

***HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO**

+CRIMINAL PETITION No.5911 OF 2015

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% Dated 28.07.2015

Between:

Gude Bhavani Sujatha ...Petitioner

and

\$ Muggulloa Srinivasa Rao and another,

.... Respondents

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! Counsel for the petitioner : M/s. T.V.Sridevi

^ Counsel for 1st respondent : T.Pradyumna Kumar Reddy

Counsel for 2nd respondent : Public Prosecutor

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? Cases referred: _____ :

- [1]. (2001)3 SCC 462
2. AIR 2009 SC 69
3. 2012(7) SCC 56
4. AIR 1991 SC 1346
5. 2004(4) SCC 158
6. AIR 2001 SC 1158

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

CRIMINAL PETITION No.5911 OF 2015

ORDER:

This Criminal Petition is filed by the petitioner (defacto-complainant of C.C.No.53 of 2009) under Section 482 Cr.P.C seeking to quash the order dated 06.01.2015 in CrI.M.P.No.3241 of 2014 in the Calendar Case supra on the file of III Additional Judicial Magistrate of First Class, Rajahmundry that is confirmed by the Special Judge for Trial of cases under S.Cs & S.Ts(POA) Act-cum-X Additional District and Sessions Judge, East Godavari at

Rajahmundry, vide order dated 01.05.2015 in CrI.R.P.No.8 of 2015.

2. Heard the learned counsel for the petitioner and the learned counsel for the accused-respondent No.1 and the Public Prosecutor appearing for the State-respondent No.2 and perused the material on record.

3. The C.C.No.53 of 2009 supra is outcome of the report of the petitioner-defacto-complainant herein registered as Cr.No.14 of 2009 for the offence under Section 498-A read with 34 IPC and Sections 3 and 4 of the Dowry Prohibition Act(for short, 'the D.P.Act') by III Town Police, L&O, Rajahmundry, against the 1st respondent herein as A.1 and his parents and two others-mediators to the marriage as A.2 to A.5 and the police after investigation by examination of as many as 8 witnesses including the defacto-complainant, filed the final report in the form of charge sheet for the offences supra against the accused supra, the learned Magistrate having taken cognizance and on securing accused, including A.1 at abroad and after supply of copies and hearing and from the charges framed under Section 240 Cr.P.C. for the offences supra, from accused pleaded not guilty and claims to be tried put the accused to trial-(as can be seen from the record, A.1 as sole accused is facing trial from the charges framed against him for the proceedings against A.2 to A.5 are quashed.

4. It is in the course of the trial of the police warrant case for the offences supra, after examination of P.Ws.1 to 4, application in CrI.M.P.3241 of 2014(covered by the impugned order) filed by the defacto-complainant/P.W.1 through advocate under Section 311 Cr.P.C. dated 26.11.2014 stating the matter is at the stage of further evidence, documents are filing by separate application that are received recently thereby could not be filed earlier for no laches and it is necessary for marking the documents in her evidence by recall. Same was opposed by the counter of the accused contending that it

is invented to drag on the matter seeking P.W.1's recall, that P.W.1 examined in chief on 2nd and 30th July, 2014 and cross-examined on 11th and 28th August and 9th September, 2014 and P.W.2- her mother was examined in chief on 24.09.2014 and 01.10.2014 and was cross-examined on 07.10.2014 and the documents now sought to file besides not genuine were not filed by them and it is an attempt at fag end of the trial to nullify the material on record favourable to the accused and to fill the lacunas of prosecution case and P.W.1 is not party to the documents 10 to 13 and 16 to be marked through her as those belong to father(L.W.3) and brother of P.W.1 and sought for dismissal.

5. Besides the application supra, the defacto-complainant filed another application Crl. M.P.No.3410 of 2014 with 16 documents listed to receive the same saying Rs.8,30,000/- transferred from the Account of P.W.1's brother to the Account of mother of accused and there was additional demand of 15 lakhs on 02.05.2008 at Rajahmundry and P.W.1's father sold his land at Katheru and has given the amount to the accused and the accused gave a complaint to Income Tax Department mentioning the fact and the Department issued summons to father of P.W.1 and they assessed the tax payable on the sale of the land which was paid of Rs.2,04,948/- in the assessment year 2008-09 and Income Tax of Rs.1,13,093/- for the year 2009-10 and Rs.60,000/- to pay for the year 2009-10 and the amount spent for the marriage of P.W.1 also shown by her father therein and in her report to police she mentioned the facts however police failed to collect the documents and in the civil suit she filed later also the documents were referred which have a bearing on the case hence necessary to receive. The counter filed by the accused supra in opposing the same is with contest that said allegations are untrue and the documents 1,4 to 7 and 16 brought into existence to

support the false claim of defacto complainant and documents 10 to 13 relates to I.T. of P.W.1's father also brought into existence to substantiate the false claim of the defacto-complainant and the petition filed at the fag end of the trial is to fill up the lacunas with no bona fides and to nullify the material on record favourable to the accused and sought for dismissal of the petition.

6. It is therefrom after hearing, the learned A.J.F.C.M., by common order dated 06.01.2015 dismissed both the applications in answering the point as follows:--

“On perusing the petitions, it is clear that the defacto-complainant, who is examined as P.W.1 has directly filed the two petitions along with the documents, but she is not expected to file these two petitions directly. It is for the police concerned to take further proceedings.

Coming to the list of documents filed, as rightly pointed by the learned defence counsel the same are no way helpful to prove the case of the prosecution. Further, as rightly pointed out by the learned counsel, the documents such as wedding card, flight ticket, etc, are filed. When the matter is coming for evidence, remaining witnesses including the investigating officer after the evidence of P.ws.1 to 4 was over. Further, the investigating officer has to investigate the matter basing on the documents seized during course of investigation and therefore filing of documents now is no way helpful to the case of prosecution in proving its case. Hence, I do not find valid reason to allow these petitions. Accordingly, the petitions are liable to be dismissed. In the result, the petitions are dismissed.”

7. It is impugning the same, the defacto-complainant carried C.R.P.No.8 and 22 of 2015 before the Court of Sessions and the learned X Additional Sessions Judge by common order dated 01.05.2015 observed in paras-11 to 13 as follows:-

“In a calendar case, State is the de-jure complainant, and the victim is only a defacto-complainant. In otherwords, in a Calender Case or Sessions Case the State is the victim under law and the physical victim is only infant victim. Hence, all the proceedings in a Calander Case on behalf of the victim shall be done by the State, represented by the A.P.P., Addl.P.P., or Spl.P.P. In other words, the defacto-complainant may take permission of the Court to assist the

prosecution and the Court shall pass appropriate order, granting or rejecting the permission to assist the prosecution. But, the victim cannot file a petition directly either to recall herself or to file documents. It is for the Investigating officer to collect all material documents and record statements of material witnesses. When once, the charge sheet is registered as Calendar Case, it becomes prerogative of A.P.P. or Addl. P.P. to do all acts on behalf of the State excluding the victim. The learned III A.J.F.C.M. has meticulously examined the procedure and had passed a well reasoned and considered order holding that the petitioner (defacto-complainant) cannot file a petition herself. In the above set of circumstances, the orders passed by the learned III A.J.F.C.M. did not suffer from any legal infirmity. If at all, the prosecution feels that any documents are necessary to be filed and to be examined, it is for the A.P.P. to take such steps as per procedure contemplated under law. With the above observations, these points are answered against the revision petitioner”.

8. It is impugning the same, in fact, two petitions are filed before this Court by the defacto-complainant supra viz; 5674 of 2015 and the present one 5911 of 2015.

9. It is needful to say that the CrI.P.No.5674 of 2015 came for admission in the motion list in the presence of the counsel for the defacto-complainant and the 2nd respondent-State rep. by the Public Prosecutor and before notice to the accused-1st respondent and before admission, this Court disposed of the same on 26.06.2015(even date) which reads as follows:-

“Heard the learned counsel for the petitioner and the learned Public Prosecutor appearing for the State, before notice to respondent No.1 and before admission.

It is the main grievance of the learned counsel for the petitioner that the trial Court as well as revisional Court gravely erred in not considering the scope of Section 24(8) proviso of amended Code of Criminal Procedure (for short ‘Cr.P.C.’) which came into force w.e.f.31.12.2009, under which the de facto complainant, if a victim can assist the prosecution and by virtue of which when she can maintain an application apart from the right to represent through private advocate that can be permitted by the Court as per the above, if not even under Section 302 Cr.P.C. and the dismissal of the

application on locus standi is thereby unsustainable.

The scope of Section 24(8) proviso is answered by this Court in Crl.M.P.No.4382 of 2014 in Crl.P.No.4546 of 2014 and Crl.M.P. No.4383 of 2014 in Crl.P.No.4547 of 2014.

The de facto complainant herein is a victim within the meaning of Section 2(w)(a) of the amended Cr.P.C. w.e.f. 31.12.2009 and as per Section 24(8) proviso amended with effect from the same day by the same Act 25 of 2009, the victim got a right to ask the Court and the Court may permit the victim to engage an advocate of his or her choice to assist the prosecution irrespective of there is any Assistant Public Prosecutor or Additional Public Prosecutor or Special Public Prosecutor, as the case may be. Needless to say even from the other existing provision under Section 302 Cr.P.C. in the proceedings before Magistrate the prosecution can be conducted by any person other than police officer not below the rank of Inspector, if not the investigating officer of the case and such conducting of the prosecution to be permitted is either personal or through pleader.

Hence, the application is disposed of giving liberty to the de facto complainant to approach the trial Court to file an application under Section 24(8) proviso Cr.P.C. to permit to conduct prosecution through private advocate and in such an event the learned Magistrate with necessary conditions so permit so as to file any application to receive documents under Section 242(2) Cr.P.C. and to recall any witness under Section 311 Cr.P.C. and Section 165 of the Evidence Act to decide within the scope of the law.

Accordingly, this criminal petition is disposed of. Miscellaneous petitions pending if any, shall stand closed”.

10. In fact, there was nothing in the notice of the Court about the pendency of the present petition as had it been, it could have chosen to dispose of commonly. Practically, by virtue of the order supra the present petition became infructuous, from the said say of defacto-complainant but for counsel for the accused asked the Court to pass an order in detail by suspending the earlier order(shown supra in the inverted commas) and hence it was heard to pass a detailed order.

11. Now the points that arise for consideration are:-

1. Whether a victim of a criminal case got no right

to file application for recall other than by learned Public Prosecutor only under the provisions of law as on date of the impugned orders and the impugned orders are if so, unsustainable and even on merits whether the documents cannot be received for not covered by police investigation material for P.W.1 to depose with reference to it and whether recall of P.W.1 by receiving of the documents to exhibit is essential for a just decision of the case?

2. To what result?

Point No.1:

12.The earlier order in CrI.P.No.5674 of 2015, dated 26.06.2015 is crystal clear about the right of the victim to assist the prosecution and not a mere assistance to the Public Prosecutor under Section 301 Cr.P.C. because of Section 302 Cr.P.C. other than in a Sessions Case and before a Magistrate Court. The three Judge Bench expression of the Apex Court well laid down the law in this regard in ***J.K. International V. State Govt. of N.C.T of Delhi***[\[1\]](#), that Section 302 Cr.P.C before a Magistrate Court permits private persons conducting prosecution by Court. Apart from Section 302 Cr.P.C., Section 2(w)(a) read with Section 24(8) proviso of the amended Cr.P.C, clearly permits the victim to participate in the criminal proceedings to assist the prosecution and that what this Court in the earlier order observed. In fact, by appearance of the accused herein there is nothing shown contrary to said conclusion or on the proposition what is stated is the factual matrix referred supra in the counter filed to oppose the Criminal Petition (the present petition) and by saying further at para-4 that Section 24(8) of Cr.P.C. has no application to the present case.

13. Now coming to other merits of the matter even, the fact that police having investigated filed final report and that was taken cognizance is not be all and end all to shut letting in any further evidence by filing any additional document to exhibit or examination of additional witness. It cannot be said that it requires further

investigation under Section 173(8) Cr.P.C. in all such cases. In fact, the law is well settled by catena of expressions on the scope of Section 311 Cr.P.C. and Section 165 of the Evidence Act. In **Hanuman Ram Vs. the State of Rajasthan**[\[2\]](#)-it was held that the object underlying Section 311 of Cr.P.C. is to prevent failure of justice on account of mistake of either party to bring a record valuable evidence or leaving an ambiguity in the statements of the witnesses. This is a supplementary provision enabling, and in certain circumstances imposing on the Court, the duty of examining a material witness who would not be otherwise brought before it. It is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the Court should be exercised, or with regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a Court to examine such of those witnesses as it considers absolutely necessary for doing justice between the State and the subject. There is a duty cast upon the Court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own accord when for certain obvious reasons either party is not prepared to call witnesses who are known to be in a position to speak important relevant facts. In **Sanjeeva Rao v. State of Andhra Pradesh**[\[3\]](#)-the Apex Court clearly laid down referring to earlier expressions in this regard mainly of **Hanuman Ram at para-12 and Mohanlal Shamji Soni Vs. Union of India**[\[4\]](#) at para-14 of rule that best evidence available should be brought on record to prove a fact or the points in issue and the same was followed in the recent expression of the Apex Court in CRIMINAL APPEAL NO.1307 OF 2014-**Mannan SK Vs. State of West Bengal**, with observation at para-10 that the aim of the Court is to discover the truth. Section 311 Cr.P.C. is one of such many provisions strengthening the Court in its

effort to ferret out the truth by procedure sanctioned by law. It is couched in very wide terms. It empowers the Court at any stage of any inquiry, trial or other proceedings under the Code to summon any person as a witness or examine any person in attendance, though not summoned as witness or recall and re-examine already examined witness. The second part of the Section uses the word 'shall'. It says that the Court shall summon and examine or recall or re-examine any such person if his evidence appears to it to be essential to the just decision of the Case. The words 'essential to the just decision of the case' are the key words. The Court must form an opinion that for the just decision of the case recall or re-examination of the witness is necessary. Since the power is wide its exercise has to be done with circumspection. It is trite that wider the power greater is the responsibility on the courts which exercise it. The exercise of this power cannot be untrammelled and arbitrary but must be only guided by the object of arriving at a just decision of the case. It should not cause prejudice to the accused. It should not permit the prosecution to fill-up the lacuna. Whether it is for filling up a lacuna or it is for just decision of a case depends on facts and circumstances of each case. In all cases it is likely to be argued that the prosecution is trying to fill up a lacuna because line of demarcation is thin. It is for the Court to consider all the circumstances and decide whether prayer for recall is genuine. Referring to another earlier expression in **Zahira Habibulla H. Sheikh Vs. State of Gujarat**[\[5\]](#) that the object of the section 311 Cr.P.C. is to enable the court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is to be exercised and the evidence is examined neither to help prosecution nor the defence; If the court feels that there is necessity to act in terms of Section 311 to

subserve the cause of justice and public interest, it is to be done with an object of getting the evidence in aid of a just decision and to uphold the truth.

14. From the above, when the case of the victim-defacto-complainant is that the documents are necessary to show the amounts passed on to the accused to meet the dowry demands and that is when proving from the documents, it cannot be contended that the court has no power to receive the same to arrive at a just decision of the case as trial is a voyage in which truth is the quest and thus apart from the case made out under first part otherwise the second part of the Section 311 Cr.P.C. when even meant for that, so also Section 165 of Evidence Act, the Courts below should have allowed the additional evidence that to be let in to unfurl truth. Both the Courts below went wrong in not considering the scope of the provisions and the law laid down in this regard and also went wrong in saying as if it requires further investigation and the petition is belated after P.Ws.1 to 4 examined or in saying some of the documents to which the P.W.1 is not a party. Once the document is relevant to the case and it is to be proved through P.W.1, the party relying need not be a party to the document but for to establish truth of a fact alleged with reference to it and it is for the Court to consider the relevancy and admissibility in appreciation of the evidence by marking any objection as subject to objection in this regard for not involving any stamp duty and registration to decide instantaneously as laid down by the Apex Court in **Bipin Santilal Panchali Vs. State of Gujarath**[\[6\]](#). It is needless to say if any of the documents that required to be proved further by any of the parties to it like father of P.W.1, the Court can call for and examine on its own under the second part of Section 311 Cr.P.C. read with 165 of Evidence Act.

15. Thus, the documents are required to be exhibited by P.W.1

by recall since the above factual matrix show the necessity of said evidence to arrive at truth and for just decision of the case and the accused cannot complain any prejudice for the reason that there is ample opportunity to cross-examine the witness with reference to the documents to support the defence. There is no apprehension for accused of any admission to be washed off, since the Court can appreciate the evidence as on date on record and with reference to it the evidence that is being let in as a whole with any improvements. The Courts below went wrong in saying the complainant sought the recall at the far end of the trial and further in saying complainant has no right but for the Public prosecutor by ignoring the concept of victimology and the scope of Section 302 Cr.P.C. and also Section 2(w)(a) read with Section 24(8) proviso of Cr.P.C.

Point No.2:

16. In the result, the Criminal Petition is allowed while reiterating the order passed by this Court in CrI.P.No.5674 of 2015 and pursuant to the direction in CrI.P.No.5674 of 2015, enabling the defacto-complainant to seek permission of the trial Court to assist the prosecution by engaging an advocate of her choice for the trial Court to permit and consequently to permit her by recall for further chief examination(P.W.1) to exhibit the documents as additional evidence with right of cross-examination to the accused by affording opportunity. Consequently, miscellaneous petitions, if any, in this Criminal Petition shall stand closed.

Dr. B. SIVA SANKARA RAO, J

Date:28.07.2015

Note: L.R.Copy to be marked.

B/o. vvr

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- [1] (2001)3 SCC 462
[2] AIR 2009 SC 69
[3] 2012(7) SCC 56
[4] AIR 1991 SC 1346
[5] 2004(4) SCC 158
[6] AIR 2001 SC 1158