

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date of Reservation	13.12.2019
Date of Judgment	31.01.2020

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THE HONOURABLE MRS. JUSTICE **T.KRISHNAVALLI**

Crl.RC(MD)No.197 of 2017

and

Crl.MP(MD)No.1768 of 2017

1.V.Balasubramanian

2.S.Senthilkumaran : Petitioners/Proposed Addl. A2 and A3

Vs.

1.State rep. by

The Inspector of Police,
Palani Adivaram Police Station,
Palani, Dindigul District.

(Crime No.159 of 2013) : 1st Respondent/Petitioner/
Complainant

2.Selvakumar

3.M.Magesh Anandhan

4.M.Lakshmanan

5.Vijayakumar

6.Arul @ Arulkumar

7.Lakshmanan

8.Murugesan

9.Karthick @ Karthick Kumar

10.Rajendran

11.Kannan : R2 to R11/R1 to R10/R1 to R10

(No relief is sought against
the respondents 2 to 11 and
hence, they are given up)

Prayer: Criminal Revision filed under Section 397 and 401 of the Code of the Criminal Procedure against the order passed in Crl.MP No.5421 of 2016 in C.C.No.103 of 2014, dated 02.02.2017 on the file of the Judicial Magistrate Court, Palani.

For Petitioner : Mr.Niranjan S Kumar

For 1st Respondent : Mr.APG Ohm Chairma Prabhu
Government Advocate
(Criminal side)



For R2 to R11 : No appearance

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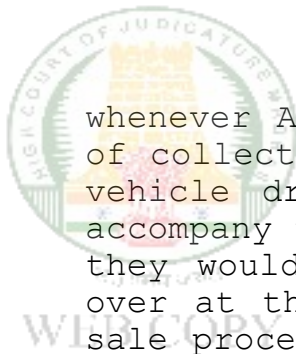
This Criminal Revision is filed against the order passed in Crl.MP No.5421 of 2016 in C.C.No.103 of 2014, dated 02.02.2017 by the Judicial Magistrate, Palani.

2.The Joint Commissioner/Executive Officer of Arulmigu Dhandayuthapani Thirukkoil, Palani lodged a complaint against some temple workers before the Palani Adivaram Police Station, alleging that on 30.08.2013 for missing of 1253 female devotees tonsure hair (Mudichu). Based on the said complaint, the Inspector of Police, attached to Palani Adivaram Police station registered a case in Crime No.159 of 2013 for the offence under section 381 IPC and after completion of investigation, filed charge sheet deleting the prime accused persons namely 1.Kathiresan, 2. V.Panneer Selvam, 3.Balasubramaniyam, 4.S.Senthil Kumaran, who are all shown as accused in the FIR.

3.Thereafter, on 14.07.2016, the Inspector of Police attached to Palani Adivaram Police Station has filed a petition under section 319 Cr.P.C in Crl.MP No.5421 of 2016 before the Judicial Magistrate, Palani to include the names of the deleted accused persons in the FIR. The learned Judicial Magistrate has allowed the said petition, dated 02.02.2017 by including the proposed accused namely Kathiresan, Paneerselvam, Balasubramaniyan and S.Senthilkumar in the charge sheet. Aggrieved by the order of the learned Judicial Magistrate, the petitioners are before this court.

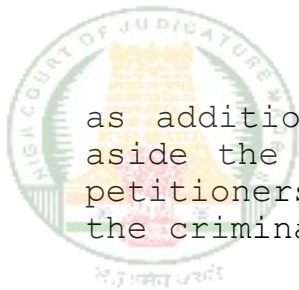
4.Heard the learned counsel appearing for the petitioner and the learned Government Advocate (Criminal side) appearing for the 1st respondent and perused the materials available on record. In-spice of service of notice, no one appears for the respondents 2 to 11.

5.The learned counsel appearing for the petitioners argued that the evidence collected during the investigation reveals that A1 to A4 including the petitioners, who were cited as A3 and A4 in the FIR were not involved in committing the offence by the other accused and that 7 other persons, who served as Security Guards in the temple through Aravind Associates and 3 persons who were named as A5 to A7 in the FIR, had stolen the Mudichu when the hairs were being taken to the godown in the temple vehicle from 8 tonsuring centres; that the Investigating Officer has submitted a report on 16.04.2014 deleting A1 to A4 from the column of FIR and another report on 22.04.2014 by altering the offence as 381 IPC and 381 r/w 34 IPC by renumbering ranks of A5 to A7 in the FIR as A1 to A3 and the newly added accused as A4 to A10 and that the evidence on record would show that during the period between 01.02.2013 and 14.08.2013,



whenever A1, the Selection Grade Record Clerk had been on the duty of collecting tonsured hairs from 8 tonsuring centres in box in the vehicle driven by A2 or A3, two securing among A2 to A4 would accompany them in the vehicle as securities. During those occasions, they would stealthily take away few "Mudichu" before handing them over at the godown, sell them to one Sankar @ Rajan and share the sale proceeds and the investigation clarified that the petitioners, who were named as A3 and A4 in the FIR did not involve in the offence committed by the accused of this case in any manner and the evidence of PW1 would show that the petitioners were working in the Hair section along with others and PW1's evidence does not show that the petitioners played any role in the offences committed by the persons, who are assigned as A1 to A10 in the charge sheet and without considering the evidence of PW1 in prospective manner, the trial court wrongly came to the conclusion that the petitioners should also be proceeded with in this case as additional accused and prays that the impugned order is liable to be set aside.

6.The learned Government Advocate (Criminal side) appearing for the first respondent/State argued that after registering FIR, the respondent police conducted enquiry and investigation as per the Code of Criminal Procedure and recorded statements under Section 161 (3) of Cr.P.C and out of investigation, 703 number of Mudichu were recovered from Vijayakumar and 550 numbers of Mudichu were recovered from Arulkumar, employees of Private Security Agency and their confession statements were recorded. Based on their confession, other accused were included in this crime. It is further submitted that subsequently on 11.12.2013, the de-facto complainant gave further statement under section 161(3) of the Criminal Procedure Code stating that as the entire offence was committed by the Private Security Agency Employees with the connivance of Devasthanam Employees namely Selvaraj, Record Clerk, Thevar Silai Tonsure Centre, M.Mahesh Anandan, Driver and M.Lakshmanan, Driver, Hair Division and A1 to A4 namely K.Kathiresan, V.Panneerselvam, V.Balasubraaniam and S.Sethilkumaran were not involved in away in the crime, requested to delete their names viz., A1 to A4 in the FIR and during the trial, PW1 the de-facto complainant clearly deposed before the trial court that 1.K.Kathiresan, Superintendent (Deputation)- Double Lock Officer, 2.V.Paneerselvam, Senior Grade Assistant, Double Lock Officer, 3.V.Balasubramaniam, Assistant, Sarvanapoigai Bathing and 4.S.Senthilkularan, Clerk, Thevar Silai Tonsure Centre are full responsibility regarding the stolen properties. Moreover PW1 admitted that when he conducted inspection, no Hundiyaal was broken and hence, without knowledge of deleted named persons that property cannot be missing from their possession and hence, the respondent police filed the petition under section 313 of the Code of the Criminal Procedure to add the petitioners as accused to prove the case beyond reasonable doubt and the trial court, after taking into careful consideration of the contentions put forth by the prosecution, allowed the petition filed under section 319 Cr.P.C and directed the respondent police to include the petitioners name



as additional accused and there is no valid ground raised to set aside the order passed by the learned Judicial Magistrate and the petitioners can prove their innocence by facing trial and prays that the criminal revision has to be dismissed.

7.Further, the learned counsel appearing for the petitioners submitted that the petition filed under section 319 of the Code of Criminal Procedure is a discretionary and extraordinary power and it is to be exercised sparingly and only in those cases where circumstances of the case so warrant and it is not to be exercised because the Magistrate or Sessions Judge is of the opinion that some other persons may also be guilty of committing that offence and only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner. For that, the learned counsel appearing for the petitioners submitted the ruling reported in **2019(4) SCC 342 (Periyasamy and others Vs. Nallasamy)**.

8.Further, the learned counsel appearing for the petitioners submitted that in section 319 of the Criminal Procedure Code, the purpose of providing if it appears from the evidence that any person not being the accused has committed any offence is clear from the words for which such person could be tried together with the accused and the word used are not for which such person could be convicted. For that, the learned counsel for the petitioners submitted a ruling reported in **(2014)3 SCC 92 (Hardeep Singh Vs. State of Punjab)**, wherein it was held in para 11 ad 12 as follows:-

"11.Learned counsel for the appellants also refers to a recent order of this Court in Labhuji Amratji Thakor & others Vs. The State of Gujarat & and five another, where, the order of summoning the additional accused on the basis of the statements of some of the witnesses in witnesses box was set aside for the reason that there is no even suggestion of any act done by the appellants amounting to an offence under Sections 3 and 4 of the Protection of Children from Sexual Offences Act 2012, it was held as under: (SCC online SC Para12)

12.The Court has to consider substance of the evidence, which has come before it and as laid down by the Constitution Bench in Hardeep Singh (supra) has to apply the test I.e., more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes un rebutted, would lead to conviction."

9. For the scope of section 319 Cr.P.C, the learned counsel



appearing for the petitioners submitted the ruling reported in **2013 (3)Crl.LR 1141 (Rekha Sharma Vs. State of Rajasthan and others,** wherein the scope of section 319 of the Code of Criminal Procedure has been discussed. In that case, it was held in para 8 to 10 as follows:-

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"8.I have given my thoughtful consideration to the rival submissions made by learned counsel for the parties and perused impugned order and scanned through the material available on record and also gone through the judgments cited by learned counsel for the parties.

9.Section 319 Cr.P.C is a special provision which reads as under:

"319.Power to proceed against other persons appearing to be guilty of offence.

(1)Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2)Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3)Any person attending the court although not under arrest or upon a summons, may be detained by such court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4)Where the Court proceeds against any person under sub-section (1), then

(a)the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;

(b)subject to the provisions of clauses (a), the case may proceed as if such, person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

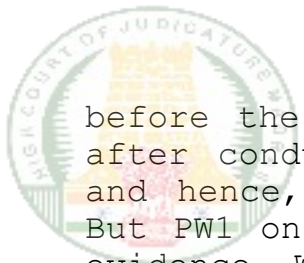
10.The above provision seeks to meet an



extraordinary situation. It although confers a power and wide amplitude, but is required to be exercised very sparingly before an order summoning an accused is present. The trial court must form an opinion on the basis of the evidence brought before it that a case has been made out that such person could be tried with the other accused persons. There is no dispute with the legal position that even if a person had not been charge sheeted, he may come within the purview of the description of such a person as contained in Section 319 Cr.P.C.

10. In this case, FIR was registered on 30.08.2013 and the first respondent police arrested one Vijayakumar and Arulkumar, who were the security staffs working under the 8th and 9th accused in the FIR. Further, 703 numbers and 550 numbers of mudichu were recovered from the said accused. Further, the accused has also made it clear about the identity of the real accused. The confession given by the said Vijayakumar and Arulkumar has had to recovery and hence from his confession, there is a discovery of a new fact and hence, the said confession was considered by the Investigating Officer. The Investigating Officer took up the investigation and conducted a detailed and thorough investigation and on the basis of such investigation, the Investigating Officer filed a detailed alternation report deleting the petitioners name from the FIR and added the real accused, who had really committed the crime and the Investigating Officer filed the alternation report and it was accepted by the learned Judicial Magistrate on 16.07.2014 and directed to issue summons to the altered newly accused. The de-facto complainant was examined as PW1 on 09.06.2016. PW1 deposed about the fact of the case and now information was given to where-about the mischief and how, he lodged the complaint in Crime No.159 of 2013 before the respondent police and about the investigation conducted. Immediately the prosecution filed a petition in Cr.MP No.5421 of 2016 under section 319 of the Code of Criminal Procedure praying to summon the petitioners as additional accused to undergo trial. The learned Magistrate allowed the petition on 02.02.2017.

11. In this case, the Investigating Officer only after conducting proper investigation deleted the names of the petitioners. In **2019(4) SCC 342 (Periyasamy and others Vs.S.Nallasamy)**, it was held that power under section 319 of the Criminal Procedure Code to be exercised sparingly and only in those cases where the circumstances of the case so warrant and it is only where strong and cogent evidence occurs against a person from the evidence let before the court, that such power should be exercised and not in a casual and cavalier manner. In this case, PW1 during the chief examination stated that allegations found in the complaint and in 161(3) Statement. Nothing has been brought to the knowledge of the learned Judicial Magistrate by PW1 through his evidence



before the trial court. In this case, the Investigating Officer, after conducting enquiry, he deleted the names of the petitioners and hence, no charge sheet was filed as against the petitioners. But PW1 once again dragged the names of the petitioners during his evidence. When PW1 has spoken about the revision petitioners it will not necessitate the court to include the names of the revision petitioners with the real offenders and only after thorough investigation, charge sheet was filed by the Investigating officer. Without any conclusive evidence, the trial court at the very beginning of the examination in chief of PW1 ought not to have invoked section 319 of the Criminal Procedure Code. But the trial Judge could have waited for some more time in the trial and if any further evidence in corroborating or supporting PW1's evidence, thereafter the learned Judge could have taken a decision as to whether section 319 of Cr.P.C has to be invoked or not. In this case, the learned trial Judge without even waiting for the minimum time to get the a prima facie clinching evidence more vulnerable than the evidence collected by the prosecution to rope any other person like the petitioner. In this case, on the basis of the confession given by Vijayakumar and Arul Kumar and after due enquiry, the Investigating Officer deleted the names of the revision petitioners and PW1 has not deposed any specific overt-act against the petitioners.

12.For all the reasons stated above, this court is of the considered view that the impugned order passed by the trial court is liable to be set side and accordingly, it is set aside.

13.In fine, the criminal revision is allowed. The impugned order, dated 02.02.2017 passed by the trial court is set aside. Consequently, connected Miscellaneous petition is closed.

Sd/-

Assistant Registrar

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/ /2020

Sub Assistant Registrar(CS)

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To,

1.The Judicial Magistrate, Palani.

2.Do through the Chief Judicial Magistrate,
Dindigul.



3.The Inspector of Police,
Palani Adivaram Police Station,
Palani, Dindigul District.

4.The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.

Copy to:

The Section Officer, (2 Copies)

Criminal Section,

Madurai Bench of Madras High Court, Madurai.

+2 CC to M/s.NIRANJAN S KUMAR, Advocate (SR-4347[F] dated
31/01/2020)

CrI.RC(MD)No197 of 2017
31.01.2020

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