

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

Criminal Petition No.11073 of 2015

ORDER:

Impugning the order of the learned Judicial First Class Magistrate, Kothapeta in CrI.M.P.No.586 of 2015 in C.C.No.277 of 2012 dated 17.06.2015, dismissing the petition under Section 311 Cr.P.C. filed to permit examination of LW1-*de facto* complainant whose evidence earlier given up, the present petition is filed by the *de facto* complainant by showing A1 & A2 as respondents 2 & 3 with respondent No.1-State.

2. CrI.M.P. No.586 of 2015 filed was at the stage after LW1 was given up and before examination of LW2. It is mentioned the case was posted for examination of LW2 from the evidence of LW1 given up on 13.01.2015 mistakenly by the prosecution and LW1 is the *de facto* complainant whose evidence is necessary, hence, to allow. The counter filed by the accused persons is in saying the petition filed three months after LW1 was given up by the prosecution and before examination of LW2 from the summons issued and present and bound over, is not sustainable and it causes prejudice to the accused and Section 311 Cr.P.C. no way permits the witness once given up to recall and thereby, sought for dismissal of the petition.

3. The counter filed was on 07.05.2015 and the order passed was on 17.06.2015 after hearing and the sum and substance of the

observation in the impugned order is that from the report of the V.R.O., Avidi village mentions about LW1 is not residing in that village and the S.H.O, Ravulapalem Police Station filed a memo returning the summons issued to LW1 and therefrom the learned Public Prosecutor endorsed as given up the evidence of LW1 on 13.01.2015 and at request summons were issued to LWs 2 to 8 for their evidence and at this stage sought for reopening the evidence of LW1, and once voluntarily given up, at best shows the negligence and not a mistake, and the prosecution cannot invoke Section 311 Cr.P.C. to summon LW1.

4. In fact, for more clarity Section 311 Cr.P.C. reads as follows:

311. Power to summon material witness, or examine person present.— Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.

It runs into two parts. First part is in use of the word “may” in exercise of judicial discussion and the second part is in use of the word “shall” which mandates the Court where it is essential to the just decision of the case. In fact, the Apex Court in **Rajendra Prasad v. Narcotic Cell through its Officer-in-charge, Delhi**¹ observed that a lacuna in prosecution not to be equated with fall out of oversight committed by the Public Prosecutor either in producing relevant material or relevant witness or any eliciting relevant answers from

¹ AIR 1999 SC 2292

witnesses as the case may be. In fact, Section 165 of the Indian Evidence Act which empowers the Court to examine any witness at any stage and put any question or to direct for production of any document or other material where it is essential for the just decision of the case. Thus, a combined reading of Part II of Section 311 Cr.P.C. and Section 165 of the Indian Evidence Act is crystal clear of the Court got the power on its own without even the prosecution application to examine LW1, that too the *de facto* complainant a material witness, who set the law in motion and it is not the prejudice alleged but rendering of substantial justice that too when witness already cited and from what the V.R.O. reported of out of availability simply given up if not inadvertently even negligently by the Public Prosecutor that is not be all much less end all for Court duty bound under Part-II of Section 311 Cr.P.C. read with Section 165 of the Indian Evidence Act to examine the witness, who is a material witness, whose examination since relevant for the just decision of the case that too when it is brought to the notice by the application of the witness is available. Therefore, the dismissal order of the Court below is per se unsustainable.

5. Accordingly and in the result, this Criminal Petition is allowed and the order in Crl.M.P.No.586 of 2015 in C.C.No.277 of 2012 dated 17.06.2015 passed by the learned Judicial First Class Magistrate, Kothapeta, is set aside by directing the trial Court to examine LW1 from the address furnished by the prosecution of summoning and

securing subject to costs of Rs.1,000/- to other side and if not chosen to receive to pay to Army Welfare Fund.

Miscellaneous petitions pending, if any, shall stand closed.

Dr. B. SIVA SANKARA RAO, J

27.11.2018
MVA

Note: Issue C.C. by 28.11.2018
(B/O)
MVA

