HONOURABLE SRI JUSTICE A. SHANKAR NARAYANA

CRIMINAL PETITION No.12098 OF 2017

ORDER:

The revision petitioner viz., Vetcha Ramesh Babu is arraigned as accused No.2 in C.C. No.535 of 2007 on the file of IV Additional Junior Civil Judge, Guntur.

2. The State through CBI/SCB/Chennai, complainant, filed an application under Section 311 of the Code of Criminal Procedure, 1973 (for short 'Code') requesting to permit the complainant to examine Sri K. Jagadiswara Rao, Commercial Tax Officer, Brodipet Circle, Guntur, in place of LW.7, who is no more, and to recall certain witnesses already examined, to mark the documents left unmarked by the previous Public Prosecutor inadvertently.

3. Respondent Nos.1, 2, 6 and 7 filed their counters. Whereas, respondent No.8 adopted it by filing a memo seeking permission of the Court and various contentions were raised before the learned Magistrate.

4. The learned Magistrate formulated as many as four (4) points for determination and deliberated on the arguments advanced and the rulings referred by the learned Public Prosecutor in **Rajendra Prasad v. Narcotic Cell** [AIR 1999 SC 2292] for the proposition that a lacuna in prosecution case is not to be equated with the fallout of an oversight committed by a public prosecutor during trial, either in

producing relevant materials or in eliciting relevant answers from witnesses. The adage 'to err is human' is the recognition of the possibility of making mistakes to which humans are prone and a corollary of any such latches or mistakes during conducting of a case cannot be understood as lacuna which a Court cannot fill up, and, the decision in **Bhumi Reddy Narapureddygari Brahmananda Reddy alias Brahmam v. State of Andhra Pradesh** [2005 (2) ALD (Crl.) 349 (AP)] for the proposition that 'when inadvertent mistakes in the prosecution evidence are to be rectified it does not amount to filling up gaps or lacuna', and acceding to the request of the complainant by assigning reasons, partly allowed recalling PWs.19, 31, 37, 38, 54, 57 to mark the list of document Nos.6, 10 to 12, 38 to 44, 46, 57, 72 to 82, 89, 90, 106 to 112, 161, 170, 172 to 178 respectively, and an order to issue summons to LW.28 - P. Suresh Babu to mark list of document Nos.15 to 36, 38 to 44, however, rejected the request to examine Mr. K. Jagadeswara Rao, CTO, in place of LW.7 - B. Rama Krishnaiah (died), and accordingly partly allowed it.

5. The respondent aggrieved over the said order preferred Criminal Revision Petition No.109 of 2016, and the learned Principal Sessions Judge, Guntur by his order dated 23.10.2017, having heard rival contentions and formulating the following points for consideration in paragraph No.18;

"(1) Whether the present revision petition is maintainable?

(2) Whether the trial court is justified in recalling the witnesses *(Sic.* Witnesses) for the purpose of marking of the documents?

(3) Whether the marking of confessional statement of an accused can be addressed by this court at this revisional stage, particularly, with reference to the status of the witness that whether he is a police officer etc.,?

(4) Whether the impugned orders dated 06.06.2016 passed in Crl.M.P. No.254/2016 in C.C.535/2007, by IV Additional Junior Civil Judge, Guntur, are sustainable in law and on facts, or whether interference is necessary, if so, on what grounds and to which extent?

(5) What is the result of the revision petition?",

referred to Section 397 of the Code and the law declared by the Hon'ble Supreme Court in **Sethuraman v. Rajamanickam**[1], held on point No.1 that the revision petition is not maintainable in view of the bar enacted by the provisions of Section 397(2) of the Code.

6. On point Nos.2 to 4, touching the merits, noted that the documents now sought to be marked were already filed as they are on record, that the omission to mark certain documents has been properly explained by the trial Court, that the objections of the revision

petitioner as to competency of the witnesses, the status of the witnesses speaking about confession can as well be recorded by the trial Court and addressed at appropriate stage after receiving the evidence and all those issues are interlocutory in nature in view of Section 397(2) of the Code, and, therefore, examining those aspects in depth by the revisional Court is improper under law, more particularly, in view of the law declared by the Hon'ble Supreme Court in **Sethuraman's Case**[1]**,** and a contra legal position showing competency of the Sessions Court to interfere with the interlocutory orders passed by the trial Court is not brought to its notice that any legal position with precedential guidance as to the orders under Section 311 of the Code by the learned IV Additional Junior Civil Judge, Guntur - cum - IV Additional Judicial Magistrate of First Class, Guntur, and accordingly found point Nos.2 to 4 against the revision petitioner. Thus, while dismissing the revision petition, however, observed that all the objections as to appreciation of evidence and competence of witness and use of confession shall be open for consideration and determination at proper and final stage.

7. Precisely, the above order is under challenge in the present criminal petition.

8. Sri A. Hariprasad Reddy, learned counsel for the petitioner, would submit that both Courts failed to notice that some of the documents were already marked through the prosecution witnesses,

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[1] 2009 CriLJ 2247

and, therefore, to mark the same documents again through the above said witnesses ought not to have been allowed. He would further submit that listed documents 170, 172 to 178 were marked through PW.57 at the time of his chief examination, but the prosecution intends to mark these documents through PW.57 again, which is impermissible. It is also his submission that confessional statements of the accused recorded by D.R.I. under Section 108 of Customs Act, 1962, cannot be used by the complainant in the present case as if they recorded the statements which is impermissible until and unless there is a charge under the Customs Act, and, therefore, the said statements cannot be used to prove the prosecution case under the Penal Code.

9. He would further submit that mere explanation that the documents were left unmarked by the previous Public Prosecutor is not a sufficient ground to call the witnesses and the law is well settled by the Hon'ble Apex Court that the prosecution cannot be allowed to fill up lacunae after completion of cross-examination as it is highly prejudicial to the petitioner, and, therefore, sought to quash the order dated 06.06.2016 passed in Criminal M.P. No.254 of 2016 in C.C. No.535 of 2007 passed by the learned IV Additional Junior Civil Judge, Guntur as confirmed by the learned Principal Sessions Judge, Guntur in Criminal Revision Petition No.109 of 2016 by the order dated 23.10.2017.

10. The learned counsel for the petitioner relies on a decision in **State (NCT of Delhi) v. Shiv Kumar Yadav**[2] for the proposition that recall cannot be allowed on the plea that the defence (previous) counsel was not competent and had not effectively cross-examined the witnesses and recall is not a matter of course and discretion given to Court, has to be exercised judiciously to prevent failure of justice and not arbitrarily and plea for recall for advancing justice has to be *bona fide* and balanced carefully with other relevant considerations including uncalled for hardship to witnesses and uncalled for delay in trial and mere observation that recall was necessary for ensuring fair trial is not enough unless there are tangible reasons to show how fairness of trial suffered without recall.

11. As regards maintainability of application of this nature under Section 482 of the Code, the learned counsel relies on the decision of the Hon'ble Supreme Court in **Prabhu Chawla v. State of Rajasthan**[3].

12. The learned special Public Prosecutor for CBI Cases would submit that since this Court has not granted stay at the inceptive stage, pursuant to the orders passed by the learned Magistrate as affirmed by the learned Sessions Judge in the revision, most of the witnesses were already recalled and examined, and, therefore, the question of turning the clock back does not arise. His further submission touching the merits is that when the revisional Court dismissed the revision, relying

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[2] (2016) 2 SCC 402

on the ruling in Hon'ble Apex Court in **Sethuraman's Case**[1]**,** the request herein to quash the said order does not arise and on this sole ground itself, the present Criminal Petition is liable to be dismissed.

12. Further submission of the learned Special Public Prosecutor is that the trial Court having thoroughly examined the purpose for which some of the witneses are sought to be recalled and examined further, and thereby allowed the petition partly even referring to the serial numbers of the listed documents and dismissed even in regard to request to examine Sri K. Jagadiswara Rao, Commercial Tax Officer, Brodipet Circle, Guntur, in place of LW.7, who is no more, and, therefore, even on merits, when the same was confirmed by the revisional Court having dealt with elaborately the averments made by both sides, the present order does not warrant interference.

13. The learned Special Public Prosecutor also placed reliance in **Bipin Shantilal Panchal v. State of Gujarat**[4] for the proposition that any objection raised as to admissibility of evidence at the stage of collection of evidence and to proceed further with trial impedes steady and swift progress of trial and recasting the practice, the Hon'ble Supreme Court held that the Court should now make note of objection, mark objected document tentatively as exhibit and decide objection at final stage. It was a judgment rendered by A Three-Judge Bench of the Hon'ble Supreme Court. Relying on the said decision, it is the submission of the learned Special Public Prosecutor that the

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[3] 2016 LawSuit (SC) 866

petitioner is left with the option to agitate all objections at final stage of the proceedings as rightly observed by the learned revisional Court, and, therefore, sought to dismiss the present criminal petition.

14. Touching merits, the complainant made two requests. One is to recall the witness already examined for further examination to mark documents as earlier some photostatcopies were marked though, originals of the same were available, somehow, inadvertently, the previous Public Prosecutor omitted to get them marked and that has been the purpose for recalling most of the witnesses except Sri K. Jagadiswara Rao, Commercial Tax Officer, Brodipet Circle, Guntur, who was sought to be examined in place of the deceased witness (LW.7), listed in the memo of list of witnesses. The second request was rejected by the learned Magistrate and the same was confirmed by the revisonal Court.

15. Concerning the first request, when the original documents were already on record, but marking photostatcopies of some of those documents by the previous Public Prosecutor cannot be a ground to reject the request to mark the originals. It is not the case of the complainant that it is intended to introduce new documents. Therefore, objection raised to mark these documents by recalling witnesses referred to in the orders of the Courts below is unsustainable, as it cannot be said that serious prejudice would

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[4] 2001 Cri.L.J. 1254

occasion affecting the rights of the petitioner (accused) in case the request is acceded to.

16. So far as the objections now raised, in relation to admissibility of documents, as observed by the learned revisional Court and as held by the Hon'ble Apex Court in **Bipin Shantilal Panchal**[3]**,** it is open to the present petitioner to raise the same at the final hearing and the trial Court is directed to decide the said objections at that stage. Therefore, the ruling in **Shiv Kumar Yadav**[1] would not render any assistance to the petitioner herein as the ground on which recall was sought for was on the plea that earlier defence counsel was not competent and has not effectively cross-examined the witnesses.

17. Thus, absolutely there is no legal infirmity or patent illegality in the order passed by the learned Magistrate and the learned revisional Court warranting interference.

18. Therefore, the Criminal Revision Petition is dismissed at the admission stage itself.

As a sequel thereto, Miscellaneous Petitions, if any, pending in the present criminal petition stand dismissed.

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A. SHANKAR NARAYANA, J

April 3, 2018.

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