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MADRAS WEEKLY NOTES (CRIMINAL)

2015 (1) MWN (Cr.)

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IN THE HIGH COURT OF MADRAS

S. Nagamuthu, J.

CrI.O.P. No.29399 of 2014 & M.P. No.1 of 2014

17.12.2014

K. Anandan

.....*Petitioner*

Vs.

K. Manoharan, Assistant, O/o. District Munsif-*cum*-Judicial Magistrate, Valparai, Coimbatore District. 2. The Government of Tamil Nadu, rep. by Home Secretary, Fort St. George, Chennai-9 [R2 impleaded vide Order dated 24.11.2014 in CrI.O.P. No.29399 of 2014]

.....*Respondents*

Criminal Procedure

Ss.167 & 309

- Remand extension — Production of Accused in person or through Videoconferencing before Court concerned mandatory.
- Chief Judicial Magistrate not empowered to nominate Magistrate, having no jurisdiction, for remand extension.
- Courts/Prisons, having no Videoconferencing facility, to approach nearest centres.
- Non-production of Accused before Court for remand/extension — If, amounts to offence under Section 166, IPC.

CRIMINAL PROCEDURE CODE, 1973 (2 of 1974), Section 167(1) — First Remand — Could be made by nearest Magistrate irrespective of whether he got jurisdiction over case or not — Physical production of Accused before Magistrate in person must for remanding to judicial custody on first occasion. (Para 8)

CRIMINAL PROCEDURE CODE, 1973 (2 of 1974), Sections 167(1) & 167(2), Proviso to — Remand — Policy custody — Could be ordered only during initial period of 15 days of remand — Unless Accused produced before Magistrate in person, Police custody cannot be ordered — Police custody cannot be ordered by producing Accused through medium of electronic video linkage. (Para 9)

CRIMINAL PROCEDURE CODE, 1973 (2 of 1974), Section 167(2) — Remand Extension — Except initial remand, all subsequent remand to be made by jurisdictional Magistrate and not by any Magistrate — Remand, when extended, custody will be only Judicial custody — Remand extension can be made by Magistrate “on production of Accused” either in person or through medium of electronic video linkage as mandated by Proviso (b) to Section 167(2). (Para 10)

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CRIMINAL PROCEDURE CODE, 1973 (2 of 1974), Section 309 — Remand during Trial — Could be made only on physical production of Accused before Court before whom case is pending — No provision for production of Accused through medium of electronic video linkage — Physical presence of Accused necessary for conducting trial and recording evidence — Physical presence can only be dispensed with under Section 317 — Only in extraordinary circumstances when Jail Authority is not in position to physically produce Accused in Court due to natural calamities, Court concerned can extend remand of Accused under Section 309 through Videoconferencing as is done under Proviso (b) to Section 167(2) — But such a course can be resorted to only in extreme and genuine cases and not in every case. (Paras 11 & 13)

CRIMINAL PROCEDURE CODE, 1973 (2 of 1974), Sections 167 & 309 — Remand Extension — Chief Judicial Magistrate, upon request of Superintendent of Prisons on ground of local body election, nominating Judicial Magistrate to extend remand of prisoners through Videoconferencing — Videoconferencing facility not available with jurisdictional Court — Chief Judicial Magistrate authorizing Magistrate having no jurisdiction over case either to extend remand under Section 167 or to remand Accused under Section 309, *held*, illegal — Extension of remand by Magistrate without having case records and by simply making endorsement in Remand warrants, *held*, illegal besides being mechanical order — However, as Chief Judicial Magistrate and Judicial Magistrate acted according to age old practice, their actions condoned by High Court. (Paras 14, 17 & 18)

CRIMINAL PROCEDURE CODE, 1973 (2 of 1974), Sections 167 & 309 — Remand/Remand Extension through Videoconferencing — Facility not available in all Courts and Prisons — Facility like “Skype”, which is operated by private service providers, could cause security concerns and not appropriate for use by Government — Videoconferencing facility available in 352 Courts out of 411 Criminal Courts in State and in 24 Prisons out of 137 Prisons in State — Prisons, where facility not available, Jail Authorities could escort Accused to nearest centre having facility, so that jurisdictional Magistrate could extend remand — Similarly, Courts where facility not available, concerned Magistrate could go to nearest centre having such facility and extend remand — High Court made it clear that without physical production of Accused or without Videoconferencing, Accused cannot be remanded or remand cannot be extended either under Section 167 or under Section 309 — Courts directed to scrupulously follow Division Bench decision in *Jayalakshmi* and Circular issued by High Court in P.Dis. No.157/2010 dated 13.12.2010 — Circular issued earlier shall stand cancelled — State Government directed to provide facility in all Courts/Prisons within a period of one year. (Paras 12, 14 – 17 & 21)

INDIAN PENAL CODE, 1860 (45 of 1860), Sections 166 & 79 — CRIMINAL PROCEDURE CODE, 1973 (2 of 1974), Sections 167 & 309 — Failure of Petitioner/Superintendent of Prisons to cause production of Accused before Court for remand — Petitioner producing Accused before Judicial Magistrate (not having jurisdiction) nominated by Chief Judicial Magistrate for remand extension — Act of Petitioner, held, would fall under general exception under Section 79, IPC — Act would not amount to offence under Section 166, IPC — Proceedings for offence under Section 166 quashed. (Paras 1, 2, 3, 19 & 20)

CASES REFERRED

Jayalakshmi v. State of Tamil Nadu, 2011 (1) MWN (Cr.) 283 (DB) 12, 16

V. Kannadasan, Advocate for Petitioner.

S. Shanmuga Velayutham, Public Prosecutor for Respondents.

Finding — Cr.O.P. allowed — M.P. closed — Directions issued.

Prayer : Criminal Original Petition filed under Section 482, Cr.P.C., to call for the records in S.T.C. No.529 of 2014 on the file of the learned District Munsif cum Judicial Magistrate, Valparai, Coimbatore District and to quash the same.

JUDGMENT

1. The Petitioner is presently the Superintendent of Prisons in Central Prison, Coimbatore. One Mr. Chandran, S/o. Karuppannan, who was an Accused in Crime No.35 of 2014 on the file of Valparai Police Station in Coimbatore District was remanded to judicial custody by the learned District Munsif cum Judicial Magistrate, Valparai on 20.6.2014 as an under-trial prisoner. On the same day, he was lodged in the Central Prison, Coimbatore. His remand was thereafter periodically extended till 11.9.2014. On 11.9.2014, Mr. Chandran was duly produced before the learned Magistrate and after supplying the copies of the documents as required under Section 207, Cr.P.C., when Mr. Chandran was questioned, he admitted the offence and the case was adjourned to 16.9.2014 for Judgment. Mr. Chandran was, then, remanded to judicial custody till 16.9.2014. On 16.9.2014, however, the Petitioner herein did not cause Mr. Chandran to be produced before the learned District Munsif cum Judicial Magistrate, Valparai on the expiry of the remand period. There was no intimation from the Petitioner to the Court, explaining the reason as to why he could not produce the Accused.

2. On the same day, the learned Magistrate issued a Show Cause Notice under Letter No.6 of 2014 calling upon the Petitioner herein to show cause on 24.9.2014 as to why action should not be taken against him for his failure to cause production of Mr. Chandran before the learned Magistrate on 16.9.2014. But the Petitioner did not appear before the Magistrate on 24.9.2014, instead, he had sent a letter in Letter No.17130/R3/2014 dated 22.9.2014, wherein he had informed the learned Magistrate that for the period between 16.9.2014 & 30.9.2014, the remand of Mr. Chandran was extended by the learned Judicial Magistrate No.II, Coimbatore through video

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linkage as directed by the learned Chief Judicial Magistrate, Coimbatore. The learned Magistrate was not satisfied with the said explanation. No document pertaining to the extension of remand from 16.9.2014 was also produced before the learned Magistrate. The Petitioner informed the learned Magistrate that in the warrant of remand, it had been recorded that the remand was extended. According to the learned Magistrate, this act of the Petitioner, failing to cause production of Mr. Chandran before the Court on 16.9.2014 amounts to offence punishable under Section 166, I.P.C.

3. An Assistant by name K. Manoharan, the First Respondent herein, who is working in the said Court filed a Private Complaint before the learned Magistrate against the Petitioner alleging that the Petitioner had committed an offence punishable under Section 166 of the Indian Penal Code. The learned Magistrate took cognizance on the said Private Complaint and issued summons to the Petitioner. On receipt of the summons, the Petitioner has rushed to this Court with this Petition, seeking to quash the said Criminal proceedings. During the course of the present proceedings, the Government of Tamil Nadu represented by Home Secretary was impleaded as Second Respondent.

4. I have heard the learned Counsel for the Petitioner and the learned Public Prosecutor appearing for the Respondents and also perused the records carefully.

5. It is the contention of the Petitioner that there was no illegal detention of the Accused Mr. Chandran beyond 16.9.2014 as his remand had been duly extended by the learned Judicial Magistrate No.II, Coimbatore. Since the learned Judicial Magistrate No.II, Coimbatore had extended the remand of Mr. Chandran as per the Order of the learned Chief Judicial Magistrate, Coimbatore, this Court called for remarks from the learned Chief Judicial Magistrate, Coimbatore as to how he could authorise the learned Judicial Magistrate No.II, Coimbatore to extend the remand of Mr. Chandran, when the learned Judicial Magistrate No.II, Coimbatore had no jurisdiction over the case. The learned Chief Judicial Magistrate, Coimbatore, in his explanation dated 17.11.2014, has stated that the local body election for Coimbatore Municipal Corporation was to be held on 18.9.2014 and the Armed Reserve and local Police personnel were all engaged in bandobust duty. Citing the said reason and further stating that the Superintendent of Police, Coimbatore District could not provide necessary Policemen for escorting the prisoners to various Courts from Central Prison, Coimbatore, the Superintendent of Police made a request under Letter dated 16.9.2014, requesting the Chief Judicial Magistrate, Coimbatore to nominate a Judicial Magistrate to extend the remand of the prisoners lodged in Central Prison, Coimbatore, whose remand period was to expire on 16.9.2014 through Videoconferencing for a period of three days between 16.9.2014 and 18.9.2014. The learned Chief Judicial Magistrate, Coimbatore has further

explained that his predecessors in office, in similar circumstances, had nominated a specific learned Judicial Magistrate at Coimbatore to extend the remand of the prisoners concerned in the cases of Judicial Magistrate Courts in various places in Coimbatore District through Videoconferencing. He has further explained that considering the said settled practice in vogue and on considering the difficulties expressed by the Superintendent of Police, Coimbatore, under Letter dated 16.9.2014, he had directed the learned Judicial Magistrate No.II, Coimbatore to extend the remand of all the prisoners concerned with the cases pending before various Criminal Courts in Coimbatore District, whose remand periods were to expire on 16.9.2014 through videoconferencing from Coimbatore District Court complex. This direction includes the case in C.C. No.27 of 2013 wherein Mr. Chandran's remand period was to expire on 16.9.2014.

6. Similarly, explanation was called for from the learned Judicial Magistrate, Fast Track Court No.II (Magisterial level), Coimbatore. He, in turn, by his letter in D. No.935/2014 dated 17.11.2014, has stated that on receipt of the proceedings of the learned Chief Judicial Magistrate, Coimbatore under D. No.2907/14 dated 16.9.2014, he extended the remand of the prisoners concerned with cases of all Judicial Magistrate Courts in Coimbatore District including the under trial prisoner by name Chandran. He has further stated that for the purpose of extending remand of these Accused, he did not have the relevant case records. The remand warrants earlier issued by various Courts were all handed over to him and thus he extended the remand of those prisoners including Mr. Chandran without the case records. He has further stated that never in the past, as per the practice, the records were produced before the learned Magistrate, who had been authorised to extend the remand during such exigencies.

7. Now, the question is as to whether the Chief Judicial Magistrate, Coimbatore was right in nominating the Judicial Magistrate No.II, Coimbatore to pass Orders of remand of under trial prisoners of various Courts in Coimbatore District in cases where the said Magistrate was not having jurisdiction to try or to deal with in any manner and whether the learned Judicial Magistrate No.II, Coimbatore was right in remanding the Accused including Mr. Chandran without having the case records in his possession.

8. The power of remand of an Accused by a Magistrate/Court flows either from Section 167 of the Code or from Section 309 of the Code. The first remand of the Accused under Section 167 of the Code during investigation, on his arrest could be made by the nearest Magistrate, before whom the Accused is produced by the Police, irrespective of the fact whether he has got jurisdiction over the case or not. It needs to be emphasised that unless the Accused is physically produced on the first

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occasion, before the Magistrate/Court in person, the Magistrate/Court cannot remand him to any custody including judicial custody.

9. During the initial period of fifteen days of remand, as it is seen in sub-section (1) of Section 167 of the Code, the Magistrate may authorise the detention of the Accused in any custody, as he thinks fit, which includes the detention of the Accused in Police custody. It is needless to point out that such Police custody could be ordered only during the period of fifteen-days from the date of production of the Accused before the Magistrate for the first time on his arrest. As per Proviso (b) to sub-section (2) of Section 167 of the Code, unless the Accused is produced before the Magistrate, the detention of the Accused in the Police custody cannot be ordered at all. In other words, the custody to the Police cannot be ordered through the medium of electronic video linkage.

10. During the subsequent periods, when the remand of the Accused needs to be extended, it is needless to point out that such custody shall be only the judicial custody. But, as per Proviso (b) to sub-section (2) of Section 167 of the Code, the Magistrate may extend further detention of judicial custody on production of the Accused either in person or through the medium of electronic video linkage. The expression “on production of the Accused” as found in this proviso needs to be underscored. The Proviso mandates the production of the Accused which may be either in person or through the medium of electronic video linkage. Thus, it is crystal clear that the extension of remand of Accused to judicial custody cannot be made in the absence of the production of the Accused either in person or through the medium of electronic video linkage. Except the initial remand of the Accused, any subsequent remand shall be made only by the jurisdictional Magistrate and not by any other Magistrate.

11. During trial, the Accused can be remanded to custody by the Magistrate or Court, before whom the case is pending, under Section 309 of the Code. When the legislature amended the Proviso (b) to sub-section (2) of Section 167 of the Code, there was no similar amendment made to Section 309 of the Code making an express provision enabling a Magistrate/Court to remand an Accused through the medium of electronic video linkage. Thus, the intention of the legislature is that remand of an accused under Section 309 of the Code could be made only on the physical production of the Accused before the Magistrate/Court. Obviously, the reason is that the physical presence of the Accused shall be required in Court for conducting the trial, during which, evidence is to be recorded only in his presence. It is mandatory that evidence shall be recorded only in the immediate presence of the Accused or when his physical presence is dispensed with under Section 317 of the Code. Therefore, it is crystal clear that for all hearings of the trial of the case, the Accused in judicial remand shall be produced by the Jail Authority without any excuse. This appears to be the intention of the

legislature in not amending Section 309 of the Code so as to make an express provision to enable the Magistrate to remand the Accused by medium of electronic video linkage.

12. From these provisions, it is clear that a remand of an Accused either under Section 167 of the Code or under Section 309 of the Code could be made only on the production of the Accused either in person or through the medium of electronic video linkage as indicated above. No Magistrate/Court shall remand an Accused to custody without the production of the Accused either in person or through the medium of electronic video linkage. In this regard, we may refer to a Division Bench Judgment of this Court in *Jayalakshmi v. State of Tamil Nadu and another*, 2011 (1) MWN (Cr.) 283 (DB), wherein, speaking for the Bench, His Lordship Hon'ble Mr. Justice C. Nagappan [presently the Judge of the Hon'ble Supreme Court] after making reference to a number of Judgments has held that without the production of the Accused either in person or through the medium of electronic video linkage, no Accused shall be remanded to custody. As directed by the Division Bench, the said Judgment has been circulated to all the Criminal Courts in the State of Tamil Nadu as well as in the Union Territory of Puducherry under Circular in K.Dis. No.38/95 dated 20.6.1995, informing all the Magistrates Courts to scrupulously follow the directions of the Division Bench in the above Judgment.

13. There may be extreme circumstances in which the Jail Authorities may not be in a position to cause physical production of the Accused in Court owing to natural calamities like flood, storm, very serious law and order problem involving high risk to the safety of the Accused. In those very extraordinary circumstances, in my considered opinion, it will be appropriate for the Jail Authority to make a written request to the Magistrate concerned, who, in turn, may extend the remand of the Accused under Section 309, Cr.P.C. through Videoconferencing as it is done under Proviso (b) to sub-section 2 of Section 167, Cr.P.C. But this should not become the routine practice of Jail Authorities. I wish to emphasize that such course can be resorted to only in extreme genuine cases and not in every case. When such a request is made by the Jail Authority, it is for the Court concerned to consider the same and then to either insist for the production of the Accused or, if the reasons are acceptable to the Court, to resort to remand the Accused for a short period through videoconferencing. So far as extension of remand under Section 167, Cr.P.C. is concerned, the Court may for its own reasons, resort to remand the Accused through medium of electronic video linkage even in the absence of compelling reasons for the non-production of the Accused in person.

14. This Court is not oblivious of the fact that videoconferencing facility is not available in every Criminal Court through out the State as well as in the prisons. The learned Chief Judicial Magistrate, Coimbatore, in the instant

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case, had authorised the learned Judicial Magistrate No.II, Coimbatore to remand all the prisoners because the said facility is available in Coimbatore whereas the same is not available in Valparai. But the learned Chief Judicial Magistrate, Coimbatore has no such power to authorise a Magistrate who has no jurisdiction over the case either to extend the remand of the Accused under Section 167, Cr.P.C. or to remand the Accused under Section 309, Cr.P.C. It is true that from the centres where there is no videoconferencing facility available, it may not be possible for a Magistrate to remand the Accused either under Section 167, Cr.P.C. or under Section 309, Cr.P.C., in extreme circumstances, through videoconferencing. Having taken note of the above factual scenario, this Court directed the Second Respondent to offer his remarks. Today, the learned Public Prosecutor has produced the letter from the Additional Director General of Police and Inspector General of Prisons, Chennai under Letter No.48027/PW.3/2013 dated 16.12.2014 wherein, he has stated as follows:

“With reference to the letter cited, I am to state that the system of extending remand of prisoners through Videoconferencing was introduced in this State during the year 2004. The Videoconferencing Equipment have been installed in 81 locations *i.e.* 17 Prisons and 64 in Court complexes at a total cost of ₹861.20 lakhs, which covers 276 Courts.

2. Subsequently, Government in G.O.Ms. No.523, Home (Pri-4) Department dated 16.9.2011 have sanctioned a sum of ₹3.12 crores for the installation of Videoconferencing Equipment in 28 Courts covering 30 Court complex and work has been completed. Purchase orders were placed with M/s. AGC Networks Ltd., Chennai and it is under installation.

3. Again, Government in G.O.Ms. No.797, Home (Pr.IV) Department, dated 7.10.2013 have sanctioned a sum of ₹6,69,60,000/- towards extension of Videoconferencing facility in additional 60 locations covering 16 Prisons and 46 Courts in 44 locations. The work for the installation of Videoconferencing facility in these locations are under progress.

4. Thus out of total number of 411 Criminal Courts in the State 352 Courts are covered under Videoconferencing System facility. Remaining 59 Courts at 44 locations have to be provided with Videoconferencing facility. Similarly, out of 137 Prisons in the State, 24 Prisons including all Central Prisons, Special Prisons for Women, District Jails and Special Sub Jails have been provided with Videoconferencing facility. Out of the remaining 113 Prisons, 3 are Open Air Jails which house only convicted prisoners. Hence, this facility is not required for Open Air Jails. Thus, 110 Jail locations and 44 Court locations totality 154 locations remain to be provided with Videoconferencing System facility which may approximately cost about 18 crores. It is proposed to cover these 154 locations in a phased manner.

5. It is further submitted that VOIP services like “Skype” allow users to make calls on phones *via* the internet. Government regulations do not allow such companies to make internet-based calls originating from India. Such companies reroute the calls (made by India-based users) internationally, thus, causing

security concerns. Hence, it is felt that telecommunication application software like Skype may not be appropriate for use by the Government.”

15. There was some debate going on before this Court during the course of this proceedings that the facility like “Skype” could be made available to all the Magistrate Courts through out the State so that in extreme circumstances, the Magistrates could remand the accused through “Skype”. But the Additional Director General of Police, as I have already extracted, has stated in Para 5 of the remarks that allowing “Skype” which is operated by private service providers will cause security concerns as the calls are routed through internationally. He has further opined that telecommunication application software like “Skype” may not be appropriate for use by the Government. When the Government feels that it involves security risk, this Court finds no reason to force the Government to provide the said “Skype” facility to all the Magistrate Courts. Therefore, I accept the said stand of the Government.

16. As has been stated in the letter of the Additional Director General of Police, out of 411 Criminal Courts in the State, 352 Courts have got videoconferencing facility already. Similarly, out of 137 Prisons in the State, 24 Prisons including all Central Prisons and Special Prisons for Women, District Jails and Special Sub Jails have been provided with videoconferencing facility. The Government has also assured that the remaining 113 Prisons will be provided with the videoconferencing facility soon. Having regard to the said statement made before this Court, I am of the view that wherever there is videoconferencing facility both in the Court as well as in the prison where the prisoner is lodged, there may not be any difficulty for the Magistrate concerned to extend the remand of the Accused through videoconferencing as indicated herein above. So far as the Jails, where there is no such videoconferencing facility available, the Jail Authorities may escort the Accused to the nearest centre where there is videoconferencing facility, so that the jurisdictional Magistrate could extend the remand through the said facility. Similarly, in the Courts, where there is no videoconferencing facility available, the Magistrate concerned may go to the nearest centre where there is videoconferencing facility from where he could extend the remand by videoconferencing facility. This alone, in my considered opinion, solve the difficulties that are faced. At any rate, I make it very clear that either without the physical production of the Accused or without the videoconferencing, no Accused shall be remanded to custody by any Magistrate either under Section 167, Cr.P.C. or under Section 309, Cr.P.C. I am hopeful that the Magistrates and other Courts shall scrupulously follow the Judgment of the Division bench in *Jayalakshmi v. State of Tamil Nadu and another*, 2011 (1) MWN (Cr.) 283 (DB), and the Circular issued by this Court in R.O.C. No.3729-A/2010/F1(P.Dis. No.157/2010), dated 13.12.2010.

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17. It is also brought to my notice that earlier there was a Circular issued by this Court in K.Dis. No.38/95, dated 20.6.1995 authorising the Chief Judicial Magistrates to nominate a Single Judicial Magistrate to remand all the Accused in case of exigencies irrespective of the fact that he does not have jurisdiction over the case. In view of the Division Bench Judgment cited supra and the Circular issued by this Court in R.O.C. No.3729-A/2010/F1(P.Dis. No.157/2010), dated 13.12.2010, all such Circulars issued earlier shall stand cancelled. In other words, I hold that the Chief Judicial Magistrate has got no power to nominate a Magistrate, who has got no jurisdiction over the case to extend the remand of the Accused under Section 167, Cr.P.C. or to remand the Accused under Section 309, Cr.P.C. Similarly, a Magistrate having jurisdiction over the case shall not remand the Accused in a mechanical fashion without having the case records.

18. In the case on hand, the learned Chief Judicial Magistrate, Coimbatore had authorised the learned Judicial Magistrate No.II, Coimbatore to remand all the Accused lodged in Central Prison, Coimbatore whose remand period expired on 16.9.2014, though the learned Magistrate had no jurisdiction over the cases. This, in my considered opinion, is illegal. Similarly, the learned Judicial Magistrate No.II, Coimbatore had extended the remand of the accused without even having case records, but, by simply making an endorsement in remand warrants, extending the remand. This is illegal besides being a mechanical order. The deprivation of personal liberty cannot be made in such a fashion as it is a fundamental right guaranteed under Articles 19 & 21 of the Constitution of India. However, in the instant case, the learned Chief Judicial Magistrate, Coimbatore and the learned Judicial Magistrate No.II, Coimbatore have acted according to the age old practice and therefore, I am inclined to condone their action.

19. Now turning to the prosecution of the Petitioner, since the remand of Mr. Chandran was extended from 16.9.2014 by the learned Judicial Magistrate No.II, Coimbatore, he had not produced the Accused before the Court. His act falls under the General Exception under Section 79 of the Indian Penal Code. Thus, the act of the Petitioner does not amount to an offence under Section 166, I.P.C. Thus the Criminal prosecution of the Petitioner in S.T.C. No.529 of 2012 is liable to be quashed.

20. In view of all the above, the Criminal Original Petition is allowed and the case in S.T.C. No.529 of 2014 on the file of the learned District Munsif *cum* Judicial Magistrate, Valparai, Coimbatore District is hereby quashed. Consequently, connected Miscellaneous Petition is closed.

21. I am hopeful that the Government of Tamil Nadu will take earnest efforts to ensure that there is videoconferencing facility to all Criminal Courts through out the State within a period of one year.
