

**Soyi Vs. State of Kerala**

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**Court :** Kerala

**Decided On :** Jun-28-2005

**Reported in :** 2006(1)KLT32

**Judge :** M. Sasidharan Nambiar, J.

**Acts :** Code of Criminal Procedure (CrPC) - Sections 200, 202, 204, 216, 220, 239, 240, 319, 319(1), 319(4), 320 and 398; Indian Penal Code (IPC) - Sections 34, 107, 109, 147, 323, 324, 325, 326, 336 and 427; Kerala Rationing Order - Sections 50

**Appeal No. :** Crl. R.P. No. 1435 of 2005

**Appellant :** Soyi

**Respondent :** State of Kerala

**Advocate for Def. :** P. Deepthy, Public Prosecutor

**Advocate for Pet/Ap. :** K.R. Sachidanandan and; Renjith B. Marar, Adv.

**Disposition :** Petition dismissed

**Judgement :**

ORDER

**M. Sasidharan Nambiar, J.**

1. Additional second accused who was impleaded by learned Judicial First Class Magistrate invoking power under Section 319 of Cr.P.C. has filed the revision. The controversy to be resolved are (1) whether the learned Magistrate is entitled to amend or alter the charge and thereafter invoking power under Section 319 is competent to implead a person as an accused and (2) whether the accused so impleaded is entitled to apply for discharge before the learned Magistrate.

2. Learned Magistrate has taken cognizance of the offences under Sections 326 and 324 of I.P.C. The sole accused was facing trial. Charge was framed for the said offences. Prosecution case is that accused after hiring autorickshaw of de facto complainant/second respondent with three others reached near building No. IX/7 of Veliliyamattom Panchayat at about 9 p.m. on 25-6-2003, pulled the second respondent out of the autorickshaw and inflicted injuries with a stone and committed offences under Sections 326 and 324 of I.P.C. Second respondent was examined in part. In the course of evidence of P.W.1, it was brought out that one week prior to the incident P.W. 1 had an altercation with petitioner in a toddy shop and P.W. 1 was assaulted and the incident of 25-6-2003 was an offshoot of that incident and two days prior to the incident P.W. 1 was shown by the toddy shop contractor to others. The specific case of P.W. 1 was that attack on him on the date of incident was at the instance of petitioner, contractor of the shop. It was also shown to the learned Magistrate that in Ext. P-1 F.I. Statement these facts were specifically stated by P.W. 1 and offence under Section 34 of I.P.C. was also alleged. But after investigation Section 34 was deleted. Learned Magistrate on that evidence was satisfied that the charge was not properly framed and therefore altered the charge incorporating offence under Section 107 of I.P.C. as well as Section 34. Learned Magistrate has also invoked his powers under Section 319 of Cr.P.C. and impleaded the petitioner as additional accused and issued summons to him which is challenged in the revision.

3. Argument of the learned Counsel appearing for petitioner is that learned Magistrate is not entitled to invoke the power under Section 319 of Cr.P.C. for an offence for which the sole accused was not being tried and by altering the charge, petitioner cannot be impleaded as additional accused and order is illegal and is to be set aside. Learned Counsel would also argue that in any event as the petitioner

is impleaded under Section 319 of Cr.P.C. he is entitled to claim discharge which cannot be denied to him. Learned Public Prosecutor argued that before the petitioner was impleaded as additional accused, learned Magistrate has altered the charge and there is no prohibition for invoking the power under Section 319 of Cr.P.C. and therefore the revision is only to be dismissed.

4. Section 319 of the Code reads:

Where, in the course of any inquiry into, or trial, of an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the court may proceed against such person for the offence which he appears to have committed.

Section 319 confers an extraordinary power on all criminal courts to proceed against a person who is not an accused in the case. Under said section if in the course of any inquiry into or trial of an offence it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with accused the court may proceed against such person for the offence which he appears to have committed. Therefore, if in the course of any trial learned Magistrate is satisfied from the evidence that a person who is not an accused has committed offence for which he could be tried together with the accused, the Magistrate is competent to proceed against such person for the offence for which he appears to have committed. Evidence contemplated could be the evidence of one witness or even the examination in chief of a witness. His evidence could definitely be treated as evidence for the purpose of Section 319(1) of the Code. The effect of that evidence is similar to the effect of an examination under Section 200 or 202, for formation of opinion for the Magistrate whether there are sufficient grounds for proceeding against a person. The satisfaction required to proceed against a person who is an accused is just like the satisfaction required for proceeding under Section 204 or 220 or 240 of the Code. He becomes an accused only when process is issued to him. Order of the learned Magistrate would definitely establish that learned Magistrate was satisfied that there are sufficient grounds to proceed as provided under Section 319(1) of the Code and therefore the order is not illegal.

5. Then the question is whether the learned Magistrate is entitled to amend or alter the charge before invoking power under Section 320 of Cr.P.C. Learned Counsel appearing for petitioner relied on the decision of the apex court in Sohan Lal and Ors. v. State of Rajasthan : 1990 CriLJ2302 and argued that the order of learned Magistrate is illegal in the light of decision laid down in Sohanlal's case. In Sohanlal's case police has charge-sheeted a case for the offence under Sections 147, 323, 325, 336 and 427 of I.P.C. After taking cognizance and hearing arguments the Magistrate discharged two of the accused, appellants 4 and 5 before the apex court and charge was framed for the offence under Section 427 of I.P.C. alone as against appellants 1 to 3. Subsequently, the Assistant Public Prosecutor filed a petition under Section 216 of the Code to amend the charge incorporating the offence under Sections 147, 325 and 336. Magistrate on that application amended the charge for the offence under Sections 147, 427, 336, 323 and 325, after impleading the appellants 4 and 5 against whom cognizance was not originally taken. That order was challenged by filing a revision before the High Court and when it was dismissed matter was taken before the apex court on special leave. Apex court held that as against appellants 1 to 3 alteration of charge can be made at any time as envisaged under Section 216 and therefore learned Magistrate could alter the charge as against them as prayed for by the prosecutor. But the Apex Court held that appellants 4 and 5 were the accused in the case as cognizance was not taken against them and Section 319 of the Code has to be read in consensus with the provisions of Section 398 of the Code. Once a person is found to have been the accused in the case, he goes out of Section 319 and whether he can be dealt with under any other provision of a Code is a different question and in the case of the accused who has been discharged under the relevant provision of the Code the nature of finality to such order and the resultant protection of the person discharged subject to the revision under Section 398 may not be loss sight of. The apex court therefore held that application of prosecutor under Section 216 in so far as appellants 1 to 3 were concerned could be dealt with under Section 216 and appellants 4 and 5 could be dealt with neither under Section 216 nor under Section 319 and therefore the order of learned Magistrate was set aside. This decision does not lay down the proposition canvassed by learned Counsel appearing for petitioner.

6. Learned Magistrate is competent to alter or amend the charge at any stage of trial before judgment is pronounced as provided under Section 216. After recording evidence of P.W. 1 partly, learned Magistrate was satisfied that charge has to be altered for the offence under Section 109 and Section 34 of I.P.C. Learned Magistrate is competent to alter and amend the charge and therefore impugned order cannot be challenged on that ground.

7. Learned Magistrate is empowered under Sub-section (1) of Section 319 to proceed against petitioner for the offence for which he appears to have committed, if he is satisfied on the evidence that petitioner not being an accused has committed offence for which he could be tried along with sole accused. Question of invoking Section 319 of Cr.P.C. for an offence which was not taken cognizance of by the learned Magistrate before invoking power under Section 319 of Cr.P. C. was considered by a learned Single Judge (as His Lordships then was) in *Annamma Cheriyan v. State of Kerala* (1990 (1) KLT 388 : 1990 Cri.L.J. 1796). In that case first accused unauthorisedly sold ration articles. Allegation against second accused is that he was in possession of ration articles without a validation document. The allegation against the person who was impleaded invoking power under Section 319 of the Code was that she made falsification of account and committed offence under Section 50 of Kerala Rationing Order as she failed to cancel appropriate space in the ration cards supplied to the card holders. Learned Single Judge found that charge against the person who was impleaded as additional accused is independent and has no nexus to the offences alleged against other accused. It was also found that Special Judge was not justified in invoking Section 319 to implead additional accused and to try her for offences other than the offences he had already taken cognizance. That was a case where the charge against additional accused who was impleaded invoking power under Section 319 was independent of the offence for which other accused were tried. Question is different herein. Case against petitioner is not independent of the case as against accused who was facing trial. Moreover, learned Magistrate has invoked the power under Section 319 of Cr.P.C. only after the charge was amended. The allegations in F.I. Statement itself shows that the case spoken to by P.W.1 and taken as a ground for invoking the power under Section 319 of Cr.P.C. was the same from the very beginning. In such circumstances I find no illegality or

irregularity in the impugned order warranting interference.

8. Sub-section (4) of Section 319 provides that where the court proceeds against any person under Sub-section (1) then the proceeding against any person shall be commenced afresh, and witnesses re-heard. Therefore, after petitioner was brought in as an accused, learned Magistrate has to commence the trial afresh as against petitioner. Charge has to be framed and has to be read over and opportunity has to be provided to the petitioner to plead guilty or not guilty. Therefore, it goes without saying that petitioner is also entitled to seek an order of discharge as provided under Section 239 of Cr.P.C. Therefore, petitioner is at liberty to seek an order of discharge as provided under Section 239 of Cr.P.C.

Revision fails and is dismissed.

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