

AMIR HAMZA SHAIKH & ORS.

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v.

STATE OF MAHARASHTRA & ANR.

(Criminal Appeal No. 1217 of 2019)

AUGUST 07, 2019

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[L. NAGESHWARA RAO AND HEMANT GUPTA, JJ.]

Code of Criminal Procedure, 1973 – ss.301, 302 – Permission to conduct prosecution – Respondent sought permission to prosecute in terms of s.302 Cr.P.C. for offences punishable u/ss. 498A, 406 r/w. 34 of IPC – Trial court declined the permission – However, the High Court granted permission to conduct prosecution – On appeal, held: Though the Magistrate is not bound to grant permission at the mere asking but the victim has a right to assist the Court in a trial before the Magistrate – The Magistrate may consider as to whether the victim is in a position to assist the Court and as to whether the trial does not involve such complexities which cannot be handled by the victim – On satisfaction of such facts, the Magistrate would be within its jurisdiction to grant of permission to the victim to take over the inquiry of the pendency before the Magistrate – High Court granted permission to the complainant to prosecute the trial without examining the said parameters – Therefore, order passed by the High Court and that of Magistrate set aside – The matter is remitted to the Magistrate to consider as to whether the complainant should be granted permission to prosecute the offences u/ss.498-A, 406 r/w. s.34 IPC.

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Allowing the appeal, the Court

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HELD: 1. In J.K. International v. State (Govt. of NCT of Delhi) & Ors., it has been held that if the cause of justice would be better served by granting such permission, the Magistrate's court would generally grant such permission. An aggrieved private person is not altogether eclipsed from the scenario when the criminal court take cognizance of the offences based on the report submitted by the police. [Para 13][607-E]

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A **2. *Mallikarjun Kodagali (Dead) represented through LRs v. State of Karnataka & Ors.*, this Court approved the Justice Malimath Committee, wherein the victim's right to participate in the criminal proceedings which includes right to be impleaded, right to know, right to be heard and right to assist the court in the pursuit of truth had been recognised. [Para 14][607-F]**

B **3. In view of such principles laid down, this Court finds that though the Magistrate is not bound to grant permission at the mere asking but the victim has a right to assist the Court in a trial before the Magistrate. The Magistrate may consider as to whether the victim is in a position to assist the Court and as to whether the trial does not involve such complexities which cannot be handled by the victim. On satisfaction of such facts, the Magistrate would be within its jurisdiction to grant of permission to the victim to take over the inquiry of the pendency before the Magistrate. [Para 15][607-G-H; 608-A]**

D **4. The High Court has granted permission to the complainant to prosecute the trial without examining the parameters laid down hereinabove. Therefore, the order passed by the High Court and that of the Magistrate is set aside. The matter is remitted to the Magistrate to consider as to whether the complainant should be granted permission to prosecute the offences under Sections 498-A, 406 read with Section 34 IPC. [Para 16][608-B]**

F *Shiv Kumar v. Hukam Chand & Anr.* (1999) 7 SCC 467 : [1999] 2 Suppl. SCR 81; *J.K. International v. State (Govt. of NCT of Delhi) & Ors.* (2001) 3 SCC 462 : [2001] 2 SCR 90; *Dhariwal Industries Limited v. Kishore Wadhwani & Ors.* (2016) 10 SCC 378 : [2016] 5 SCR 212; *Mallikarjun Kodagali (Dead) represented through LRs v. State of Karnataka & Ors.* (2019) 2 SCC 752 – relied on.

G *Babu v. State of Kerala* 1984 CriLJ 499 – referred to.

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Case Law Reference

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[1999] 2 Suppl. SCR 81 **relied on** **Para 8**

[2001] 2 SCR 90 **relied on** **Para 9**

[2016] 5 SCR 212 **relied on** **Para 10**

(2019) 2 SCC 752 **relied on** **Para 11**

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CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No.
1217 of 2019

From the Judgment and Order dated 27.11.2018 of the High Court
of Judicature at Bombay in Criminal Writ Petition No. 4939 of 2018

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Ashok Arora, Surjeet Singh, Vishwa Pal Singh, Advs. for the
Appellants.

Nishant Ramakantrao Katneshwarkar, Anoop Kandari,
Karamsingh Rajput, Abdulrahiman Tambdi, S. Gowthaman, Advs. for
the Respondents.

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The Judgment of the Court was delivered by

HEMANT GUPTA, J.

1. Leave granted.

2. The challenge in the present appeal is to an order passed by the
High Court of judicature at Bombay on November 27, 2018 whereby an
order passed by the Magistrate declining permission to respondent No.
2 to prosecute the appellants-accused for the offences punishable under
Sections 498A, 406 read with Section 34 of Indian Penal Code, 1860¹,
was allowed.

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3. The respondent No. 2 had sought permission to conduct
prosecution in terms of Section 302 of the Code of Criminal Procedure,
1973² for the aforesaid offences. The learned Magistrate declined
permission without giving any reason but the High Court considered the
judgments on the subject and granted permission to conduct prosecution
only for the reason that the application has been made by an aggrieved
party.

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¹ for short, 'IPC'

² for short, 'Code'.

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A 4. Learned counsel for the appellants argued that the High Court is not required to give permission to prosecute mechanically only for the reason that such permission is sought by an aggrieved party. It is contended that the prosecution is to be conducted by a Public Prosecutor who is an officer of the Court and required to assist the Court to do justice rather than to be vindictive and take side with any of the parties.

B If the party is allowed to proceed to take over the investigation, the avowed object of fairness in the criminal justice dispensation system shall be shaken.

C 5. The present Section 302 of the Code is similar to Section 495 of the Code of Criminal Procedure, 1898. Section 302 of the Code reads as under:

D “**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 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:

E 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.

F (2) Any person conducting the prosecution may do so personally or by a pleader.”

G 6. It may be noticed that under Section 301 of the Code, the Public Prosecutor may appear and plead without any authority before any Court in which that case is under inquiry, trial or appeal and any person may instruct a pleader who shall act under the directions of the Public Prosecutor and may with the permission of the Court submit written submissions.

H 7. A Division Bench of Kerala High Court in *Babu v. State of Kerala*³ examined as to when permission should be granted. The Court held as under:

“3. ...In *Subhash Chandran v. State of Kerala* 1981 KLT Case No. 125 a learned Judge of this Court held:

H ³ 1984 CriL J 499

Whether permission should be granted or not is a matter left to the discretion of the Court, the discretion being used in a judicial manner. It is true that the petitioner as the son of the deceased and as a person who has a right to make out that there was rashness and negligence on the part of the accused and claim damages from him may be interested in the prosecution. But that fact is not by itself a ground for permitting him to conduct the prosecution in the place of the Assistant Public Prosecutor who is in charge of the case. It is settled law that where a cognisable offence is committed and a prosecution is launched by the State it is for the Public Prosecutor to attend to the prosecution. The object of a criminal prosecution is not to vindicate the grievances of a private person.

4. Under Section 301, a Pleader engaged by a private person can assist the Public Prosecutor or the Assistant Public Prosecutor as the case may be in the conduct of the prosecution while under Section 302 the Magistrate may permit the prosecution itself to be conducted by any person or by a pleader instructed by him. The distinction is when permission under Section 302 is given the Public Prosecutor or the Assistant Public Prosecutor as the case may be disappears from the scene and the pleader engaged by the person who will invariably be the de facto complainant will be in full charge of the prosecution.....This does not mean that permission cannot at all be granted under Section 302. Under very exceptional circumstances permission can be granted under Section 302. Otherwise, there is no reason why the provision is there in the Code. But that is to be done only in cases where the circumstances are such that a denial of permission under Section 302 will stand in the way of meeting out, justice in the case. A mere apprehension of a party that the Public Prosecutor will not be serious in conducting the prosecution simply because a conviction or an acquittal in the case will affect another case pending will not by itself be enough. At the same time, if the apprehension of the party is going to materialise the court can pending the trial, grant permission under Section 302 even if a request for permission was rejected at the outset.”

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A 8. This Court in *Shiv Kumar v. Hukam Chand & Anr.*⁴ has examined the distinction between the scope of Section 301 and 302 of the Code. It has been held that Section 302 of the Code is applicable in respect of the offences triable by Magistrate. It enables the Magistrate to permit any person to conduct the prosecution whereas in terms of Section 301 of the Code, any private person may instruct a pleader to act under the directions of the Public Prosecutor or Assistant Public Prosecutor in any trial before any court and to submit written arguments after the close of the evidence. This Court held as under:

C “12. In the backdrop of the above provisions we have to understand the purport of Section 301 of the Code. Unlike its succeeding provision in the Code, the application of which is confined to Magistrate Courts, this particular section is applicable to all the courts of criminal jurisdiction. This distinction can be discerned from employment of the words “any court” in Section 301. In view of the provision made in the succeeding section as for Magistrate Courts the insistence contained in Section 301(2) must be understood as applicable to all other courts without any exception. The first sub-section empowers the Public Prosecutor to plead in the court without any written authority, provided he is in charge of the case. The second sub-section, which is sought to be invoked by the appellant, imposes the curb on a counsel engaged by any private party. It limits his role to act in the court during such prosecution “under the directions of the Public Prosecutor”. The only other liberty which he can possibly exercise is to submit written arguments after the closure of evidence in the trial, but that too can be done only if the court permits him to do so.

F 13. From the scheme of the Code the legislative intention is manifestly clear that prosecution in a Sessions Court cannot be conducted by anyone other than the Public Prosecutor. The legislature reminds the State that the policy must strictly conform to fairness in the trial of an accused in a Sessions Court. A Public Prosecutor is not expected to show a thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts involved in the case. The expected attitude of the Public Prosecutor while conducting prosecution must be couched

H ⁴(1999) 7 SCC 467

in fairness not only to the court and to the investigating agencies but to the accused as well. If an accused is entitled to any legitimate benefit during trial the Public Prosecutor should not scuttle/conceal it. On the contrary, it is the duty of the Public Prosecutor to winch it to the fore and make it available to the accused. Even if the defence counsel overlooked it, the Public Prosecutor has the added responsibility to bring it to the notice of the court if it comes to his knowledge. A private counsel, if allowed a free hand to conduct prosecution would focus on bringing the case to conviction even if it is not a fit case to be so convicted. That is the reason why Parliament applied a bridle on him and subjected his role strictly to the instructions given by the Public Prosecutor.”

9. In a three Judge Bench of this Court in *J.K. International v. State (Govt. of NCT of Delhi) & Ors.*⁵, where offences under Sections 420, 406 and 120-B IPC were investigated and charge sheet filed on the basis of complaint of the appellant, the accused filed a petition for quashing of the charges in which the complainant wanted to be heard. The Public Prosecutor filed an application before the Magistrate for amending the charge for incorporating two more offences which were exclusively triable by the Court of Sessions. The Magistrate dismissed the application but the said order was not challenged by the prosecution. It was held that the scheme in the Code indicates that the person who is aggrieved by the offence committed is not altogether wiped out from the scene of the trial merely because the investigation was taken over by the police. This Court while considering the provisions of sub-section (2) of Section 301 and Section 302, held as under:

“9. The scheme envisaged in the Code of Criminal Procedure indicates that a person who is aggrieved by the offence committed, is not altogether wiped out from the scenario of the trial merely because the investigation was taken over by the police and the charge-sheet was laid by them. Even the fact that the court had taken cognizance of the offence is not sufficient to debar him from reaching the court for ventilating his grievance. Even in the Sessions Court, where the Public Prosecutor is the only authority empowered to conduct the prosecution as per Section 225 of the Code, a private person who is aggrieved by the offence involved

⁵(2001) 3 SCC 462

A in the case is not altogether debarred from participating in the trial. This can be discerned from Section 301(2) of the Code which reads thus:

B “301. (2) If in any such case 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.”

C 10. The said provision falls within the Chapter titled “General Provisions as to Inquiries and Trials”. When such a role is permitted to be played by a private person, though it is a limited role, even in the Sessions Courts, that is enough to show that the private person, if he is aggrieved, is not wiped off from the proceedings in the criminal court merely because the case was charge-sheeted by the police. It has to be stated further, that the court is given power to permit even such private person to submit his written arguments in the court including the Sessions Court. If he submits any such written arguments the court has a duty to consider such arguments before taking a decision.

D 11. In view of such a scheme as delineated above how can it be said that the aggrieved private person must keep himself outside the corridors of the court when the case involving his grievance regarding the offence alleged to have been committed by the persons arrayed as accused is tried or considered by the court. In this context it is appropriate to mention that when the trial is before a Magistrate’s Court the scope of any other private person intending to participate in the conduct of the prosecution is still wider...

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H 12. The private person who is permitted to conduct prosecution in the Magistrate’s 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 aggrieved by the offence committed against him or against anyone 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 court would generally grant such permission. Of course, this wider amplitude is limited to Magistrates' 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 Public Prosecutor. The limited role which a private person can be permitted 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 offences based on the report submitted by the police. The reality cannot be overlooked that the genesis in almost all such cases is the grievance of one or more individual that they were wronged by the accused by committing offences against them."

10. Both the aforesaid judgments came up for consideration before this Court in ***Dhariwal Industries Limited v. Kishore Wadhvani & Ors.***⁶ wherein the learned Magistrate had held that the complainant is not alien to the proceeding and, therefore, he has a right to be heard even at the stage of framing of charge. The High Court modified the order and permitted the counsel engaged by the complainant to act under the directions of the Public Prosecutor in charge of the case. The Court held as under:

"13. Having carefully perused both the decisions, we do not perceive any kind of anomaly either in the analysis or ultimate conclusion arrived at by the Court. We may note with profit that in *Shiv Kumar* [*Shiv Kumar v. Hukam Chand*, (1999) 7 SCC 467 : 1999 SCC (Cri) 1277], the Court was dealing with the ambit and sweep of Section 301 CrPC and in that context observed that Section 302 CrPC is intended only for the Magistrate's Court. In *J.K. International* [*J.K. International v. State (Govt. of NCT of Delhi)*, (2001) 3 SCC 462 : 2001 SCC (Cri) 547] from the passage we have quoted hereinbefore it is evident that the Court has expressed the view that a private person can be permitted to

⁶(2016) 10 SCC 378

- A conduct the prosecution in the Magistrate's Court and can engage a counsel to do the needful on his behalf. The further observation therein is that when permission is sought to conduct the prosecution by a private person, it is open to the court to consider his request. The Court has proceeded to state that the court has to form an opinion that cause of justice would be best subserved and it is better to grant such permission. And, it would generally grant such permission. Thus, there is no cleavage of opinion."
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11. In *Mallikarjun Kodagali (Dead) represented through LRs v. State of Karnataka & Ors.*⁷, three Judge Bench of this Court considered the victim's right to file an appeal in terms of proviso to Section 372 inserted by Central Act No. 5 of 2009 w.e.f. December 31, 2009. This Court considered 154th Report of the Law Commission of India submitted on August 14, 1996; the Report of the Committee on Reforms of Criminal Justice System commonly known as the Report of the Justice Malimath Committee; Draft National Policy on Criminal Justice of July, 2007 known as the Professor Madhava Menon Committee and 221st Report of the Law Commission of India, April, 2009, and observed as under:
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- "5. Parliament also has been proactive in recognising the rights of victims of an offence. One such recognition is through the provisions of Chapter XXI-A CrPC which deals with plea bargaining. Parliament has recognised the rights of a victim to participate in a mutually satisfactory disposition of the case. This is a great leap forward in the recognition of the right of a victim to participate in the proceedings of a non-compoundable case. Similarly, Parliament has amended CrPC introducing the right of appeal to the victim of an offence, in certain circumstances. The present appeals deal with this right incorporated in the proviso to Section 372 CrPC.
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- G 8. The rights of victims, and indeed victimology, is an evolving jurisprudence and it is more than appropriate to move forward in a positive direction, rather than stand still or worse, take a step backward. A voice has been given to victims of crime by Parliament and the judiciary and that voice needs to be heard, and

H ⁷(2019) 2 SCC 752

if not already heard, it needs to be raised to a higher decibel so that it is clearly heard.” A

12. The Court dealt with Justice Malimath Committee in the following manner:

“16. Thereafter, in the substantive Chapter on Justice to Victims, it is noted that victims of crime, in many jurisdictions, have the right to participate in the proceedings and to receive compensation for injury suffered. It was noted as follows: B

“6.3. Basically two types of rights are recognised in many jurisdictions, particularly in continental countries in respect of victims of crime. They are, firstly, the victim’s right to participate in criminal proceedings (right to be impleaded, right to know, right to be heard and right to assist the court in the pursuit of truth) and secondly, the right to seek and receive compensation from the criminal court itself for injuries suffered as well as appropriate interim reliefs in the course of proceedings.”” C D

13. In *J.K. International*, it has been held that if the cause of justice would be better served by granting such permission, the Magistrate’s court would generally grant such permission. An aggrieved private person is not altogether eclipsed from the scenario when the criminal court take cognizance of the offences based on the report submitted by the police. E

14. In *Mallikarjun Kodagali*, this Court approved the Justice Malimath Committee, wherein the victim’s right to participate in the criminal proceedings which includes right to be impleaded, right to know, right to be heard and right to assist the court in the pursuit of truth had been recognised. F

15. In view of such principles laid down, we find that though the Magistrate is not bound to grant permission at the mere asking but the victim has a right to assist the Court in a trial before the Magistrate. The Magistrate may consider as to whether the victim is in a position to assist the Court and as to whether the trial does not involve such complexities which cannot be handled by the victim. On satisfaction of such facts, the Magistrate would be within its jurisdiction to grant of G

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- A permission to the victim to take over the inquiry of the pendency before the Magistrate.

16. We find that the High Court has granted permission to the complainant to prosecute the trial without examining the parameters laid down hereinabove. Therefore, we set aside the order passed by the High Court and that of the Magistrate. The matter is remitted to the Magistrate to consider as to whether the complainant should be granted permission to prosecute the offences under Sections 498-A, 406 read with Section 34 IPC. The appeal is allowed.

Ankit Gyan

Appeal allowed.