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Crl.O.P.(MD)No.4534 of 2019

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 20.12.2021

Delivered on : 31.01.2022

CORAM:

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

Crl.O.P. (MD)No.4534 of 2019
and
Crl.M.P. (MD)No.2779 of 2019

S.Sivakumar

... Petitioner/
Accused No.4

vs.

1.State through
The Inspector of Police,
Uthumalai Police Station,
Tirunelveli District.

...Respondent/
Complainant

2.Dr.Elangovan,
Joint Director of Health Services,
O/o. the Joint Director of Health Services,
Tenkasi,
Tirunelveli District.

... Respondent/
Defacto Complainant

PRAYER : Criminal Original Petition filed under Section 482 Cr.P.C, to call for the records pertaining to the case in C.C.No.15 of 2019 on the file of the Judicial Magistrate, Alangulam and quash the same as against the petitioner.

For Petitioner : Mr.V.Kathirvelu, Senior Counsel
for Mr.P.Subbiah

For Respondents : Mr.M.Muthumanikkam
Government Advocate (Crl. side) for R1
No appearance for R2

O R D E R

This Criminal Original Petition has been filed, invoking Section 482 Cr.P.C., seeking orders to call for the records pertaining to the case in C.C.No.15 of 2019 pending on the file of the Court of the Judicial Magistrate, Alangulam and quash the same.

<https://hcservices.ecourts.gov.in/hcservices/>



2.The petitioner is the fourth accused in C.C.No.15 of 2019 on the file of the learned Judicial Magistrate, Alangulam.

3.On the basis of the complaint lodged by the second respondent / defacto complainant, who was the then Joint Director of Health Services, Tenkasi, Tirunelveli District, FIR came to be registered against four persons including the petitioner in Crime No.183 of 2017 for the alleged offences under Sections 419 and 420 IPC and Section 15(3) of Indian Medical Council Act, 1956.

4.The first respondent, after completing the investigation, has laid a final report under Section 173 Cr.P.C. dated 26.09.2017 against the same four persons arraying the petitioner as the fourth accused for the alleged offences under Sections 419, 420, 34 and 109 IPC and Section 15(3) of Indian Medical Council Act, 1956 and the case was taken on file in C.C.No.15 of 2019 and is pending on the file of the learned Judicial Magistrate, Alangulam.

5.It is pertinent to mention that the accused 1 to 3 were charged for the offences under Sections 419 and 420 IPC r/w Section 15(3) of Indian Medical Council Act, 1956 and that the petitioner/fourth accused was charged for the offences under Sections 109 and 34 IPC r/w Section 15(3) of Indian Medical Council Act, 1956.

6.The case of the prosecution is that the first accused was running a Poly Clinic viz., Jai Sriram Poly Clinic at Uthumalai, Alangulam Taluk, Tirunelveli District, that the accused 1 to 3 without any required qualification was giving Allopathy treatment to the persons and thereby, cheated the general public and that the fourth accused being a registered Allopathy practitioner abetted the other accused and shared common intention in the commission of the said offence.

7.It is evident from the FIR that the second respondent, the then Joint Director of Health Services, Tenkasi, along with the medical officers of Primary Health Centres of Nettur and Uthumalai, had inspected the Jai Sriram Poly Clinic at Uthumalai and that since the clinic was found in locked condition and as they were not able to contact the owner of the clinic, they had sealed the premises in the presence of the revenue authorities and directed the owner and the staff of that Poly Clinic to appear for enquiry before the second respondent and after conducting enquiry, he came to know that the first accused without any prescribed qualification has been giving treatment with the help of the accused 2 and 3 and the fourth accused, who was a retired civil surgeon has been giving instructions through phone for treating the patients and that since the second respondent came to know that the first accused was running a bogus hospital, he was constrained to lodged the



8.It is further evident from the FIR that subsequently on 18.08.2017 after removing the seal, they had seized three stethoscope, various medicines and other hospital instruments from the clinic of the first accused.

9.It is further evident from the records that the first respondent has examined the second respondent and the other two medical officers, who had accompanied with the second respondent, Village Administrative Officer (VAO) of Uthumalai and his assistant and two other mahazar witnesses and also the Sub-Inspector of Police, who registered the case and recorded their statements under Section 161(3) Cr.P.C.

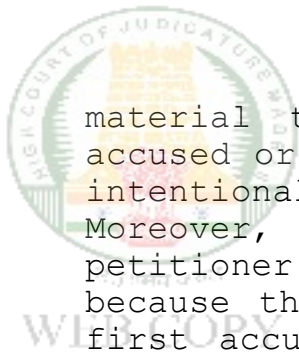
10.In the complaint itself, the second respondent has specifically alleged that the petitioner herein at the enquiry has stated that he was a retired civil surgeon and that he used to visit the Jai Sriram Poly Clinic on every Sunday between 10.00 a.m. and 12.00 noon and treat the patients.

11.As rightly contended by the learned counsel for the petitioner, the prosecution has specifically admitted that the petitioner is a medical practitioner and retired civil surgeon, that the only charge levelled against the petitioner is that he had abetted the other accused and shared common intention in the commission of an offence under Section 15(3) of Indian Medical Council Act, 1956.

12.Section 107 IPC defines the abetment and the offence of abetment is constituted by instigating a person to commit an offence or engaging in a conspiracy to commit an offence or intentionally aiding a person to commit an offence. In order to proceed against a person for the offence under Section 107 IPC, the prosecution is duty bound to prove the element of *mens rea*. An accused person can be charged with abetment only if he instigates another to do a criminal act or intentionally aids by any act or illegal omission for the doing of a thing or engages somebody with a purpose to do an illegal act.

13.It is pertinent to note that mere association of the accused who is charged for the offence of abetment with the main offender, in the absence of any material to show that there was an instigation by the accused or that there was any intention either in aiding or in commission of the offence committed by the main offender, it cannot be said that the accused has committed the offence of abetment.

14.In the case on hand, though the prosecution has alleged that the petitioner had abetted or shared the common intention with the other accused in the commission of an offence, they have not



material to show that the petitioner had instigated the other accused or engaged in a conspiracy to commit the alleged offence or intentionally aided the other accused to commit the offence. Moreover, there is absolutely no material to show that the petitioner had shared common intention with the other accused. Just because the petitioner was visiting the Poly Clinic, owned by the first accused, on every Sunday for treating the patients for two hours, that by itself is not sufficient to show that he had abetted or shared the common intention for the commission of the offence.

15. Though the prosecution has alleged that the other accused have treated the patients after getting advise or instructions from the petitioner through phone, admittedly, the prosecution has not produced the call details of the petitioner and the other accused to prove that the other accused were taking instructions or advise for treating the patients from the petitioner.

16. No doubt, the second respondent/defacto complainant has alleged in the complaint that the accused 2 and 3 have given statements to the effect that they were taking instructions or advise of the petitioner through phone. Admittedly, the statements allegedly recorded by the second respondent were not produced either before the Investigating Officer or before the trial Court or before this Court.

17. It is not case of the prosecution that the second respondent has produced the alleged statements along with the complaint or that they have received the same subsequently. Even assuming for arguments sake that the said statements are available, the same cannot be considered as an extra judicial confession and so far as the present petitioner is concerned, the same can only be taken as an extra judicial confession of the co-accused.

18. A Division Bench of this Court in ***Shivaraj and others vs. State by The Inspector of Police, Dharmapuri Police Station, Dharmapuri*** (Crl.A.No.108 of 2016 dated 10.08.2016) has specifically held that the extra judicial confession of the co-accused cannot be treated as a substantive evidence against the other.

19. Admittedly, the petitioner is aged about 73 years. In the case on hand, as already pointed out, there is absolutely no material to link the petitioner with the alleged offences. Considering the above, this Court is of the view that permitting the prosecution to proceed against the petitioner would only amount to an abuse of process of law and as such, the proceedings against the petitioner is liable to be quashed, but the Prosecution has to proceed against the other accused.

20. In the result, this Criminal Original Petition is allowed and the proceeding in C.C.No.15 of 2019 on the file of the learned



Judicial Magistrate, Alangulam, against the petitioner stands quashed. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-III)

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Sub Assistant Registrar

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 Judicial Magistrate,
Alangulam.
2. The Inspector of Police,
Uthumalai Police Station,
Tirunelveli District.
3. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.P.SUBBIAH, Advocate (SR-3194[F] dated 31/01/2022)

order made in
Crl.O.P. (MD)No.4534 of 2019
and
Crl.M.P. (MD)No.2779 of 2019
31.01.2022

CSM

MS/23.02.2022/5P.5C