THE HON'BLE SRI JUSTICE Dr B. SIVA SANKARA RAO

CRL.P.No.3599 of 2015

ORDER:

This Criminal Petition is filed by the petitioner/A.1 under Section 482 Cr.P.C. seeking to quash the order dated 02.07.2014 in Crl.M.P.No.3647 of 2014 in C.C.No.165 of 2007 on the file of Additional Judicial First Class Magistrate, Mangalagiri, Guntur District.

2. The petitioner is the A.1, by name, Smt S. Hemalatha, a retired employee, aged about 63 years in C.C.No.165 of 2007. The second respondent is the commandant of 6th Battalion, APSP, Mangalagiri-the de facto complaint and the first respondent is the State representing the Station House Officer, Mangalagiri Police Station, Guntur District rep. by learned Public Prosecutor.

3. The petitioner is impugning the order dated 02.07.2014 in Crl.M.P No.3647 of 2014 in CC No.165 of 2007 passed by the learned Additional Judicial First Class Magistrate, Mangalagiri, which is the order in application filed under Section 319(3) Cr.P.C. Before coming to it, the factual matrix required to mention shows, based on the report of the *de facto* complainat-2nd respondent-G. Subba Rao herein, the Station House officer, Managalagiri Police Station registered a case in Crime No.109 of 2006 saying that there is a misappropriation of cash of Rs.3,30,957/-from the account of 6th Bettalion, APSP, Mangalagiri was outcome with lack of supervision of A.O. and B-Superintendent and B-8 clerk. The police having registered the crime against all the 4 accused, and it is after further investigation by examination of the de facto complainant as PW.1 and T. Bhoj Raj Yadav, Assistant Commandant, who conducted preliminary enquiry in this regard as LW.2 and P.Sadasivaiah, Superintendent, Stores, as LW.3, revealed about receiving of 4 cheques from A.2-R.Narahari, Superintendent 'B' section, K. Venkaiah, HC 1185 (Treasury NCO), APSP, Mangalagiri about receiving of cheque for Rs.29,898/- from A.2 encashing the amount and handing over the same to A.2-R.Narahari and as per instructions of A.2 Narahari, Smt Hemalatha, the present quash petitioner as LW.5 retired A.O.in the office of commandant regarding facts of her administration, verifying the records cheating by accused pertaining to the commandant to remit the misappropriated amount in the ZB account and remitting the cash along with A.2 in

SBI, Mangalagiri and of one P.Sunitha, Junior Assistant to speak her transfer to B.8 seat. On earlier instructions of A.O. and Superintendent and giving assistance to A.1 and refusing of cash from LW4 K Venkaiah and she applying petition for transfer, LWs.7 to 14 viz., LW.7-P.B.R.S.V.Prasad, retired administrative officer, LW.8-N.Sai Babu, retired superintendent, LW.9-C.Prasad, Superintendent, LW.10-M.Sampath, Superintendent, LW.11-V.Seshamma, In-charge Superintendent, LW.12-H.Satyanarayana, Assistant Commandant, LW.13-P. Rajendra Prasad, Assistant Commandant and E.H.Rajaram, some of them since retired and LWs.15 to 18 viz., T.Somaraju, Manager of SBI speaks of his returning three cheques to LW3 Sada Sivaiah and furnished all bank statements of LW.5 Hemalatha and LWs.16 to 18 viz Kamadula Prasad, Dasari Nageswar Rao and R.N.Murthy about conducting of auditing in B section in the office of Commandant and assisting the I.O., including tracing the acknowledgements to 14 cheques leave about the mediators to the arrest of some of the accused by I.Os. i.e., LWs.21 and 22.

4. In the final report filed by police stating the 22 witnesses against two accused out of more 4 accused of the F.I.R., viz charging only SA Saleem-A4 of the F.I.R and R. Narahari-A2 of F.I.R. As per instructions of the Government, the scheme of payment of salaries through bank has implemented from November, 2002. The Zero Balance Account was opened on 01.11.2002 with State Bank of India, Mangalagiri in the name of Drawing and Disbursing Officer i.e., Administrative Officer for crediting all Non-Government recoveries, made from the men and officers etc., including Ministerial and hospital staff every month through pay bill and administration will issue cheques to their concerned, as per cheque statement, prepared by B3-Senior Assistant and B section superintendent for drawing the amount from SBI, Mangalagiri branch.

5. A1 SA Saleem worked in B8 seat since opening of the ZB Account i.e., from 01.11.2002 and according to office manual, he has to prepare the cheques as per cheque statement prepared by B3-Senior Assistant and also makes cash transactions under instructions of B superintendent and assists him in preparing the cash memos, RVs, Evs etc., and A2 is the custodian of Zero balance cash book, cheque book and deals with cheques and cash transactions and make entries in the cash book and he has to supervise the work of A1 besides other staff of his section. While so, in the month of November, 2006 A1 SA Saleem and LW6 P. Sunitha were transferred to B5 and B8 seats respectively from their previous seats of B8 and B5

and A1 assumed charge of B5 seat taken from P Sunitha, but however he did not handover the charges of B8 seat to Sunitha and himself continued to look after the work of B8 seat. A2 who is the Superintendent of the same section instructed LW.6-Sunitha to learn the work of B8 seat by giving assistance to A1 as she is a new one to the seat. On advise of A2, LW.5 who is the Administrative Officer also instructed LW.6 orally to assist A1 and the B Section Superintendent in writing the cash memo books and ZB account cash book and the said Sunitha having waited for 5 months, later applied for transfer to another seat from B8 seat but in vain. Though LW.6 Sunitha writing the cash memo books, A1 used to put his initial near the stamp of COMMANDANT, and in order to keep the illegal financial transactions, both A1 and A2 avoided her interference into the financial matters. While things stood thus, on 03.05.2006 A2 Narahari issued a cheuqe bearing No.018329 for Rs.29,989/- to LW.4-K. Venkaiah, Head constable, with instructions to encash the same from SBI, Mangalagiri Branch and accordingly Venkaiah enchased and when tried to handover the same to A2, he instructed Venkaiah to give the same to Sunitha and she refused the same as she was not handedover charge of B8 seat by A1 though he was already transferred to B5 seat, and later, on the instructions of A2 Narahari, Venkaiah handed over the cash to A1, but the same was not entered in ZB account cash book either on 3.5.2006 or on subsequent dates upto 18.05.2006 and the said amount was mis-appropriated by A1 and A2 and that on 17.05.2006 the said Narahari has given 4 cheques (bearing Nos.018343 to 018346 dated 16.05.2006 for Rs.4,172/-, Rs.4,292/-; Rs.10,250/- and Rs.19,550/- in total Rs.38,264/-) to LW.3-P.Sada Sivaiah for encashment and then he visited the bank on 18.05.2006 and presented all the 4 cheques in SBI, of them only one cheque bearing No.018346 for Rs.19,550/- was honoured and credited and while the remaining were returned by the bank authority saying that there is no sufficient balance in the ZB Account, and on enquiry, LW.15, the Manager of SBI informed that the balance of their account is only Rs.3550/- or so and LW3 Sada Sivaiah returned to the Head quarters and submitted a report to LW.1 through LW.5 Hemalatha, Administrative officer (present quash petitioner) by enclosing the uncleared cheques and on receipt of information, Hemalatha secured the assistance of A2-Narahari, met the Manager of the bank and verified the bank statements and perused the Zero Balance Account Cash book and found cash balance is Rs.72,626/- as on 17.05.2006 and when she compared the ZB Account to that of the bank statement, she found Rs.69,070/- was misappropriated by the accused. LW.1 who was camping at Visakhapatnam received the information on 20.5.2006 and after informing the same to the Deputy Inspector General of Police, IV Battalion, Kakinada, returned to the head quarters on 22.05.2006 and enquired into the matter and verified all the records and found the misappropriation from B section and sent a report, and on instructions of DIG., LW.2-T.Bhoj Raj conducted preliminary inquiry on 23.5.2006 and found that A1 suddenly applied C.L on 18.05.2006 and escaped from the office without getting leave sanction and called Narahari-A2 by Subbarao along with Hemalatha to his chamber and fixed them responsiblity and instructed them to remit the amount of Rs.3,30,957/- under misappropriation else he would file a criminal case against them. LW.5 Hemalatha tried her level best to secure the presence of A1 but in vain and LW.6-Sunitha refused to pay anything and it is due to pressure of LW.1-G.Subba Rao and A2-Narahari and LW.5-Hemalatha have jointly remitted an amount of Rs.1,95,000 and Rs.1,36,000/- respectively in the ZB Account of SBI, Mangalagiri on 27.5.2006 and they informed the same to LW.1-G.Subba Rao through a note file on that day and on the same day A1 has also got paid an amount of Rs.99,000/- in the ZB account through online system from SBI, Guntur.

6. The final report of investigation from the report of LW.1 dated 29.05.2006 of crime No.109 of 006 registered under Section 409 IPC shows recording the statements of witnesses referred supra and it revealed that Saleem and Narahari tampered the records including counterfoils of the cheques and of which there is writings of Saleem-A.1 for 11 cheques and found A1-Saleem misappropriated the difference amount among 4 cheques tampered with counterfoils of Rs.66,956/- and also with regard to 14 cheques to a tune of Rs.2,31,898/- and the cheques were honoured on 27.5.2006 and further investigation shows A1-Saleem on 19.06.2006 in the presence of mediators-LWs.19 and 20, when questioned made a disclosure covered by panchanama as himself responsible for the misappropriation/embezzlement to a tune of Rs.2,71,943/- by tampering the records in the year 2004 and LW.5 Hemalatha (quash petitioner), who retired from service on 30.5.2006 has already remitted an amount of Rs.1,36,000/- to the ZB account in obedience to the direction of LW1-Subba Rao and also with good intention not to cause any interruption to the day-to-day cash transactions and without prejudice to any further action. LW.5-Hemalatha presumed that A2-Narahari, who is custodian of the cash records and immediate superior of A1 Saleem might have gone through all the records thoroughly and carefully, she was signing in the ZB Account cash book and cheques and making entries in the cash book with good faith and with regard to

LW.6-P.Sunitha, she has not involved in any of the cash transactions and the records attended by her during her tenure and there was no misappropriation on her part and she also made a representation for her transfer from B8 seat and thereby Hemalatha and Sunitha were deleted from the charge sheet as arrayed as accused for no role of them in the police final report.

7. The learned Magistrate thereby from the final report taken cognizance of the case only against Saleem and Narahari as A.1 and A.2 under Section 190 Cr.P.C. From the said final report vide accusation for the offence under Section 409 IPC and it is there after framing of charges, trial commenced and in the course of trial, LW.1-G.Subba Rao, retired as Commandant in the year 2006, came to the witness box and deposed in chief-examination on 02.01.2014 and was cross-examined by accused persons on 11.2.2014 and 11.3.2014 respectively.

8. LW.2-T.Bhojaraj Yadav was examined in chief on 9.6.2014 and was cross-examined by accused persons on that day. It is after that, before adducing further evidence on 18.6.2014, the learned Assistant Public Prosecutor filed application in C.C.No.165 of 2007, pending trial, under Section 319 Cr.P.C. The application reads that the police filed final report for the offences under sections 420 and 409 IPC and the trial was taken up at the cognizance stage and the initial statement given by the *de facto* complainant to the police revealed that proposed A.2 and A.4 viz, Hemalatha, retired Administrative Officer and Sunitha, Junior Assistant, also participated in the offence. During trial, PW.1 categorically stated on oath about involvement of two persons namely Hemalatha and P.Sunitha, who were figured as LW.5 and LW.6 in the charge sheet, and their complicity also referred in F.I.R. and also in the 161 Cr.P.C. statements of witnesses. Hence, in the circumstances prayed to permit prosecution to add those two persons also as accused along with two persons facing trial i.e., Saleem and Narahari.

9. Notice given to the contesting advocates represented by their counsel and they have stated no objection as per the endorsement of the Magistrate, who taken cognizance in allowing application and he observed that contesting accused, who are facing trial reported no objection. The docket order of the learned Magistrate in Crl.M.P.No.3647 of 2014 in CC No.165 of 2007, which reads as under:

" No objection reported from accused. Heard both sides. Perused the record. As prima facie case is made out against A.1 and A.3, who are deleted by police while filing charge sheet, this court thinks it necessary to implead A1 and A3 who are shown in the list of witnesses as LWs.5 and 6 in view of the evidence of PW.1, FIR and S.161 Cr.P.C. statements.

Accordingly, the petition is allowed as prayed for..."

10. Aggrieved by the said order, now impugned to quash the same, saying no grounds to array them as co-accused invoking Section 319 Cr.P.C what the learned Public Prosecutor stated is that PW.1 evidence speaks their complicity and PW.1's initial report speaks their complicity. In fact, PW.1 statement/ report registered as crime and further investigated by police and filed final report deleting the two ladies from array of accused. So far as Sunitha concerned, there is no role at all and so far as Hemalatha, the present quash petitioner, but for, on asking by PW.1 the commandant under whom she works, for remitting the balance, she is innocent and it is both Saleem and Narahari that have misappropriated, that is also revealed from the disclosure statement of Saleem and no complicity of Hemalatha also. But for relying on Narahari, the immediate superior to Saleem in maintaining cash book and making entries but for at best dereliction of duty there is nothing cheating or misappropriation of amounts.

11. It is also further submission that even the trial court after hearing Additional Public Prosecutor on behalf of prosecution and the A1 and A2 Saleem and Narahari facing trial, framed the charges only against them and found no material against these two ladies either while on taking cognizance or later and there is nothing new in the evdiene of PW.1 for the court to allow the application for sake of mere asking without even considering existence of *prima facie* material from the evidence of PW.1 to implicate.

12. In fact a perusal of deposition of PW.1 Subba Rao in the chief examination shows that while he was working as commandant in VI Batalion, APSP, Mangalagiri while he was on duty at Visakhapatnam and on coming to know through A3-K. Parameswara Rao, over phone, a news has been published in Vartha, Guntur district edition dated 20.5.2006 about the discrepancy in the Zero Balance Account and on that he contacted the Administrative Officer over phone to look into Zero Balance account on that the A.O. contacted the SBI Manager at Mangalagiri and have taken the statement to tally the statements along with

cheuqes, which were issued by the A.O because A.O. is fully responsible to maintain and supervise the account along with B Superintendent and also B8 clerk, as these three persons are the responsible for accounts, and after his arrival from the duties from Visakhapatnam and received instructions from DIG-4, APSB Battalion, Kakinada conducted the preliminary enquiry through Assistant Commander T.Bhojaraju (LW2) and from that he came to know that cash of Rs.3,30,957/- was misappropriated in the Zero Balance account itself with lack of supervision of A.O., B-Superintendent and B-8 clerk and later it came to his notice that AO and B-Superintendent deposited Rs.3,31,000/- in the Zero Balance account on 27.05.2006 but it was actually misappropriated by the then B8 clerk (A4) and after intimating the same to DIG-4, APSB Kakinda, he ordered to register a case against A.O Hemalatha, B-Superintendnet R.Narahari (A2), P.Sunitha, Junior Assistant and B-8 Clerk S.A.Saleem (A4) and he in-turn registered a case at Mangalagiri Police Station and submitted report to DGP under intimation to ADGP, APSP Battalion, Mangalagiri. Ex.P1 is the report given by him and Ex.P2 is the proceedings issued by DIG-4 of APSP Battalion and ExP.3 is the proceedings issued by DIG-4 of APSP Battalion to register a case. That is what all his chief examination. In fact for the learned Public Prosecutor to file application, there is nothing to say from the said chief examination of PW.1, for the first time, Hemalatha and Sunitha these two persons misappropriated the amount practically there is nothing against Sunitha even though learned Public Prosecutor asked to implead Hemalatha and Sunitha as co-accused and the Magistrate allowed as it is for sake of mere asking without even going through deposition of PW.1 as what Section 319 Cr.P.C. speaks of the stage to add the other two accused facing trial responsible to make them additional accused, is, where in the course of any enquiry into, or trial of an offence, it appears form the evidence with any person not being the accused has committed any offence, for which, such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

13. Sub-sections (2) and (3) of 319 Cr.P.C., where such person appeared before Court to take to custody and otherwise to secure either by summoning or by issuing warrant of arrest and sub section (1) of Section 319 Cr.P.C, the procedure to be followed so far as newly added accused concerned *de nova* by commencing fresh and the witnesses to be re-heard, as if such person had been an accused

when the Court can took cognizance of the offence upon which the enquiry or trial was commenced.

14. The 5 Judges Bench of the Apex Court reported in ***Hardeep Singh vs. State of Punjab*** categorically held on the scope of wording of Section 319 (1) of Cr.P.C., that the degree of satisfaction for invoking Section 319 Cr.P.C sub Section (1) should be of more than a *prima facie* case has existed before framing of charge, but short of satisfaction to the extent that offence, if not rebutted may lead to conviction of a person sought to be added as accused.

15. Now the material for arraying two ladies whose names were originally mentioned in the FIR, even, when the police after investigation found no complicity of them and the mere statement of PW.1 that the present quash petitioner along with A2 liable for the amounts misplaced by A2 Narahari and A1 Saleem, does not make her liable with any complicity to the crime but for her making the entries by believing the words of A2 Narahari, Superintendent, a dereliction of duty. What PW.1-G. Subba Rao deposed in his chief examination referred supra is simply a lack of supervision by the A.O. Hemalatha and nothing more of she also misappropriated the amount or privy with other accused, but for dereliction of duty in saying along with Saleem B-8 Section Assistant and Sunitha Junior Assistant Narahari, Superintendent of the Section and Hemalatha, A.O., are responsible for the maintenance of ZB Account, drawal of accounts and maintenance of cash books. Thus same is not sufficient, but for to say dereliction of duty, to rope any of them as privy to the crime or participated in the crime by embezzlement of the amounts and falsely maintained accounts for that purpose. Thus from PW1 chief examination placed reliance by the learned Additional Public Prosecutor in adding two ladies as accused is not sufficient from perusal of the said chief examination, for the learned Magistrate to come to a conclusion to include them as co-accused invoking Section 319 Cr.P.C, as it falls short of requirement of the material as contemplated by law from the wording of Section 319 (1) CrPC as laid down by 5 Judges Bench of the Apex Court's decision of **Hardeep Singh**'s case referred supra.

16. Having regard to the above, the order of learned Magistrate is liable to be set aside. It is needless to say if from further evidence and in future, if there is availability of the material as required by law from the expression referred supra, the learned Magistrate has right to take cognizance, that is no way bar by virtue of this order and to that extent, this Criminal Petition is allowed.

Miscellaneous petitions, if any pending in this Criminal Petition, shall stand closed.

JUSTICE Dr B. SIVA SANKARA RAO.

Date : 25-11-2015

Gvl