

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 23.01.2020

CORAM

THE HONOURABLE Mr.JUSTICE P.RAJAMANICKAM

CRL.O.P.No.28440 of 2019
and Crl.MP.No.15179 of 2019

Abirami

.. Petitioner

Vs.

State Rep by
The Inspector of Police,
T-13, Kundrathur Police Station,
Kundrathur,
Chennai - 600 069.
Crime No.1101/2018.

..Respondent

PRAYER: Criminal Original Petition filed under Section 482 of the Code of Criminal Procedure, to call for the records in Crl.MP.No.1886 of 2019 dated 20.09.2019 on the file of the learned Mahila Sessions Judge at Chengalpet.

For Petitioner : Mr.G.Krishnamurthy

For Respondents : Mr.M.Mohammed Riyaz
Additional Public Prosecutor

O R D E R

This petition has been filed to set aside the order passed by the learned Mahila Sessions Court Judge, Chengalpattu in Crl.MP.No.1886 of 2019 in S.C.(K).No.77 of 2018 dated 20.09.2019.

2. The learned counsel for the petitioner has submitted that the petitioner has been arrayed as accused No.1 in the above case and he is facing trial for the alleged offence under section 302 IPC. He further submitted that in order to prove his innocence, the petitioner has filed an application under section 91 r/w 93 of Cr.P.C. in Crl.MP.No.1886 of 2019 in S.C.(K)No.77 of 2019 on the file of the Mahila Court, Chengalpattu to call for General Diary from the police station. He further submitted that the learned Trial Court Judge has dismissed the said application relying upon the decision of this Hon'ble Court

in Haji Mohammed and others -Vs- the State rep. by The Inspector of Police, Koradacheri Police Station, Thiruvarur District (2019 (1) MadWN (Cri) 411 as accused is not entitled to call for a General Diary from the police station. He further submitted that the said judgment was over ruled by the Hon'ble First Bench of this Court, in P.Kalaiselvam Vs State rep. by Inspector of Police, Melapalayam Police Station, Tirunelveli District in CRL A (MD) Nos.262 & 263 of 2013, batch dated 07.03.2019 and hence he requests to set aside the order passed by the Trial Court and direct the Trial Court to send for the General Diary from the respondent police.

3. The learned Additional Public Prosecutor has fairly conceded that the judgment passed by the learned Single Judge of this Court in Haji Mohammed and others -Vs- the State rep. by The Inspector of Police, Koradacheri Police Station, Thiruvarur District (cited supra) has been over ruled by the Hon'ble First Bench of this Court in P.Kalaiselvam Vs State rep. by Inspector of Police, Melapalayam Police Station, Tirunelveli District (cited supra) and hence he requests to pass appropriate order in this petition.

4. A perusal of the order passed by the learned Trial Court Judge in Crl.MP.No.1886 of 2019 shows that relying upon the decision of the learned Single Judge of this Court in Haji Mohammed and others -Vs- the State rep. by The Inspector of Police, Koradacheri Police Station, Thiruvarur District (cited supra) has dismissed the petition as the accused is not entitled to call for a General diary in view of the bar under Section 172 of Cr.P.C. The said judgment has been over ruled by the First Bench of this Court in P.Kalaiselvam Vs State rep. by Inspector of Police, Melapalayam Police Station, Tirunelveli District (cited supra). In the said decision, the Hon'ble First Bench has held that what is referred to in Section 172 of Cr.P.C is only the case diary, whereas the General Diary is maintained under Section 44 of the Police Act and finally over-ruled the decision in Haji Mohammed -Vs- the State rep. by The Inspector of Police, Koradacheri Police Station, Thiruvarur District (cited supra). The Hon'ble First Bench held as under:

"24. We are of the view that the prosecution case cannot be thrown out merely on the ground of discrepancies in the general diary. An entry in the general diary is not a substantive evidence. When the learned counsel appearing for the accused sought to refer to Ex.D1, the learned Additional Public Prosecutor submitted that it would not be open to the accused to place reliance thereon in view of the bar set out in Section 172 of Cr.P.C. The learned

Additional Public Prosecutor brought to our attention to the decision reported in 2018(2) LW Criminal 853 (Haji Mohammed Vs. The State rep. by the Inspector of Police, Koradacheri P.S., Thiruvarur District) in which it has been held that a general diary also falls within the scope of Section 172 of Cr.P.C and the bar that has been provided under Section 172 will equally apply to a general diary also. The accused shall not be entitled to call for a general diary, unless it falls within the scope of Section 172(3) of Cr.P.C.

25. While we hold that the discrepancy brought out by the learned Senior Counsel appearing for the accused will not affect the prosecution case, we must also lay down here that the aforesaid decision rendered by the learned Single Judge in CrI.OP(MD) No.26744 of 2018 dated 27.11.2018 (2018(2) LW Criminal 853) does not represent the correct legal position. Section 172 of Cr.P.C. reads as follows:

172. Diary of proceedings in investigation. (1) Every police officer making an investigation under this Chapter shall day by day enter his proceedings 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.

(1-A) The statements of witnesses recorded during the course of investigation under section 161 shall be inserted in the case diary.

(1-B) The diary referred to in sub-section (1) shall be a volume and duly paginated. (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 be 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.

26. The Hon'ble Supreme Court in the decision reported in (1995) 4 SCC 430 (Shamshul Kanwar Vs. State of U.P.) observed that some vagueness or confusion is there in respect of the meaning of the word "diary" used in Section 172 and other Sections of Cr.P.C and suggested that a legislative change is necessary. It did not hold that the general diary or station diary will fall within the scope of Section 172 of Cr.P.C. There is no doubt that as per the police standing orders in force in Tamilnadu, there are two kinds of diaries. One is the station diary or the general diary maintained in the police station itself and the other is the diary maintained by the investigating officer setting forth the day to day proceedings in respect of the case. There is no doubt whatsoever that such a case diary or police diary maintained by the investigating officer is what is referred to Section 172 of Cr.P.C. The learned Judge in Haji Mohammed case has held that not only the case diary but also the general diary maintained in the police station would fall within the ambit of Section 172 of Cr.P.C. The learned Judge extensively refers to the decision reported in (2014) 2 SCC (Lalitha Kumari Vs Govt of Uttar Pradesh) and comes to the conclusion that the ratio that can be culled out from the said judgment is that the right of an accused in relation to a Police file and "the General Diary" is a very limited one and is controlled by Section 172 Cr.P.C.

27. We are constrained to observe that the Hon'ble Supreme Court has nowhere held it to be so. It is true that the expression police diary/general diary have been used somewhat interchangeably. What appears to have escaped the attention of the learned Judge is the categorical observation made in Paragraph No.95 of the aforesaid judgement rendered by the constitution bench. The said para reads as under:

95. The police is required to maintain several records including Case Diary as provided under Section 172 of the Code, General Diary as provided under Section 44 of the Police Act etc., which helps in documenting every information collected, spot visited and all the actions of the police officers so that their activities can be documented. Moreover, every information received relating to commission of a non-cognizable offence also has to be registered under Section 155 of the Code.

Therefore, there can be no manner of doubt that what is referred to in Section 172 of Cr.P.C is only the case diary. This is because the general diary is maintained under Section 44 of the Police Act. They are two distinct documents. In State Vs. H.Srinivas (2018) 7 SCC 572, it has been reiterated that the concept of maintaining general diary has its origin under Section 44 of the Police Act, 1861 as applicable to States. Section 44 of the Police Act reads as under: Police-officers to keep diary. It shall be the duty of every officer in charge of a police-station to keep a general diary in such form shall, from time to time, be prescribed by the State Government and to record therein all complaints and charges preferred, the names of all persons arrested, the names of the complainants, the offences charged against them, the weapons or property that shall have been taken from their possession or otherwise, and the names of the witnesses who shall have been examined. The Magistrate of the district shall be at liberty to call for and inspect such diary.

28. Police Standing Order Nos.706 and 707 of Tamil Nadu Police Standing Orders deal with the contents of the general diary. In some Lal Vs. State of U.P.(1978) 4 SCC 302, the general diary is referred to as a public document. In (1978) 4 SCC 428, (Sadhu Singh Vs. State of U.P., it has been mentioned that entries are made in the general diary about the events that took place in the police station in chronological order and it is ordinarily difficult to fabricate false entries in the general diary. In Bir Singh Vs. State of U.P. (1977) 4 SCC 420, the courts, from the trial court to the Supreme Court, took note of the overwriting in the original general diary. In hundreds of reported decisions, one can find references to the entries made in the general diary and reliance being placed thereon.

29. Section 172 of Cr.P.C came up for interpretation before the Hon'ble Supreme Court in a recent decision reported in (2017) 7 SCC 668 (Balakram Vs. State of Uttarakhand). The Hon'ble Supreme Court after referring to Section 172 of Cr.P.C and Section 145 of the Indian Evidence Act, 1872 held as follows:

9. The afore-mentioned provisions are to be read conjointly and homogenously. It is evident from Sub-section (2) of Section 172 Code of Criminal Procedure, that the Trial Court has unfettered power to call for and examine the

entries in the police diaries maintained by the Investigating Officer. This is a very important safeguard. The legislature has reposed complete trust in the Court which is conducting the inquiry or the trial.

If there is any inconsistency or contradiction arising in the evidence, the Court can use the entries made in the diaries for the purposes of contradicting the police officer as provided in Sub-section (3) of Section 172 of Code of Criminal Procedure. It cannot be denied that Court trying the case is the best guardian of interest of justice. Under Sub-section (2) the criminal court may send for diaries and may use them not as evidence, but to aid it in an inquiry or trial. The information which the Court may get from the entries in such diaries usually will be utilized as foundation for questions to be put to the police witness and the court may, if necessary in its discretion use the entries to contradict the police officer, who made them. But the entries in the police diary are neither substantive nor corroborative evidence, and that they cannot be used against any other witness than against the police officer that too for the limited extent indicated above".

In view of the analysis of the aforementioned cases and the relevant statutory provisions, we hold that the decision reported in 2018 (2) LW (Criminal) 853 (Haji Mohammed Vs. The State rep. by the Inspector of Police, Koradacheri P.S., Thiruvavarur District) has been wrongly decided and we overrule the same.

5. The learned Trial Court Judge has dismissed the petitioner's petition relying upon the decision in reported in 2019(1) MWN (Cri) 411 : 2018(2) LW (Cri.)853 (Haji Mohammed -Vs- the State rep. by The Inspector of Police, Koradacheri Police Station, Thiruvavarur District). The said decision has been overruled by the Hon'ble First Bench of this Court (Madurai Bench) in P.Kalaiselvam Vs State rep. by Inspector of Police, Melapalayam Police Station, Tirunelveli District (cited supra). In respect of PSR (Prisoners Search Register) is concerned, the learned Trial Court Judge has not expressed any views. The learned Additional Public Prosecutor also has not raised any serious objection with regard to the production of PSR. Hence the order passed by the Trial Court is liable to be set aside.

6. In the result, this petition is allowed. The order passed by the learned Sessions Judge, Mahila Court, Chengalpet in Crl.MP.No.1886 of 2019 in S.C. (K) 77 of 2018 dated 20.09.2019 is set aside. The respondent is directed to produce the documents mentioned in Crl.MP.No.1886 of 2019 before the Trial Court.

Sd/-
Assistant Registrar

// True Copy//

Sub Assistant Registrar

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To

1.The Inspector of Police,
T-13, Kundrathur Police Station,
Kundrathur,
Paramathy Velur Range,
Namakkal District.

2.The Sessions Judge,
Mahila Court, Chengalpet.

3. The Public Prosecutor,
High Court, Madras.

+lcc to Mr.G.Krihnamoorthy, Advocate, SR.No.4867.

BR(CO)
CSR: 26.02.2020

CRL.O.P.No.28440 of 2019

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