

THE HON'BLE DR. JUSTICE B.SIVA SANKARA RAO

CRIMINAL PETITION Nos.7213 AND 7259 OF 2017

COMMON ORDER:

The petitioner in both the petitions is one and the same no other than accused/appellant in Criminal Appeal No.45 of 2017, pending on the file of X Additional District and Sessions Court, Anakapalle of Visakhapatnam District. The Criminal Appeal maintained was against the conviction judgment of the II Additional Metropolitan Magistrate-cum-V Metropolitan Magistrate, Anakapalle, in C.C.No.83 of 2010, dated 04.04.2017. The case is outcome of the 2nd respondent's private complaint for the offence under Section 138 N.I.Act.

2. Heard learned counsel for the petitioner and perused the grounds urged in the quash petition and also heard the 1st respondent – Public Prosecutor, before ordering notice to the 2nd respondent – defacto complainant and perused the other material on record.

3. The grievance in Criminal Petition No.7213 of 2017 is that when calling for records of the lower court, the appellate court wants to dispose of the appeal, which is not just and the docket order of the appellate court in CrI.M.P.No.119 of 2017, dated 21.07.2017 is liable to be quashed.

4. A perusal of the said docket order discloses that petitioner's counsel claims only instructed to file petitions but

not to argue the case on behalf of the appellant/accused and appellant/accused wants to engage a senior counsel, that was opposed by the complainant/respondent and the court observed that having given opportunity to submit arguments on behalf of the appellant/accused, the learned counsel for the appellant did not chose to argue and the Crl.M.P.No.112/2017, dated 14.07.2017, allowed directing the appellant/accused to attend before the appellate court. The appellant, however, did not attend either on 07.07.2017 or on 14.07.2017 or even on that 21.07.2017 and there are no reasons assigned for his failure to comply with bail bonds as per order in Crl.M.P.No.64/2017, dated 24.04.2017, thereby, the petition filed under Section 317 Cr.P.C. in Crl.M.P.No.119/2017 was dismissed.

5. Coming to Criminal Petition No.7259 of 2017, which is covered by impugned docket order dated 21.07.2017. A perusal of the docket order impugned shows appellant called absent on 21.07.2017, which is in continuation to the order referred supra in Crl.M.P.No.119/2017, dated 21.07.2017, respondent present, appellant absent, for hearing, call at 03.00 p.m., and again at 03.20 p.m. and counsel for appellant do not want to argue the criminal appeal on the ground that appellant wants to change the advocate and posted at 04.15 p.m., and again at 04.30 p.m. and the advocate-on-record for appellant also called absent. While allowing Criminal Petition No.112/2017, dated 14.07.2017, the court directed accused/appellant to attend before the

court on 21.07.2017 and however, absent so also earlier and at this juncture, the learned counsel for the appellant on record by name Sri P.A.Narasimham, appeared before the court and not inclined to argue the criminal appeal saying appellant instructed him only to file petitions but not to argue criminal appeal and he wants to engage a senior counsel. The counsel for respondent/complainant submits appellant/accused never attended even direction of the court and it is deliberate and intentional to avoid appearance before court and argue the criminal appeal and the criminal case is of the year 2010, though appeal is a latest one against the trial courts conviction judgment dated 04.04.2017 and he could drag on in the trial court and the petition is liable to be dismissed and bail order to be set aside and N.B.W. to be issued.

6. In fact, an advocate-on-record cannot arrogate while continuing on record but for if at all to report no instructions if unwilling to continue, in a brow beating manner, saying he is engaged only to file petitions for adjournments and not to argue the case. If at all the appellant wants to engage a senior advocate, there is no difficulty for opening the case and taking a time and securing the senior counsel. However, that was not the case on hand in the representation by the learned counsel before the lower appellate court. Suffice to say, for no more is required to observe against the advocate and the party/appellant conduct. However, the appellate court need not cancel the suspension of sentence order passed under

Section 389 Cr.P.C., if at all the appellant not chosen to argue through the advocate-on-record, by virtue of the three judge bench expression of the Hon'ble Apex Court in ***Bani Singh Vs. The State of Madhya Pradesh***¹ that appellate court need not even issue N.B.W., need not insist for presence of the appellant and even the advocate on record of the appellant failed to appear or even failed to argue the case, the appellate court can dispose of the appeal on merits, from the combined reading of Section 386 r/w 390 Cr.P.C.

7. Having regard to the above, the N.B.W. issued is cancelled and the bail order in CrI.M.P.No.64/2017, cancellation order is set aside and the lower appellate court shall call for record of the trial court and on securing, fix a day with minimum one week gap for the appellant to secure any advocate to argue the case on merits, else to decide the appeal on own merits, by virtue of this order and the expression of the Hon'ble Apex Court in ***Bani Singh case (referred supra)***.

8. Accordingly and with the above observations, these two criminal petitions are allowed. Pending miscellaneous petitions, if any, shall stand closed.

DR.B.SIVA SANKARA RAO, J

22.08.2017
SS

¹ AIR 1996 SC 2439