

The court made the following : [order follows]

HONOURABLE SRI JUSTICE P. KESHAVA RAOCRIMINAL PETITION NO. 3003 OF 2011**ORDER:**

Heard the learned counsel for the petitioners/A-1 to A-17 and the learned Public Prosecutor for the respondent/State.

2. The present Criminal Petition is filed to quash the orders dated 28/1/2010 passed by the II-Additional Judicial Magistrate of First Class, Machilipatnam, Krishna district, in CrI.MP.No. 290 of 2011 in CC.No. 338 of 2010.

3. The facts of the case are that the petitioners are A-1 to A-17 in Crime No.1 of 2010 of Marine Police Station, Gilakaladindi, Krishna district. All the petitioners are fishermen by caste and they are Srilankan citizens. They are captains and crew of the three fishing vessels. They were arrested on 12/03/2010 by the Marine Police on the alleged offences punishable under section 3 and 10 of the Maritime Zones of India [Regulation of Fishing by Foreign Vessels] Act, 1981 and section 13 and 14 of Foreigners Act, 1946. After investigation, charge sheet has been filed. However, the Collector and District Magistrate, Krishna at

Machilipatnam, after considering the letters of Deputy High Commissioner of Srilanka for Southern India, Chennai and Deputy Minister of Economic Development, Srilanka, Colombo have decided to consider withdrawal of prosecution against the petitioners.

4. In the said letters they have informed that the petitioners, who are Srilankan nationals have not committed any mistake/offence but due to Engine failure, they have entered into the Indian territory. In fact, before entering into Indian territory, they have informed the said fact to the Assistant Director [MCS] for Director General Department of Fisheries and Aquatic Resources of Srilanka and it was recorded in the log-book and finally requested for deportation of the petitioners/17 Srilankan nationals and release the three vessels and requested to withdraw the prosecution against the petitioners. In the Proceedings C.No. 695-1/SB-XI/2010, dated 07/12/2011, the Superintendent of Police, Krishna at Machilipatnam has reported that Ministry of Home Affairs, Government of India, vide letter No. 25019/11/2010-F.IV, dated 14/05/2010 have given consent for

repatriation of the petitioners to their country of origin provided no Court case is pending against them and that they are not required in any other case. Even the Principal Secretary, Home [Passports-A] Department, Government of Andhra Pradesh, vide Memo.No. 8129/Passports-A-1/2010, dated 26/05/2010 gave directions to the Superintendent of Police, Krishna at Machilipatnam, to take necessary action for repatriation of the petitioners to their country of origin, since Ministry of Home Affairs, Government of India, New Delhi [Foreigners IV-Section] has no objection, provided no case is pending against them and they are not required in any other case. In those circumstances, the Collector and District Magistrate, Krishna at Machilipatnam, vide Proceedings Rc.No. C-1.973/M/2010, dated 09/1/2011, requested the Assistant Public Prosecutor, II-Additional Judicial Magistrate of First Class, Machilipatnam to file a petition under section 321 of Cr.P.C., for withdrawal of the prosecution. Accordingly, the learned Assistant Public Prosecutor filed Crl.MP.No. 290 of 2011 in CC.No. 338 of 2010 under

section 321 Cr.P.C., seeking withdrawal of the case against the petitioners.

5. The court below, after considering the memo enclosed to the said application and after hearing the arguments of the learned Assistant Public Prosecutor, passed orders dated 20/01/2011, directing the Police concerned to hand over the properties in Form No. 60 {tem Nos. 1 to 111} to the petitioners. On such return of the articles, the concerned Police was directed to file acknowledgement before the court. However, the sale proceeds of Rs.1,39,852=00 deposited into the court out of the auction of 'tuna' fish in public auction is confiscated. Aggrieved by the said confiscation of Rs.1,39,852=00, the present Criminal Petition is filed by the petitioners.

6. The counsel for the petitioners would contend that when once the application under section 321 of Cr.P.C., is filed to withdraw prosecution of criminal case against the petitioners, the question of confiscation of the said amount will not arise. The counsel also brought

to the notice of this Court, the letters dated 09/01/2011 and 23/02/2011 and the effect of withdrawal of prosecution against the petitioners.

7. The learned Public Prosecutor fairly submitted that when once the prosecution case is withdrawn against the petitioners, and returned the articles as directed in the orders, the question of confiscation of the amount may not arise. It is relevant to extract Section 321 of Cr.P.C., which deals with withdrawal of the prosecution case and the same is as under :

Section 321 Withdrawal from Prosecution :

The Public Prosecutor or Assistant Public Prosecutor in charge of a case may, with the consent of the Court, at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried; and, upon such withdrawal, ---

[a] If it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;

[b] If it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences :

Provided that where such offence -----

- i) *was against any law relating to a matter to which the execution power of the Union extends, or*
- ii) *was investigated by the Delhi Special Police Establishment under the Delhi Special Police Establishment Act, 1946 [25 of 1946], or*
- iii) *involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or*

- iv) *was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty, and the prosecutor in charge of the case has not been appointed by the Central Government he shall not, unless he has been permitted by the Central Government to do so, move the Court for its consent to withdraw from the prosecution and the Court shall, before according consent, direct the Prosecutor to produce before it the permission granted by the Central Government to withdraw from the prosecution.*

8. A reading of the said provision would indicate that the Public Prosecutor or Assistant Public Prosecutor in-charge of a case, with the consent of the Court at any time before the judgment is pronounced withdraw the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried and upon such withdrawal, the accused shall be discharged in respect of such offence or offences.

9. In the case on hand, basing on the letters addressed by the Srilankan Government and also Ministry of Home Affairs, Government of India, New Delhi, the Collector and District Magistrate, Krishna at Machilipatnam, has directed the Public Prosecutor to withdraw the prosecution launched against the petitioners. Accordingly, when application is filed for withdrawal of the prosecution, the court below after directing all the articles including the vessels to be returned to the

petitioners, cannot confiscate the amounts and it goes contrary to the intention enshrined in section 321 of Cr.P.C. The letters addressed by the Srilankan Government as well as the Ministry of Home Affairs, Government of India, New Delhi would not indicate that withdrawal should be conditional. That being the case, when once the prosecution case has been withdrawn against the petitioners, the sale proceeds of 'tuna' fish cannot be confiscated.

10. Therefore, the orders passed in CrI.MP.No. 290 of 2011 in C.C.No. 338 of 2010 dated 28/01/2011 by the II-Additional Judicial Magistrate of First Class, Machilipatnam, Krishna district, are modified partly as far as directing to refund a sum of Rs.1,39,852=00 to the petitioners along with interest accrued thereon.

11. Accordingly, the Criminal Petition is allowed in part as indicated above.

12. As a sequel, miscellaneous petitions if any, pending in this criminal petition shall stands closed.

JUSTICE P. KESHAVA RAO.

HONOURABLE SRI JUSTICE P. KESHAVA RAO

CRIMINAL PETITION NO. 3003 OF 2011
[ALLOWED]



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