

THE HONOURABLE Dr.JUSTICE B.SIVA SANKARA RAO

Criminal Petition Nos.10291, 10297, 10298 and 10300 of 2018

COMMON ORDER :

In the four Criminal Petitions 1) CrI.P.No.10291 of 2018 covered by C.C.No.554 of 2017, 2) CrI.P.No.10297 of 2018 covered by C.C.No.590 of 2017, 3) CrI.P.No.10298 of 2018 covered by C.C.No.567 of 2017 and 4) CrI.P.No.10300 of 2018 covered by C.C.No.126 of 2016 2018. The C.C.No.554 of 2017 is outcome of Cr.No.99 of 2016 of III Town Police Station, Visakhapatnam, registered for the offences punishable u/ sec.420, 468 and 471 IPC; C.C.No.590 of 2017 is outcome of Cr.No.541 of 2014 and 542 of 2014 of same Police Station supra, registered for the offences punishable u/ sec.420, 465 and 468 IPC; C.C.No.567 of 2017 is outcome of Cr.No.84 of 2016 of same Police Station supra, registered for the offences punishable u/ sec.465, 445 and 506 IPC; C.C.No.126 of 2016 is outcome of Cr.No.923 of 2013 of same Police Station supra, registered for the offences punishable u/ sec.120-B, 420, 468 and 471 IPC, are pending on the file of IV Addl. Chief Metropolitan Magistrate, Visakhapatnam. Pending trial, the defacto-complainant-Mallidi Kasturi in CC No.554 of 2017 (CrI.P.No.10291 of 2018) filed CrI.M.P.No.819 of 2018, the defacto-complainants- Smt. KBVL Varalakshmi and K.Gajendra Rao in CC No.590 of 2017(CrI.P.No.10297 of 2018) filed CrI.M.P.No.817 of 2018, the defacto-complainant-Ramakrishna Reddy Padala in CC No.567 of 2017 (CrI.P.No.10298 of 2018) filed CrI.M.P.No.818 of 2018 and the defacto-complainant-Mallidi Kasturi in CC No.126 of 2016(CrI.P.No.10300 of 2018) filed CrI.M.P.No.1139 of 2018 u/ sec.302 CrPC in seeking permission to conduct prosecution.

2. It appears in some of the matters notice given to the learned counsel for the accused and not in all the matters and the learned Magistrate on the docket passed a single line order mechanically of allowed

which is not even outcome of application of mind to the facts and any necessity to invoke in the interest of justice Section 302CrPC within the juridical discretion. Same is the impugment herein.

3. Heard both sides including the learned Public Prosecutor representing the State and perused the material on record.

4. No doubt, the Apex Court in the expression in Shiv Kumar Vs. Hukum Chand¹ of the 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 Delhi² 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 Wadhwani³ 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.

5. 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

¹ 1999 (7) Supreme 606

² 2001 (3) Supreme 214

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

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.

6. 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.”

7. 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.

8. 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.

9. 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 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

⁴ AIR 1959 SC 375

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 Sundeep Kumar Bafna Vs. State of Maharashtra⁵ 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 Bihar⁶, 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.

10. 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 of victim in Delta Car Private Limited Vs Sanjeev Shah⁷ 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

⁵ 2014 (16) SCC 623

⁶ AIR 1966 SC 911

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

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 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.

11. 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

⁸ 2015 (2) ALT (Cri.) 216

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 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 is 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 generic 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.

12. In the present case, no doubt as pointed out by the learned counsel for the complainants/ respondents that was a single line order did not consider the scope of Section 24(8) proviso of same provides to assist the prosecution which is different from conducting of prosecution provided by Section 302CrPC and in contra-distinction to assist the prosecutor covered by Section 301Cr.P.C. Leave about the application of Section 302 CrPC, even the Magistrate Court is not therefrom prevented to permit the victim to assist the prosecution as per the wording of Section 24(8) proviso of the amended CrPC of 2009.

13. Having regard to the above, the impugned order of the Magistrate in a single line of 'allowed' no way sustainable but for to permit the victim by giving reasons on merits.

14. Having regard to the above, the Criminal Petitions are allowed by setting aside the orders dt.19.06.2018 in CrI.M.P.No.819 of 2018 in C.C.No.554 of 2017; CrI.M.P.No.817 of 2018 in C.C.No.590 of 2017; in CrI.M.P.No.818 of 2018 in C.C.No.567 of 2017 and in CrI.M.P.No.1139 of 2018 in C.C.No.126 of 2016 on the file of the IV Addl.Chief Metropolitan Magistrate, Visakhapatnam and by remanding the same to the learned Magistrate to restore the applications to file and hear both sides afresh and pass orders by giving reasons on own merits and in the light of the legal position discussed supra.

15. Pending miscellaneous petitions, in these Criminal Petitions, if any, shall stand closed.

Date:20.12.2018
Vvr

Dr. B.SIVA SANKARA RAO J,

