

IN THE HIGHCOURT OF JUDICATURE AT MADRAS

Reserved on : 20.01.2020

Pronounced on : 07.02.2020

CORAM:

THE HONOURABLE MR.JUSTICE P.RAJAMANICKAM

CRL.OP.No.33088 of 2019
and
CRL.MP.No.18253 of 2019

Kumaresan

...Petitioner

Vs.

The State Rep. By
The Inspector of Police,
T-4, Maduravoyal Police Station,
Chennai - 600 095

..Respondent

Prayer: Criminal Original Petition is filed under Section 482 of the Code of Criminal Procedure to issue necessary directions to the II Additional District and Sessions Court, Thiruvallur at Poonamallee and to eschew the evidence of PW4 adduced during his examination-in-chief on 28.11.2019 in S.C.No.84 of 2019, pending trial before the said Court.

For Petitioner : Mr.Arun Anbumani

For Respondent : Mr.M. Mohamed Riyaz
Additional Public Prosecutor

ORDER

This Criminal Original Petition has been filed by the Accused No.1 to eschew the evidence of PW4 adduced during his examination-in-chief on 28.11.2019 in S.C.No.84 of 2019 on the file of the II Additional District and Sessions Judge, Thiruvallur, at Poonamallee.

2. The case of the prosecution is that one Nalini W/o.Rajesh suspecting foul play in the death of her husband Rajesh who died on 15.07.2018 lodged a complaint on 20.07.2018 and based on the said complaint, the respondent has registered a case in Cr.No.719 of 2018 on 20.07.2018 under Section 174 of

Cr.PC., During investigation, CCTV footages were seized from the camera which was installed near the scene of occurrence. The said CCTV footages show that on 15.07.2018 at about 06:30 p.m., the deceased Rajesh was consuming liquor along with one Sivakumar (PW4) and one Sundarraaj (PW5) at Alapakkam Main Road near Mahalakshmi Enterprises Firewood Depot; that the petitioner herein joined with them and consumed liquor and all of them left the said place of occurrence; that the petitioner called the deceased to come back to the said place again to have liquor; that the petitioner came to the place of occurrence at about 21:10 hours, prior to arrival of the deceased, at about 21:15 hours, the petitioner has prepared a mixture of cyanide in liquor in one glass and liquor alone was poured in another glass, and that when the deceased thereafter came there, the petitioner gave the cyanide mixed liquor glass to him which was consumed by the deceased inside the car. Since the deceased has not returned to the house, the deceased's wife Nalini (defacto complainant), went to the scene of occurrence and found that the deceased fallen down in front of the car in an unconscious state and she took him to the hospital and there, the doctor declared him as dead.

3. Based on the aforesaid CCTV footages, the respondent has arrested the petitioner on 22.07.2018 and obtained confession and also recovered material objects. The petitioner gave a confession before the police that there was an affair for him with one Padmavathi (A2) and that the deceased also having affair with her and hence, the petitioner and A2 conspired to murder the deceased and in pursuance of the said conspiracy, the petitioner has administered cyanide poison by mixing in liquor to the deceased and based on the said confession, the Accused No.2 was also arrested and after completing the investigation, a charge sheet was filed against the accused persons under Sections 302 r/w. 120-B and 114 of IPC.

4. During trial, on the side of the prosecution, P.Ws.1 to 5 were examined. The deceased's wife viz., Tmt.Nalini was examined as PW1 and through her, two CDs containing CCTV footages were marked as M.Os.1 and 2. One Sivakumar was examined as PW4 on 28.11.2019, during his chief-examination, the CDs (M.Os.1 and 2) were played before the court and the learned Public Prosecutor has asked questions by showing the said CCTV footages. Aggrieved by the same, the Accused No.1 has filed the present petition to eschew the chief-examination of PW4.

5. The learned counsel for the petitioner has submitted that on 28.11.2019, one Sivakumar was examined as PW4 on the side of prosecution. After his initial chief-examination, CCTV footages were sought to be played through a laptop after obtaining permission from both side counsel. The defence merely

consented to the CCTV footages being played in the laptop of the learned Public Prosecutor. However, to the shock and surprise of the defence, the Learned Public Prosecutor in the trial court showed the CCTV footages to PW4 and put leading questions to him suggesting the answer which the learned Public Prosecutor expected to receive from the said witness and the same was objected to by the defence as the same was contrary to the Evidence Act. However, the objections were overruled by the trial court and the learned Public Prosecutor has asked as many as 32 leading questions to the PW4 and the answers to the same were recorded as Sl.Nos.1 to 32 in PW4's examination-in-chief. He further submitted that the questions put to PW4 were not recorded by the trial court in the deposition. The objections raised by the defence were also not recorded by the trial court in the deposition.

6. The learned counsel for the petitioner has further submitted that the objection raised by the defence would have been recorded in CCTV camera installed in the trial court. He further submitted that inspite of the objections raised by the defence, the trial court has permitted the learned Public Prosecutor to ask leading questions to PW4. He further submitted that some of the questions were asked to the PW4 with regard to CCTV footages recorded even after PW4 left the said place. He further submitted that the cross-examination of PW4 was deferred by the defence and the prosecution proceeded to examine one Sundarraaj as PW5 and the said PW5 was examined-in-chief in part and adjourned to 10.02.2019 for continuation of chief-examination. He further submitted that since the learned Public Prosecutor has suggested the answers to PW4 and the trial court has recorded the same without even recording the objections raised by the defence side, chief examination of PW4 has to be eschewed or otherwise great prejudice would be caused to the petitioner.

7. The learned counsel for the petitioner in support of his contentions has relied upon the following decisions:

1. Varkey Joseph Vs. State of Kerala 1993 Supp (3) SCC 745
2. Dinesh Dutt Joshi Vs. State of Rajasthan and Another, (2001) 8 SCC 570
3. A.V. Sivakumar Vs. A. Shanmugam, 2010 SCC OnLine Mad 221
4. Ashakumar Vs. S. Vijayalakshmi and another, 2012 (1) MWN (Cr.) DCC 47 (Mad.)
5. S. Yuvaraj Vs. State rep. By The Inspector of Police, Gobichettypalayam, 2013 (6) CTC 320.

8. Per contra, the learned Additional Public Prosecutor has submitted that the deceased namely Nalini was examined as PW1. She has deposed in her evidence that on 21.07.2018 at about 07.30 p.m., the police called them and accordingly, she, her mother-in-law Mary, father-in-law, Sampath went to the police station. There they have been shown the CCTV footages stating that the same were recorded in a camera which has been installed near the place of occurrence. After watching the said CCTV footages, she has narrated everything before the court what she has seen in the said CCTV footages, but the CD's containing the said CCTV footages were not marked through her at that time. He further submitted that during cross examination on the side of A1, questions were asked to PW1 by referring to the said CCTV footages, but a suggestion was put that what she has stated in her evidence was not recorded in the CCTV footages and at that stage, with the permission of the court, the learned Public Prosecutor has marked the two CDs containing CCTV footages as M.Os.1 and 2 and thereafter again on the side of the A1 (petitioner herein), the said witness was cross examined by referring to the said CCTV footages. He further submitted that during the said cross-examination, on behalf of the petitioner questions were asked with regard to the CCTV footages even by referring to the times and events recorded in the said CCTV footages.

9. The learned Additional Public Prosecutor has further submitted that one Sivakumar was examined as PW4 on 28.11.2019 and he deposed that on 15.07.2018 at about 6.00 p.m., he along with the deceased and one Sundarraaj went to one fire wood depot which is situated nearer to the deceased's house and there, all of them consumed liquor and at that time, the petitioner herein contacted him through his mobile phone and asked him about his location and for that, he replied that they are in the fire wood depot and consuming liquor and thereafter, the petitioner came there and also stated what happened thereafter. He further submitted that during his chief-examination, he has voluntarily stated that on 21.07.2018, at about 7.00 p.m., the police called him and hence he went to the police station and there, the police played the CCTV footages in a cellphone and on watching the said CCTV footages, he has stated what was recorded in the said CCTV footages and only thereafter, in order to ask questions by referring to the CCTV footages, the CD was played in the Public Prosecutor's Laptop with the consent of both side counsel.

10. The learned Additional Public Prosecutor has further submitted that PW4 deposed by watching the CCTV footages and narrated the occurrence by referring to the times recorded in the said CCTV footages, but the learned Public Prosecutor has

not asked any leading questions. He further submitted that at the time of recording the PW4's evidence, objections were not raised on the side of the defence. Only as an after thought, the petitioner has filed the present petition to eschew the evidence of PW4. He further submitted that PW4 has not stated any new facts. He has deposed before the court just what has been seen by him in the CCTV footages. He further submitted that since already the CDs containing the CCTV footages were marked as M.Os.1 and 2, only for better use by the parties and court, the scenes of CCTV footages were recorded through PW4 and if his evidence is eschewed, that would cause prejudice to the prosecution and therefore, he prayed to dismiss this petition.

11. In the typed set of papers filed by the petitioner xerox copies of the depositions of Pws.1 to 5 are enclosed. A perusal of PW1's deposition shows that she was examined-in-chief on 23.09.2019. At that time, she deposed that on 21.07.2018 at about 07.30 p.m., she was called by the police and accordingly, she went to the police station along with her mother-in-law Mary and father in-law Sampath. She further deposed that in the police station, CCTV footages were played stating that the same were recorded in the camera which has been installed near the place of occurrence. She further deposed that in the said CCTV footages, she has noticed that the petitioner herein has mixed something along with liquor and gave to her husband and thereafter, her husband consumed the same and thereafter he became unconscious. After completing the chief-examination on 23.09.2019, the case was adjourned to 01.10.2019 for cross examination of PW1. On 01.10.2019, PW1 was cross-examined on behalf of A1 (petitioner herein). She was elaborately cross-examined by touching various aspects including the CCTV footages and finally one suggestion was put as follows:

“ சி.சி.டி.வி கேமிராவில் நான் பார்த்ததாக சொல்லும் விவரங்கள் எதுவும் அந்த சி.சி.டி.வி கேமிராவில் இல்லை என்று சொன்னால் சரியல்ல.”

12. Thereafter, the trial court has recorded that since PW1 has already deposed in her chief-examination with regard to CCTV footages, for the purpose of cross-examination by referring to the said CCTV footages, two CDs containing CCTV footages were marked as M.Os.1 and 2 through the said witness. Thereafter the accused were permitted to cross examine PW1. One of the CDs (MO1) was played in a laptop and the same was shown to the PW1. On behalf of A1, questions were asked to the said witness by referring to the events and times recorded in the said CCTV footages. After completion of cross examination of A1, the said witness was cross-examined on behalf of A2. On behalf of A2 also, the PW1 was elaborately cross examined with reference to various aspects including the CCTV footages which was played before the court.

13. On 28.11.2019, one Sivakumar was examined as PW4. The said witness has deposed that on 15.07.2018 at about 06:00 p.m., the deceased and one Sundarraaj assembled near fire wood depot for consuming the liquor and he further deposed that subsequently the petitioner herein also joined with them. He further deposed that on 21.07.2018, at about 7:00 p.m., he was called by the police and accordingly, he went to the police station and there the police showed the CCTV footages through cellphone and he stated what he has seen in the said CCTV footages and everything has been recorded in his evidence. Thereafter with the consent of both side counsel, one of the CDs was played through the Public Prosecutor's laptop and permitted the Learned Public Prosecutor to ask questions by referring to the said CCTV footages. Accordingly, the chief examination was continued. The witness has answered by referring to the times and events. In the deposition of PW4, nothing has been recorded as to whether any objection was raised on the side of the accused when the said witness was examined-in-chief by referring to the CCTV footages. Therefore, the contention of the learned counsel for the petitioner that in spite of the objections raised by the defence side counsel, the trial court has permitted the Public Prosecutor to ask leading questions, cannot be accepted.

14. It is also to be pointed out that CDs containing footages were marked through PW1 only to enable the accused to cross examine the said witness by referring to the CCTV footages. Further, one of the CDs (MO1) was played before the court during cross-examination of PW1 and the said witness was cross examined by referring to the times and events which were recorded in the said CCTV footages. When the accused persons themselves chosen to ask questions during cross examination by referring to the times and events recorded in the CCTV footages, this court is of the view that there is no bar for the prosecution to ask questions by referring to the said CCTV footages. Furthermore, as already pointed out, the said CDs containing CCTV footages were already marked as MOS 1 and 2 and in such a case, the court can play the said CDs and verify the contents therein and use the same for taking decision in the case. PW4 has not stated any new facts in his chief-examination. He just deposed by watching the CCTV footages which has been played before the court through a laptop. Further, nothing is found that any leading question was asked on the side of the prosecution. If the deposition is recorded in question and answer form, this court will have an opportunity to see whether any leading question was asked in this case. Since the deposition has not been recorded in question and answer form, it cannot be inferred from the answers alone that a leading questions were asked.

15. As already pointed out that since the CDs containing CCTV footages were marked as M.Os 1 and 2, and already, elaborately on behalf of the petitioner herein, PW1 was cross examined by playing the CD before the court by referring to times and events recorded in the said CCTV footages, even if the chief examination of PW4 is eschewed that would not serve any purpose.

16. In Varkey Joseph Vs. State of Kerala (cited supra), the appellant therein was charged, found guilty, and convicted under Section 302 IPC and was sentenced to undergo Rigorous Imprisonment for life for causing the death of his brother Mathew and the same was confirmed on appeal by the High Court of Kerala. Against the same, the appellant has filed an appeal before the Hon'ble Supreme Court by Special Leave. In that case, the Sessions Court has recorded the evidence in the form of questions put by the prosecutor and the defence counsel and answers given by each witness. On seeing the said deposition, the Hon'ble Supreme Court has found that the leading questions were asked on the side of the prosecution to the prosecution witnesses and hence the Hon'ble Supreme Court has held that the said evidence cannot be taken into consideration. But in this case, as already pointed out that the trial court has not recorded the evidence of PW4 in question and answer form and under the said circumstances, this court cannot infer from the answer alone that leading questions were asked by the learned Public Prosecutor. Therefore, the aforesaid decision will not help the petitioner herein.

17. In Dinesh Dutt Joshi Vs. State of Rajasthan and Another, (cited supra), the Hon'ble Supreme Court in paragraph No.6 has observed as follows:

"Section 482 of the Code of Criminal Procedure confers upon the High Court inherent powers to make such orders as may be necessary to give effect to any order under the Code, or to prevent abuse of the process of the any Court or otherwise to secure the ends of justice. It is well established principle of law that every Court has inherent power to act ex debito justitiae - to do that real and substantial justice for the administration of which alone it exists or to prevent abuse of the process of the Court. The principle embodied in Section is based upon the maxim: Quando lex aliquid alicuiconcedit, concedere videtur id quo res ipsa esse non potest i.e. when the law gives anything to anyone, it gives also all those things, without which the thing itself would be unavailable. Section does not confer any new power, but only declares that the High Court possesses inherent powers for the purposes specified

in the Section. As Lacunae are sometimes found in procedural law, the Section has been embodied to cover such Lacunae wherever they are discovered. The use of extraordinary powers conferred upon the High Court under this Section are however required to be reserved, as far as possible, for extraordinary cases."

18. From the aforesaid decision, it is clear that Section 482 of Cr.P.C., confers upon the High Court inherent powers to make such orders as may be necessary to give effect to any order under the Code, or to prevent abuse of the process of the any Court or otherwise to secure the ends of justice. With regard to the aforesaid proposition of law, there is no quarrel.

19. In A.V. Sivakumar Vs. A. Shanmugam (cited supra), a private complaint was filed under Section 138 of the Negotiable Instruments Act and based on the same, a case was taken on file in CC.No.218 of 2003 on the file of the Judicial Magistrate No.I, Namakkal and during trial, PW1 was examined. Thereafter the case was transferred to the Judicial Magistrate No.II, Namakkal and it was numbered as STC.No.485 of 2006. Since, the said case was converted into summary trial case, the learned Judicial Magistrate - II, Namakkal has recorded PW1's evidence once again. Challenging the same, the accused filed petition under Section 482 Cr.P.C., before this court. This court has allowed the said petition, but in this case, the facts are totally different and hence the aforesaid decision will not apply to the facts of this case.

20. In Ashakumar Vs. S. Vijayalakshmi and another (cited supra), one witness was examined on the side of the defence and since according to the said witness, the deposition was not recorded as stated by him, he refused to sign the deposition and also filed a petition, to correct the same, but the said Magistrate has dismissed the said petition and hence, the petitioner has filed a petition under Section 482 Cr.P.C., before this court. Considering the aforesaid facts, this court has allowed the said petition and directed the trial court to eschew the evidence of the said witness.

21. In S. Yuvaraj Vs. State rep. By The Inspector of Police, Gobichettypalayam (cited supra), when the advocates are on boycott, the learned trial court Judge has examined PWs1 to 13 on the side of the prosecution and hence accused has filed Transfer Original Petition before this court. This Court has recorded the findings that since the evidence was recorded in the absence of the defence counsel that has to be effaced from the records and transferred the case to some other court and

order for denovo trial. But it appears that subsequently, a Division Bench of this court has overruled the said decision.

22. Further from the aforesaid decisions, it can be said that this court by exercising power under Section 482 Cr.P.C., depending upon the facts and circumstances of the case, can eschew the evidence of the witnesses. But in this case as already stated that the only grievance of the petitioner is that the learned Public Prosecutor before the trial court has asked leading questions but there is no material to substantiate the said allegation. Under the said circumstances, the aforesaid decisions also will not help the petitioner.

23. For the aforesaid reasons, this court does not find any merit in this petition. Accordingly, this petition is dismissed. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

// True Copy//

Sub Assistant Registrar

gv

To

1. The II Additional District and Sessions Court,
Thiruvallur, Poonamallee.
2. The Public Prosecutor,
High Court, Madras.
3. The Inspector of Police,
T-4 Maduravoyal Police Station,
Chennai-95

+1cc to Mr.Arun Anbumani, Advocate, Sr.No.9890

CRL.OP.No.33088 of 2019
and
CRL.MP.No.18253 of 2019

SS (CO)
GS(22/05/2020)