



CrI.O.P.No.5826 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.07.2023

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

CrI.O.P.No.5826 of 2023

and

CrI.M.P.Nos.3640 & 3642 of 2023

P.Manikandan

... Petitioner

Vs.

1. Central Bureau of Investigation,
Rep., by The Inspector of Police,
MDMA, Chennai.
(OD at CBI, SCB, Chennai)

2. The State Rep., by
The Inspector of Police,
Mangalam Police Station,
Thiruvannamalai.

3. P.Paramasivam

... Respondents

Prayer: Criminal Original Petition is filed under Section 482 of Cr.P.C., to call for the records of the charge sheet / final report filed by the first respondent in Special S.C.No.42 of 2021 on the file of the learned Special Court for the trial of cases under POCSO Act, Tiruvannamalai and quash



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the same and subsequently quash the entire proceedings in Special S.C.No.42 of 2021 on the file of the learned Special Court for the trial of cases under POCSO Act, Tiruvannamalai.

For Petitioner : Mr.M.Palanivel

For Respondents : Mr.K.Srinivasan,
Special Public Prosecutor

ORDER

This Criminal Original Petition is filed under Section 482 of Cr.PC., by the accused, by name, Manikandan.

2. According to the petitioner, the High Court in the Referred Trial No.2 of 2018 acquitted him vide judgment dated 24.07.2018 from all the charges levelled against him and he was directed to be set at liberty forthwith. While so, the de nova investigation by the CBI conducted pursuant to the direction of the Division Bench in the referred trial order, is non-est in law, attracts the principles of double jeopardy, violates the rights enshrined under Article 20(ii) of the Constitution and Section 300 of Cr.P.C.



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3. The petitioner was initially tried before the Special Court under POCSO Act in S.C. No.102 of 2015 for charges under Sections 364(A) IPC and 302 IPC. He was found guilty of abducting a four year old girl child and causing her death. The trial Court, after examining the witnesses, convicted him for life for the offence under Section 364(A) IPC and imposed death sentence for offence under Section 302 IPC. As statute requires, the judgment was referred to Division Bench of this Court for confirmation of the death sentence in Referred Trial No.2/2018. The accused also filed Appeal against conviction that was numbered as Crl.A.102 of 2018. While considering the referred trial and the criminal appeal, the Division Bench of this Court found grave error in investigation as well as in the trial. Finally the Court concluded as under:

“20.1. The Criminal Appeal is allowed, setting aside the conviction and sentence imposed on the appellant/accused by the learned Fast Track Mahila Court Judge, Thiruvannamalai, in S.C.No.102 of 2015, by the judgment, dated 31.01.2018. The appellant/accused is acquitted of all the charges levelled against him and his directed to be set at liberty, forthwith, unless his presence is required in connection with any other case. Fine amounts,



if any, paid by the appellant, shall be refunded to him. Bail bonds, if any, shall stand discharged.

20.2. The Case Diary and other relevant documents shall be transferred to the Central Bureau of Investigation, Chennai, who is directed to conduct de-novo investigation and file necessary final report before the committal court, within a period of three months from the date of receipt of a copy of this judgment.”

4. Pursuant to this direction, CBI has taken up the de novo investigation and completed the investigation, filed the final report before the Special Court for POCSO Cases, Thiruvannamali. The trial Court has framed charges under Sections 364 and 302 IPC and commenced the trial. On the day when present petition filed, the prosecution has completed examining all its witnesses except the I.O. At that juncture, the present original petition is filed on the ground that he being acquitted for the same charges, cannot be prosecuted again, in the light of Section 300 Cr.P.C.

5. Learned counsel appearing for the petitioner relied upon the judgments of the Hon'ble Supreme Court in ***Kolla Veera Raghav Rao Vs.***



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Gorantla Venkateswara Rao and Ors in Crl.A.No.1160 of 2006 and T.P.Gopalakrishnan Vs. State of Kerala in Crl.A.Nos.187-188 of 2017 and

submitted that the final report filed by the CBI which has been now taken on file by the POCSO Court, Thiruvannamali in Special S.C. No.42/2021, has to be quashed.

6. Per contra, the learned Special Public Prosecutor for CBI submitted that in the referred trial, which examining the sustainability of the trial Court judgment imposing death sentence on the petitioner, the Division Bench of this Court found material error in investigation as well as in the appreciation of evidence by the trial Court. Therefore, while setting aside the conviction, ordered de nova investigation by the CBI.

7. Pursuant to that, investigation was taken up. Prosecution has marshalled its witnesses and trial nearing completion. After his unsuccessful attempt to delay the trial by enacting a drama of fake death, the present petition is filed which has no legs to stand either on law or on facts.



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8. Learned Special Public Prosecutor for CBI submitted that the facts of the case does not fall within the ambit of Section 300 Cr.PC. The trial based on the State police though culminated in conviction, the same has been set aside by the Division Bench of this Court in the referred trial, which is nothing but the continuation of the trial. Therefore, the petitioner cannot presume that he was acquitted and the order of acquittal has reached finality. Section 386 of the Code vest power with the appellate Court to set aside the order of conviction passed by the trial Court and order fresh trial. In *Satyajit Banerjee and Others Vs. State of West Bengal and Others* reported in *(2005) 1 Supreme Court Cases 115*, the Hon'ble Supreme Court had an occasion to consider almost similar plea but declined to entertain the petition filed by the accused on following the dictum laid down in *Best Bakery's case* reported in *(2004) 4 SCC 158*. Taking note of the fact that in the retrial, substantial part of recording evidence being completed, the Hon'ble Supreme Court declined to exercise its discretionary jurisdiction under Article 136 of Constitution and refrained from upsetting the judgment of the High Court.



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9. In this case, the facts are still worse if, the petitioner is really aggrieved by the direction of the Division Bench, ought to have approached the Supreme Court but, did not challenge the order of re-investigation and allowed the investigation to get completed. Before the trial Court, he answered the charges framed against him and stood for trial. After examination of 34 witnesses on the side of the prosecution and when the matter was adjourned for examining I.O., the present petition has been filed on the frivolous ground. The malicious intention of the accused to protract the trial by abusing the process of law need to be contemned.

10. **Point for consideration:**

(i) Whether the facts of the case attracts
Section 300(i) of Cr.P.C.,?

11. Pursuant to the order passed by the Division Bench in the referred trial, de nova investigation was ordered and the same has culminated in filing final report which has been taken on file by the POCSO Court, Tiruvannamali in Special S.C.No.42 of 2021.



12. To attract Section 300(i) Cr.P.C., prior trial referred must have been for the same offence, same charges and it should have been attained finality, the order of acquittal must be in force. As far as the facts of the case in hand, as rightly pointed out by the learned Special Public Prosecutor for CBI, order for re-investigation came to be passed by the Division Bench of this Court in the referred trial which is nothing but continuation of the trial, the judgment of the trial Court was tested as to whether the death sentence to be confirmed or not. The Division Bench after being satisfied that the case to re-investigate had set aside the prior trial decision and ordered de nova investigation.

13. Incidentally, in this case, the accused has also filed appeal and both were taken up together and judgment passed on 24.07.2018 is well within the power of the appellate Court under Section 386 Cr.P.C., which enumerates the powers of the appellate Court. Section 386(b) reads as under:

386(b) in an appeal from a conviction-

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be retried by a



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*Court of competent jurisdiction subordinate to such
Appellate Court or committed for trial.*

14. This is a case, a 4 year old girl child being kidnapped and done to death and body thrown into a well. The investigation pointed the needle of suspicion towards the petitioner herein and he was tried and convicted. The Division Bench of this Court found the investigation was perfunctory leading to improper appreciation of evidence. Hence, the Division Bench, having found fault on the investigating agency as well as the trial Judge had made certain comments and reserved their opinion about the trial Judge for administrative action.

15. In the said circumstances, the Division Bench has rightly thought it fit to meet the ends of justice, de nova investigation to be done by premier investigating agency i.e., CBI. The petitioner has not challenged the said order, he submitted himself for the trial. Having found that the wind of trial is against him, to put spokes in the judicial process, the present petition is filed with an illusionary reason that Section 300 Cr.P.C., gives protection to him, which in fact not.



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16. The judgment cited by the counsel appearing for the petitioner relates to cases where the accused was tried for the specific offence and trial reached finality. On the basis of the very same offence and for the same set of facts, charges were framed and the accused was asked to face the trial again. In that circumstances, the Supreme Court has held rightly that there cannot be a second trial for the same offence which has already been heard and decided finally.

17. Contrarily, when there is perfunctory investigation or farce trial, Supreme Court has come down heavily and ordered retrial. To quote, in the *Best Bakery's* judgment reported in *(2004) 4 SCC 158*, the Hon'ble Supreme Court had visualised dishonest and faulty investigation and held, ordering retrial / re-investigation is permissible in law.



18. For the sake of completion, this Court extracts the relevant observation made by the Hon'ble Supreme Court which will fortify the decision of this Court to dismiss this petition as well as the decision of Division Bench which has ordered re-investigation.

“52.Whether a retrial under Section 386 or taking up of additional evidence under Section 391 is the proper procedure will depend on the facts and circumstances of each case for which no straitjacket formula of universal and invariable application can be formulated.

53.In the ultimate analysis whether it is a case covered by Section 386 or Section 391 of the Code, the underlying object which the court must keep in view is the very reason for which the courts exist i.e. to find out the truth and dispense justice impartially and ensure also that the very process of courts are not employed or utilized in a manner which give room to unfairness or lend themselves to be used as instruments of oppression and injustice.

70.In the background of principles underlying Section 311 and Section 391 of the Code and Section 165 of the Evidence Act, it has to be seen as to whether the High Court's approach is correct and whether it had acted justly, reasonably and fairly in placing premiums on the serious



lapses of grave magnitude by the prosecuting agencies and the trial court, as well. There are several infirmities which are telltale even to the naked eye of even an ordinary common man. The High Court has come to a definite conclusion that the investigation carried out by the police was dishonest and faulty. That was and should have been per se sufficient justification to direct a retrial of the case. There was no reason for the High Court to come to further conclusion of its own about false implication without concrete basis and that too merely on conjectures. On the other hand, the possibility of the investigating agency trying to shield the accused persons keeping in view the methodology adopted and out-turn of events can equally be not ruled out. When the investigation is dishonest and faulty, it cannot be only with the purpose of false implication. It may also be noted at this stage that the High Court has even gone to the extent of holding that the FIR was manipulated. There was no basis for such a presumptive remark or arbitrary conclusion.”

19. This view has been again reiterated in **Satyajit Banerjee's** case (cited supra). The Hon'ble Supreme Court in **Ajay Kumar Ghoshal and Others Vs. State of Bihar and Another**, reported in (2017) 12 SCC 699



following **Best Bakery's** judgment, reiterated that appellate Court has power under Section 386(b)(i) to order retrial / de nova trial if, it is satisfied that omission or irregularity has caused miscarriage of justice.

20. For better appreciation, the relevant observation of the Hon'ble Supreme Court in **Ajay Kumar Ghoshal's** case is extracted below:

41.The appellate court hearing a criminal appeal from a judgment of conviction has power to order the retrial of the accused under Section 386 of the Code. That is clear from the bare language of Section 386(b). Though such power exists, it should not be exercised in a routine manner. A de novo trial or retrial of the accused should be ordered by the appellate court in exceptional and rare cases and only when the opinion of the appellate court such course become indispensable to avert failure of justice. Surely this power cannot be used to allow the prosecution to improve upon its case or fill up the lacuna. A retrial is not the second trial; it is continuation of the same trial and same prosecution. The guiding factor for retrial must always be demand of justice. Obviously, the exercise of power of retrial under Section 386(b) of the Code, will depend on the facts and circumstances of each



case for which no straitjacket formula can be formulated but the appeal court must closely keep in view that while protecting the right of an accused to fair trial and due process, the people who seek protection of law do not lose hope in legal system and the interests of the society are not altogether overlooked.”

21. Section 300(i) Cr.P.C., qualified the protection only in case the order of conviction or acquittal remains in force.

Sub Sections (2) to (5) of Section 300 Cr.P.C., and the explanation with illustrations further makes clear that the protection of “*autrefois acquit*”, is not absolute but subject to conditions.

Acquittal in previous trial with a direction for re-investigation is not an acquittal in force.

22. In the result, the Criminal Original Petition is dismissed as frivolous and devoid of merits. Consequently, connected miscellaneous petitions are closed.



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23. The trial Court is directed to complete the trial and pass such judgment, within a period of 30 days from today, without being influenced by any of the observations either made in this order or in the order passed by the Division Bench.

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Index : Yes/No

Neutral Citation : Yes/No

AT

To

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Dr.G.JAYACHANDRAN,J.

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