IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : **20..11..2014**

CORAM

THE HONOURABLE MR. JUSTICE S.NAGAMUTHU

Crl.O.P.No.30606 of 2014
and M.P.No.1 of 2014

Venkatrayan

... Petitioner

Vs.

State by
The Sub Inspector of Police,
Mallasamudram Police Station,
Namakkal District.

... Respondent

Petition filed under Section 482 of the Code of Criminal Procedure praying to withdraw the case in Criminal Appeal No.55 of 2014 pending on the file of the learned District and Sessions Judge, Namakka Sessions Division, and to transfer the same to the file of this Court so as to be heard along with Crl.R.C.No.1030 of 2014 pending on the file of this court.

For petitioner : Mr.V.V.Sairam

For respondents : Mr.M.Maharaja, APP

ORDER

The petitioner has come up with this original petition seeking to withdraw the appeal in Criminal Appeal No.55 of 2014 pending on the file of the learned Principal Sessions Judge, Namakkal Sessions Division, to this court so as to be heard along with Crl.R.C.No.1030 of 2014 pending on the file of this court.

2. **The facts of the case in brief would be as follows:-** On a first information lodged by the petitioner - Venkatrayann, the respondent herein registered a case in Crime No.161 of 2012 and filed the final report before the learned Judicial Magistrate, Tiruchengode, for the alleged offences punishable under Sections 341 and 324 of IPC. One Mr.Ganapathy Gounder and Rathinam are the accused in the said case. On completing the investigation, the Sub Inspector of Police, Mallasumudhram Police Station, filed a final report before the learned Judicial Magistrate, Tiruchengode, who in turn, took cognizance of offences under Sections 341 and 324 of IPC in C.C.No.318 of 2012.

3. On the information of Mr.Ganapathy Gounder, a case in Crime No.162 of 2012 was registered for the alleged offences

punishable under Sections 307 r/w 34 and 506(ii) of IPC against the petitioner herein and one Mr.Suresh. On completing the investigation, the respondent filed the final report in the said case against the petitioner and Suresh and the case was, later on, committed to the Court of Session. The learned Sessions Judge, Namakkal, took cognizance and thereafter, made over the same to the learned Assistant Sessions Judge, Tiruchengode, for trial in S.C.No.71 of 2013.

4. From the records it is seen that during the pendency of the case in S.C.No.71 of 2013 on the file of the learned Assistant Sessions Judge, Tiruchengode, the learned Principal Sessions Judge, Namakkal, by his proceedings in D.No.475/TROP/2014 dated 03.02.2014 had withdrawn and transferred the case in C.C.No.318 of 2012 from the file of the learned Judicial Magistrate, Tiruchengode, to the file of the learned Assistant Sessions Judge, Tiruchengode, for being tried along with the case in S.C.No.71 of 2013. As per the said order passed on the administrative side by the learned Principal Sessions Judge, Namakkal, the learned Judicial Magistrate, Tiruchengode, transmitted the records in C.C.No.318 of 2012 to the learned Assistant Sessions Judge, Tiruchengode, for simultaneous trial. The learned Assistant Sessions

Judge renumbered the case as C.C.No.01 of 2014.

5. The learned Assistant Sessions Judge, Tiruchengode, accordingly, tried both the cases simultaneously and by judgement dated 30.07.2014 convicted the petitioner and Suresh under Section 307 r/w 34 and 506(ii) of IPC in S.C.No.71 of 2013. As against the said conviction and the sentence, Mr.Venkatrayan, the petitioner herein and Mr.Suresh have filed an appeal before the learned Principal Sessions Judge, Namakkal in Crl.A.No.55 of 2014 and the same is pending.

6. The learned Assistant Sessions Judge, Tiruchengode, on the same day, i.e., on 30.07.2013, acquitted the accused Ganapathy Gounder and Rathinam in C.C.No.01 of 2014. Challenging the said order of acquittal, the petitioner, who is the de facto complainant in the case, has filed a revision before this court and the same is now pending in Crl.R.C.No.1030 of 2014.

7. On the ground that these cases are cases in counter, the petitioner has come up with this original petition seeking to withdraw the case in Crl.A.No.55 of 2014 from the file of the learned Principal Sessions Judge, Namakkal, to the file of this court so as to be tried along with Crl.R.C.No.1030 of 2014.

8. I have heard the learned counsel appearing for the petitioner and the learned Additional Public Prosecutor appearing for the State and also perused the records carefully.

9.0. During the course of the present proceedings, I have noticed a number of irregularities / illegalities committed at various stages. I wish to deal with the same one after the other.

9.1. As I have already noticed, the offences involved in C.C.No.318 of 2012 [renumbered as C.C.No.01 of 2014 by the court of session] were not exclusively triable by the court of sessions. But, the learned Sessions Jude transferred the case to the file of the learned Assistant Sessions Judge for trial. The learned Sessions Judge had failed to notice that the court of session cannot take cognizance of offences as a court of original jurisdiction; unless the case has been duly committed to the court of session either under Section 209 of Cr.P.C. or under Section 323 of Cr.P.C. In this case, since the offences in C.C.No.01 of 2014 were not exclusively triable by a court of session, though it is a counter case to the case in S.C.No.71 of 2013, the learned Magistrate was, perhaps, under the mistaken impression that the said case could not be committed to the court of session. The learned

Magistrate ought to have committed the case to the court of session while committing the case in S.C.No.71 of 2013. The learned Sessions Judge has, on his part, failed to notice that he has not been empowered to transfer a case from the Court of a Magistrate to the Court of Assistant Sessions under Section 408 of Cr.P.C. The Assistant Sessions Judge, has to follow the procedure for trial before a court of session under Chapter XVIII of the Cr.P.C. But, in this case, the learned Assistant Sessions Judge had followed the procedure for trial of warrant-cases.

9.2. The above deviations from the established procedure, I apprehend, would have been committed due to the misunderstandings of the relevant legal provisions, though the Hon'ble Supreme Court has repeatedly clarified the doubts. Therefore, I deem it necessary to deal with the relevant legal provisions one after the other.

10. Let us, at the first, deal with the issue as to whether it would be lawful for a Magistrate to commit a case which involves offences not exclusively triable by the court of session. It is needless to point out that if any one or more of the offences involved in a case is / are triable exclusively by the Court of Session, then, it is mandatory for

the Magistrate to commit the case under Section 209 of Cr.P.C. Section 209 of Cr.P.C. does not empower the Magistrate to commit a case which does not involve offences exclusively triable by the court of session.

11. Next comes Section 323 of Cr.P.C. which is an extension of Section 209 of Cr.P.C. The said provision reads as follows:-

> **"323. Procedure when, after commencement of inquiry or trial, Magistrate finds case should be committed.** If, in any inquiry into an offence or a trial before a Magistrate, it appears to him at any stage of the proceedings before signing judgement that the case is one which ought to be tried by the Court of Session, he shall commit it to that Court under the provisions hereinbefore contained and thereupon the provision of Chapter XVIII shall apply to the commitment so made**."**
>
> [Emphasis supplied]

12. The expression "it appears to him at any stage of the proceedings that the case is one which ought to be tried by the court of session" came to be considered by the Hon'ble Supreme Court in ***Sudhir and others Vs. State of Madhya Pradesh, AIR 2001 SC 826***. In that case, precisely, the question was when there

are two cases in the nature of cases in counter [cross cases] whether it would be lawful for the Magistrate to commit the case which does not involve offences exclusively triable by the court of session. In paragraphs 13 and 14 of the judgement, the Hon'ble Supreme Court has held as follows:

> *"13. How to implement the said scheme in a situation where one of the two cases (relating to the same incident) is charge-sheeted or complained of, involves offences or offence exclusively triable by a Court of Sessions, but none of the offences involved in the other case is exclusively triable by the Sessions Court. The magistrate before whom the former case reaches has no escape from committing the case to the Sessions Court as provided in Section 209 of the Code. Once the said case is committed to the Sessions Court, thereafter it is governed by the provisions subsumed in Chapter XVIII of the Code. Though, the next case cannot be committed in accordance with Section 209 of the Code, the magistrate has, nevertheless, power to commit the case to the court of Sessions, albeit none of the offences involved therein is exclusively triable by the Sessions Court. Section 323 is incorporated in the Code to meet similar cases also. That section reads thus:*
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> > *"If, in any inquiry into an offence or a trial before a Magistrate, it appears to*

him at any stage of the proceedings before signing judgment that the case is one which ought to be tried by the Court of Session, he shall commit it to that Court under the provisions hereinbefore contained and thereupon the provisions of chapter XVIII shall apply to the commitment so made."

14. The above section does not make an inroad into Section 209 because the former is intended to cover cases to which Section 209 does not apply. When a magistrate has committed a case on account of his legislative compulsion by Section 209, its cross case, having no offence exclusively triable by the Sessions Court, must appear to the magistrate as one which ought to be tried by the same Court of Sessions. We have already adverted to the sturdy reasons why it should be so. Hence the magistrate can exercise the special power conferred on him by virtue of Section 323 of the Code when he commits the cross case also to the Court of Sessions. Commitment under Section 209 and 323 might be through two different channels, but once they are committed their subsequent flow could only be through the stream channelised by the provisions contained in Chapter XVIII."

13. A close reading of the above judgement would make it

abundantly clear that under Section 323 of Cr.P.C., the counter case which involves offences not exclusively triable by the court of sessions should also be committed to the court of sessions for trial while committing the other case under Section 209 of Cr.P.C. In the instant case, the learned Magistrate ought to have committed the case in C.C.No.318 of 2012 when he committed the case in P.R.C. No.13 of 2013 [taken cognizance in S.C.No.71 of 2013 by the court of session]. It is also the law, for any reason, if the Magistrate fails to act *suo motu,* it is always open for any one of the parties including the investigating officer to approach the Magistrate with a plea under Section 323 of Cr.P.C. to commit the case to the court of session along with the other case involving offences exclusively triable by the court of session. If the Magistrate declines to commit so, the remedy for the aggrieved lies either before the Court of Session or High Court by way of revision.

14. Now, let us examine the power of the Sessions Judge under Section 408 of Cr.P.C. which reads as follows:-

> "**408. Power of Sessions Judge to transfer cases and appeals.** (1) Whenever it is made to appear to a Sessions Judge that an order under this sub-section is expedient for the ends of justice, he may order that any particular case be

transferred from one Criminal Court to another Criminal Court in his sessions division.

(2) The Sessions Judge may act either on the report of the lower Court, or on the application of a party interested or on his own initiative.

(3) The provisions of sub-sections (3), (4), (5), (6), (7) and (9) of section 407 shall apply in relation to an application to the Sessions Judge for an order under sub-section (1) as they apply in relation to an application to the High Court for an order under sub-section (1) of section 407, except that sub-section (7) of that section shall so apply as if for the words "one thousand" rupees occurring therein, the words "two hundred and fifty rupees" were substituted."

15. A close reading of Section 408 of Cr.P.C. would go to show that it does not empower a Sessions Judge to direct a Magistrate to commit a case to the court of session. Such power is vested only with the High Court under Section 407 of Cr.P.C. which reads as follows:-

"**407. Power of High Court to transfer cases and appeals.** (1) Whenever it is made to appear to the High Court—

(a) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or

(b) that some question of law of unusual

difficulty is likely to arise; or

(c) that an order under this section is required by any provision of this Code, or will tend to the general convenience of the parties or witnesses, or is expedient for the ends of justice, it may order—

(i) that any offence be inquired into or tried by any Court not qualified under sections 177 to 185 (both inclusive), but in other respects competent to inquire into or try such offence;

(ii) that any particular case, or appeal, or class of cases or appeals, be transferred from a criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction;

(iii) that any particular case be committed for trial of to a Court of Session; or

(iv) that any particular case or appeal be transferred to and tried before itself.

(2) The High Court may act either on the report of the lower Court, or on the application of a party interested, or on its own initiative:

Provided that no application shall lie to the High Court for transferring a case from one criminal Court to another criminal Court in the same sessions division, unless an application for such transfer has been made to the Sessions Judge and rejected by him.

(3) to (8) .. ..

.. .."

[Emphasis supplied]

16. A cursory comparison of these two provisions of the Code would go to show that the High Court alone has been empowered under Section 407(1)(c)(iii) of Cr.P.C. to direct a Magistrate to commit any case whether it involves offence exclusively triable by the court of session or not to the court of session for trial. The Sessions Judge has neither power to direct a Magistrate to commit a case to the court of session nor does he has power to transfer a case from the Court of Magistrate to the Court of Session or Court of Assistant Sessions.

17. The next question is whether the learned Assistant Sessions Judge was legally right in trying the case without taking cognizance under Section 193 of Cr.P.C. Under Section 190 of Cr.P.C., only the Judicial Magistrate has been empowered to take cognizance of any offence. S.193 of Cr.P.C. states that a Court of Session may also take cognizance of an offence as a Court of Original Jurisdiction if the case has been committed to the said court. S.193 of Cr.P.C. came up for consideration before a Constitution Bench of the Hon'ble Supreme Court in ***Dharam Pal and Ors Vs. State of Haryana*** reported in ***(2014) 3 SCC 306*** wherein the Hon'ble Supreme Court has set the controversies at rest by holding that the court of session may take

cognizance of any offence as a court of original jurisdiction only upon the case being committed to the said court. In the instant case, since the case was not committed to the court of session, there was no cognizance taken at all by the court of session and instead, the learned Assistant Sessions Judge simply tried the case on transfer. This is, undoubtedly, an irregularity committed by the learned Assistant Sessions Judge. The learned Assistant Sessions Judge is required to follow the procedure for trial before a court of session under Chapter XVIII of Cr.P.C. He has got no power at all to try any case by following the procedure for trial of warrant- cases. But, in the instant case, unfortunately, the learned Assistant Sessions Judge tried the case by following the procedure for trial of warrant-cases. This is yet another irregularity.

18. Incidentally, I wish to state that though the case in C.C.No.01 of 2014 was tried by the learned Assistant Sessions Judge, Tiruchengode, without there being an order of committal, on that score, the judgement of the learned Assistant Sessions Judge, cannot be invalidated, in view of thelaw laid down by the Hon'ble Supreme Court in **State of Madhya Pradesh v. Bhooraji , 2001 Crl.L.J. 4228**

and followed by this Court in **Ganesan v. State of Tamil Nadu, 2011 (5) CTC 747.**

19. Now turning to the present petition, before the Code of Criminal Procedure [Amendment] Act, 2008 [Act 5 of 2009] by which proviso to S.372 of Cr.P.C. was added, there was no right of appeal for a victim in respect of a case instituted on a police report. The remedy for the victim to challenge the order of acquittal was only by way of revision under Sections 397 and 401 of Cr.P.C. The rights of the victims were not duly recognized in those days in the criminal justice delivery system. Considering this anomaly, the legislature amended the Code giving a place for the victim in the system giving him right to challenge the order of acquittal by way of appeal. That is how, the proviso has been added to Section 372 of Cr.P.C. which reads as follows:-

> "**372. No Appeal to lie unless otherwise provided. -** No appeal shall lie from any judgement or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force:
>
> Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or

> convicting for a lesser offence or imposing inadequate compensation , and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such court"

20. In the instant case, as against the order of acquittal in C.C.No.01 of 2014, the petitioner herein, who is the victim of the crime ought to have filed an appeal to the court of session where the criminal appeal in Crl.A.No.55 of 2014 is already pending. But, unfortunately, the petitioner has come up with the present petition for withdrawal of the appeal in Crl.A.No.55 of 2014 from the file of the learned Sessions Judge to the file of this court so as to be tried along with Crl.R.C.No.1030 of 2014. In my considered opinion, Crl.R.C.No.1030 of 2014 itself is not maintainable as the remedy for the petitioner is to file only a criminal appeal, but, however, under Section 401(5) of Cr.P.C. the petitioner can approach this court for converting the said revision as an appeal and to remit the same to the file of the learned Sessions Judge so as to be tried along with the appeal in Criminal Appeal No.55 of 2014. Thus, in my considered opinion, it is not at all possible for this court to withdraw the appeal in Criminal Appeal No.55 of 2014 from the

file of the learned Sessions Jude, Namakkal, as prayed for.

21. In the result, this criminal original petition fails and the same is accordingly dismissed, however, with a liberty to the petitioner to work out his remedy for conversion of revision in Crl.R.C.No.1030 of 2014 as a criminal appeal and for further orders.

Index : yes. 20.11.2014
Internet : yes.
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Note: The Registry is directed to place this order before My Lord The Hon'ble The Chief Justice to decide as to whether to circulate the same to all the criminal courts in the State of Tamil Nadu and Union Territory of Puducherry or not.

To

1.The Sessions Judge, Namakkal Sessions Division, Namakkal.
2.The Assistant Sessions Judge, Tiruchengode, Namakkal Dist.
3.The Judicial Magistrate, Tiruchengode, Namakkal District.
4.The Sub Inspector of Police, Mallasamudram Police Station, Namakkal District.
5.The Public Prosecutor, High Court, Madras.

S.NAGAMUTHU. J.,

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Crl.O.P.No.30606 of 2014

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