

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

CRIMINAL PETITION No.2286 OF 2015

ORDER:

This is a Criminal Petition filed under Section 482 of the Code of Criminal Procedure, 1973 (for short, 'Cr.P.C') by the petitioner/*de facto* complainant requesting to set aside the order dated 24.02.2015 in Criminal M.P. No.872 of 2015 in C.C. No.223 of 2011 passed by the learned III Additional Chief Metropolitan Magistrate, Vijayawada, Krishna District.

2. Heard the learned counsel for petitioner-*de facto* complainant, and the learned counsel for the accused persons-respondents 1 and 2, and also the learned Public Prosecutor representing the State-third respondent. Perused the material on record.

3. This criminal petition is filed saying revision is not maintainable as the dismissal of application, filed under Section 311 Cr.P.C, in Criminal M.P. No.872 of 2015, vide order dated 24.02.2015, by the learned III Additional Chief Metropolitan Magistrate, Vijayawada, Krishna District, is unsustainable.

4. The factual matrix from the record is that there was a criminal case covered by C.C. No.1342 of 2009 on the file of the Court of the learned I Additional Chief Metropolitan Magistrate, Vijayawada, against the accused persons, at the instance of the *de facto* complainant herein, covered by police investigation and charge sheet of the crime registered based on private complaint, filed by the *de facto* complainant herein, that was referred to police under Section 156 Cr.P.C. The learned Magistrate has taken cognizance of the offence against the accused under Section 506 I.P.C and allotted case number viz., C.C. No.223 of 2011. The allegations were that the accused persons were threatening to withdraw the earlier criminal case and also threatened to withdraw the private complaint and the threats were during the period between 04.08.2009 and 04.01.2010, including in the Court premises when she came to the Court to give evidence in the earlier criminal case referred supra. The Court has conducted trial and four witnesses in all were examined, undisputedly, including the said

complainant as P.W.1 and two more witnesses referred to in the charge sheet as well as the private complaint list of witnesses, and the Investigating Officer was examined on 02.04.2014 itself as P.W.4. It is needless to say that subsequently the *de facto* complainant/petitioner filed Criminal M.P. No.4199 of 2014 for marking of the computer disks, and the same was allowed, after hearing, by order dated 06.01.2015, and he was recalled and the documents were marked as M.O.1 and M.O.2. Undisputedly, even the evidence of Investigating Officer, as P.W.4, was completed on 02.04.2014, who collected the so-called call data during investigation, was not exhibited. The *de facto* complainant or the learned Assistant Public Prosecutor not even chosen to file an application to recall P.W.4 for exhibiting the so-called call data earlier. No doubt, if that is the only scope of Section 311 Cr.P.C, in refusal to recall within the discretion of the trial Court on grounds of the laches of prosecution, the order no way requires interference. It is not necessary to go into the scope of Sections 230, 231, 233, 242 to 244, 247 or 254 Cr.P.C, herein, but for the scope of Section 311 Cr. P.C. and Section 165 of the Evidence Act, a bare reading of Section 311 Cr.P.C is running into two parts. The first part confers discretionary power in such matters, whereas the second part is mandatory in use of the words 'shall' on the part of the learned trial Magistrate where it is just and necessary of such evidence for a just decision of the case to receive the same or recall a witness or call for production of the document or examine a witness as the case may be. The second part of Section 311 Cr.P.C is akin to the power of the learned Magistrate under Section 165 of the Evidence Act, to exercise to sub-serve the ends of justice in order to arrive a just decision of the case. Thus, in such an application, the Court not only to examine scope of first part of Section 311 Cr.P.C., but also to consider if not falling under the first part, whether the evidence is necessary under the second part to exercise the power ordained by the legal obligation also with reference to Section 165 of the Evidence Act. This Court by order dated 10.10.2014 in CrI. R.C. No.1276 of 2014 considered the scope with reference to the expressions of the Apex Court.

5. From the above, a perusal of the impugned order of the learned Magistrate, no way, shows proper application of mind to the factual matrix much less scope of the second part of Section 311 Cr.P.C as well as Section 165 of the

Evidence Act. Therefore, by setting aside the impugned order of the learned Magistrate, the matter is remitted back, by restoring the application before the learned Magistrate, to decide afresh within the scope of the second part of Section 311 Cr.P.C also read with Section 165 of the Evidence Act, and if it is a material document to arrive a just decision to allow the same, if not material by dismissal of the application. Needless to say the earlier decision of the learned Magistrate in no way influence his mind while taking fresh decision on the application on own merits within the scope of law supra. As the matter is long pending, the Magistrate shall make every endeavor to dispose of the case within two months by posting the matter on day-to-day basis for disposal of the application by fresh hearing and therefrom to decide the case with any further trial or not.

6. In the result, the Criminal Petition is allowed, and the matter is remitted back, by restoring the application before the learned Magistrate, to decide afresh within the scope of second part of Section 311 Cr.P.C also read with Section 165 of the Evidence Act.

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

Dr. B. SIVA SANKARA RAO, J

Date: 04.06.2015

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HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

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Date: 04.06.2015

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