



Crl.O.P.No.20256 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 24.11.2022

Pronounced on : 06.12.2022

CORAM

THE HON'BLE **Dr.JUSTICE G.JAYACHANDRAN**

Crl.O.P.No.20256 of 2019

and

Crl.M.P.No.10411 of 2019

Muthuvappa @ Jeavul Haq Sahabudeen

... Petitioner

Vs.

1.State Rep.by  
The Inspector of Police,  
Nagore Police Station,  
Nagapattinam District.

J.M.Sulthan

... Respondents

**Prayer:-** Criminal Original Petition has been filed under Section 482 of Cr.P.C., praying to call for the records and quash the entire proceedings against the petitioner in the split up case in S.C.No.52 of 2011 on the file of the learned District and Sessions Court, Nagapattinam.

For Petitioner : Mr.K.Ethirajalu

For R1 : Mr.N.S.Suganthan  
Government Advocate (Crl.Side)

For R2 : No appearance



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**ORDER**

The petitioner herein is a third accused in Crime No.153 of 2003.

2. The case against the petitioner and the 1<sup>st</sup> accused was split up as S.C.No.52 of 2011 from the main Sessions Case No.170 of 2004, since the petitioner and the 1<sup>st</sup> accused absconded pending trial. The present Criminal Original Petition is filed to quash the case against the petitioner on the ground that the trial against A2 ended in acquittal and the testimony of the witnesses examined has not proved. Hence it will be a futile exercise for the prosecution trying the petitioners.

3. The case of the petitioner is that Syed Jahabar Ali Jinnah Sahib was murdered by A1, who alleged to have been in connivance with A2 and A3. A2 alone was tried and others absconded and case against them got split up. This petitioner is charged for with A2. The trial Court has acquitted A2. The benefit of acquittal of A2 has to be extended to the absconding accused also, since the charges against them along with A2 is for conspiracy, house trespass to commit murder. Murder in furtherance



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of common intention and in alternate abetment to murder.

4. The learned counsel for the petitioner submitted that as per the Final Report, at the midnight of 01.03.2003, A1, A2 and A3 trespassing into the house of Syed Jahabar Ali Jinnah Sahib/the deceased, while A3 caught hold the neck of the deceased, A1 pushed the deceased on the cot and caused head injury to the deceased. A2 tied a wire around the neck of the deceased. A1 put a towel around the neck and smothered him with the help of A3 who closed the mouth of the deceased.

5. Charge against A1 to A3 for offence under Sections 120(B) and 449 I.P.C., as against A1 for the offence under Section 302 I.P.C., and as against A2 and A3 for the offence under Section 302 r/w.109 I.P.C., were framed by the trial Court.

6. During the course of trial, A1 and A3(the present



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petitioner) absconded. Hence the case has been split up and re-numbered as S.C.No.52 of 2011. The trial against A2 alone proceeded. The prosecution to prove the case examined eighteen (18) witnesses, marked thirty (30) exhibits and twenty two (22) Material Objects.

7. After appreciating the evidence, particularly PW.1, who set the criminal law into motion, suspecting foul play in the death of his friend Syed Jahabar Ali Jinnah Sahib, who did not support the case of the prosecution and he has deposed that the servant in the deceased house by name Abdullah admitted his guilt of murdering Syed Jahabar Ali Jinnah Sahib whereas, the prosecution has arrested three persons who are unconnected to the offence. The family members of the deceased namely PW.3, PW.4 and PW.5 claimed that Syed Jahabar Ali Jinnah Sahib died naturally. The Postmortem Report does not favour the case of the prosecution. The body of Syed Jahabar Ali Jinnah Sahib was exhumed after the complaint given by PW.1 suspecting foul play in the death of Syed Jahabar Ali Jinnah Sahib. While the death occurred on midnight of 01.03.2003, complaint of suspicious death registered on 04.03.2003. The body was exhumed on 05.03.2003 and thereafter, the Postmortem was



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conducted. The prosecution has arrayed this petitioner as one of the accused purely based on the extra judicial confession given by A1 who is still absconding and that statement cannot be used against A3, who is not tried together with A1. The case of the petitioner stands on the same footing i.e., A2, who has been acquitted after examination of the witnesses and therefore, the benefit of co-accused should be extended to this petitioner also.

8. This Court perused the records and the submissions made by the learned counsel for the petitioner as well as the learned Government Advocate (Crl.Side) for the State.

9. The sum and substance of the prosecution case is that the deceased, who had the habit of homo sex, few days prior to the occurrence has attempted to induce A1 and A2 to satisfy his unnatural desire. Therefore, A1 to A3 gathered together and conspired to kill Syed Jahabar Ali Jinnah Sahib, since his conduct was against nature and affecting the Society. Pursuant to the conspiracy, on the midnight of 01.03.2003 they trespassed into the house of Syed Jahabar Ali Jinnah Sahib caught hold of his neck and pushed him down on the cot. The said



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Syed Jahabar Ali Jinnah Sahib sustained head injury. He was strangled with wire and throttled using towel. The prime purposed of the crime was A1, who caused the death by strangulation and smothering. The other two accused aided and assisted him in pursuant to the conspiracy conceived by them.

**10.** The prosecution after completion of investigation has filed Final Report with the list of witnesses annexed. They proposed to examine 45 witnesses. But in the course of trial after framing of charges, A1 and A3 got absconded and the case against them got split up. A2 alone was tried hence 18 witnesses relating to A2 alone were examined. The trial Court assigning reason had acquitted A2.

**11.** The point for consideration is now whether the acquittal of A2 will automatically enure the acquittal for A3 who is absconding and evading trial?



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**12.** The learned Government Advocate (Crl.Side) for the

State relying upon the following judgments:-

***(1) Shri Sat Kumar Versus State of  
Haryana [(1974) 3 SCC 643]***

***(2) Kulwant Singh Versus State of  
Punjab and another [High Court of Punjab  
and Haryana]***

***(3) Jagtar Singh Versus State of  
Haryana [(2015) 7 SCC 675]***

***(4) Moosa Versus Sub Inspector of  
Police [(2006) 42 AIC 461]***

and submitted that the petition under Section 482 Cr.P.C., for quashing the complaint on the ground that the co-accused of the petitioner has already been acquitted by the trial Court is not sustainable. Acquittal of one accused cannot give the benefit to the other accused who is absconding and evading the trial.

**13.** Acquittal of co-accused is irrelevant. The guilt or innocence of each accused to be proved through proper trial. The absconding accused cannot gain any premium for his abscondance because the co-accused who faced the trial has gain acquittal.



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**14.** The learned counsel for the petitioner submitted that the evidence so far let in by the prosecution not incriminating this petitioner/the 3<sup>rd</sup> accused. There cannot be any better evidence against this petitioner to prove the guilt of the petitioner. The trial against this petitioner will be an empty formality. While the prosecution witnesses examined so far has not supported the case of the prosecution version, no purpose in continuing the trial against this absconding accused, when the result of acquittal is certain. No case could be made out against these petitioners from the evidence so far recorded. Hence to meet the ends of justice, the power under Section 482 Cr.P.C., has to be exercised and criminal complaint against this petitioner has to be quashed.

**15.** On reading of the record, this Court finds that it is a case of conspiracy between A1 to A3 to commit murder of Syed Jahabar Ali Jinnah Sahib who alleged to be prone to unnatural sexual activity. According to the prosecution, the said Syed Jahabar Ali Jinnah Sahib



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was done to death on midnight of 01.03.2003. His family members, returned from Chennai on 02.03.2003 early morning, found Syed Jahabar Ali Jinnah Sahib dead and they hurriedly buried him by 5 'o' clock evening. PW.1/J.M.Sulthan, friend of the deceased, who saw the deceased with injury on the head and bleeding through the mouth, suspected that it is not a natural death and therefore, reported it to the police on 04.03.2003. This has prompted the respondent police exhumed the body of Syed Jahabar Ali Jinnah Sahib and sent it for autopsy. The doctor who conducted post-mortem has opined that the death as resulted following head injuries involving brain and its vital structure. While acquitting A2, the trial Court has taken note of the fact that the family members of the deceased have turned hostile and the confession statement of A1 cannot be used against A2. The recovery of Material Objects are also suspected. What this Court finds in the discussion in the trial Court judgment as against A2 confined only to the evidence pertaining to A2 and the prosecution has also out of 45 listed witnesses examined only 18 witnesses and not examined rest of the witnesses, since their evidence is not in connection with the role of A2.



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16. In this context, it is pertinent to refer the Full Court Judgment of Kerala High Court when similar issue came up for consideration and referred to Larger Bench to decide whether the acquittal of co-accused will ensure the same benefit to the absconding accused against whom the case is split up and pending.

17. After referring catena of judgments and the provisions of law The Hon'ble Full Bench of Kerala High Court in ***Moosa Vs. Sub Inspector of Police*** reported in ***2005 SCC OnLine Ker 605*** held that, there may be distinguishing features in the evidence so far as the acquitted and convicted accused are concerned and merely because some of the accused were acquitted by itself may not be a ground or bar a trial itself leaving the question as to whether the co-accused is entitled to rely on the earlier judgment as the rule of estoppel at the time of trial. In the said judgment following judgments referred for the dictum mentioned under:-

(i) referring ***Ramaswaini Goundan V. Subbaraya Gounder (AIR (35) 1948 Madras 388)*** reference was made to Section 35 of the



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*Evidence Act and held that a previous judgment though not inter parties is admissible under Section 35 to prove a statement made by a predecessor in title of the party against whom the document is sought to be used. Consequently, where such a judgment contains an admission as to the date of death of the father of the predecessor in title, the admission is admissible to prove the date of the death of such person. The above decision would show that even if a judgment is not inter parties and may not be relevant within the meaning of Sections 40 to 43, the question will be admissible under Section 35 to prove certain facts.*

*(ii) **Gangadhar Behera V. State of Orissa (2003 SCC (Crl.) 32**, the apex Court held that merely because some of the accused have been acquitted, though evidence against all of them, so far as direct testimony went, the same does not lead as a necessary corollary that those who have been convicted must also be acquitted and it is always open to a Court*



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*to differentiate the accused who had been acquitted from those who were convicted. Reference was made to **Gurliaran Singh V. State of Punjab (AIR 1956 SC 460).**”*

*(iii) **Raju Rai Vs. State of Bihar [2005 (7) SCC 459]** where the Hon'ble Supreme Court has held that judgment of acquittal in the trial of the co-accused tried separately is wholly irrelevant in the subsequent trial of the other accused who has not tried earlier and that the judgment in their case is not admissible within the meaning of Sections 40 to 44 of the Evidence Act, 1872.*

**18.** Reading of the charges indicates that A1 to A3 conspired and alleged to have trespass into the house of the deceased. However the overt act attributed each to of them are different. Out of 45 listed witnesses, 18 alone witnesses were examined in the trial as against A2. The trial Court conclusion about A2 in the light of the evidence adduced by the prosecution cannot be the same if the prosecution chooses to examine the remaining witnesses while trying the split up case against this petitioner. It is not absolutely certain that the conclusion will be same



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as A2. Therefore, Court cannot give premium to absconder merely because his co-accused faced trial and earned acquittal.

19. The facts of the case indicates the evidence against each of the accused to be recorded and tested independently by Judicial mind. The conclusion regarding A2 will not automatically extend to the absconding accused A3 since not all the witnesses on behalf of the prosecution were examined earlier and the overt act against this petitioner is not one and the same as that of A2 though there are some over lapping.

20. In the said circumstances, law requires the absconding accused to be tried independently in the separate trial after he being secured, de hors of the fact that his co-accused gain acquittal after full trial.

21. The judgment rendered by the Full Bench of Kerala High Court in *Moosa Vs. Sub Inspector of Police* case is very clear and certain on this legal issue, saying petition to quash the trial against the



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absconding accused is not automatic by default when the co-accused tried and acquitted on merits of the evidence available. Hence, ***this Criminal Original Petition stands dismissed.*** Consequently, the connected Criminal Miscellaneous Petition is also dismissed.

**06.12.2022**

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Index: Yes/No

Speaking Order/Non Speaking Order

To

- 1.The District and Sessions Court, Nagapattinam.
- 2.The Inspector of Police,  
Nagore Police Station,  
Nagapattinam District.
- 3.The Public Prosecutor,  
High Court of Madras, Chennai.



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**Dr.G.JAYACHANDRAN, J.**

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Delivery Order made in  
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