

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELENGANA AND THE STATE OF ANDHARA PRADESH**

CRIMINAL PETITION No.4624 of 2018

Between:

Dr. Ayyalasomayajula Bhavani Sankar Sastry and another

.....Petitioners

and

Mavvuri Venkata Ramana and another

.....Respondents

Date of Judgment pronounced on : 20-12-2018

HONOURABLE DR. JUSTICE B. SIVA SANKARA RAO

1. Whether Reporters of Local newspapers : Yes/No
May be allowed to see the judgments?
2. Whether the copies of judgment may be marked : Yes/No
to Law Reporters/Journals:
3. Whether The Lordship wishes to see the fair copy : Yes/No
Of the Judgment?

*** HONOURABLE DR. JUSTICE B. SIVA SANKARA RAO**
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< GIST:

> HEAD NOTE:

! Counsel for the petitioners : Sri Milind G. Gokhale

^ Counsel for the respondents : Sri PAK Kishore for R.1
Learned PP for R.2

? Cases referred

1. 1999 (7) Supreme 606
2. 2001 (3) Supreme 214
3. CrI.A.No.859 of 2016 @ SLP(Criminal) No.5717 of 2012)
4. AIR 1959 SC 375
5. 2014 (16) SCC 623
6. AIR 1966 SC 911
7. CrI.P.No.5674 of 2015 dated 26.06.2015
8. 2015 (2) ALT (Crl.) 216

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO**CRIMINAL PETITION No.4624 of 2018****ORDER:**

The petitioners are accused Nos.1 to 4 of CC.No.172 of 2012 on the file of learned III Additional Chief Metropolitan Magistrate, Visakhapatnam at Gajuwaka taken cognizance for the offences punishable under Sections 120B, 403,420, 468, 471, 193, 411 r/w 34 IPC, which is outcome of crime no.543 of 2011 of SHO Gajuwaka on the report of the 1st respondent-defacto complainant, which is now at the post cognizance stage. From the petition filed under Section 302 Cr.P.C. by the defacto complainant supra in Crl.M.P.No.720 of 2017 in said CC.No.172 to permit to conduct prosecution through his private advocate Sri PAK Kishore including for the pre-charge hearing so to participate, that was even opposed by the accused persons orally without filing counter but for by the Asst. Public Prosecutor in filing counter and disputing the entitlement and by saying the Asst. Public Prosecutor got thorough and sufficient knowledge about the provisions of law and facts of the case and the private person is not entitled to conduct trial but for to Assist the Asst. Public Prosecutor, and allegations in the petition of the Asst. Public Prosecutor of the Court is very busy and overburdened with many cases is not correct for bound to conduct prosecution in pending cases every day and the allegation of it is not conducive for the petitioner-Complainant to meet the Asst. Public Prosecutor

frequently in connection with the case to instruct is not tenable and the allegation of the case may result in non-proper conducting of prosecution is also untrue. The learned Magistrate after hearing allowed the petition by the impugned order dated 30.10.2017.

2. The present petition is questioning the same with contentions in the grounds that the order of the learned trial Court in permitting the defacto complainant to conduct prosecution through his private advocate is neither in consonance with law nor in true appreciation of the facts and it is an improper exercise of the discretion in allowing the petition by lost sight of the fact that a private advocate will always got vested interest in favour of his client and not possible to conduct impartial prosecution and allowing the petition under Section 302 Cr.P.C. by the trial Court is outcome of failure to appreciate the fact that it is the police who to conduct the entire investigation and the person prosecuting the case must not have any vested interest and role of prosecutor is to bring true facts and even it is allowed to be conducted by a private advocate engaged by defacto complainant the entire endeavour will be to get conviction and thereby ought to have dismissed. It is also contended that there was an observation by the Sind High Court at the age old time in **Ahmed Mahomed Ismail Vs. Emperor** of an advocate privately represent the complainant should have no place other than that of the one strictly subordinate to the

officer who prosecutes on behalf of the crown, for crown stands not necessarily for conviction but for justice and it also does not stand for acquittal of one accused represented by a particular advocate at the cost of others and at the cost of justice. The further contention is that the learned trial Magistrate has erred in holding that due to heavy workload of the Asst. Public Prosecutor appointed by the State he may not be able to conduct prosecution properly. The further contention is that petition for discharge of the accused persons is also pending and thereby it is not a fit case to permit private advocate to conduct prosecution on behalf of the defacto complainant. It is also contended that learned trial Judge failed to consider the scope of Section 302 Cr.P.C. and the expressions of the Apex Court in this regard.

3. The learned counsel for the quash petitioners A.1 to A.4 in impugning the order of the learned trial Judge supra reiterated the contentions in the quash petition supra, whereas the learned counsel for the 1st respondent-defacto complainant supported the order of the lower Court. The learned Public Prosecutor representing the 2nd respondent-State asks the Court to decide the matter on own merits.

4. Heard and perused the material on record.

5. The impugned order of the learned Magistrate running in 5 pages with 13 Paras speak that the Calendar Case is outcome of the report of the defacto complainant registered by SHO, Gajuwaka against A.1 stating that on

receiving an amount of Rs.21,42,500/- by DD, A.1 attended for first registration and effected registration towards his share of the land, however on receiving Rs.25 lakhs he did not attend for registration and on the other hand filed a case in the Court with forged documents in saying thereby cheated the defacto complainant and blackmailed by abused him for which SHO, Gajuwaka registered the crime No.543 of 2011 for the offences punishable under Sections 420, 468, 471, 193 r/w 34 IPC against A.1 and A.2 and police after investigation filed charge sheet against A.1 to A.4 for the offences supra including Section 411 r/w 34 IPC and 403 IPC also that was taken cognizance as CC.No.172 of 2012 supra and accused put forth their appearance and filed application for discharge which is pending. It is averred that the learned APP is busy with other aspects and unable to attend and defacto complainant unable to meet him and thereby wants to engage private advocate to conduct the prosecution. Having referred to factum of no counter filed by the learned counsel for the accused, but by APP and from hearing having formulated the point as to whether petitioner entitled to seek permission of Court to permit him to engage an advocate for conducting prosecution and to participate in the proceedings before the Court, it was answered from Paras 9 to 12 of the impugned order in particular, referring to the expression of the Apex Court in **Shiv Kumar Vs. Hukum Chand**¹ of the

¹ 1999 (7) Supreme 606

Three Judge Bench on the scope of Section 302 Cr.P.C. vis-à-vis Section 225 Cr.P.C. and the expression of the Apex Court in **JK International Vs. State (NCT) of Delhi**² on the scope of Sections 190, 225, 301, 302 & 482 Cr.P.C. and at Para 12 observed that the private person who is permitted to conduct prosecution in the Magistrate's Court can engage a counsel to do needful in the Court on his behalf. It further amplifies the position that if a private person is engaged by the aggrieved of the offence committed on him and against any one in whom he is interested he can approach the Magistrate and seek permission to conduct prosecution by himself. It is open to the court to consider his request. If the Court thinks that cause of justice would be served better by granting such permission, the Court would generally accord such permission. It also referred the expression in **Dhariwal Industries Limited Vs. Kishore Wadhwani**³ of the Two Judge Bench particularly Para 18 on the scope of Section 302 Cr.P.C. holding that power is conferred on the Magistrate to grant permission to the complainant to conduct prosecution independently. The wording of Section 302 Cr.P.C. is in empowering the Court to the effect that any person conducting the prosecution may be permitted to do so personally or by pleader and thereby of the considered opinion that the Court can exercise the discretion in favour of

² 2001 (3) Supreme 214

³ Crl.A.No.859 of 2016 @ SLP(Criminal) No.5717 of 2012)

the petitioner in view of the circumstances stated in the petition.

6. It was observed that as per the contents of the charge sheet suit in OS.No.94 of 2010 pending on the file of learned II Additional District Court and there were several money transactions between the parties for Rs.20 crores or so. Originally the III Additional Chief Metropolitan Magistrate's Court was having pendency of 3,600 cases and at present there are 1,300 cases pending including cases pertaining to the NI Act, the Assistant PP allotted to the Court has been attending only twice in a week instead of 5 days. Since the civil case is pending between the parties and learned PP is not fully available to the Court to participate with the case and petition under Section 239 Cr.P.C. for discharge pending for disposal, observed it as a fit case to grant permission to petitioner as prayed for. As a result, it is observed Sri PAK Kishore; advocate is permitted to conduct prosecution on behalf of the defacto complainant.

7. Undisputedly the petition was filed under Section 302 Cr.P.C. and the petition was allowed only under Section 302 Cr.P.C. Undisputedly the present petitioners accused Nos.1 & 4 did not file any counter before the lower Court though that itself is not a ground to allow the petition, but for subjective satisfaction from facts and outcome of the judicial application of mind including on the scope of law under Section 302 Cr.P.C. Once it is not a case under Section 24(8)

proviso of Cr.P.C., where there is no difference between a warrant case or sessions case or a summons case for a victim to be permitted to assist the prosecution with reference to Section 2(wa) Cr.P.C. covered by amended Act No.5/2009; there is nothing to go into the scope of the law under Section 24(8) proviso of Cr.P.C., but for to confine to the scope of Section 302 Cr.P.C.

8. No doubt as to the expression of this Court in **Mehaboob Unnisa Agarwal Vs. State** Section 24(8) proviso Cr.P.C. is available even in a sessions case to assist the prosecution conducting by the prosecutor for a private advocate being engaged by the victim can be permitted to put any further questions in the chief or cross examination. It was in fact the power of the trial court referable to section 165 Evidence Act. Same was no doubt set aside by the Apex Court in the Special Leave to Appeal (Criminal) No.2240/2018 dated 14.05.2018 in the **High Court of Judicature of Hyderabad for the State of Telangana and the State of AP Vs. Mahabunisa Begum**, saying said concession is contrary to the scheme of the provisions of the code in sessions cases for prosecution therein to be conducted by public prosecutor under Section 225 Cr.P.C., as held in **Shiv Kumar** supra. Here it is not the case under Section 24(8) proviso Cr.P.C., nor it is a sessions case to conduct prosecution by public prosecutor under Section 225 Cr.P.C., but for under Section 302 Cr.P.C.

9. Section 302 Cr.P.C. for more clarity reads as follows:

“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.**”

10. Section 302 Cr.P.C. from the above enables the Magistrate enquiring into or trying a case to permit the prosecution to be conducted by any person and if at all to permit a police officer, he must not below the rank of Inspector and is not one who has taken part in the investigation of the offence where accused is being prosecuted. So far as others, other than Advocate General or Government Advocate or Public Prosecutor or APP concerned, those can conduct prosecution only with permission of Court. Subject to that any person permitted by court to conduct the prosecution may do so personally or by engaging a pleader. The very wording is crystal clear with wide scope and amplitude of the discretion conferred on the trial Magistrate in any enquiry or trial to permit the prosecution to be conducted by any person other than Assistant PP in all

summary trial cases or summons cases or warrant cases instituted otherwise than on private complaint. Though Section 301 Cr.P.C. is applicable to all the Courts of criminal jurisdiction, Section 302 Cr.P.C. is not applicable to sessions cases from the specific wording of Section 225 Cr.P.C. that what the Apex Court constitution Bench in **Shiv Kumar** supra in the year 1999 held particularly at paras 12 to 20 and same only appears considered in the recent short order delivered by the Apex Court in the Special Leave to Appeal (Criminal) No.2240/2018 dated 14.05.2018 in the **High Court of Judicature of Hyderabad for the State of Telangana and the State of AP Vs. Mahabunisa Begum**, in saying both sides submit permission of private advocate in a sessions case to put any questions additionally by court is against the scheme of the provisions of the code.

11. In fact Section 24(8) proviso of Cr.P.C., was incorporated by amendment in 2009 and the proviso was not there earlier. For more clarity, same is reproduced herein:

“Section 24(8): The Central Government or the State Government may appoint, for the purposes of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor.

Provided that the Court may permit the victim to engage an advocate of his choice **to assist the prosecution** under this sub-section.

12. From the above, it makes no difference between a sessions case triable before a sessions judge or a summary or summons or warrant case triable before a Magistrate or other

designated court headed by a sessions judge with powers of a Magistrate. Further the distinction in the wording of conducting prosecution under section 302 Cr.P.C., to assist the prosecution under Section 24(8) proviso of Cr.P.C. and to assist the prosecutor under section 301 Cr.P.C. not came for consideration either before the Apex Court constitution Bench in **Shiv Kumar** supra of the year 1999 or in its reiteration by the Apex Court in the Special Leave to Appeal (Criminal) No.2240/2018 dated 14.05.2018 in the **High Court of Judicature of Hyderabad for the State of Telangana and the State of AP Vs. Mahabunisa Begum**, leave about the expressions in between of the Apex Court Constitution Bench in **JK International Vs. State (NCT) of Delhi of 2001** and in **Dhariwal Industries Limited Vs. Kishore Wadhwani in 2016** of the Apex Court Two Judge Bench. The word prosecution and the word prosecutor are not one and same in meaning, because of the notable difference between the two. What Section 225 Cr.P.C. speaks is that - In every trial before a Court of Session, the prosecution shall be conducted by a Public Prosecutor. Section 225 Cr.P.C confined to trial and not for pre-trial prosecution, though Section 225 Cr.P.C speaks of opening of the case for prosecution by the prosecutor in describing the charge brought against the accused and stating by what evidence he proposes to prove the guilt of the accused, which no doubt for pre-charge enquiry also contemplated by sections 227 & 228 Cr.P.C. It

does not mean in a Sessions case the Sessions Judge concerned cannot permit a victim in person or through advocate to assist prosecution. Had it been simply assisting the public prosecutor like under section 301(2) Cr.P.C. of any private person instructs a pleader to prosecute any person in any Court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so instructed shall act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor, and may, with the permission of the Court, submit written arguments after the evidence is closed in the case, there is no need of incorporating the proviso to Section 24(8) Cr.P.C. of the right and power of the Court which includes even a Sessions Court to permit the victim to engage an advocate of his or her choice to assist the prosecution. It was in fact a right of the victim recognised and conferred on the Court the power to permit the victim to engage an advocate of her or his choice to assist the prosecution. It is here the crux lies to understand the meaning of prosecution for not defined in the code. However the fact remains that the Constitution Bench of the Apex Court way back in 1959 defined what is meant by prosecution in considering the scope of the lis before it on double jeopardy, viz., in **Leo Roy Frey Vs. State of Punjab**⁴ at Para 10 that to prosecute means to seek, to obtain, to enforce or the like by legal

⁴ AIR 1959 SC 375

process as to prosecute a right or claim in Court of law and otherwise to pursue by legal proceeding to redress or for punishment so to proceed judiciously to accuse of some crime or breach of law or pursue for redressal or punishment of crime or violation of law before legal Tribunal to prosecute a man. Prosecution is in fact a criminal proceeding before court meant for hearing both sides and to pass orders. Prosecutor is having a role in prosecution as one of both sides of the criminal lis. It does not mean public prosecutor alone to conduct prosecution as per Section 301(1) Cr.P.C. and not to permit any private person by Magistrate. That is why Section 302 specifically provides and confers power on a Magistrate to permit the defacto complainant or other person like victim in person or through advocate or even an Inspector and above rank of a police officer to conduct prosecution, though otherwise public prosecutor can conduct prosecution as per Section 301(1) Cr.P.C. in all cases and particularly for sessions cases as per Sections 225 & 226 Cr.P.C. Here for Sessions cases there is no provision to conduct prosecution other than by public prosecutor as per Sections 225 & 226 Cr.P.C., similar to Section 302 Cr.P.C., to protect the rights of the victim on unforeseen side in the adversarial criminal justice system as part of the victimology, power is conferred to victim defined in Section 2(wa) of Cr.P.C. to assist the prosecution under Section 24(8) proviso of Cr.P.C. in the year 2009 by incorporating the proviso for first time and as it is

not merely to assist the prosecutor under section 301(2) Cr.P.C. and consideration of the same before the Apex Court constitution Bench expressions earlier to 2009-10, in **Shiv Kumar** supra of the year 1999 or later in **JK International** supra of 2001, but for if at all in **Dhariwal Industries Limited Vs. Kishore Wadhwani in 2016** of the Apex Court Two Judge Bench, where even it did not come for consideration and in its reiteration by the Apex Court Two Judge Bench in the Special Leave to Appeal (Criminal) No.2240/2018 dated 14.05.2018 in the **High Court of Judicature of Hyderabad for the State of Telangana and the State of AP Vs. Mahabunisa Begum**, there was no consideration even of what is the scope of Section 24(8) proviso of Cr.P.C. incorporated for first time in the year 2009. No doubt the Apex Court Two Judge Bench in **Sundeeep Kumar Bafna Vs. State of Maharashtra**⁵ at Para 28 discussed the role of the Public Prosecutor and private counsel in prosecution that as laid down in **Thakur Ram Vs. State of Bihar**⁶, in a case of police report a private party has really no locus standi, since the aggrieved party is the State, are strictly *senso obiter dicta* but it did presage the view that was to be taken by this Court later.

13. In fact this court on the scope of section 24(8) proviso of the amended Cr.P.C by Act No 5/2009, of the right

⁵ 2014 (16) SCC 623

⁶ AIR 1966 SC 911

of victim in **Delta Car Private Limited Vs Sanjeev Shah**⁷ held that the defacto complainant being a victim even in bail application can be permitted to come on record as co-respondent either to assist the court or to assist the PP as the case may be and even from the wording of Section 24(8) proviso Cr.P.C for such power is available as it should not be forgotten the factum of victim who is put to injury physically or mentally suffering being the ultimate loser can not be prevented from knocking the doors of the Court or participating in the proceedings, including under the guise of there is a danger by biased representation from victims; as it is the victim put to pain, trouble and damage as a result of offence mainly and no amount of compensation even awarded can bring back the life or limb nor restore the actual pain or damage or injury suffered and though under the public policy it is primary duty of the State to conduct prosecution that is not the be all or end all, much less to prevent the victim to participate in the proceedings including to conduct prosecution. For that conclusion referred the expressions in in **Shiv Kumar** supra of the year 1999 or later in **JK International** supra of the year 2001 and for the meaning of prosecution the expression in **Leo Roy Frey** supra of the year 1959. Further relying on the expression in Delta cars supra, in a subsequent expression of this Court in **Gude Bhavani**

⁷ Crl.P.No.5674 of 2015 dated 26.06.2015

Sujatha Vs. Muggulla Srinivasa Rao⁸ , it was held that either under Section 302 Cr.P.C or even under section 24(8) proviso of amended Cr.P.C Magistrate Court got power to permit the victim or the defacto complainant to conduct prosecution by participating in the proceeding by engaging private advocate.

14. In **Shiv Kumar** supra from the plain wording of Section 302 Cr.P.C. it is made clear that Magistrate Court concerned can permit any person to conduct prosecution other than police officer of the cadre not below rank of Inspector and such person need not be a PP. Thus even the complainant or defacto complainant can conduct prosecution provided the Magistrate accorded permission. The defacto complainant in such case can conduct either personally or by engaging advocate of his choice therefrom. In **JK International** supra on scope of Section 302 Cr.P.C. it was observed at Para 12 that the private person who is permitted to conduct prosecution in the Magistrate Court can engage a counsel to do the needful in the Court in his behalf. It further amplifies the position that if a private person is aggrieved by the offence committed against him or against any one in whom he is interested, he can approach the Magistrate and seek permission to conduct the prosecution by himself. It is open to the Court to consider his request. If the Court thinks

⁸ 2015 (2) ALT (Crl.) 216

that the cause of justice would be served better by granting such permission, the Courts would generally grant such permission. Of course this wider amplitude is limited to Magistrate Courts, as the right of such private individual to participate in the conduct of prosecution in the sessions Court the very much restricted and is made subject to the control of the PP. The limited role which a private person can permit to play for prosecution in the sessions Court has been adverted to above. All these would show that an aggrieved private person is not altogether to be eclipsed from the scenario when the criminal Court takes cognizance of the offence based on his report submitted by the police. The reality cannot be overlooked that the generics in almost of such case is the grievance of one or more individual that they were wronged by the accused by committed offence against them.

15. Coming to the case on hand, the order of the learned Magistrate says the APP is appearing only twice a week and not regularly and there are about 1300 case pending. Once such is the case, from what the counter of APP says of he can conduct the prosecution and no private advocate including for the defacto complainant either in person or through advocate can be permitted, what the Court considers for early disposal the defacto complainant can be permitted to conduct prosecution through his advocate though not used thereby the cause of justice that can be

better served. One of the submissions in the course of hearing in reply arguments by learned counsel for the accused of the impugned order of the learned Magistrate is that permitting the defacto complainant to conduct prosecution by advocate of his choice is nothing but encouragement of persecution. It cannot be accepted for the reason the learned trial Magistrate always must alive in conduct trial or enquiry including of pre-trial enquiry from the mandatory and settled expressions of the Apex Court conferred such power under Section 165 of the Act for not a silent spectator to keep quiet or to encourage any attempt for persecution but for the conducting of prosecution. No doubt in the impugned order before the learned Additional Chief Metropolitan Magistrate allowing the petition by permitting to conduct prosecution on behalf of the defacto complainant, scope of Section 24(8) proviso of amended Cr.P.C did not came for consideration, but for Section 302 Cr.P.C and once Section 302 Cr.P.C enables the Magistrate for allowing the petition permitting to conduct prosecution on behalf of the defacto complainant as per the settled expressions of the Apex Court supra in **Shiv Kumar** supra, **JK International** supra and **Dhariwal Industries Limited** supra, there is nothing to interfere with the impugned order, but for to say the learned Magistrate is not correct in saying for conducting prosecution the defacto complainant as prosecution is not conducting by or on behalf of the defacto complainant alone

for the same is a crime against society, the Court is only permitting prosecution to be conducted by the defacto complainant through his pleader named as Sri PAK Kishore instead of APP and it requires to modify in the impugned order to that extent.

16. Having regard to the above, the impugned order of the learned Magistrate no way requires interference but for to modify the order of what the permission accorded is to conduct prosecution and not confined on behalf of the defacto complainant, needless to say the Magistrate Court got power if at all found at any time that the prosecution is not properly conducting by the Advocate representing the complainant, it can change the advocate and appoint any other advocate of its choice or even got power to cancel the permission or modify the permission granted suitably.

17. Accordingly and in the result, this Criminal Petition is disposed of with above observations.

Miscellaneous petitions, if any, shall stand closed.

Dr. B. SIVA SANKARA RAO, J

Date: 20.12.2018
Note: L.R. Copy to be marked
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