Karthikeyan

Additional Public Prosecutor.

ORDER

This petition has been filed to challenge the order dated 16.03.2020 passed in C.M.P.No.140 of 2020 in S.C.No.75 of 2018 on the file of the Subordinate Court, Mannargudi, thereby dismissing the application filed by the petitioner under Section 233(3) of Cr.P.C., to issue process to the petition mentioned witnesses to attend and produce the documents in support of the defence side.

2. The learned counsel appearing for the petitioner would submit that the petitioner has been charged for the offences under Sections 454, 120B, 397 r/w 395 r/w 34 of IPC and Sections 25(1)(a), 25(1-B)(a), 27(1) of Arms Act and he is under custody for the past two years. However the trial Court while dismissing the petition filed by the petitioner under Section 233(3) of Cr.P.C., stated that only for the reason to delay the proceedings of the case, the said petition has been filed. From the date of his arrest, the petitioner is under custody and the prosecution completed its evidence and posted the matter for defence side evidences. The petitioner has got valuable right to

examine any witnesses and rejection of his application is premature and it is mandatory for the trial Court to allow the defence witnesses to put forth their case and only thereafter the evidensary value has been tested by the trial Court. In this regard, the learned counsel appearing for the petitioner relied upon the following judgments :-

- i) 1982 CrL. L.J. 899 - Parameswara Kurup Janardhanan Vs. State of Kerala
- ii) 2004 (2) CrL. 135 - Srimathi Mallammal Vs State by Chamarajpet police
- iii) 2004 SCC (CrL) 999 - Zahira Habibullah v. State of Gujarat
- iv) CrL.A.No.636 of 2007 dated 27.04.2007 - Ravi @ Ravichandran Vs. State rep by Inspector of Police.

3. Per contra, the learned Additional Public Prosecutor submitted that the right of the petitioner granted under Section 233(3) of Cr.P.C. is not mandatory one. The trial Court can also refuse the request of the accused when it is made for the purpose of vexation or delay or for defeating the ends of justice. In the case on hand, the prosecution have completed their witnesses and posted for defence witnesses. While being so, the petitioner filed this petition to examine the editor and reporters of the Tamil Murasu and Tinakaran news papers of Trichy and Thiruvavarur, to disprove the date of arrest of the petitioner herein, since the newspapers published news, as if the petitioner was arrested on 11.05.2018 at about 2.30 am. The witnesses are editor and reporters of Tamil daily and there is absolutely no specific reason stated by the petitioner to issue process to them. The petitioner has committed very serious offences of robber and dacoity and also attempted to cause death and also committed the offence under Arms Act. Therefore, the news paper cannot be treated as proof and the fact reported therein cannot be considered, since the news paper merely hearsay evidence and therefore the news items are inadmissible evidence. Hence, the trial Court rightly rejected the petition filed by the petitioner and prayed for dismissal of this petition.

4. Heard Mr.R.Sankarasubbu, learned counsel appearing for the petitioner and Mr.S.Karthikeyan, learned Additional Public Prosecutor appearing for the respondents.

5. The petitioner is an accused in S.C.No.75 of 2018 on the file of the Subordinate Court, Mannargudi, and charged for the offences under Sections 454, 120B, 397 r/w 395 r/w 34 of IPC and Sections 25(1)(a), 25(1-B)(a), 27(1) of Arms Act. After completion of the prosecution witnesses, the petitioner filed the petition under Section 233(3) of Cr.P.C., to issue process summons to the witnesses mentioned in the petition viz., to

examine the editor and reporters of the Tamil Murasu and Tinakaran news papers of Trichy and Thiruvarur Division. It is relevant to extract the provisions under Section 233(3) of Cr.P.C., as follows:-

"233. Entering upon defence -

.....

(3) If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice."

6. It is very clear that the trial Court shall issue such process on the application on the request of the accused to the witnesses. At the same time, it can also be refused on the ground of vexation, delay or for defeating the ends of justice. In the case on hand, the accused was arrested and remanded to judicial custody and even till today, he is undergoing imprisonment in S.C.No.75 of 2018. Therefore, there is no question of delay the proceeding of the case, by filing the applicable under Section 233(3) of Cr.P.C., by the petitioner herein.

7. To support of his contention, the learned counsel appearing for the petitioner relied upon judgment reported in 1982 Cr1. L.J. 899 in the case Parameswara Kurup Janardhanan Vs. State of Kerala which reads as follows :-

"6. Section 232 of the present Code corresponds to Section 289(2) and (3) of the old Code; while Section 233 corresponds to Section 289 of the old Code. Section 289(1) of the old Code reads:

When the examination of the witnesses for the prosecution and the examination (if any) of the accused are concluded, the accused shall be asked whether he means to adduce evidence.

Section 233(1) reads: Where the accused is not acquitted Under Section 232, he shall be called upon to enter on his defence and adduce any evidence he may have in support thereof.

The provision in Sub-section (1) of Section 233, Cr.P.C. is undoubtedly a very

salutary provision which is mandatory in nature and intended to protect the interests of the accused person. Under this provision, an accused person is entitled to be reminded of his right to adduce evidence in support of his plea. The counsel for the appellant is right in his submission that the latter part of the mandatory provision in Sub-section (1) of Section 233, Cr.P.C. has not been complied with by the trial Court, as revealed from the judgment and the records available in the case. There is nothing on record to show that the trial Court has called upon the appellant to adduce any evidence he may have in support of his plea. Under Section 233(1), Cr.P.C. there is a duty cast on the trial Court to call upon the appellant to enter on his defence and adduce evidence, he may have in support thereof. It was submitted on behalf of appellant that the violation of the mandatory provision in Section 233(1) has resulted in serious prejudice in the conduct of the defence of the appellant and a valuable right thereunder conferred on him has been denied him. That the accused should be called upon to enter on his defence and adduce evidence he may have in support of his plea is mandatory is clear from the language of the Sub-section (. This is an important rule relating to the trial of a Sessions Case and it is an essential part of criminal trial. The procedure prescribed in this Sub-section (is not an idle formality. Whether the accused would have given an answer or not, it was the duty of the Sessions Judge to have put this question to him. Omission to put this question occasions failure of justice. In the absence of full and effective compliance of the mandatory provisions in Section 233 (1, it cannot be said that the appellant has not been prejudiced in the conduct of his defence. In the circumstance it is only just and proper that the appellant should be given an opportunity to adduce defence evidence, if any, in support of his plea. The argument raised by the

learned Public Prosecutor that in the light of what the appellant stated Under Section 313, Cr, P. C. and in the written statement no useful purpose will be served by giving an opportunity to the accused to adduce evidence is a point to be borne in mind by the trial Judge while evaluating defence evidence, if any adduced.

8. He also relied upon the judgment reported in 2004 (2) Cr1. 135 in the case of Srimathi Mallammal Vs State by Chamarajpet police, which reads as follows :-

"9. From the material on record, it is seen that the accused have been facing serious charge of murder, in addition to other charges. At this stage it is necessary to quote the provisions of Section 233(3) of the Cr. P.C.: "If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice". The provisions of Section 223 of the Cr. P.C. provide that the accused has a right to seek attendance of any witness and the Court/has been enjoined with the power of compelling such witness to appear before the Court unless the Court records reasons for turning down the claim of the accused.

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12. It is also necessary to mention that the matter had been posted to 31-10-2003 and non-bailable warrant to the said Dr. Krishnappa had returned unexecuted. Even on this date, the learned Sessions Judge did not call for a report or explanation from the Station House Officer for non-execution of the non-bailable warrant and also did not report the matter to the higher ups in the Police Department requiring action to be taken against the concerned. The learned Sessions Judge had closed the side, particularly, on the ground that the case is an old case and

the case had been pending at that stage from 5-7-2003. From this, it is clear that the learned Sessions Judge had closed the side of the accused without affording full opportunity to the accused to put forth his defence. It is elementary principle of law that the Court of law should provide full and fair opportunity to both sides to prove of the contentions raised and this exercise should be done within four corners of the law. In the case on hand, patently, the accused had been facing trial in respect of the offence including the offence of murder and the presence of Dr. Krishnappa was not secured by the Court, for no fault on the part of the accused and patently, the learned Sessions Judge had not passed order for issue of process following the provisions of Section 66 of the Cr. P.C."

9. He further relied upon the judgment reported in 2004 SCC (Cr1) 999 in the case of *Zahira Habibullah v. State of Gujarat*, which held as follows :-

"36. The principles of rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the Courts of law. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning Nelson's eyes to the needs of the society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to

the victim and the society. Fair trial obviously would mean a trial before an impartial Judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial

.....
39. Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an overhasty stage-managed, tailored and partisan trial."

10. The learned counsel appearing for the petitioner also relied upon the judgment dated 27.04.2007 passed in Crl.A.No.636 of 2007 in the case of Ravi @ Ravichandran Vs. State rep by Inspector of Police, in which the Hon'ble Supreme Court of India held as follows :-

"11. Photograph of the deceased which had been published in Tamil daily 'Dinakaran' was proved by one King Kong, who examined himself as DW-1. He pursuant to the summons issued to him had brought with him a copy of the newspaper dated 16.08.1993. He in his deposition stated that in the fourth page of the newspaper, two photographs were published showing the persons connected with Tirupur murder case. Their names were also disclosed therein as Udayakumar and Ravi. He was not even cross-examined.

12. The High Court by a curious process of reasoning opined that as the DW-1 did not whisper a word that the photographs published in the newspaper were those of the photographs of the

appellant and the said Udayakumar and as he had not been asked to identify them in court, his evidence was not admissible in law.

13. Objections were taken by the accused that their photographs had been taken in the police station. It has further been accepted that whereas the Accused No. 1 was short in stature, the appellant was tall. The age of the persons who had been selected for test identification parade had not been noted by the Magistrate, who conducted the test identification parade. No person having similar scar mark on his hand was put on the test identification parade."

The above judgments are squarely applicable to the case on hand and this Court feels that the petitioner may be given one more opportunity to put fourth his defence.

11. Insofar as the admissibility of the news item in the newspapers as evidence, it can be considered only after examining the witnesses and marking the news papers. The trial Court can test the evidensary value after examining the witnesses and marking the newspapers. It is settled propositions of law that news items being in the nature of hear-say evidence, unless proved by the witnesses, it can be the best secondary evidence. It is well known that the reporters collected the information and pass it on to the Editor to edit the news items and then published it. Therefore, the news items cannot be said to prove themselves although they may be taken into account with other evidence, if the other evidence is forcible. Therefore, the trial Court can very well consider the evidensary value of the news items and evidence of editor and reporter while disposing the case. The denial of right of the petitioner to examine his witness for the reason that the news paper cannot be treated as proof of facts reported therein and it is merely hear-say and inadmissible in evidence is premature.

12. In view of the above discussion, this criminal original petition is allowed and the order dated 16.03.2020 passed in C.M.P.No.140 of 2020 in S.C.No.75 of 2018 on the file of the Subordinate Court, Mannargudi, is hereby set aside on condition that the petitioner shall examine the witnesses on the date fixed by the trial Court without fail, if the petitioner failed to examine the witnesses on time, the trial Court is directed to proceed the trial in accordance with law. The trial Court is also directed to complete the defence side evidence process within a period of four weeks from the date of receipt of a copy of this Order. The evidensary value of those witnesses and the

exhibits marked through them can be very well tested by the trial Court while disposing the case. Consequently, connected miscellaneous petition is also closed.

Sd/-

Assistant Registrar

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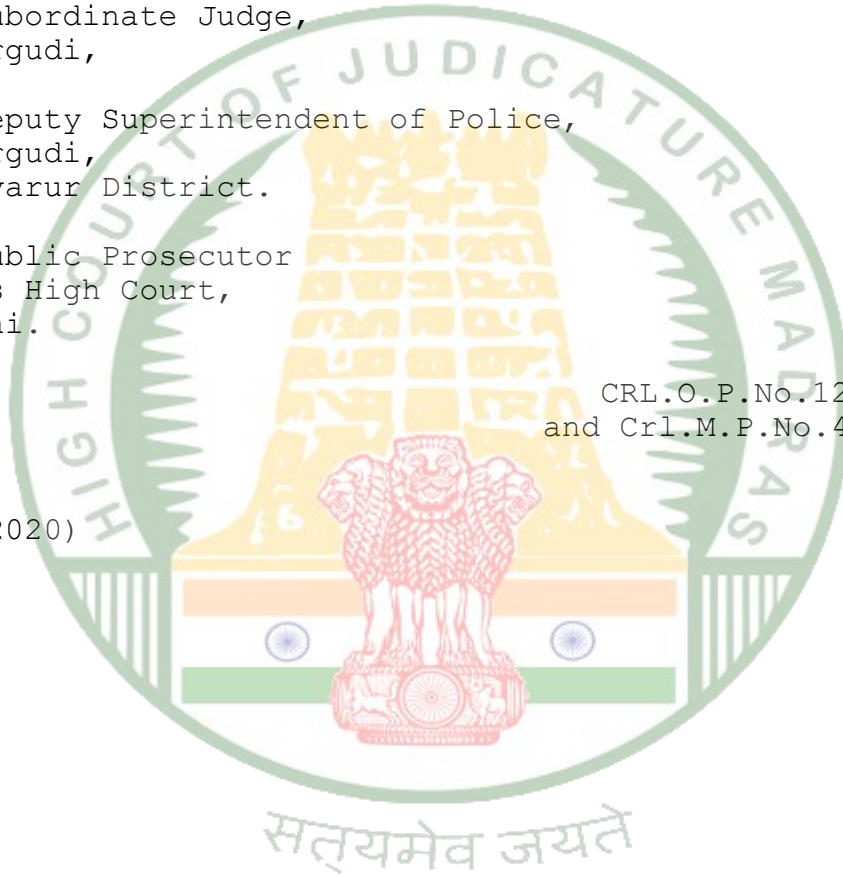
Sub Assistant Registrar

To

1. The Subordinate Judge,
Mannargudi,
2. The Deputy Superintendent of Police,
Mannargudi,
Thiruvarur District.
3. The Public Prosecutor
Madras High Court,
Chennai.

CRL.O.P.No.12200 of 2020
and Crl.M.P.No.4853 of 2020

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