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Crl.O.P.No.214 of 2024

In the High Court of Judicature at Madras

08.1.2024

Coram :

The Honourable Mr.Justice N.ANAND VENKATESH

Criminal Original Petition No.214 of 2024
& Crl.M.P.No.143 of 2024

Velu Durai

...Petitioner

Vs

The State rep.by
The Inspector of Police,
Royapettah Police Station,
Chennai.

...Respondent

PETITION under Section 407 of the Criminal Procedure Code praying to withdraw and transfer the case in S.C.No.434 of 2007 on the file of the learned First Additional Sessions Judge, Chennai to any other Sessions Court at Chennai to secure the ends of justice.

For Petitioner : Mr.R.Sankarasubbu
For Respondent : Mr.A.Damodaran, APP

ORDER

This is a petition filed by the petitioner seeking for withdrawal and transfer of the case in S.C.No.434 of 2007, pending on the file of the First Additional Sessions Court, Chennai to any other Sessions Court at Chennai.



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2. Heard the learned counsel for the petitioner and the learned Additional Public Prosecutor appearing for the respondent.

3. The petitioner is facing trial before the Court below for offences under Section 452, 395 and 397 of the Indian Penal Code. The prosecution had examined all the witnesses. When the case was at the stage of questioning under Section 313 of the Criminal Procedure Code (for short, the Code), the petitioner filed Crl.M.P.No.25855 of 2023 under Section 311 of the Code to recall P.W.14 for cross examination. This application came to be dismissed by the Court below by an order dated 09.10.2023.

4. According to the petitioner, P.W.14 was examined in his absence and this witness is said to have implicated the petitioner as if the petitioner handed over the gold jewels to him. After having dismissed the application filed by the petitioner to recall P.W.14, the Court below recalled P.W.5 pursuant to the examination of the Investigating Officer after a period of four years. That apart, the Court below also, on its own, examined P.W.16. Therefore, the petitioner contended that the application that was filed by him to recall P.W.14



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was dismissed on 09.10.2023 whereas a different yardstick was followed by permitting the recall of two other witnesses. Hence, the petitioner apprehends that he will not get fair justice before the Court below and has sought for the transfer of the case from the file of the First Additional Sessions Court, Chennai to any other Sessions Court within the same division. The petitioner also filed Transfer Crl.M.P.No. 27739 of 2023 before the Principal Sessions Court, Chennai and this application also came to be dismissed by an order dated 18.12.2023. It is under these circumstances, the above petition has been filed before this Court.

5. The main ground that has been urged by the learned counsel for the petitioner is that the application filed the petitioner in Crl.M.P. No.25855 of 2023 to recall P.W.14 for cross examination was dismissed on 09.10.2023 by the Court below on the ground that it was filed belatedly whereas two other witnesses were recalled belatedly by the Court below in support of the prosecution. According to him, the petitioner apprehends that the Court below predetermined the issue and hence, the petitioner will not get fair justice before the Court below.



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6. This Court has carefully considered the submissions of the learned counsel for the petitioner.

7. One vital fact that has to be taken into consideration, which will have a bearing in this case, is with regard to Crl.O.P.No.25661 of 2023 filed by the petitioner before this Court challenging the order dated 09.10.2023 passed by the Court below in Crl.M.P.No.25855 of 2023 in S.C.No.434 of 2007 dismissing his application to recall P.W.14 for cross examination. The said criminal original petition was heard and considered in detail by this Court and by an order dated 16.11.2023, the said criminal original petition was dismissed.

8. The relevant portions in the said order dated 16.11.2023 passed by this Court in Crl.O.P.No.25661 of 2023 are extracted as hereunder :

"5. In the course of hearing this Criminal Original Petition, the Learned Counsel for the petitioner submitted that, the petitioner facing trial for house trespass, robbery and causing hurt. The identity of this petitioner not established by the prosecution through P.W.14, since the petitioner was not present in the Court when the deposition of P.W.14 was recorded. The witness has only mentioned the name of the petitioner.



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However, the trial Court is proceeding as if this witness has identified the petitioner. Therefore, it is necessary to recall this witness.

6. The reason said orally before the High Court are not found in the petition filed before the trial Court. Whatever observation made in the Miscellaneous Petition will no way going to influence the final decision of the Court, which will be based on the evidence available. While the petition for recall is filed without assigning reasons worth considering, the order of the Trial Court dismissing the recall petition cannot be termed as unjust or illegal as claimed by the petitioner. It is also noted that, on 03.07.2019, when P.W.14 examined, the petitioner was absent and he had been represented by his Counsel, who had filed petition under Section 317 Cr.P.C., and same been allowed. He had not sought for deferring the cross examination. Probably the need for recall of P.W.14 had arise, because the Court by exercising its power under Section 311 of Cr.P.C., had summoned L.W.25, who was given up by the prosecution earlier. Incidentally, the examination of P.W.14 and the date on which the prosecution has dispensed the examination of L.W.25 and L.W.26 are one the same day. L.W.25, who was examined as P.W.16 on the summon issued by the Court in exercise of power under Section 311 Cr.P.C., after completion of questioning under Section 313 of Cr.P.C., did not support the prosecution and treated as hostile witness. In his deposition P.W.16 had not said anything about P.W.14 or in the cross the prosecution has suggested to him anything about P.W.14. It is not a case where the accused had a right reserved under Section 231(2) of



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Cr.P.C to defer the cross examination of P.W.14. Nor it is not the case of the petitioner that the examination of P.W.16 pursuant to the summon issued by the Court in exercise of power under section 311 Cr.P.C., after questioning under Section 311 Cr.P.C., had caused him some prejudice which requires recall of P.W.14, which will be essential to arrive at a just decision of the case.

7. Section 311 of Cr.P.C does not gives any right to the accused to recall a witness already examined, without assigning valid reasons. While the Court is requested to exercise its power under Section 311 Cr.P.C., by either of the parties, they have to satisfy the Court that it is necessary to recall and re-examine a witness to arrive at just decision.

8. Section 311 of Cr.P.C., consists of two parts. The first part gives pure discretionary authority to the criminal Court and enables it at any stage of inquiry, trial or other proceedings under the code to act in one of the three ways, namely i). summon any person as witness; or ii). to examine a person in attendance, though not summoned as a witness; or iii). to recall and re-examine any person already examined.

9. In the instant case, the trial Court had in exercise of its power under Section 311 of Cr.P.C (first part) has summoned L.W.25 and examined him as P.W.16, after questioning the accused under Section 313 of Cr.P.C., recording that, he (L.W.25) is a material witness. The same reasoning or parity cannot be drawn for recall of P.W.14 who was already examined 4 years ago. If we read the second part of Section 311 Cr.P.C., which is mandatory. It imposes an obligation on the



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Court, i). to summon and examine or ii). to recall and re-examine any such person if his evidence appears to be essential to the just decision of the case. (Ref: Swapan Kumar Chatterjee Vs. CBI reported in 2019/ INSC/11).

10. The Learned Counsel for the petitioner reading the impugned order of rejecting the recall petition submitted that the trial Judge has preconceived that, P.W.14 has specifically implicated the accused Vel Durai (petitioner herein), while the fact remains that, there was no such implication in the testimony of P.W.14. He also submitted that the trial Court had presumed that, the accused had won over the witness. This Court, though finds some force in the said submission, the observation of the trial Court is to be restricted with reference to the Miscellaneous Petition seeking recall of P.W.14."

9. It is very clear from the said order dated 16.11.2023 that this Court had assigned reasons as to why the order dated 09.10.2023 passed by the Court below rejecting the application of the petitioner to recall P.W.14 did not require any interference. Further, this Court also clarified that the observations made in the said order dated 09.10.2023 would not have any bearing while deciding the sessions case finally. In view of the said order dated 16.11.2023, the very basis, on which, the above petition has been filed ceases to exist.



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10. If the Court below thought it fit to recall two other witnesses for examination, that, by itself, cannot be a ground to cast aspersions against the Court below just because the application filed by the petitioner to recall P.W.14 was rejected. Each decision that is taken by the Court below, while recalling the witnesses or rejecting the request to recall the witnesses, is supported by reasons. If every such judicial order passed by the Court below is made as a ground to seek for transfer of the case, it will indirectly amount to interfering with the judicial work performed by the Court below. While deciding Transfer Crl.M.P.No.27739 of 2023, by an order dated 18.12.2023, the learned Principal Sessions Judge, Chennai assigned sufficient reasons as to why the transfer of the case was not warranted. This Court concurs with the findings reached by the learned Principal Sessions Judge, Chennai.

11. It is also relevant to take note of the judgment of the Apex Court in the case of ***Nahar Singh Yadav Vs. Union of India*** ***[reported in 2011 (1) SCC 307]***. The relevant portion in this judgment is extracted as hereunder :

"Thus, although no rigid and inflexible rule or test



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could be laid down to decide whether or not power under Section 406 of the Cr.P.C. should be exercised, it is manifest from a bare reading of Sub-Sections (2) and (3) of the said Section and on an analysis of the decisions of this Court that an order of transfer of trial is not to be passed as a matter of routine or merely because an interested party has expressed some apprehension about the proper conduct of a trial. This power has to be exercised cautiously and in exceptional situations, where it becomes necessary to do so to provide credibility to the trial. Some of the broad factors which could be kept in mind while considering an application for transfer of the trial are:-

(i) when it appears that the State machinery or prosecution is acting hand in glove with the accused, and there is likelihood of miscarriage of justice due to the lackadaisical attitude of the prosecution;

(ii) when there is material to show that the accused may influence the prosecution witnesses or cause physical harm to the complainant;

(iii) comparative inconvenience and hardships likely to be caused to the accused, the complainant/the prosecution and the witnesses, besides the burden to be borne by the State Exchequer in making payment of travelling and other expenses of the official and non-official witnesses;

(iv) a communally surcharged atmosphere, indicating some proof of inability of holding fair and impartial trial because of the accusations made and the nature of the crime committed by the accused; and

(v) existence of some material from which it can be inferred that the some persons are so hostile that



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they are interfering or are likely to interfere either directly or indirectly with the course of justice."

12. It will also be relevant to take note of the decision of the Apex Court in the case of ***Rajesh Talwar Vs. CBI [reported in 2012 (4) SCC 217]***. In this judgment, the Apex Court has reiterated the standards to be applied while considering a transfer petition.

13. The facts of the present case do not fall within the parameters laid down by the Apex Court. In view of the same, this Court does not find any ground to transfer the case at the stage of final arguments.

14. Accordingly, the above criminal original petition stands dismissed. Consequently, the connected Crl.M.P. is also dismissed.

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N.ANAND VENKATESH,J

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To

- 1.The First Additional Sessions Court, Chennai.
- 2.The Inspector of Police,
Royapettah Police Station,
Chennai.
- 3.The Public Prosecutor,
High Court, Madras.

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