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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31.08.2021

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THE HON'BLE Mr. JUSTICE C.V.KARTHIKEYAN

Crl.O.P.No.14096 of 2021
and Crl.M.P.No.7717 of 2021

Indira Kumari ... Petitioner/Accused - 1

Vs.

- 1.State represented by
The Deputy Superintendent of Police,
CBCID, Metro Wing,
Chennai. ... 1st Respondent / Complainant
2. Dr.P.Shanmugam ... 2nd Respondent / Accused - 3
3. A. Babu ... 3rd Respondent / Accused - 4
4. R. Venkatakrishnan @ Venkat .. 4th Respondent / Accused - 5

Prayer: Criminal Original Petition filed under Section 482 of Cr.P.C., to withdraw the case pending in C.C.No.12 of 2019 on the file of the Additional Special Court for Trial of Criminal Cases related to Elected Members of Parliament and Members of Legislative Assembly of Tamil Nadu, Chennai and the same may be transferred to any other Special Court for Trial of Criminal Cases related to Elected Members of Parliament and members of Legislative Assembly of Tamil Nadu in nearer district.

For Petitioner .. Mr.L.V.Rohith

For Respondents .. Mr.E.Raj Thilak
Govt. Advocate (Criminal Side)

ORDER

Even before I address the issue now raised by the learned counsel for the petitioner / 1st accused in C.C.No.12 of 2019 now pending on the file of the Additional Special Court for Trial of Criminal Cases related to Elected Members of Parliament and Members of Legislative Assembly of Tamil Nadu, Chennai, one aspect has to be stated.



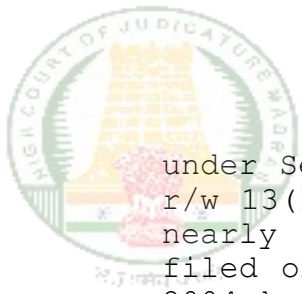
2. On 13.08.2021, the present petition was moved before Hon'ble Mr. Justice M. Nirmalkumar who was holding the portfolio as Special Judge in the High Court pertaining to the matters relating to Elected Members of Parliament and Members of Legislative Assembly of Tamil Nadu. The learned Single Judge recused from hearing the matter. On that particular date, the alternative Judge to Mr. Justice M. Nirmalkumar was Mr. Justice P. Velmurugan and therefore the matter was posted before Mr. Justice P. Velmurugan on 23.08.2021.

3. The portfolio had however been changed by the Hon'ble Chief Justice and this Court was placed as the alternate Court to Mr. Justice M. Nirmalkumar. Therefore, the matter was placed before this Court by the Registry on 26.08.2021, the next hearing date. This statement is made because Mr. R. Singaravelan, learned Senior Counsel, who appeared before this Court on 26.08.2021 and Mr. L. V. Rohith, learned counsel who now appears on behalf of the petitioner herein expressed wonder as to how the matter was placed before this Court. The learned Senior Counsel and the learned counsel should understand that the matter has been placed only in accordance with the Roster determined by the Hon'ble Chief Justice. Without examining the cause list, particularly the notification published on 19.08.2021 by the High Court, an unwarranted statement had been made by Mr. R. Singaravelan, learned Senior Counsel who after making that statement disappeared, and in his place a new counsel Mr. L. V. Rohith, learned counsel has advanced arguments today. I hope that this explanation would satisfy the petitioner. It is to be mentioned that the Hon'ble Chief Justice did not change the portfolio of this particular Court alone but also shuffled the portfolio of a few other Judges and this was necessitated owing to the retirement of Mr. Justice N. Kirubakaran.

4. Now I shall address the issue raised in the present petition. CrI.O.P.No.14096 of 2021 has been filed seeking to withdraw the C.C.No.12 of 2019 now pending before the Additional Special Court for Trial of Criminal Cases related to Elected Members of Parliament and Members of Legislative Assembly of Tamil Nadu, and to transfer the same to some other Court of competent jurisdiction.

5. The only reason advanced, is quite strange. When I put a specific question to both the learned Counsels, they stated that they have not done any research on the particular aspect, which they have now raised. But, let me answer the issue which has been raised.

6. As against the present petitioner/A1, First Information Report was originally lodged on 22.08.1997 in Cr.No.15 of 1997,



under Sections 120(B), 409, 420 of I.P.C and under Section 13(2) r/w 13(1)(d) of P.C. Act, 1988, by any mathematical calculation, nearly about 24 years ago. Thereafter, the final report was filed on 27.02.2004 and it was taken cognizance as C.C.No.12 of 2004 by the Principal Sessions Judge, City Civil Court, Chennai and made over to the IV Additional Sessions Judge, City Civil Court, Chennai. On constitution of the Special Court, to examine the cases against the Elected Members of Parliament and Members of Legislative Assembly of Tamil Nadu, the matter had been transferred to the Additional Special Court and it was taken on file and renumbered as C.C.No.12 of 2019. Thankfully, the trial had come to an end. All the witnesses had been examined. Substantial arguments had also been advanced. This was the position in February, 2020.

7. Thereafter, my attention had been drawn to the subsequent hearing dates which took place. It must also be kept in mind that from March, 2020, there was a national lockdown owing to COVID-19 pandemic situation and no Court could function, and much less, no Court could examine any witness or even invite witnesses to the Court premises for being examined and also for being cross-examined. That was a reality which the learned Counsel should understand. My attention had been drawn to the proceedings on 25.10.2019, when it was stated that after completion of the evidence of the prosecution witnesses, questions under Section 313 of Cr.P.C., were put to the accused, including this particular accused, and as fairly stated even on the earlier occasion by Mr.R.Singaravelan, learned Senior Counsel and Mr.L.V.Rohith, learned Counsel for the petitioner who today appears, the present petitioner waived the right to examine any defence witness.

8. The Special Public Prosecutor however then filed an application on 30.10.2019 to recall P.W-63. That application was allowed. That order has not been challenged till this particular date. The next progress of the case was on 20.11.2019 and I must make it clear that it was not the successive hearing date. On 20.11.2019, the Public Prosecutor filed an application to recall P.W-3.

9. The present petitioner was again examined under Section 313 of Cr.P.C., with respect to the incriminating portion of the evidence of P.W-3. It is to be specifically mentioned that the present petitioner herein did not seek to examine any defence witness.

10. Thereafter, the case again proceeded on 04.02.2020. It is seen that the counsel for the present petitioner/A1 advanced arguments and filed written arguments. On 11.02.2020, the Special Public Prosecutor filed an application under Section 311



of Cr.P.C., to recall P.W-11. The trial had thus been meandering and circulating around the same stage. On 26.02.2021, after the lifting of the lock down, a perusal of the notes shows that A1, A4 and A5 were present and were questioned under Section 313(1)(b) of Cr.P.C., with respect to the evidence recorded during the further examination of P.W-11. Thereafter, on 25.03.2021, A1, A4 and A5 were present and were questioned again under Section 313(1)(b) of Cr.P.C., on the further evidence of P.W-63. The events after such examination of the present petitioner/A1 under Section 313(1)(b) of Cr.P.C., with respect to the incriminating evidence adduced by P.W-63 after being recalled by the learned Public Prosecutor, has led to the filing of the present petition. The petitioner seeks to withdraw the case and to transfer the case to some other Court of competent jurisdiction.

11.It is the contention of the learned Senior Counsel/learned Counsel who alternatively argued, by drawing my attention to the questions put during the course of examination under Sec.313 of Cr.P.C., that the present petitioner was requested to explain the incriminating portions of P.W-63 and thereafter, question No.4 was whether the present petitioner had anything to state with respect to such incriminating evidence. The answer was that she had already given her statement in writing. The next question which had been typed, was whether she had any defence witnesses to examine. That particular question, had been struck off by the learned Judge. Claiming that the learned Judge has therefore, caused prejudice and had not permitted the petitioner herein an opportunity of examining any defence witness with respect to the statements made by P.W-63, when recalled, the present petition has been filed.

12.It is the claim that an application has been filed under Section 311 Cr.P.C., by the present petitioner in CrI.M.P.No.11878 of 2021, seeking permission to examine two witnesses namely, Tmt. Senthil Kumari, Formerly Additional Superintendent of Police, CB CID, Chennai, now D.I.G of Police and Tmt. Radhika, formerly Additional Superintendent of Police, CB CID, Chennai, now D.I.G of Police, V&A.C., Chennai. That application came to be dismissed by order, dated 23.07.2021.

13.It is pointed out by Mr.E.Raj Thilak, learned Government Advocate (Criminal Side) that the present petitioner has not challenged that particular order, but, rather had filed the present petition, seeking to transfer the case from the Court where the trial had been conducted and which must be kept in mind, is the Special Court dealing with cases against Elected Members of Parliament and Members of Legislative Assembly of Tamil Nadu.



14. In so far as the right to examine the defence witnesses on completion of prosecution evidence and after questioning under Section 313 of Cr.P.C., is concerned, when the accused seek to examine a particular witness, opportunity must be granted. There cannot be any second opinion on that particular aspect. It is also incumbent on the part of the accused to give the list of witnesses and also to give their addresses, so that, summons can be issued to those witnesses, inviting them to adduce evidence on behalf of the accused.

15. It must also be kept in mind that the evidence of the defence witnesses cannot be examined as a stand alone evidence, but, must be examined with relation to the defence put up by the accused, during the course of trial. If the accused had put up a defence of alibi, then to corroborate and substantiate that particular evidence, witnesses can be examined by the accused provided, of course, that the accused had given that explanation when questioned under Section 313(1)(b) of Cr.P.C. Otherwise, the evidence of the defence witness would only stand without any basis. The accused may also produce defence witnesses to disprove the case of prosecution. If, for example, the prosecution produces an eye witness, who states that he was present in a place at the time of commission of the offence, the defence witness can prove and produce a defence witness who can say that the witness was not actually so present, but was present elsewhere.

16. In the instant case, to the answers under Section 313 Cr.P.C., particularly with respect to the additional evidence adduced by P.W-63, the present petitioner/accused had not given any such explanation seeking requirement to examine any defence witnesses. It is to be noted that the trend of judgments go that if prejudice is caused to the accused, the Court should step in to prevent such prejudice being suffered by any accused, during the course of trial. The onus is on the accused to substantiate that prejudice was caused.

17. In the instant case, learned Counsel stated that during the learned Judge, while dismissing the application under Section 311 of Cr.P.C., filed in CrI.M.P.No.11878 of 2021 had stated that she did not find any requirement to examine the said two witnesses / officers. According to the prosecution, the said two officers did not perform any investigation in the present case. It is also evident that the matter related to a First Information Report, which was lodged in the year 1997 and to a charge sheet which was filed in the year 2004 was at the back of the mind of the learned Judge. Therefore, the learned Judge was also under the pressure to complete the trial at the earliest.



This particular reasoning in the said petition has not been challenged in manner known to law. Rather, it is now pressed as a ground to transfer the case.

18.I had time to reflect on the issue raised and did some research. Unfortunately the learned Counsel stated that he have not examined whether evidence can be permitted on behalf of the accused, when a witness has been recalled, particularly when the accused had turned down such a request to examine defence witnesses, when the opportunity was first presented after completion of evidence on behalf of the prosecution and when questioned under Section 313 of Cr.P.C.

19.In (2000) 9 SCC 754, Selvi J. Jayalalitha Vs. State by Deputy Superintendent of Police, Chennai, the appellant was before the Hon'ble Supreme Court, with respect to a criminal case, which was, at that particular point of time, pending before the XII Additional Sessions Judge II, Chennai. In that case, the prosecution evidence had been closed and the trial judge had proceeded with questioning under Section 313 of Cr.P.C. Thereafter the matter was posted for examination of defence witnesses. The appellant did not produce any defence witness and did not present any list of defence witnesses. The matter was then adjourned. In the next hearing date also, the defence witnesses were not produced, nor was the list of witnesses to be examined on the defence side presented. The case was again adjourned. Then, trial Court chose to close the evidence for defence and posted the matter for arguments. At that time, the appellant filed an application under Section 311 of Cr.P.C to recall some of the witnesses, who had already been examined on behalf of the prosecution.

20.In the instant case, the only difference is that, the prosecution filed an application under Section 311 of Cr.P.C., to recall among other witnesses, P.W-63. In the precedent cited namely, (2000) 9 SCC 754, the trial Court did not find the necessity to recall any witnesses for arriving at a just decision of the case. The application was therefore dismissed. That order was challenged before the High Court, under Section 482 of Cr.P.C. A learned Single Judge dismissed that particular petition. Thereafter, the appellant went before the Hon'ble Supreme Court. In the Hon'ble Supreme Court, the Counsel for the appellant submitted a list of four witnesses to be examined on behalf of the appellant therein. The Hon'ble Supreme Court then observed as follows in para No.6:-

"6. The trial court should afford an opportunity to the appellant to examine those witnesses. As the 1st among the witnesses shown in the list is the appellant herself, permission need be granted only if a separate application in



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that behalf is filed under Section 315 of the Code because it has to be done at the risk of the appellant herself. It is submitted on behalf of the State of Tamil Nadu that the addresses of the witnesses have not been furnished in the list and therefore it would not be possible for the trial court to issue process. The same list of names shall be submitted before the trial court by the appellant on 8-5-2000 or at the most on 9-5-2000 and then addresses (as far as could be gathered by the appellant) should also be shown against each of the witnesses shown in the list. It is agreed that summons can be handed over to the counsel by the appellant as service would be effected without causing any delay in the matter. We permit the trial court to do so. A request has been made on behalf of the appellant that examination of the defence witnesses may not be insisted on before 15-5-2000. There is nothing unreasonable in the said submission and therefore we express the hope that the trial court will accommodate the said request of the appellant. If no application is made under Section 315 of the Code the trial court need not wait for that part of the matter."

21. In para No.4 of the said order, the Hon'ble Supreme Court had observed that,

"Yet as a Court of justice, we are of the view that one more opportunity can be granted to the appellant for examining the defence witnesses if she proposes to do."

22. The Hon'ble Supreme Court had observed that, as a Court of justice, opportunity can be granted for examining the defence witnesses if the appellant proposes to do. In that particular case, as seen in para No.6, specific dates have been given when the witnesses should be examined and an outer date limit was also given. The Hon'ble Supreme Court had also stated that if no application is made under Section 315 of Cr.P.C., the trial Court need not wait for that part of the matter.

23. In *Baba Vs. State of Maharashtra*, reported in (2002) 9 SCC 567, when examined under Section 313 of Cr.P.C., the accused declined to examine any defence witness in reply to a specific question asked in the original examination under Section 313 of Cr.P.C. But, in a fresh examination under Section 313 of Cr.P.C., before the High Court, the accused sought to examine three further witnesses. The High Court did not grant such



28. Thereafter, the Prosecutor filed an application to recall P.W-63, P.W-3 and P.W-11. The present petition is confined to the evidence adduced by P.W-63 when recalled. There is no quarrel on the fact that questions were put forth with respect to the incriminating evidence adduced by P.W-63, when recalled. P.W-63, it must be kept in mind, was the Investigating Officer. Thereafter, when asked whether the present petitioner had anything to state, the petitioner stated that she had already submitted whatever she wanted to state in writing at the earlier instance. The only grievance is that, she was not granted any opportunity to examine defence witness and that the question in that regard was struck off by the learned Judge and her application seeking such a permission was also dismissed by the trial Court.

29. There is yet another judgment of the Hon'ble Supreme Court reported in (2015) 1 SCC 96, Nar Singh Vs. State of Haryana. In that particular case, the Hon'ble Supreme Court went on to observe as to what 'prejudice' would imply. The onus was on the accused to show that "prejudice has been caused or where prejudice has been implicit and whether the Appellate Court has the power to remand the case for a re-decision from the stage of recording of statement under Section 313 of Cr.P.C".

30. That case primarily related to omission of putting questions with respect to incriminating evidence adduced by the prosecution. The Hon'ble Supreme Court had stated that the Appellate Court should "examine and further examine the convict or the counsel appearing for the accused" whether the accused had acceptable explanations to offer with respect to the questions put under Section 313 Cr.P.C. The High Court should satisfy that "no prejudice was caused or no failure of the justice was occasioned". If it was of the opinion that "non-compliance of the provisions under Section 313 of Cr.P.C., has been occasioned or is likely to have occasioned prejudice to the accused, the appellate Court may direct retrial from the stage of recording the statements of the accused under Section 313 of Cr.P.C.," and directions can be given to the trial Court.

31. Thus the issue now to be examined is whether the present petitioner has suffered prejudice owing to denial of opportunity to examine the two defence witnesses. The present petitioner claims that prejudice is caused. It is seen that in the application filed under Section 311 of Cr.P.C., in CrI.M.P.No.11878 of 2021 which is not under consideration of this Court, still, the present petitioner had stated that



valuable evidence has to be brought on record and ambiguity in the statement of witness examined cannot be left open.

32.The petitioner stated the two named witnesses, Tmt. Senthil Kumari and Tmt. Radhika have to be examined as witnesses on the side of the petitioner.

33.Having given my deep consideration to the arguments advanced on behalf of the petitioner and also by the learned Government Advocate on behalf of the prosecution, I hold that the petitioner herein should be granted an opportunity to examine the two named witnesses. They are also police officials. It is claimed by the learned Counsel for the petitioner that they were, at some point of time, involved with the investigation. This aspect has been denied by the prosecution. It does not lie in the mouth of the either one of the counsels to assert or deny that fact. The best evidence can be obtained from the witnesses themselves. They will know whether they were or were not part of the investigation process. I am confident, as responsible police officials, they will state the actual facts regarding their knowledge with respect to the facts surrounding this particular case. Therefore, even on examining the issue from a converse angle, I hold that no prejudice would be caused to the prosecution by examining the two witnesses. However, they can be examined by the petitioner only with respect to the facts stated in the additional evidence of P.W-63, after being recalled.

34.This has been consented to by Mr.L.V.Rohith, learned Counsel for the petitioner. When a specific question was put to the learned Counsel, he stated that the examination of the two witnesses would be restricted only with respect to the additional evidence given by P.W-63 after being recalled. Therefore, let the two witnesses aforementioned, be examined to that limited aspect by the accused No.1/petitioner herein. The two witnesses may also be cross-examined by the prosecution.

35.A time frame / schedule is also fixed by this Court. I am informed that C.C.No.12/2019 is again scheduled to be heard on 02.09.2021 before the learned Trial Judge. On 02.09.2021, the petitioner herein, may file a memo seeking permission to examine the two additional witnesses. I am conscious of the fact that the learned Judge had dismissed the application filed under Section 311 of Cr.P.C., to examine those two witnesses in CrI.M.P.No.11878/2021. But, as a Court of Justice, let me proceed further and ensure that the trial comes to an end, instead of circulating around that particular issue. Therefore, even though that order had not been put to test before me and even though the present application relates to transfer of the case, which relief I am not inclined to grant, I would rather,



on the other hand, direct that the two witnesses stated by the petitioner be examined as defence witnesses.

36.The following schedule is therefore fixed.

(i) On 02.09.2021, the petitioner is to give the names of the two witnesses and the posts they are now holding. The matter may be adjourned to 06.09.2021.

(ii) By that particular date, summons to both the witnesses are to be served and they must be present in the Court.

(iii) They must be examined on 06.09.2021, again restricting their evidence in chief by the petitioner / A1 only to the additional evidence adduced by P.W-63, after being recalled.

(iv) They must be examined on 06.09.2021 and cross-examined on behalf of the prosecution.

(v) This exercise, if not completed on 06.09.2021, may be further taken upon 08.09.2021 and again on 13.09.2021, but, should be completed finally by 15.09.2021.

37.The two witnesses shall be bound to appear before the Court on 06.09.2021, 09.09.2021, 13.09.2021 and 15.09.2021. If however their examination in chief and cross-examination is completed, they can be discharged.

38.I am informed that arguments have already been advanced and written arguments have also been filed. If any further arguments are to be stated, they may be advanced and written arguments should be filed on or before 24.09.2021. Let the matter be heard on a day to day basis from 20.09.2021 till 24.09.2021. On completion of the entire process of hearing arguments, an obligation is placed on the learned Trial Judge to deliver the judgment on merits, on appreciation of evidence, on appreciation of relevant factors and on appreciation of the matters on record within the time stipulated by the Code, and at any rate by 30.09.2021.

39.The present Criminal Original Petition is disposed of with the above directions. The trial is to proceed before the same Judge. The relief seeking transfer is specifically rejected. I am confident that the learned Judge would bestow attention and examine the merits of the case and examine the evidence and deliver a judgment in accordance with law. Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CO)

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Sub Assistant Registrar



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To,

- 1.The Assistant Sessions Judge,
Chennai-1.
- 2.The Deputy Superintendent of Police,
CBCID, Metro Wing,
Chennai.
- 3.The Additional Special Court for
Trial of Criminal Cases related
to Elected Members of Parliament
and Members of Legislative Assembly
of Tamil Nadu, Chennai.
- 4.The Principal Sessions Judge,
City Civil Court,
Chennai.
- 5.The IV Additional Sessions Judge,
City Civil Court,
Chennai.

+1cc to Mr.V.Krishnakumar, Advocate Sr.43724

Crl.O.P.No.14096 of 2021
and Crl.M.P.No.7717 of 2021

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srg 01/09/2021