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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.12.2021

CORAM:

THE HON'BLE MR.JUSTICE M.NIRMAL KUMAR

CRL.O.P.No.21638 of 2021

Anas Maideen

...Petitioner/Accused

Versus

State by,
The Inspector of Police,
Koothanallur Police Station,
Thiruvarur District.
(Crime No.213 of 2009).

...Respondent/Respondent

PRAYER: Criminal Original Petition filed under Section 482 of the Code of Criminal Procedure, to call for the records and set aside the order dated 15.09.2021 in Crl.M.P.No.480 of 2021 on the file of the Principal District and Sessions Judge, Thiruvarur pending disposal of the above Criminal O.P.

For Petitioner : Mr.Sarath Chandran for
Mr.S.K.Kannadasan

For Respondent : Mr.E.Raj Thilak,
Additional Public Prosecutor

ORDER

The petitioner, who is the accused in S.C.No.62 of 2010, has filed a petition under Section 311 Cr.P.C., in Crl.M.P.No.480 of 2021 in S.C.No.62 of 2010 before the learned Principal District and Sessions Judge, Thiruvallur (trial Court). The trial Court, by order, dated 15.09.2021, permitted the petitioner to cross examine the available prosecution witnesses, against which, the present petition.

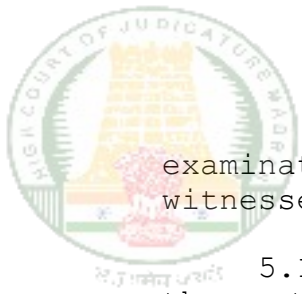
2.The learned counsel for the petitioner submitted that in S.C.No.62 of 2010, the learned Judicial Magistrate No.II, Mannargudi had examined all the prosecution witnesses in the absence of the petitioner, who was then abroad. As per the Evidence Act, 1872, the evidence recorded against the petitioner in his absence cannot be used against him and hence, all the prosecution witnesses to be examined a fresh.



He further submitted that there was frequent wordy quarrel between the petitioner and the victim and at the instance of the local residents, the issue between them settled amicably. On 28.09.2009, again there was a wordy quarrel between the petitioner and the victim, due to which the petitioner had inflicted injuries on the victim, resulting in death. Hence, a case in Crime No.213 of 2009 was registered by the respondent Police.

3.The learned counsel further submitted that during trial, the petitioner got employment in Singapore as unskilled laborer. Due to the financial constraint, he had to fly abroad for the job and he worked there till the time, when he returned back to India. During the year 2020, due to pandemic of COVID-19, the petitioner returned to India on 05.03.2020 and he was arrested in Trichirapalli Airport and remanded back to judicial custody, since NBW was pending against him in the above case. Thereafter, the petitioner has filed a bail application before this Court in Crl.O.P.No.8150 of 2020, wherein this Court, by order, dated 16.06.2020 had granted bail to the petitioner. From then on, the petitioner has been regularly appearing before the trial Court. Since the petitioner was abroad, the trial Court directed the learned Judicial Magistrate No.II, Mannargudi to examine the prosecution witnesses LW1 to LW28 in the absence of the petitioner as per Section 299 Cr.P.C and the same was done. Hence, the petitioner has filed a petition under Section 311 Cr.P.C., before the trial Court to recall and re-examine the prosecution witnesses afresh. The trial Court, by order, dated 15.09.2021 held that the petition has been filed belatedly and the petitioner did not state any reason for re-examination of the prosecution witnesses and he filed the petition to prolong the trial and to escape to abroad and partly allowed the petition, permitting the petitioner to utilize the statement of witnesses recorded earlier by the learned Judicial Magistrate No.II, Mannargudi.

4.The learned counsel for the petitioner further submitted that Section 299 Cr.P.C., consists of two fold with conditions, both the conditions to be applied in such circumstances that only when the evidence recorded in the absence of the accused comes into play and can be used in subsequent trial. The first condition is that the accused person to be an absconder and the second is that there was no immediate prospect of arresting him. In the event, an order under the said provision is passed, deposition of any witness taken in absence of an accused may be used against him if the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without any amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable. In this case, the trial Court had not given any reason whether at all the deponents are dead or not available with supporting materials. Hence, the petitioner cannot be denied of his valuable right of cross



examination. As per Section 273 Cr.P.C., the evidence of witnesses to be recorded in presence of the accused.

5. In support of his submissions, the learned counsel for the petitioner relied on the decision of the Hon'ble Apex Court in the case of "Jayendra Vishnu Thakur Versus State of Maharashtra and another reported in (2009) 7 SCC 104 and Central Bureau of Investigation Versus Abu Salem Ansari and another reported in (2011) 4 SCC 426" and decision of this Court in the case of "H.Aarun Basha Versus State represented by the Inspector of Police reported in 2018 SCC OnLine Mad 12845", wherein the Hon'ble Apex Court as well as this Court had held that Section 299 Cr.P.C., comes into play only on satisfaction of the two conditions. Hence, the learned counsel for the petitioner prayed for setting aside the order of the trial Court and sought direction to the trial Court to re-examine all the prosecution witnesses afresh and permit the petitioner to cross examine them.

6. The learned Additional Public Prosecutor appearing for the respondent Police submitted that a case in Crime No.213 of 2009, for offence under Section 302 IPC has been registered against the petitioner. On completion of investigation, charge sheet was filed before the learned Judicial Magistrate No.II, Mannargudi and the same was taken on file as P.R.C.No.33 of 2009. During trial, since the petitioner absconded for years together, the trial Court has given long pending case number. The petitioner was arrested on his arrival at Tiruchirapalli Airport on 05.03.2020 and remanded to Judicial custody and later, he was granted bail by this Court in Crl.O.P.No.8150 of 2020. He further submitted that the petitioner has not given any reason for recall and re-examine the prosecution witnesses and he filed the petition under Section 311 Cr.P.C., only to prolong the trial and again to escape to foreign country. This Court while granting bail to the petitioner in Crl.O.P.No.8150 of 2020, had directed the trial Court to complete the trial within a period of six months. Due to COVID-19 lock down, the trial could not be completed within the time frame fixed by this Court.

7. The learned Additional Public Prosecutor further submitted that on completion of investigation, charge sheet was filed before the learned Judicial Magistrate No.II and it was taken on file as P.R.C.No.33 of 2009 and thereafter, committed to the Principal District and Sessions Court (trial Court), Thiruvallur and it was renumbered as S.C.No.62 of 2010. During trial, the petitioner had appeared before the trial Court and charges were framed against him for offence under Section 302 IPC. When the date for trial was fixed and when the trial proceedings was commenced and 16 prosecution witnesses appeared, the learned counsel Mr.Hasan Mohammed, who defended the petitioner, represented 'No Instructions' and thereafter, the petitioner not appeared before the trial Court. Since he was unable to be secured, NBW was issued on



01.02.2011 by the trial Court. After taking surety action and proclamation proceedings under Sections 82 Cr.P.C., the petitioner has been declared as absconding accused and the case has been transferred to the Long Pendency Case register and the trial Court, by order, dated 16.08.2018 directed the learned Judicial Magistrate No.II, Mannargudi to examine the prosecution witnesses LW1 to LW28 following Section 299 Cr.P.C., and the learned Magistrate had completed the procedure on 25.10.2018.

8.In order to substantiate his arguments, the learned Additional Public Prosecutor relied on the decision of the Hon'ble Apex Court in the case of "Nirmal Singh Versus State of Haryana reported in (2000) 4 SCC 41", wherein it had held that when the accused is absconded, the evidence can be recorded in his absence as per Section 299 CrP.C. In view of the same, the petitioner to examine the prosecution witnesses a fresh cannot be entertained. Anyhow, the petitioner has been given opportunity to cross examine the available prosecution witnesses. If the petitioner permits to cross examine all the prosecution witnesses again, it would amount to harassment to the witnesses. Hence, he strongly opposed this petition.

9.This Court considered the rival submissions and perused the materials available on record.

10.In catena of decisions, the Hon'ble Apex Court as well as this Court, had clearly held that Section 299 Cr.P.C., is on two fold that the abscondness of the accused as well as the non availability of the witnesses have to be satisfied. In this case, the abscondness of the accused is proved and with regard to non availability of the witnesses, no reason has been given by the trial Court.

11.The Hon'ble Apex Court in the cases of "Jayendra Vishnu Thakur Versus State of Maharashtra and another reported in (2009) 7 SCC 104" and "Nirmal Singh Versus State of Haryana reported in (2000) 4 SCC 41" and this Court in the case of "H.Aarun Basha Versus State represented by the Inspector of Police reported in 2018 SCC OnLine Mad 12845" reiterated the said two conditions. In this case, the trial Court had failed to give any reason for non availability of the witnesses, on the other hand, permitted the petitioner to cross examine the available prosecution witnesses.

12.In view of the above, this Court set asides the order, dated 15.09.2021 in CrI.M.P.No.480 of 2021 in S.C.No.62 of 2010 passed by the trial Court and this Criminal Original Petition is allowed. The trial Court is directed to recall the prosecution witnesses and record their evidence afresh. The petitioner is directed to cross examine the prosecution witnesses on the day when they are appearing, without seeking any unnecessary adjournments. In the event of petitioner



adopting any dilatory tactic, the trial Court to take coercive action against the petitioner, if needed keep him in confinement and proceed with the trial. This direction is necessary, since the case is a long pendency case from the year 2009.

Sd/-

Assistant Registrar (CS-VIII)

//True Copy//

Sub Assistant Registrar

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To

1.The Principal District and Sessions Court,
Thiruvarur.

2.The Inspector of Police,
Koothanallur Police Station,
Thiruvarur District.

3.The Public Prosecutor,
High Court, Madras.

+1cc to Mr.S.K.Kannadasan, Advocate SR. No.64764

CRL.O.P.No.21638 of 2021

SVI (CO)
PR (10/01/2022)