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DHARIWAL INDUSTRIES LTD.

v.

KISHORE WADHWANI & ORS.

(Criminal Appeal No. 859 of 2016)

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SEPTEMBER 06, 2016

[DIPAK MISRA AND ADARSH KUMAR GOEL, JJ.]

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Code of Criminal Procedure, 1973: ss. 301, 302 – Permission to conduct prosecution – Role of complainant – Held: Role of informant or the party is limited during the prosecution of a case in a Court of Session – Counsel engaged by him is required to act under the directions of public prosecutor – As far as s.302 is concerned, power is conferred on the Magistrate to grant permission to the complainant to conduct the prosecution independently – However, for availing benefit of s.302, he has to file a written application making out a case so that magistrate can exercise the jurisdiction as vested in him and form the requisite opinion – s.302 applies to every stage including the stage of framing charge inasmuch as the complainant is permitted by the Magistrate to conduct the prosecution.

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J.K. International v. State (Govt. of NCT of Delhi) and Ors. (2001) 3 SCC 462 : 2001(2) SCR 90; Sundeep Kumar Bafna v. State of Maharashtra and Anr. (2014) 16 SCC 623 : 2014 (4) SCR 486; Shiv Kumar v. Hukam Chand and Anr. (1999) 7 SCC 467 : 1999 (2) Suppl. SCR 81 – relied on.

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Case Law Reference

2001(2) SCR 90 relied on Para 6

2014 (4) SCR 486 relied on Para 6

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1999 (2) Suppl. SCR 81 relied on Para 6

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 859 of 2016.

From the Judgment and Order dated 13.02.2012 of the High Court of Bombay in CRWP No. 3438 of 2010.

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K. T. S. Tulsi, P. H. Parekh, Sr. Advs., Lalit Chauhan, Raj Kamal, Vishal Prasad, Ms. Ritika Sethi, K. Raj, Abhishek Vinod Deshmukh (for M/s Parekh & Co.), Advs. for the Appellant. A

Dr. A. M. Singhvi, Vikas Singh, Sr. Advs., Priya Puri, Amit Bhandari, Anil Naidu, Ms. Churchi M., Advs. for the Respondents.

The Judgment of the Court was delivered by B

DIPAK MISRA, J. 1. Leave granted.

2. The present appeal, by special leave, assails the order dated 13th February, 2012 passed by the High Court of Judicature at Bombay in Criminal Writ Petition No. 3438 of 2010 whereby the learned Single Judge has modified the order dated 30th August, 2010 whereunder the Additional Chief Metropolitan Magistrate, 8th Court, Esplanade, Mumbai in C.C.No.927/PW/2007 had permitted the appellant to be heard at the stage of framing of charge under Section 239 of the Code of Criminal Procedure (for short, "CrPC"), by expressing the view that the role of the complainant is limited under Section 301 CrPC and he cannot be allowed to take over the control of prosecution by directly addressing the Court, but has to act under the directions of Assistant Public Prosecutor in charge of the case. C D

3. The facts which are requisite to be stated for the purpose of adjudication of the present appeal are that the appellant filed a complaint under Section 200 CrPC for the offences punishable under Sections 109, 193, 196, 200, 465, 467 and 471 read with Section 120-B of Indian Penal Code (IPC). The learned Magistrate exercising the power under Section 156(3) CrPC, directed the police to investigate into the allegations. The investigating agency registered an FIR and eventually laid the charge-sheet before the Court and thereafter the case was registered as C.C. No. 927/PW/2007. E F

4. After the charge-sheet was filed, the accused persons filed an application under Section 239 CrPC seeking discharge. At that juncture, the appellant made an oral prayer before the learned Magistrate seeking permission to be heard along with the Assistant Public Prosecutor. The learned Magistrate after hearing the learned counsel for the parties observed that the original complainant is not alien to the proceeding and, therefore, he has a right to be heard even at the stage of framing of charge and, accordingly, granted the permission. G H

A 5. Being dissatisfied with the aforesaid order, the accused-respondents preferred the criminal writ petition before the High Court. The High Court referred to Section 301 CrPC and certain authorities of this Court and came to hold thus:-

B “Undoubtedly the first informant now enjoys a role higher than earlier as already seen in the preceding paragraphs. In fact perusal of the petition shows that the petitioners also not wish to deny participation of the first informant altogether. They only want his role to be limited as under Section 301 Cr.P.C. An application for discharge can result into putting an end to the prosecution either partly or fully.

C This stage is in that respect similar to the stage of consideration of the police report by the Magistrate under Section 173(2) Cr.P.C and the proceedings for quashing of the complaint filed by the accused person. The first informant, therefore, is likely to be interested in seeing that the matter reaches the stage of trial and is disposed off after recording of evidence. If by judicial pronouncements, he is now granted hearing at the earlier two stages, he can be granted hearing at the stage of discharge also, though the Criminal Procedure Code does not make provision for hearing to him at that stage. If the first informant appears before the Court and desires to participate in the application, opportunity cannot be refused to him. Now the next question would be about the nature of the hearing to be given to the first informant. Should the hearing be independent to the hearing to the Public Prosecutor or it be through the Public Prosecutor. In my opinion, his role will have to be limited as under Section 301 Cr.P.C. for the same reasons, as given in Anthony D’Souza’s¹ case and keeping in focus the role of the Public Prosecutor. He cannot be allowed to take over the control of prosecution by allowing to address the court directly. Therefore, the petition is partly allowed. The impugned order is modified to the extent that the Counsel engaged by respondent no. 2 shall act under the directions of the Assistant Public Prosecutor in-charge of the case.”

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6. Questioning the legal propriety and the approach of the High

H ¹ *Anthony D’Souza v. Mrs. Radhabai Brij Ratan Mohatta*. 1984 (1) BC.R. 157

Court, it is submitted by Mr. K.T.S. Tulsi, learned senior counsel appearing for the appellant that the High Court has gravely erred by placing reliance on Section 301 CrPC and completely ignoring the stipulations inherent in Section 302 CrPC. According to Mr. Tulsi, there is a distinction between a trial before a Magistrate and a sessions trial and Section 302 CrPC has exclusive application to a magisterial trial and hence, the complainant can address the Court directly, if permitted by the Court. To strengthen the said submission, he has commended us to the authorities in *J.K. International v. State (Govt. of NCT of Delhi) and others*² and *Sundeep Kumar Bafna v. State of Maharashtra and another*³.

7. Mr. Vikas Singh, learned senior counsel, in his turn, contends that Section 301 CrPC is applicable to all categories of cases and therefore a complainant is entitled to assist the Court under the directions of the public prosecutor. That apart, submits Mr. Singh, he has the only other liberty to file the written arguments with the permission of the court. Mr. Singh would vehemently urge that the appellant had never sought to conduct the case under Section 302 CrPC and as envisaged, no application in that regard was filed and, therefore, no fault can be filed with the order of the High Court. It is further submission that as the factual matrix would exposit, the learned Magistrate allowed the prayer on the basis of an oral submission which is one under Section 301 CrPC and, in such a situation, no laxity should be given to him to take the benefit of Section 302 CrPC. Additionally, propones Mr. Singh, that there is slight disharmony in the pronouncement in *J.K. International* (supra) and *Shiv Kumar v. Hukam Chand and another*⁴ which needs to be reconciled.

8. Section 301 CrPC reads as follows:-

“Appearance by Public Prosecutors.-(1) The Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any court in which that case is under inquiry, trial or appeal.

(2) If in any such case any private person instructs a pleader to prosecute any person in any Court, the Public Prosecutor

² (2001) 3 SCC 462

³ (2014) 16 SCC 623

⁴ (1999) 7 SCC 467

A 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.”

B 9. In *Shiv Kumar* (supra), the Court has clearly held that the said provision applies to the trials before the Magistrate as well as Court of Session.

C 10. Section 302 CrPC which is pertinent for the present case 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 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.”

F 11. In *Shiv Kumar* (supra) interpreting the said provision, the Court has ruled:-

“8. It must be noted that the latter provision is intended only for magistrate courts. It enables the magistrate to permit any person to conduct the prosecution. The only rider is that magistrate cannot give such permission to a police officer below the rank of Inspector. Such person need not necessarily be a Public Prosecutor.

9. In the Magistrate’s Court anybody (except a police officer below the rank of Inspector) can conduct prosecution, if the Magistrate permits him to do so. Once the permission

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is granted the person concerned can appoint any counsel to
conduct the prosecution on his behalf in the Magistrate's
Court. A

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11. The old Criminal Procedure Code (1898) contained an
identical provision in Section 270 thereof. A Public
Prosecutor means any person appointed under Section 24
and includes any person acting under the directions of the
Public Prosecutor,(vide Section 2(u) of the Code). B

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." C
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12. It is apt to note here that in the said decision it has also been
held that from the scheme of CrPC, the legislative intention is manifestly
clear that prosecution in a Sessions Court cannot be conducted by anyone
other than the public prosecutor. It is because the legislature reminds the
State that the policy must strictly conform to fairness in the trial of an
accused in a Sessions Court. The Court has further observed that a
public prosecutor is not expected to show the thirst to reach the case in
the conviction of the accused somehow or the other irrespective of the
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A true facts involved in the case.

13. In *J.K. International* (supra), a three-Judge Bench was adverting in detail to Section 302 CrPC. In that context, it has been opined that 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. If a private person is 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. This Court further proceeded to state that it is open to the court to consider his request and if the court thinks that the cause of justice would be served better by granting such permission the court would generally grant such permission. Clarifying further, it has been held that the said wider amplitude is limited to Magistrate's Court, 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.

14. Having carefully perused both the decisions, we do not perceive any kind of anomaly either in the analysis or ultimate conclusion arrived by the Court. We may note with profit that in *Shiv Kumar* (supra), 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* (supra) 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 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.

15. In *Sundeeep Kumar Bafna* (supra), the Court was dealing with rejection of an order of bail under Section 439 CrPC and what is meant by "custody". Though the context was different, it is noticeable that the Court has adverted to the role of public prosecutor and private counsel in prosecution and in that regard, has held as follows:-

"... in *Shiv Kumar v. Hukam Chand* (supra), the question

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that was posed before another three-Judge Bench was whether an aggrieved has a right to engage its own counsel to conduct the prosecution despite the presence of the Public Prosecutor. This Court duly noted that the role of the Public Prosecutor was upholding the law and putting together a sound prosecution; and that the presence of a private lawyer would inexorably undermine the fairness and impartiality which must be the hallmark, attribute and distinction of every proper prosecution. In that case the advocate appointed by the aggrieved party ventured to conduct the cross-examination of the witness which was allowed by the trial court but was reversed in revision by the High Court, and the High Court permitted only the submission of written argument after the closure of evidence. Upholding the view of the High Court, this Court went on to observe that before the Magistrate any person (except a police officer below the rank of Inspector) could conduct the prosecution, but that this laxity is impermissible in the Sessions by virtue of Section 225 CrPC, which pointedly states that the prosecution shall be conducted by a Public Prosecutor. ...”

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16. Mr. Tulsi, learned senior counsel, has drawn inspiration from the aforesaid authority as *Shiv Kumar* (supra) has been referred to in the said judgment and the Court has made a distinction between the role of the public prosecutor and the role of a complainant before the two trials, namely, the sessions trial and the trial before a Magistrate’s Court.

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17. As the factual score of the case at hand is concerned, it is noticeable that the trial court, on the basis of an oral prayer, had permitted the appellant to be heard along with the public prosecutor. Mr. Tulsi, learned senior counsel submitted such a prayer was made before the trial Magistrate and he had no grievance at that stage but the grievance has arisen because of the interference of the High Court that he can only participate under the directions of the Assistant Public Prosecutor in charge of the case which is postulated under Section 301 CrPC.

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18. We have already explained the distinction between Sections 301 and 302 CrPC. The role of the informant or the private party is limited during the prosecution of a case in a Court of Session. The counsel engaged by him is required to act under the directions of public prosecutor. As far as Section 302 CrPC is concerned, power is conferred

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A on the Magistrate to grant permission to the complainant to conduct the prosecution independently.

19. We would have proceeded to deal with the relief prayed for by Mr. Tulsi but, no application was filed under Section 302 CrPC and, therefore, the prayer was restricted to be heard which is postulated under Section 301 CrPC. Mr. Singh, learned senior counsel appearing for the respondents would contend that an application has to be filed while seeking permission. Bestowing our anxious consideration, we are obliged to think that when a complainant wants to take the benefit as provided under Section 302 CrPC, he has to file a written application making out a case in terms of *J.K. International* (supra) so that the Magistrate can exercise the jurisdiction as vested in him and form the requisite opinion.

20. Mr. Tulsi, learned senior counsel appearing for the appellant submits that he intends to file an application before the learned Magistrate and hence, liberty may be granted. Mr. Singh has seriously opposed the same. Regard being had to the rivalised submissions, we only observe that it would be open to the appellant, if so advised, to file an application under Section 302 CrPC before the learned Magistrate. It may be clearly stated here that the said provision applies to every stage including the stage of framing charge inasmuch as the complainant is permitted by the Magistrate to conduct the prosecution. We have said so to clarify the position of law. If an application in this regard is filed, it shall be dealt with on its own merits. Needless to say, the order passed by the learned Magistrate or that of the High Court will not be an impediment in dealing with the application to be filed under Section 302 CrPC. It is also necessary to add that we have not expressed any opinion on the merits of the application to be filed.

21. The criminal appeal is, accordingly, disposed of.