
(2016) 02 MAD CK 0169
In the Madras High Court
Case No : Crl. O.P. No. 2855 of 2016

Krishnaiah

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 10-02-2016

Acts Referred:

Constitution of India, 1950 — Article 14, Article 21, Article 22, Article 22(1)
Criminal Procedure Code, 1973 (CrPC) — Section 243(3), Section 303, Section 311,
Section 312, Section 313

Citation : (2016) 2 MLJ Criminal 205

Hon'ble Judges : P. Devadass, J.

Bench : Single Bench

**Advocate : C.S. Dhanasekaran, for the Appellant; U. Srinivasan, Spl. Public
Prosecutor, for the Respondent**

Final Decision : Dismissed

Judgement

P. Devadass, J.—1. A-5 in C.C. No. 31 of 2010 on the file of the learned XI Additional Sessions Judge (CBI Cases) aggrieved by the orders of the said judge passed in Crl.M.P. No. 248 of 2016 in directing him to deposit an exorbitant amount as condition to recall PWs.35 and 38 for his cross-examination has filed this petition.

2. A-5 and certain others are being prosecuted for certain offences before the said Court. Prosecution produced its witnesses. Recording of prosecution evidence was over. Examination of the accused under Section 313 Cr.P.C. was also over.

3. At this juncture, in the Trial Court, A-5 filed Crl.M.P. No. 248 of 2016 under Section 311 Cr.P.C to recall Pws 35 and 38, who are retired Government Officials, for their cross-examination. He wants to test their testimony on the altar of cross-examination. It became necessary for him to put up effective defence in this case.

4. On 25.01.2016, the trial Court allowed his recall petition, however, directed

him to pay Rs. 10,000/- as cost to the District Legal Services Authority, Chennai and since PWs.35 and 38 have to come from Bangalore and Kerala also directed him to pay them Rs. 10,000/- and Rs. 15,000/- respectively towards witness batta.

5. Aggrieved, A-5 has come before us.

6. The learned counsel for the petitioner submitted that actually it is putting fetters on his right to defend himself effectively. Further, as per Section 243(3) Cr.P.C, only reasonable expenses could be ordered to be paid to the witnesses. By way of comparison, the learned counsel also would refer to Section 312 Cr.P.C where also the phraseology "reasonable expenses" has been employed. He would also refer to some of the rules in the Criminal Rules of Practice regulating collection of witness patta.

7. The learned Special Public Prosecutor for CBI cases would submit that the Court has the power to direct deposit of a reasonable amount. But, at the same time, the Courts have the power to curtail any dilatory tactics or any attempt to derail the on going trial.

8. I have considered the rival submissions, perused the impugned order and the materials on record.

9. "No one is a born criminal". Everyone is presumed to be innocent until he is held otherwise by the Court after a fair trial. His such right of presumption itself is his basic human right (See Universal Declaration of Human Rights, 1948 and International Conventions on Civil and Political Rights, 1966, Rathinam Vs State of Tamil Nadu and Another, , 2011 (11) SCC 140 and Chinna Pillai and Another Vs Inspector of Police, Taluk Police Station, Krishnagiri, 2012 (2) LW (CrL.) 499). When he is slapped with charges constitutionally he is entitled to defend himself (See Article 22(1) Constitution of India). It is a facet of human right. No one shall be deprived of his life or liberty save by procedure established by law (See Article 21, Constitution of India). The procedure should be "fair", "reasonable" and "just" [See Maneka Gandhi vs Union Of India (, 1978 AIR SC 597)]. So any unfair procedure in a criminal trial will vitiate the trial. This aspect of fair trial also has been statutorily expressed in Section 303 Cr.P.C. This right to fair trial, namely, the right of the accused to defend himself effectively includes his right to cross-examine the prosecution witnesses. In exercising his this right there shall not be any fetters on him. The accused should not be prejudiced, the accused should not be prevented directly or indirectly or economically in putting forth his defence. It is also a matter of "access to justice". Breach of this is breach of Maneka Gandhi decision (supra).

10. The opportunity to the prosecution to prosecute the accused and the opportunity to the accused to defend himself effectively shall be ensured by the trial Court. It should be a reasonable opportunity. It should not be an empty formality. It should not be made impracticable by putting fetters on the exercise of this right.

11. Now, in this case in exercise of his right of cross-examination and to defend himself effectively, A-5 wants to cross-examine PWs 35 and 38 who have already deposed against him. As per his defence, testimony in their chief-examination need to be tested by way of cross-examination. So far as A-5 is concerned, the evidence of PWs.35 and 38 remain unchallenged and untested through cross-examination. As on today, it contains some incriminating information as against A5. To establish his innocence, he wants to cross-examine them. As already stated, it is his constitutionally guaranteed right. It has been subsequently strengthened by the statutory provisions in the Code of Criminal Procedure, 1973. No fetters shall be made on his exercise of said right.

12. Now, in the facts and circumstances, the directions in the impugned order disables him economically to exercise his right of defence. If he could not recall these witnesses, he will be prejudiced. Then the trial will not be a fair trial.

13. Now we look at Section 243(3) Cr.P.C, which runs as under:

"Section 243(3): The Magistrate may, before summoning any witness on an application under subsection (2), require that the reasonable expenses incurred by the witness in attending for the purposes of the trial be deposited in Court."

14. Mark here the phrase "reasonable expenses". By way of analogy, we can look at Section 312 Cr.P.C. It deals with similar situation when the complainant and other witnesses are to be recalled. There also the word "reasonable expenses" has been employed. And it is subject to the rules made by the State Government.

15. Thus a Trial Court can direct the accused to deposit a reasonable sum towards witness batta. In this connection, certain rules also have been made in Criminal Rules of Practice. Rule 406 of the said Rules deals with what the Court should do when an official witness, who has retired or a non-official witness is summoned to depose as regards their travelling expenses, daily allowance, subsistence allowance. It cannot go beyond Section 243(3) or Section 312 Cr.P.C. Rules cannot go against the statutory Code. And both cannot go against Articles 21 and 22 of the Constitution of India.

16. Thus the Trial Court cannot fix an unreasonable amount to recall a witness for the cross-examination of the defence. It will be against Articles 14, 21 and 22 of the Constitution and doing violence to Section 243(3), 303 Cr.P.C and to Rule 406 of Criminal Rules of Practice and it will be against the concept of fair trial and Maneka Gandhi's decision (supra).

17. Now, in this perspective of the matter, if we look at the impugned order we have no hesitation to hold that unreasonable amount has been fixed by the Trial Court to recall PWs.35 and 38. Direction to the accused to pay costs towards District Legal Services Authority is uncalled for. It is putting restriction on the right of Further, huge amount towards cross-examination of the accused. travelling expenses and other expenses have been fixed by the Trial Court. What was fixed by the Court is more than what one will incur for travelling from

Bangalore and Kerala.

18. PW.35 is a retired Government Servant, now in Bangalore. He has been summoned to depose in connection with some official acts to which she has performed during her service career. She held a post equivalent to an "A" Grade Officer. She shall be reimbursed three tier A.C. to and fro train fare through shortest route. She shall also be paid Rs. 600/- per day towards her subsistence allowance for two days.

19. PW.38 was a retired Police Inspector. He is now in Kerala. He retired as a Group-B Officer. He shall be paid II Class to and fro fare through shortest route. He shall also be paid Rs. 600/- per day towards his subsistence allowance for two days.

20. In view of the foregoing, the impugned order of the learned XI Additional Session Judge (CBI Cases), Chennai passed in Crl.M.P. No. 248 of 2016 dated 25.01.2016 is modified to the effect that the petitioner shall deposit witness batta on the lines indicated in this order within three days from the date of receipt of a copy of this order. The direction to deposit Rs. 10,000/- to the District Legal Services Authority, Chennai and Rs. 10,000/- and Rs. 15,000/- towards travelling expenses of PW35 and PW38 are set aside.