

HON'BLE DR. JUSTICE B.SIVA SANKARA RAO

CRIMINAL REVISION CASE No.969 OF 2017

ORDER:

The revision petitioner/*de facto* complainant is the husband of the revision respondent No.1 (A1) of the marriage dated 26.05.2010. He is the *de facto* complainant in C.C.No.1203 of 2015, on the file of Judicial First Class Magistrate/Special Mobile Court – cum- XI Metropolitan Magistrate, Cyberabad. The accused therein were the revision respondent No.1 (A1) and Mrs.Janabi Kalikar (A2), it was outcome of Crime No.527 of 2014 of Chaitanyapuri Police Station, for the offences punishable under Sections 211, 417, 419 and 420 of I.P.C., from the private complaint filed, that was referred to police for investigation under Section 156(3) Cr.P.C. and the police, after investigation, since filed the charge sheet, that was taken cognizance for the offences under Sections 198, 199, 406 and 420 of IPC and Section 12(1)(b) of the Passport Act.

2. The *de facto* complainant in the said calendar case supra, filed petition in CrI.M.P.No.1474 of 2016, under Section 302 Cr.P.C., seeking permission to conduct the prosecution through his advocate Sri K.Saibabu. The accused 1 and 2 opposed the petition contending that there are no proper reasons for seeking the indulgence in allowing

the petition to conduct prosecution by *de facto* complainant through private advocate and the same is nothing but fictitious, besides premature, to consider and the allegation of State is over burdened with dearth of public prosecutors and the permission to be accorded to get speedy justice cannot be credence and the case is nothing but a counter blast to C.C.No.1569 of 2014, against the present *de facto* complainant and others, under Sections 448 and 324 r/w 34 of I.P.C. The order of the learned Magistrate in that petition speaks that several contentions raised not relevant to the petition purpose and coming to the main objection of State can prosecute through A.P.P. and the petitioner cannot engage a private advocate, however, Section 302(2) Cr.P.C. permits to conduct the prosecution through private advocate, thereby petition allowed. Against the said order dated 03.10.2017 passed by the learned Magistrate in Crl.M.P.No.1474 of 2016, the revision respondent No.1/A1 maintained Crl.R.C.No.159 of 2016 and the said revision petition, by order dated 10.03.2017, was allowed setting aside the order allowing the application passed by the lower court in Crl.M.P.No.1474 of 2016 supra, by observing that conducting of prosecution by A.P.P. is a rule and permitting another person by Magistrate is an exception and not as a matter of right to conduct the prosecution before Magistrate through private advocate in the police warrant case and thereby permitting by the learned Magistrate at the instance

of the *de facto* complaint through his private advocate to conduct prosecution besides not supported by any reasons is not outcome of judicial discretion and as the lower court allowed the same in routine manner, same is set aside. It is impugning the same, the present revision is filed.

3. The respondents, even served, failed to attend. Heard counsel for the revision petitioner/*de facto* complainant and the public prosecutor, representing the revision 2nd respondent – State and taken as heard the revision 1st respondent, since served failed to attend and perused the material on record.

4. Section 302 of Cr.P.C. reads as follows:

“302. Permission to conduct prosecution :-

(1) Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than a police officer below the rank of Inspector; but no person, other than the Advocate-General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission: Provided that no police officer shall be permitted to conduct the prosecution if he has taken part in the investigation into the offence with respect to which the accused is being prosecuted.

(2) Any person conducting the prosecution may do so personally or by a pleader.”

5. It is different to Section 301 of Cr.P.C. The basic difference between the two is - Section 301 of Cr.P.C., is to

permit any private pleader of a party, complainant or witness to assist the prosecutor, whereas, Section 302 of Cr.P.C., enables the Magistrate in enquiry or trial to permit the prosecution to be conducted by any person specified therein and once despite Assistant Public Prosecutor is there generally to conduct the prosecution in that court of the police cases, once this provision enables the Magistrate and the learned Magistrate specifically referred the same including by referring to Section 302(2) Cr.P.C., of the permission to be conducted by prosecution other than through public prosecutor by private person in the discretion of the court is either to conduct by said person or through his advocate or pleader. It is nowhere stated it is only an exception and conducting by public prosecutor is a rule. Once there is an application and when the *de facto* complainant wanted to effectively conduct the prosecution through private advocate and once that is permitted by court, for the lower revision court, within the limit scope under Section 397 Cr.P.C., to sit against for interference, if at all the impugned order is incorrect or illegal or outcome of impropriety, that does not enable for not even an appellate court to sit against to set aside, that too in saying the order not contained so many reasons though the order speaks the reasons from reading of the provision and in considering the request for several other contentions as rightly pointed no way relevant for purpose of deciding the petition. As rightly concluded by the learned

Magistrate and even the revision court order by saying no reasons is not sustainable so also in saying conducting prosecution by State through public prosecutor is a rule or permitting a private person is an exception, despite the provision covered by Section 302 Cr.P.C. is very specific of conferring discretion on the magistrate. Apart from that, when the very petition averments contain the reasons in seeking the permission and that was considered without consideration of the same in setting aside the impugned revision order of the lower court is unsustainable.

6. Further Section 24(8) *proviso* of Cr.P.C., also enables the court to permit the victim to engage advocate of his choice to assist the prosecution. Here the perusal of the complaint averments shows the *de facto* complainant is a victim, within the meaning of Section 2(w)(a) and once such is the case, to assist the prosecution is since different to the assisting of the prosecutor, it is practically conducting a prosecution as also laid down by this court referring to the terminology of what is meant by conducting prosecution and assisting prosecution laid down by the Apex Court, way back, in ***Delta Car Private Limited Vs. Sanjiv Shah***¹ CrI.M.P.No.4382 of 2014 in CrI.P.No.4546 of 2014 and batch, that was reiterated by quoting with approval in CrI.P.No.5674 of 2015 between ***Gude Bhavani Sujatha Vs. Muggulla Srinivasa Rao and***

¹ LAWS (APH)-2014-7-167

another². Further by quoting with approval in **J.K.International Vs. State Government of NCT of Delhi and others**³ among other expressions, in the recent past expression of the Apex Court in **Dhariwal Industries Limited Vs. Kishore Wadhwani and others**⁴, it is observed that there is a discretionary power conferred on the Magistrate under Section 302 to permit conducting of prosecution independently rather through public prosecutor and the permission to conduct prosecution includes the right to be heard the *de facto* complainant at the time of framing the charges besides during other enquiry/trial and even in a sessions case to extend the same. There is nothing even from the expression of such permission is only an exception and conducting of prosecution by the public prosecutor is a rule.

7. Having regard to the above, the impugned order of the learned Sessions Judge is set aside as unsustainable by restoring the order of the learned Magistrate.

8. Accordingly and with the above observation, this criminal revision case is allowed. Miscellaneous petitions pending, if any, in this case shall stand closed.

DR.B.SIVA SANKARA RAO, J

26.04.2017
SS

² 2015 (2) ALD (CrL.) 516

³ 2001 C.C.R. 267 SC

⁴ IV (2016) SCR 18 (SC)