HON'BLE Dr.JUSTICE B. SIVA SANKARA RAO

Criminal Petition No.11525 of 2018

ORDER:

The petitioner is A.2 in C.C.No.125 on the file of the I Judl. Magistrate of First Class (for short, 'the JFCM') Special Mobile Court, Kadapa. It is on the report the 2nd respondent-defacto-complainant, Cr.No.412 of 2015 was registered on 02.09.2015 for the offence punishable u/sec. 323 r/w 34 IPC. There are in all 4 accused viz: A.1-Police Constable, A.3 is wife and A.4 is daughter of A.1 and the A.2 is the petitioner herein. The crime registered was with the permission of the learned I Addl.JFCM, Kadapa u/sec.155(3) CrPC from the offence u/sec.323 IPC a non-cognizable offence. After investigation by examining as many as 8 witnesses including the defacto-complainant as L.W.1, L.Ws.2 to 7 to speak regarding the motive for the offence, witnessing and their intervention for rescue of L.W.1 and L.W.8-the Doctor, NIMS hospital, Kadapa to speak about the treatment provided to the defacto-complainant-L.W.1 besides 3 Police officials viz; L.Ws.9 to 11 who registered the crime, investigated and filed chargesheet. The police filed final report showing as no case made out so far as A.2-the petitioner herein but for against the A.1 who slapped the L.W.1 on instigation of A.4 and A.5 and causing swelling injuries and A.3 and A.4 also pushed the L.Ws.1 and 2 and also the L.Ws.4 to 7 not supported the L.W.1 and thus shown the offence is made out against the A.1, A.3 and A.4 only. It is from the police final report showing no case is made out against the A.2 since the allegations against the A.2 are false thereby not charged, a protest application was filed by the defacto-complainant before the learned I Addl.JFCM, Kadapa in Crl.M.P.No.5285 of 2017 dt.06.10.2017. It is from the said protest, the learned Magistrate taken cognizance for the offence against the A.1 to A.4 u/sec. 323 r/w 34 IPC including against the A.2 by deferring with the police opinion of no case

made out against the A.2 vide order dt.04.01.2018 for issuing summons against them returnable by 19.01.2018 which is impugned herein.

2. Heard Sri Anup Koushik Karavadi learned counsel for the petitioner and heard the learned Public Prosecutor representing 1st respondent-State and also heard Sri G.Sunderesan, the learned counsel for the 2nd respondent/complainant and perused the entire material on record.

3. Before coming to the legality and correctness of the order of taking cognizance by the learned Magistrate so far as the petitioner/A.2 by deferring with police final report opinion of no case made out against him is concerned, it is necessary to mention that Cr.No.386 of 2015 registered by Kadapa I town Police Station against the defacto-complainant for the offence punishable u/sec.354-B and 509 r/w 34 IPC. A.2 herein is the Sub Inspector of Police who registered the crime and investigated the same. It is based on the report of the defacto-complainant therein by name L.Rajeshwari, no other than the A.3 herein wife of A.1 herein and also known as L.Rajamma w/o Srinivasulu Reddy. It is during investigation of said Crime No.386 of 2015, dt.21.08.2015, the defacto-complainant herein as A.1 therein was apprehended and submitted to judicial custody having been produced before the I Addl.JFCM, Kadapa, taken to judicial custody. The defacto-complainant herein as A.1 therein was later enlarged on bail on 27.08.2015. He went to NIMS General Hospital, Kadapa, on 28.08.2015 and from the hospital intimation as MLC from the statement recorded of the non-cognizable offence with permission of Magistrate, the present crime is registered.

4. The allegation is that the A.2 beat the defacto-complainant herein (A.1 of Cr.No.386 of 2015) after arrest and before remand to judicial custody and caused injuries on his ear and neck. The protest against the police final repot of alleged beating is not true concerned is that the police did not properly conduct investigation in filing final report by not charging

the A.2-Sub Inspector in the present Cr.No.412 of 2015. As held by the Constitution Bench of the Apex Court in Dharampal Vs. State of Haryana[1] that the learned Magistrate concerned is not bound by the police final report opinion and can defer with if at all to take cognizance even the police filed referred report. Once the referred report accepted and intimated the referred report to the defacto-complainant, the defacto-complainant gets a right to raise protest and in such an event, the procedure contemplated is of the private complaint procedure as held by this Court in S.Balakrishnan Vs. State of Telangana[2] with reference to the Dharampal supra among others on the scope of the protest is that the protest petition shall not be a outright private complaint but to indicate the protest as to how the investigation is faulty and it is therefrom the learned Magistrate if at all to take cognizance on the protest with reference to the earlier investigation by following the private complaint procedure in recording the sworn statement and give a reasoned conclusion as to how the investigation is faulty and in which area from the said protest to take cognizance. It appears the police final report was not accepted by the time the protest raised by the defacto-complainant for the order of the learned Magistrate referred supra, dt.04.01.2018 which showing *"The defacto-complainant called absent. Petition filed and allowed. The defacto-complainant filed protest petition through his counsel under Section 190(1)(a) CrPC prays the Hon'ble Court not to accept chargesheet and take the cognizance against the accused. Perused the final report, complaint and other relevant record and protest petition and there is a prima facie case made out against A.2. Hence, the deletion against the A.2 is not permitted. Hence the case is taken on file against A.1 to A.4 for offence u/sec.323 r/w 34 of IPC and issue summons to A.1 to A.4. Call on 19.01.2018."*

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[1] AIR 2013 SC 3018
[2] 2016 (2) ALT (Crl) 428 AP

5. The learned Magistrate did not even refer what is the final report conclusion in not charging the A.2 concerned and how it is not valid from the investigation material to defer with police opinion. In fact, the investigation report is very clear of the inconsistent versions of the witnesses of no case made out to charge or to take cognizance from the final report so far as against the A.2, thereby deleted from the array of the accused by charging others. Furthermore, even from the perusal of the very report that investigation in Cr.No.412 of 2015 and from the police final report and protest application, the alleged beating in causing so called simple injury, was while the defacto-complainant was in police custody as A.1 in Cr.No.386 of 2015 under the petitioner-A.2 Sub Inspector of the concerned police Station. It was after arrest and producing to judicial custody by observing formalities and in between the alleged beating taken place according to the version of the defacto-complainant. If such is the case, it is intimately connected with the discharge of the duties of Sub Inspector of Police in arrest of the defacto-complainant as accused and to remand to judicial custody by production before the Magistrate. Leave about nothing is even shown of any statement given before the Magistrate, if allegedly beaten for the Magistrate to refer to medical examination of the accused while remanding to judicial custody prima facie accusation of the defacto-complainant herein as A.1 along with another as A.2 in Cr.No.386 of 2015. Once such is the case sanction is required as contemplated by the settled expressions of the Apex Court referred in S.Balakrishna supra and even on arrest to proceed with a private complainant procedure if at all as laid down in the expression of the Apex Court in Anil Kumar Vs. M.K.Ayyappa[3] What all laid down in the expression placed reliance by the counsel for the defacto-complainant of Raj Kishor Roy Vs. Kamaleswar

[3] 2013(10)SCC 705

Pandey[4] is also that only if the act complained of is not connected with discharge or purported discharge of official duties, sanction is not required and otherwise sanction is not mandatory and each case depends upon own facts to decide. Even the expression in Chowdary Parveen Sultana Vs. State of West Bengal[5] not laid down any different propositions but for the difference to note whether it is a colorable exercise if any, same is also the position of law from K.Kalimuthu Vs.State[6]. As such the decisions referred in Balakrishna supra, even the officer in discharge or purported discharge of duties exceeded his limitations, still sanction is a must.

6. Having regard to the above, the cognizance taken by the learned Magistrate deferring with the police opinion in the final report and by considering the protest is outcome of non-application of mind on the requirement of sanction under 197CrPC which is pre-requisite from the accusation supra, thereby the cognizance order is unsustainable to set aside.

7. In the result, the Criminal Petition is allowed by setting aside the cognizance order impugned herein against the petitioner/A.2 in C.C.No.125 on the file of the Judl.Magistrate of First Class, Special Mobile Court, Kadapa. The petitioner herein is acquitted and his bail bonds shall stand cancelled. Miscellaneous petitions, if any, pending shall stand closed.

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Dr. JUSTICE B. SIVA SANKARA RAO

Date:05.12.2018
Vvr

[4] (2002) 6 SCC 543
[5] AIR 2009 SC 1404
[6] AIR 2005 SC 2257