

THE HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

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CRIMINAL PETITION No.15970 OF 2013

ORDER:

Heard learned counsel for the petitioners/ A.1 to A.4 of PRC No.104 of 2013 on the file of Chief Metropolitan Magistrate, Vijayawada, which is out come of the report of the 2nd respondent – *de facto* complainant in Cr.No.268 of 2011 of II Town Police Station, Vijayawada in relation to the incidents one on 10.04.2011 and the other on 23.04.2011. The offences relating to the first incident are under Sections 447, 323, 506 read with 34 of the Indian Penal Code, 1860 (for short, 'IPC') and the offence relating to the second incident is under Section 306 IPC exclusively against A.5 and not against A.1 to A.4.

02. The contention of the counsel for the petitioners to the extent of registering the two crimes, conducted investigation and filed one charge sheet, however, by saying so far as A.1 to A.4 only attracts the offences under Sections 447, 323 and 506 read with 34 I.P.C. and not Section 306 I.P.C. as it attracts only against A.5 specifically shown in the second incident and the learned Magistrate taken cognizance of the crime and numbered as PRC to commit the case to the Court of Sessions.

03. It is the say that though in Section 209 Cr.P.C. the word appears is there, which requires judicial application of mind as the cloud is cleared vide expression of the Apex Court in a judgment reported in Dharmapal v. State of Haryana.

04. The learned Magistrate did not consider the same and is proposing to commit to the Court of Sessions including for the first incident so far as the offence against A.1 to A.4 alleged, triable only by the Magistrate and the offence, if at all, triable by Court of Sessions against A.5, out of the second incident along with the first incident, the learned Magistrate ought to have been consider and split up the case by retaining the case so far as against A.1 to A.4 for hearing of Charges or Examination on Charges, as the case

may be, and should have committed, if at all, after compliance of sub-clauses (a) to (d) to Section 209 Cr.P.C. the case of A.5 to the Court of Sessions and thereby otherwise committing the case to the Court of Sessions, and directing the petitioners to file application for discharge under Section 227 r/w. Section 223 Cr.P.C. to consider before framing of charges under Section 228 Cr.P.C. invoking that provision and sending back the case to learned Magistrate is uncalled for.

05. Now the cloud is cleared by the expression of the Apex Court in **Dharmapal** (supra) saying that the Magistrate has to apply judicial mind from the use of word appears in Section 209 Cr.P.C. It is thus the duty of the Magistrate from the above to commit to Court of Sessions, where the case is triable only by the Court of Sessions and not in every case, merely because police filed charge sheet showing as if triable before the Court of Sessions.

06. Once such is the case, Magistrate shall invoke Section 317(2) Cr.P.C., if at all split up the file, with another set of police final report with Part II CD so far as A.5 concerned and commit the case of A.5 to the Court of Sessions and in so far as the case against A.1 to A.4 concerned, to retain for trial before the Magistrate, without need of Sessions Judge to send back the case against A.1 to A.4 by invoking Section 228 Cr.P.C.

07. Accordingly and in the result, the petition is disposed of giving liberty to the petitioners/ A.1 to A.4 to file application by virtue of the order and under Section 209 Cr.P.C. read with Section 317 (2) Cr.P.C. before the learned Magistrate to retain the case so far A.1 to A.4 concerned (while committing the case in so far as A.5 to the Court of Sessions); without prejudice to their right to participate in the further hearing before the charges to be framed, to argue for any discharge and to decide on own merits. .

08. Miscellaneous petitions, if any, pending in this petition shall stand closed.

Dr. B. SIVA SANKARA RAO, J

09.12.2015

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