THE HON'BLE SRI JUSTICE TARLADA RAJASEKHAR RAO

CRIMINAL PETITION No.12904 OF 2018

ORDER:

The present Criminal Petition is filed under Section 482 of the Code of Criminal Procedure, 1973 (Cr.P.C.), praying to call for the records pertaining to the order dated 17.09.2018 in Criminal Revision Petition No.125 of 2017 on the file of the III Additional Sessions Judge, East Godavari at Kakinada, in allowing the Criminal Revision Petition by setting aside the order dated 31.05.2017 in C.C.S.R.No.3727 of 2015, wherein the learned V Additional Judicial Magistrate of First Class, Kakinada, took cognizance of the offence for the deleted accused on protest petition in Crime No.19 of 2014 of II Town L & O Police Station, Kakinada, for the offences punishable under Sections 306 and 420 I.P.C. read with Section 34 I.P.C. and to quash the said order dated 17.09.2018 in Criminal Revision Petition No.125 of 2017.

2. The facts succinctly are that:

The petitioner/complainant who is an agriculturist has admitted his daughter in PG Course in GSL Medical College, Rajanagaram, believing the words of the

accused Nos.1 to 5 that they are providing good quality of education and having best teaching staff. Later, they have noticed many irregularities, lacking of facilities and lacking of teaching staff, the same was questioned by the petitioner/complainant as well as the daughter of the petitioner herein, who is the deceased. Therefore, the respondents/accused have bore grudge against the daughter of the petitioner and developed enmity and treated the petitioner in humiliation and harassed the deceased physically and mentally. Therefore, the daughter of the petitioner herein committed suicide.

3. Basing upon the writings of the deceased, which ultimately shows the fingers towards A1 to A12, where the deceased-Dr. Srilakshmi stated that A1 to A12 are responsible for the death of the deceased and on the death of the daughter of the petitioner herein, the petitioner has lodged a report to Kakinada II Town Police and the police registered the case in Crime No.19 of 2014 under Section 174 Cr.P.C. and subsequently altered to Section 306 I.P.C. and investigated the case and forwarded the charge sheet against A1 by deleting the names of A2 to A12.

4. Aggrieved by the same, the petitioner herein filed a protest petition/complaint before the V Additional Judicial Magistrate of First Class at Kakinada in C.C.S.R.No.3727 of 2015 in Crime No.19 of 2014 of Kakinada II Town L & O Police Station. The learned Magistrate, by an order dated 31.05.2017, has allowed the protest petition/complaint and took cognizance of the case against A2 to A6 on file for the offence punishable under Section 306 I.P.C. and issued NBWs against them, dismissed the complaint against A7 to A12.

5. Aggrieved by the said order dated 31.05.2017 in taking cognizance against A2 to A6 for the offence punishable under Section 306 I.P.C., A2 to A5 preferred Criminal Revision Petition No.125 of 2017 on the ground that the complainant failed to make out a *prima facie* case for the offences punishable under Sections 306 and 420 I.P.C. r/w Section 34 I.P.C. against the accused and on entire reading of the sworn statement, it does not constitute the offence and, therefore, prayed to allow the Criminal Revision Petition No.125 of 2017.

6. Learned III Additional Sessions Judge, on relying on the judgment of the Hon'ble Apex Court in *Jile Singh vs. State of*

Uttar Pradesh and another[1], has allowed the Criminal Revision Petition in the following manner, which is reproduced hereunder in verbatim:

> "As per the ratio laid down by the Apex Court in ***Jile Singh Vs. State of Uttar Pradesh and another*** relied on by learned counsel for revision petitioners which is referred supra, it is very clear that when once the case relating to the death of deceased is committed to the Sessions Court, the Magistrate is having no authority to issue summons or warrant against the revision petitioners herein on the complaint filed by the complainant. If the impugned order is allowed to stand, it would mean addition of the petitioners to the array of the accused in the pending case before the Sessions Judge, at a stage prior to collecting any evidence by that Court. As the Sessions Case relating to the death of deceased is pending on the file of II Addl. Assistant Sessions Judge's Court, Kakinada, it is always open to the said Court basing on the evidence of complainant and others to add any other accused in the said case by invoking the provisions of Sec.319 Cr.P.C. But the learned Magistrate without considering the said fact took cognizance of the offence against the revision petitioners herein vide impugned order dt.31.05.2017."

[1] (2012) 2 SCC (Cri) 175

7. Learned Sessions Judge has allowed the said Criminal Revision Petition on the ground that it is always open to the petitioner/complainant to add them as accused by invoking the provisions of Section 319 Cr.P.C. and set aside the order dated 31.05.2017 of V Additional Judicial Magistrate of First Class, Kakinada, and allowed the Criminal Revision Petition by an order dated 17.09.2018.

8. Aggrieved by the order dated 17.09.2018, in Criminal Revision Petition No.125 of 2017, the present Criminal Petition is filed to set aside the order on the ground that the order impugned is contrary to law and the judgment relied on by the learned Sessions Judge has no application to the facts of the case in the Criminal Revision Petition. Therefore, he would urge to quash the proceedings in Criminal Revision Petition No.125 of 2017 dated 17.09.2018 and further urged for doing substantial justice to allow the Criminal Petition and to take cognizance against the deleted accused, i.e., A2 to A6, who are arrayed as respondents herein.

9. Learned III Additional Sessions Judge has allowed the Criminal Revision Petition on the sole ground that the deleted accused cannot be added at a stage prior to Section 319 Cr.P.C.

Only on collecting some material and evidence during the course of trial is appropriate time for adding of the accused.

10. Learned counsel appearing for the petitioner/complainant relied on the judgment of the Hon'ble Apex Court in the case of *Jile Singh vs. State of Uttar Pradesh and another* (1 supra), where the learned Sessions Judge has allowed the Criminal Revision Petition stating that any person not being the accused in the trial has committed the offence and the case is made out for exercise of power under Section 319 Cr.P.C. for proceeding against such person and it will be open to the Sessions Judge to proceed accordingly and the present order will not come in the way in exercise of power under Section 319 Cr.P.C.

11. Learned counsel for the petitioner/complainant also relied on the judgment of the Hon'ble Apex Court in *Ranjit Singh vs. State of Punjab*[2] and in *Dharam Pal and others vs. State of Haryana and another*[3], where the Hon'ble Apex Court has held that *Ranjit Singh's* case (2 supra) is not good law in compare with the case of *Kishun Singh and others vs. State of Bihar*[4] and also relied on the judgment of *Kishun Singh's* case (4 supra).

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[2] (1998) 7 SCC 149
[3] (2014) 3 SCC 306
[4] (1993) 2 SCC 16

12. *Per contra*, fulminating the contentions raised by the petitioner/complainant, learned counsel for the respondents/ accused relied on the judgment of the Hon'ble Apex Court *Dharam Pal's* case (3 supra) and would contend that the learned Magistrate cannot take cognizance prior to the stage of Section 319 Cr.P.C. and therefore, he would urge to dismiss the Criminal Petition.

13. The point for consideration is, whether the learned Magistrate can take cognizance against the deleted person when a case triable by the Court of Sessions or the Court has to wait till the stage of Section 319 Cr.P.C. reaches?

14. The Hon'ble Supreme Court in *Dharam Pal's* case (3 supra), after considering the provisions of the Code of Criminal Procedure, Sections 193, 319, 202, 204, 190 and 200 of Cr.P.C. and after considering the judgment in *Ranjit Singh's* case (2 supra), held that *Kishun Singh's* case (4 supra) as good law and the decision in *Ranjit Singh's* case (2 supra) is not a good law.

15. In *Dharam Pal's* case (3 supra), the issue was made reference and answered in the following manner, which reads as follows:

> "To commit the case for trial to the Court of Session, which would only resort to Section 319 of the Code to array any other person as accused in the trial, in other words, there could be no intermediary stage between taking of cognizance under Section 190(1)(b) and Section 204 of the Code issuing summons to the accused. The effect of such as interpretation would lead to a situation where neither the committing Magistrate would have any control over the persons named in column 2 of the police report nor the Sessions Judge till Section 319 Cr.P.C. stage was reached in the trial, and ultimately found material against the persons named in column 2 of the police report, the trial would have to be commenced *de novo* against such persons which would not only lead to duplication of the trial, but also prolong the same."

16. As seen from *Dharam Pal's* case (3 supra), the judgment entails that in the event of the Magistrate disagrees with the police report, the Magistrate has two choices. He may act on the basis of the protest petition that may be filed, or he may, while disagreeing with the police report, issue process and summon the accused. Thereafter, if on being satisfied that a case had been made out to proceed against the persons named in column 2 of the report, proceed to try the said persons or he was

satisfied that a case had been made out which was triable by the Court of Sessions, he may commit the case to the Court of Sessions to proceed further in the matter. The Hon'ble Supreme Court also held that there is no need to wait till the stage of Section 319 Cr.P.C. was reached, before proceeding against the persons against whom a *prima facie* case was made out from the materials contained in the case papers sent by the learned Magistrate while committing the case to the Court of Session. It is also observed that waiting till the stage of Section 319 Cr.P.C., the trial would have to be commenced *de novo* against such persons which would not only lead to duplication of the trial, but also prolong the same.

17. The Hon'ble Supreme Court also further held at paragraph No.39 that under Section 209 Cr.P.C., as follows:

> "It is the Magistrate was required to take cognizance of the offence before committing the case to the Court of Session. Answering the question, the Hon'ble Supreme Court has stated that it is well settled that cognizance of an offence can only be taken once. In the event, a Magistrate takes cognizance of the offence and then commits the case to the Court of Session, the question of taking fresh cognizance of the offence and, thereafter, proceed to issue summons, is not in accordance with law. If cognizance is to be taken of the offence, it could be taken either by the Magistrate or

by the Court of Session. The language of Section 193 of the Code very clearly indicates that once the case is committed to the Court of Session by the learned Magistrate, the Court of Session assumes original jurisdiction and all that goes with the assumption of such jurisdiction. The provisions of Section 209 Cr.P.C. will, therefore, have to be understood as the learned Magistrate playing a passive role in committing the case to the Court of Session on finding from the police report that the case was triable by the Court of Session.

This takes us to the next question as to whether under Section 209, the Magistrate was required to take cognizance of the offence before committing the case to the Court of Session. It is well settled that cognizance of an offence can only be taken once. In the event, a Magistrate takes cognizance of the offence and then commits the case to the Court of Session, the question of taking fresh cognizance of the offence and, thereafter, proceed to issue summons, is not in accordance with law. If cognizance is to be taken of the offence, it could be taken either by the Magistrate or by the Court of Session. The language of Section 193 of the Code very clearly indicates that once the case is committed to the Court of Session by the learned Magistrate, the Court of Session assumes original jurisdiction and all that goes with the assumption of such jurisdiction. The provisions of Section 209 will, therefore, have to be understood as the learned Magistrate playing a passive role in committing the case to the Court of Session on finding from the police report that the case was triable by the Court of Session. Nor can there be any question of

> part cognizance being taken by the Magistrate and part cognizance being taken by the learned Sessions Judge."
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> (emphasis supplied)....

18. As seen from the judgment of the Hon'ble Apex Court in *Dharam Pal's* case (3 supra), cognizance can be taken by the Magistrate before committing the case to the Sessions Court under Section 209 Cr.P.C. If the Magistrate is not intended to take cognizance, he commits the case to the Court of Session, the Court of Session will take cognizance under Section 193 of Cr.P.C.

19. In the present case, learned Magistrate has taken cognizance and committed the matter to the Sessions Court, as the case is triable by the Court of Session for the offence under Sections 306 and 420 I.P.C. Therefore, in view of the judgment of the Hon'ble Apex Court in *Dharam Pal's* case (3 supra), the Magistrate can take cognizance and commit the case for trial to the Court of Session. Once the Magistrate took cognizance, the learned Sessions Judge cannot take cognizance for the same offence for the second time as held by the Hon'ble Supreme Court in *Dharam Pal's* case (3 supra).

20. The Hon'ble Apex Court in *Pradeep S. Wodeyar vs. State of Karnataka*[5] held that:

> "The order passed by a Court of competent jurisdiction shall not be reversed or altered by a Court of appeal on account of an irregularity of the proceedings before trial or any inquiry. It is settled law that cognizance is pre-trial or inquiry stage. Therefore, irregularity of a cognizance order is covered by the provision. In order to determine if the provision applies to pre-trial orders like an irregular cognizance order or only applies to orders of conviction or acquittal, it is necessary that to interpret the provision contextually.
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> Chapter XXXV Cr.P.C. is titled "Irregular Proceedings". Section 460 Cr.P.C. on the one hand provides for those irregularities, if any, on the part of a Magistrate which do not vitiate proceedings. Section 461 Cr.P.C. on the other hand.
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> 460. Irregularities which do not vitiate proceedings.— If any Magistrate not empowered by law to do any of the following things, namely:
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> (a) to issue a search-warrant under section 94;
> (b) to order, under section 155, the police to investigate an offence;
> (c) to hold an inquest under section 176;
> (d) to issue process under section 187, for the apprehension of a person within his local jurisdiction who has committed an offence outside the limits of such jurisdiction;

[5] (2021) 19 SCC 62

(e) to take cognizance of an offence under clause (a) or clause (b) of Sub-Section (1) of section 190;
(f) to make over a case under Sub-Section (2) of section 192;
(g) to tender a pardon under section 306;
(h) to recall a case and try it himself under section 410; or
(i) to sell property under section 458 or section 459,

erroneously in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered.

21. In the present case, the learned Magistrate has taken cognizance against the accused and committed the accused to the Sessions Court and the learned Sessions Judge in Criminal Revision Petition No.125 of 2017, held by relying on the judgment of the Hon'ble Supreme Court in *Jile Singh's* case (1 supra) deleting from the array of the accused that can be added only under Section 319 Cr.P.C. is unsustainable in law and it was contrary to the law laid down in *Dharam Pal's* case (3 supra). Therefore, the order of the learned Sessions Judgfe to add the array of the deleted accused has to wait till the case reaches the stage of Section 319 Cr.P.C. is un-sustainable in view of the law laid down in *Dharam Pal's* case (3 supra). Accordingly, it is liable to be set aside.

22. In view of the judgment of the Hon'ble Apex Court in *Dharam Pal's* case (3 supra), the order of the III Additional Sessions Judge, Kakinada, in Criminal Revision Petition No.125 of 2017 dated 17.09.2018 is unsustainable in law and it is liable to be set aside and as per the judgment of the Hon'ble Apex Court in *Dharam Pal's* case (3 supra), apparently the Magistrate can take cognizance against the deleted accused, if it finds some material against the deleted accused before committing the case under Section 190 of Cr.P.C. Learned Sessions Judge has categorically observed in the order that there is some material against the respondents/accused.

23. Accordingly, the Criminal Petition is allowed and the order dated 17.09.2018 passed in Criminal Revision Petition No.125 of 2017 on the file of the III Additional Sessions Judge, East Godavari at Kakinada, is hereby set aside and the learned Magistrate is directed to proceed in accordance with law from the stage it was stalled.

As a sequel, interlocutory applications, pending if any in this case, shall stand closed.

JUSTICE TARLADA RAJASEKHAR RAO

Date: 09.02.2024
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THE HON'BLE SRI JUSTICE TARLADA RAJASEKHAR RAO

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