

**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

Orders Reserved on	14.07.2020
Orders Pronounced on	22.07.2020

CORAM:**THE HONOURABLE Mr.JUSTICE R.PONGIAPPAN****CRL OP (MD) No.7354 of 2020****and****CRL MP (MD) Nos.3567 & 3566 of 2020**

1.Soundarajan @ Perumal
2.Jeyakanthan
3.Sasikumar
4.Stalin
5.Prabhakaran
6.Praveen Kumar
7.Kaviyarasu
8.Shanmugam
9.Sales Natarajan @ Natarajan
10.Vinoth @ Hariharan

... Petitioners /Petitioners/
Accused

Vs.

The State Represented by
The Inspector of Police, Kulithalai
(Crime No.320 of 2019)

... Respondent /Respondent /
Complainant

PRAYER: Petition filed under Section 482 of Criminal Procedure Code, praying to call for the records of the order passed by the learned Sessions Judge, Karur, in Crl.M.P.No.615 of 2020 in S.C.No.74 of 2019, dated 24.06.2020 and set aside the same and consequently, direct the learned Sessions Judge to summon the Nodal Officers of the respective cell phone companies by whom the list of cell phone numbers have been activated and operated as detailed in Annexure I to produce the available Call Details Records with Tower Locations for the period between 01.07.2019 to 31.08.2019.

For Petitioners : Mr.B.Prashanth Nadaraj
For Respondent : Mr.S.Chandrasekar
Additional Public Prosecutor

O R D E R

The petitioners herein are the petitioners in Crl.M.P.No.615 of 2020 in S.C.No.74 of 2019, pending on the file of the learned Sessions Judge, Karur. Further, they are arrayed as Accused Nos.1 to 10 in the above referred Sessions Case.

2. It is not in dispute that as of now, the case instituted against this petitioners in S.C.No.74 of 2019 is kept pending for the examination of prosecution witnesses. In the above circumstances, the petitioners herein filed a petition before the



the Nodal Officers of the respective Cell Phone Companies by whom the list of cell phone numbers have been operated as detailed in the list hereunder and to produce the available call details records with tower locations for the period between 01.07.2018 and 31.08.2019.

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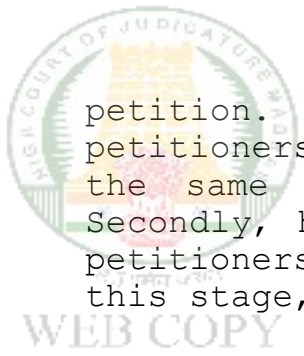
3. The learned Sessions Judge after affording an opportunity to the prosecution, by order dated 24.06.2020, dismissed the application filed by the petitioners. Aggrieved over the same, the petitioners are before this Court with this Criminal Original Petition.

4. The first and foremost submission made by the learned counsel appearing for the petitioner is that in general call details records have to be destroyed by the respective cell phone companies, after the lapse of one year. Without knowing the said procedure, the learned Sessions Judge dismissed the application filed by the petitioners by saying some other reasons. In fact, the particulars required by the petitioners are very much necessary to prove the innocence of the petitioners. He would further submit that the findings arrived at by the trial Court that these types of applications under Section 91 of Cr.P.C., have to be filed only at the time when the case is posted for defence, is no relevance to the case of the petitioners. Accordingly, he urged this Court to set aside the order passed by the learned trial Judge in Crl.M.P.No.615 of 2020, dated 24.06.2020, by saying that if the records now required by the petitioners are not received, there is no chance to receive the same after the period of one year.

5. The learned Additional Public Prosecutor appearing for the respondents would submit that while at the time of disposing the petition filed by the petitioners, the learned Sessions Judge thoroughly analysing the factual aspects and thereafter, dismissed the application. He would further submit that without knowing the case of the prosecution, filing these types of applications are only with an intent to protract the proceedings. Furthermore, he would submit that since the case is kept pending for examination of the prosecution witnesses, it cannot be said that at the time of occurrence, the deceased and the petitioners are having the mobile phones with number as stated in Annexure I, enclosed along with the petition.

6. I have heard the learned counsel appearing on either side and perused the materials available on record.

7. Upon considering the arguments advanced by either side, while at the time of disposing the petition, the trial Judge has dismissed the application by mentioning two reasons. Initially, without seeing the evidence given by the prosecution witness, at this stage, it cannot be said that during the time of occurrence, the petitioners are having the mobile phones now referred in the



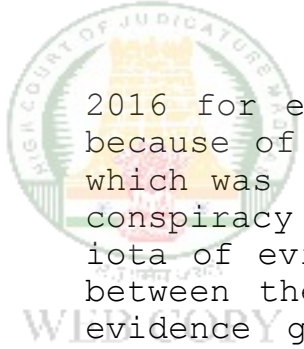
petition. Though the mobile phone numbers are in the name of the petitioners only because of the said reasons, it cannot be held that the same were used by the petitioners and the accused alone. Secondly, he came to the conclusion that the petition filed by the petitioners under Section 91 Cr.P.C., is not at all maintainable in this stage, since the case was not posted for defence.

8. Now, on considering the reasons cited by the trial Judge, it is true, in normal occasions a person, who purchased the mobile phone cannot keep the same in all 24 hours. Furthermore, it cannot be held that a mobile phone belongs to petitioners was used by the petitioners alone, at the relevant point of time.

9. The arguments advanced by the learned counsel appearing for the petitioners is fully relied upon the Judgment of the Delhi High Court in **Suresh Kalmadi Vs. CBI** in Crl.M.C.No.2143 of 2015, dated 22.05.2015. In the above referred Judgment, in paragraph No.20, it has been held as follows:-

"20. In the present case, the petitioner is facing trial for an offence which may entail him punishment. He is seeking production of those documents and things which according to prosecution records even appear to be inexistence and which he feels shall help him in defending himself. According to him that these documents are connected with the case in hand. Therefore, it cannot be argued straightway that he is trying for making of any roving or fishing inquiry or is making a request which may be unreasonable. It is settled law that in a criminal trial the prosecution has to be absolutely fair and impartial. The main purposes of a criminal trial is not to get some one convicted. The object is to discover the truth and punish the accused if found guilty. The documents which he himself cannot procure for the purposes of putting his defence have to be requisitioned by invoking Section 91 Cr.P.C., if the Court is satisfied that those are necessary or desirable for the purpose of trial."

10. So, absolutely, according to the above Judgment, before allowing these types of applications, it is necessary to satisfy that the documents required by the accused are necessary or desirable for the purpose of trial. Now, on go through the factual aspects, admittedly, along with other charges, the offence under Section 302 IPC. (2 counts) were framed against these petitioners. So, it is obvious, the punishment provided for the said offence is upto the death. In otherwise, now on go through the copy of the final report, it is understandable that P.Ws.1 to 4 are close relatives of the deceased. Previous to the occurrence, the deceased Venkaman filed a petition before this Court in W.P.(MD)No.16338 of



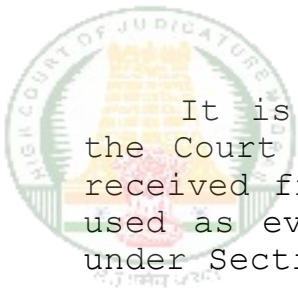
2016 for evicting the encroachments made in the water body. Only because of the reasons that the deceased attempted to evict temple, which was situated in the encroached area, all the petitioners made conspiracy and committed the offence. In otherwise, there was no iota of evidence that before the occurrence, there was conversation between the petitioners and the deceased. So, without seeing the evidence given by the prosecution witnesses, it cannot be said before the occurrence, the petitioners are having the good relationship with the deceased and therefore for proving the same the call details are necessary.

11. The learned counsel appearing for the petitioner further relied the Judgment of Bombay High Court in **Kamal Ahmed Mohammed Vakil and Ors. Vs. State of Maharashtra** reported in **(2012 SCC Online Bom 1913)**, in the said case also, the application under Section 91 of Cr.P.C., has been filed only after closing the prosecution side evidence. Further, in the Judgment relied on by the petitioner in **Pawan Duggal Vs. State** reported in **(2001 (59) DRJ 645)**, the High Court of Delhi has held that since the investigation itself is based on the mobile phone, sim number registered in the name of the accused is relevant to consider the prayer sought for by the accused by way of filing application under Section 91 Cr.P.C. But here it is a case that investigation is not rooted through the mobile phone having by the accused.

12. The learned counsel appearing for the petitioner further relied on one another Judgment in **Nitya Dharmananda Vs. Gopal Sheelum Reddy** reported in **(2018 (2) SCC 93)**, in the said case also it is made clear that to invoke Section 91 of Cr.P.C., Court has to satisfy that the material available with the investigator made part of the charge-sheet. But here is the case that there was no material available with the Investigating Officer in respect to the mobile phone belongs to either accused or the witnesses. Therefore, at any event, the Judgments relied on by the petitioner is no way helpful to the case of the petitioner.

13. One another aspect, which is necessary to decide for disposing the petition as the materials now sought for by the petitioner is relevant to the case of the petitioner or not. In the Judgment in **Harpal Singh @ Chhota Vs. State of Pubjab** reported in **(AIR 2016 SC 5389)**, our Hon'ble Apex Court has held that where the prosecution has relied upon the secondary evidence in the form of printed copy of mobile phone call details, even assuming that the mandate of Section 65-B(2) of the Evidence Act had been complied with, in the absence of a certificate under Section 65-B(4) of the said Act, the same has to be held inadmissible in evidence.

14. Thus, the legal principles that any electronic record in the form of secondary evidence cannot be admitted in evidence unless a certificate under Section 65B of the Evidence Act is satisfied.



It is pertinent to point out that in the present case, before the Court though the call details required by the petitioners are received from the custody of the Nodal Officers, the same cannot be used as evidence, since it is not possible to get the certificate under Section 65B(4) of the said Act.

WEB COPY 15. Further, in the Judgment relied by the petitioners' counsel, the application under Section 91 Cr.P.C., was filed only during the time of cross-examination of P.W.18 and not before at the time of examining the other prosecution witnesses. In this regard, in the case of **State of Orisa Vs. Debendra Nath Padhi**, reported in **(AIR 2005 SC 359)** the three Judges Bench of Hon'ble Apex Court has held as follows:

"Any document or other thing envisaged under S.91 can be ordered to be produced on finding that the same is "necessary or desirable for the purpose of investigation, inquiry, trial or other proceedings under the Code." The first and foremost requirement of the section is about the document being necessary and desirable. The necessity or desirability would have to be seen with reference to the stage when a prayer is made for the production. If any document is necessary or desirable for the defence of the accused, the question of invoking S.91 at the initial stage of framing of a charge would not arise since defence of the accused is not relevant at that stage. When the section refers to investigation, inquiry, trial or other proceedings, it is to be borne in mind that under the section a police officer may move the Court for summoning and production of a document as may be necessary at any of the stages mentioned in the section. Insofar as the accused is concerned, his entitlement to seek order under S.91 would ordinarily not come till the stage of defence. When the section talks of the document being necessary and desirable, it is implicit that necessity and desirability is to be examined considering the stage when such a prayer for summoning and production is made and the party who makes it whether police or accused. If under S. 227 what is necessary and relevant is only the record produced in terms of S.173 of the Code, the accused cannot at that stage invoke S.91 to seek production of any document to show his innocence, Under S.91 summons for production of document can be issued by Court and under a written order an officer-in-charge of police station can also direct production thereof. Section 91 does not confer any right on the accused to produce document in his possession to prove his defence. Section 91 presupposes that when the document is not produced process may be initiated



to compel production thereof. Jurisdiction under S.91 of the Code when invoked by accused the necessity and desirability would have to be seen by the Court in the context of the purpose - investigation, inquiry, trial or other proceedings under the Code. It would also have to be borne in mind that law does not permit a roving or fishing inquiry."

16. Accordingly, the above referred verdict is clear in respect to the petition filed under Section 91 Cr.P.C. According to the said proposition, those types of applications have to be filed only at the time when the accused entered into defence and not before that. Moreover, as already observed, in the final report filed by the respondent, nothing was averred in respect to using of mobile phones by the petitioners and the deceased. The learned trial Judge clearly observed in his order that for the charges framed against the petitioner only the prosecution has to prove his case and the attempt made by the accused to disprove the same is unnecessary, at this stage. Therefore, I am of the considered opinion that the reasons stated in the impugned order is well within the law and therefore, no interference is necessary in the said order.

17. In fine, this Criminal Original Petition stands dismissed. Consequently, the connected miscellaneous petitions are also dismissed.

Sd/-

Assistant Registrar

// True Copy //

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Sub Assistant Registrar(CS)

MPK

Note : In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

- 1.The Sessions Judge,Karur.
- 2.The Inspector of Police,Kulithalai
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.

Order made in

CRL OP(MD)No.7354 of 2020

22.07.2020

SMA/28/07/2020/6P/4C