Vali and ors. Vs. Vali Mohd. and ors.

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Court : Rajasthan

Decided On : Mar-20-1979

Reported in : 1979WLN120

Judge : S.K. Mal Lodha, J.

Appeal No. : S.B. Criminal Revision Appeal No. 199/1977

Appellant : Vali and ors.

Respondent : Vali Mohd. and ors.

Disposition : Petition dismissed

Judgement :

S.K. Mal Lodha, J.

1. The petitioners Vali Mohammed Sakka and Basir son of Karim have filed this petition for revision under Sections 401/397 Cr.P.C. against the older of the learned Additional Sessions Judge, Hanumangarh dated August 6, 1977, by which he directed the Judicial Magistrate, Hanumangarh to take cognizance against them for an offence under Section 302 IPC and to summon them.

2. Non-petitioner No. 1 Vali Mohammed son of Nagar is complainant After recording First Information Report, regarding an offence of murder at the instance of complainant, and completing the investigation and arrest of one Idrish, the SHO,

Hanumangarh submitted a challan for commitment of the case in the court of she Judicial Magistrate, Hanumangarh on December 29, 1976 The complainant submitted a protest petition in respect of the sane occurrence to the Judicial Magistrate implicating four accused persons including Idrish against whom challan was submitted by the police The learned Judicial Magistrate, dismissed the protest petition on May 3, 1977 holding that cognizance cannot be taken against them. He observed that there were no sufficient grounds at all to proceed against the petitioners and Karim.

3 Feeling aggrieved by the order dismissing the protest petition, the complainant preferred a revision petition.

4. The learned Additional Sessions Judge, Hanumangarh, by his order dated August 6, 1977, accepted the revision petition against the petitioners and directed the Judicial Magistrate, Hanumangarh to take cognizance of offence under Section 302 IPC against the petitioners and to summon them. The revision was, however, not accepted against Karim. Against that order of the learned Additional Sessions Judge, Hanumangarh dated August 6, 1977, the petitioners have preferred this revision petition.

5. It was contended by Mr. D.K. Purohit that the order of the Judicial Magistrate dated May 3, 1977 amounted to a dismissal of the complaint under Section 203 Cr PC and such could only be set aside under Section 398 Cr PC. Under Section 398 Cr PC, the only order, according to the learned Counsel, that could be passed was to direct the Judicial Magistrate to make further inquiry into the complaint and such direction could only be made after giving an opportunity to the concerned persons, to show cause as to why such direction should not be made He urged that the learned Additional Sessions Judge had no jurisdiction to give a direction to the judicial Magistrate to take cognizance of he offence. According to him taking cognizance of an offence is an executive act and not a judicial one. It h not obligatory on the Magistrate to take cognizance of an offence and the cognizance of an offence can only be taken once which the learned Magistrate has already done against the accused Idrish. He further submitted that on the facts and in the circumstances, relied on by the learned Judicial Magistrate, Hanumangarh in his

order dated May 3, 1977, dismissal of the protest petition was proper and the teamed Additional Sessions Judge was not justified in interfering with that order in revision, for, the view taken by the Judicial Magistrate being a possible view.

6 The learned Public Prosecutor supported the order under revision. According to him, the order of the learned Judicial Magistrate is non est in law and that the learned Additional Sessions Judge has not taken cognizance of any offence, he has merely sent the case back to the Judicial Magistrate with a direction to him to take cognizance of offence under Section 302 IPC against the petitioners and to summon them Thus, according to the learned Public Prosecutor, the petitioner will have an opportunity to contest before the Judicial Magistrate and, therefore, non-issuance of notice in revision is not material

7. Mr. Bhagwati Prasad, learned Counsel for the non petitioner No. 1 (complainant) submitted that cognizance of offence had already been taken by the Judicial Magistrate against the accused Idrish The protest petition was nothing but a sort of complaint to the Magistrate against the petitioners and Karim and he was required to decide it judicially. He, therefore, urged that as it was a judicial order, revision against that order, by the complainant was justified. According to the learned Counsel, it is only the executive or administrative order which is not revisable When the protest petition was dismissed, the order tantamount to refusing to take cognizance against the petitioners and Karim It was not necessary to give an opportunity to the petitioners of showing cause under Section 398 Cr PC in as much as proviso to that Section only applies to a person accused of an offence who has been discharged and question of discharge arises after summoning of accused. Learned Public Prosecutor urged that Section 239 Cr PC contains provisions relating to discharge and these provisions apply when an accused person is present before the court, and in this case, that stage has not reached a yet, because it is only after taking cognizance that the petitioners would appear before the court.

8. In view of the submissions, made by the learned Counsel for the parties, the interesting questions of law that arise are:

(1) Whether the order of the Judicial Magistrate dated May 3, 1977, declining to take cognizance against the petitioners, whereby dismissing the protest petition, filed by the complainant, is a judicial order, which could be revised by the learned Additional Sessions Judge in revision?

(2) Whether the order of the Judicial Magistrate dated May 3, 1977, amounted to dismissal of complaint under Section 203 Cr PC or discharge of the petitioners accused of offence under Section 302 IPC and if the answer to this question is in affirmative, only order that could be passed by the learned Additional Sessions Judge was to direct Judicial Magistrate to make further inquiry into the complaint?

(3) Whether it was necessary for the learned Additional Sessions Judge before making the order in revision to have afforded an opportunity to show cause to the petitioners? and

(4) Whether on the facts and in the circumstances of the case, the learned Additional Sessions Judge was justified in directing the Judicial Magistrate to take cognizance of offence under Section 302 IPC against the petitioners and to summon them?

9. For a better appreciation of the arguments, it is necessary to notice the relevant provisions of the Code of Criminal Procedure.

10. Section 169 Cr.P.C. provides for release of accused when evidence is deficient. It relates to cases in which it is found that there is no sufficient evidence for forwarding the accused to Magistrate and consequently no person is sent up for trial. Section 170 Cr PC deals with cases to be sent to Magistrate when evidence is sufficient. Thus, it applies to cases in which upon investigation the accused is sent up for trial.

11. Section 173 Cr PC provides for report after the completion of the investigation and shoeing the results of investigation. Section 173(2)(i) Cr.P.C., amongst others, provides that as soon as the investigation is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Govt.

stating particulars mentioned in it. Sub-section (4) of Section 173 Cr PC lays down that whenever it appears from a report forwarded under this Section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.

12. Section 190 Cr.P.C. provides for taking cognizance of offences by Magistrates. The expression take cognizance of any offence used in Section 190(1) means the taking notice of any offence in a judicial capacity with a view to the initiation of judicial proceeding against the offender or in respect of that offence.

13. Section 203 Cr PC deals with dismissal of complaint 'without issuing a process'. Section 209 provides for commitment of case to Court of sessions when offence is triable exclusively by it. The material portion of Section 209 is as under:

When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Sessions, he shall:

(a) commit the case to the Court of Sessions;

(b) ...

(c) ...

(d) ...

14. Section 239 Cr PC provides for discharge of accused under the circumstances, specified in the section. Before discharging the accused under this Section, following preliminaries have to be performed:

(1) consideration of the police report and the documents sent with it under Section 173 Cr PC.

(2) examination, if any, of the accused as the Magistrate thinks necessary;

(3) giving prosecution and the accused an opportunity of being heard; and

(4) thereafter to consider whether the charge is groundless.

Thus, the Magistrate before either passing an order of discharge under this section or framing a charge under Section 240 has first to determine whether the material before him furnishes a reasonable basis for foundation of accusation. It is clear that Section 239 Cr PC applies when the accused is present before the Court In this case, this stage was not reached, far, the protest petition filed by complainant was dismissed by the learned Judicial Magistrate on May 3, 1977.

15. Legal Remembrancer v. Abani Kumar : AIR1950 Cal437 was approved by their Lordships of the Supreme Court in R.R. Chati v. State of U.P. : [1951]2SCR370 . In Legal Remembrancer's case : AIR1950 Cal437 it was observed.

What is taking cognizance has not been confined in the Cr PC and I have no desire to attempt to define it. It seems to me clear however that before it can be said that any Mag. has taken cognizance of any offence Under Section 190(1)(a), Cr PC he must not only have applied his mind to the contents of the petition but he must have done so for the purpose of proceeding, in a particular way as indicated in the subsequent provisions of this Chap., proceeding under Section 200 & thereafter sending it for inquiry & report under Section 202. When the Mag. applies his mind not for the purpose of proceeding under the subsequent sections of this Chap but for taking action of some other kind e(sic)g ordering investigation...under Section 156(3), or is using a search warrant for the purpose of the investigation he cannot be said to have taken cognizance of the offence.

In Darshan Singh v. State of Maharashtra : 1971 CriLJ1697 , while considering the provisions of Section 190 Cr PC it was observed as under:

As has often been held, taking cognizance does not involve any formal action or indeed action or any kind but occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance, therefore, takes place at a point when a Magistrate first takes judicial notice of an offence. This is the position whether the Magistrate takes cognizance of an offence on a complaint, or on a police report or upon information of a person other than a police officer. Thereafter, when a Magistrate takes cognizance of an offence upon a police report prima facie he does so of the offence or offences disclosed in such report.

Two other important sections, which deserve notice are Sections 397 and 398 Cr PC, Section 397 Cr PG empowers the High Court or any Sessions Judge to call for records of inferior Criminal Courts and examine them for the purpose of satisfying itself or himself as to whether a sentence, finding or order of such inferior court is legal, correct or proper, or whether the proceedings of such inferior court are regular Section 398 Cr PG confers power on the High Court or Sessions Judge to order further inquiry. This section relates to proceedings antecedent and preliminary to trials, the object of which is to ascertain whether or not a trial should take place. Trial begins when the accused is charged and called on to answer, and then the question before the Court in whether the accused is to be acquitted or convicted, not whether the complaint is to be dismissed or the accused discharged. Order under Section 398 Cr PC can only be for further inquiry. Proviso to Section 398 for Cr PC lays-down that any direction under Section 398 for further inquiry into the case of any person who has been discharged should not be made unless such person has had an opportunity of showing cause why such direction should not be made.

16. In the light of these provisions, it is to be considered whether the order of the learned Judicial Magistrate dismissing the protest petition of May 3, 1977, holding that cognizance cannot be taken against the petitioners and Karim, is a judicial order or not. If it was a judicial order, revision against that order before the learned Additional Sessions Judge, Hanumangarh was justified.

17. In Gopaldas v. State of Assam AIR 1961 SC 986, their Lordships of the Supreme Court observed:

We are unable to construe the would 'may' in Section 190 to mean 'must'.

The view taken in Gopaldas's case AIR 1961 SC 986 is further strengthened by the opinion expressed by their Lordships of the Supreme Court in State of Assim v. Abdul Noor : 1970 CriLJ1264 , wherein it was observed:

The Magistrate can under Section 190 before taking cognizance, ask for investigation by the police under Section 156(3) of the Criminal Procedure Code. The Magistrate can also issue warrant for production before taking cognizance.

18. In view of these decisions, in my opinion, it is settled law that the word 'may' used in Section 190 gives a judicial discretion to the Magistrate to take cognizance on a police report or a complaint.

19. It is equally veil-settled that the taking cognizance means cognizance of offence and not offenders Sneaking for the Court, Sikri, J, as he then was, in Raghubans Dubey v. State of Bihar : 1967 CriLJ1081 , observed as under:

In our opinion, once cognizance has been taken by the Magistrate, he takes cognizance of an offence and not the offenders, once he takes cognizance of an offence it is his duty to find out who the offenders really are and once he comes to the conclusion that apart from the persons sent up by the police some other persons are involved, it is his duty to proceed against those persons The summoning of the additional accused is part of the proceeding initiated by his taking cognizance of an offence.

In this case, the learned Judicial Magistrate took cognizance of the offence under Section 302 IPC against Idrish after submission of the charge-sheet under Section 173(2) Cr PC. The protest petition was filed by the complainant on January 3, 77 stating that the police has not submitted any challan against the petitioners and Karim, though there is evidence against them having committed an offence under Section 302 IPC It follows, therefore that the proceedings were pending before the learned Judicial Magistrate when the protest petition was filed. The learned Judicial Magistrate was to find out who were the other offenders involved in the commission of the offence of murder. While doing so, he was required to apply his mind whether from the evidence, prima facie, case of murder against the petitioners and Karim is made out or not. After examining the papers which were submitted with the charge-sheet, he passed the order that there are no sufficient grounds to proceed against them. In these circumstances, the order of the learned Judicial Magistrate dated May 3, 1977 declining to take cognizance against the petitioners and Karim whereby dismissing the protest petition, filed by the complainant, was a judicial order.

20. Under Section 397 Cr.P.C., the Sessions Judge has been empowered to examine the record of any proceedings before any inferior criminal court for the

purpose of satisfying himself as to the correctness, legality or propriety of any order, passed and as to the regularity of any proceedings to of such inferior court.

21. The order passed by the learned Judicial Magistrate dated May 8, 1977, refusing to take cognizance against the petitioners, being a judicial one, could be revised by the learned Additional Sessions Judge. As the petitioners could not be summoned before taking cognizance the question of discharging them vide order dated May 3, 1977, does not arise. In Chandra Deo v. Prakash Chandra : [1964]1SCR639 it was observed as under:

The entire scheme of Ch. XVI the Code of Criminal Procedure shows that an accused person does not come into the picture at all till process is issued.

22. In other words, when the learned Judicial Magistrate dismissed the protest petition, it cannot be said that the petitioners were discharged and when there was no discharge, Section 398 Cr.P.C. is not attracted, for, under Section 398 Cr.P.C. an order for further inquiry can only be made, inte alia, into the case of any person accused of offence, who has been discharged. The order of the Judicial Magistrate, dismissing the protest petition or declining to take cognizance against the petitioners and Karim does not tantamount to discharging the on and, therefore, I am unable to agree with the learned Counsel for the petitioners that the order dated May, 3, 1977 amounted to discharge of the petitioners accused of offence under Section 302 IPC and that the only order that could be passed by the learned Additional Sessions Judge was to direct the Judicial Magistrate to make further inquiry into the complaint. It follows, therefore, that it was not necessary for the learned Additional Sessions Judge to have afforded an opportunity of showing cause co the petitioners as envisaged by Section 398 Cr.P.C.

23. The learned Additional Sessions Judge took note of the fact that in the first information report, the names of the petitioners as well as Karim were mentioned. He was of the opinion that the charge-sheet against the petitioners should have been submitted as the statements of Vali Mohd. (complainant) Khusi Mohd. & Kamal recorded by the police show that the petitioners had participated in the commission of the offence of murder. He was further of the opinion that refusal of the learned Judicial Magistrate to take cognizance of offence against the

petitioners was illegal and improper. In these circumstances, the learned Additional Sessions Judge was not wrong when he directed the Judicial Magistrate to take cognizance against the petitioners and to summon them, I am not satisfied that the order of the learned Additional Sessions Judge, in the facts and circumstances of the case, is illegal, improper or incorrect.

24. Some authorities, other than those which have already been referred to here in above, were also cited at the bar by the learned Counsel for the parties. It is not necessary to discuss them, for, it will unnecessarily encumber the judgment as they are not nearer home.

25. The net result is that answers to the questions which I have formulated above, are these:

(1) the order passed by the Judicial Magistrate on May 3, 1977, declining to take cognizance against the petitioners and dismissing the protest petition tiled by the complainant is a judicial order and it could be revised in revision.

(2) the order of the Judicial Magistrate dated May 3, 1977 does not amount to dismissal of complaint under Section 203 Cr.P.C. or discharge of the petitioners. In these circumstances, the question of directing the Judicial Magistrate to make further inquiry into the complaint, does not arise.

(3) it was not necessary for the learned Additional Sessions Judge to have issued notice to the petitioners before passing the order under revision.

(4) on the basis of the material, that was before the learned Additional Sessions Judge, he was justified in directing the Judicial Magistrate to take cognizance of offence under Section 302 IPC against the petitioners and to summon them.

26. All the contentions raised by the learned Counsel for the petitioners are, therefore, devoid of force.

27. The result is that this revision petition has no force and it is, accordingly, dismissed.

28. Before parting with the case, on the basis of the decisions reported in Sanjay Gandhi v. Union of India a : 1978 CriLJ642 (6) & Hareram v. Tikaram : 1978 CriLJ1687 , I wish to observe that the petitioners would be at liberty to invoke the provisions of Section 227 Cr.P.C. on the case being committed to the Court of Sessions.