

Kalamudeen and ors. Vs. State of Rajasthan and anr.

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Court : Rajasthan

Decided On : May-17-2005

Reported in : RLW2005(3)Raj2116; 2005(3)WLC251

Judge : H.R. Panwar, J.

Acts : Arms Act - Sections 24; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 2, 173, 190, 207, 208, 209, 309, 319, 397, 482, 4001; Indian Penal Code (IPC) - Sections 34, 120B, 140, 147, 148, 149, 302, 307, 323, 324, 325, 407, 406 and 448

Appeal No. : S.B. Criminal Revision Petition No. 829 of 2004

Appellant : Kalamudeen and ors.

Respondent : State of Rajasthan and anr.

Advocate for Def. : J.P.S. Choudhary, Public Prosecutor and; Dharendra Singh, Adv. for Non-Petitioner No. 2.

Advocate for Pet/Ap. : Deepak, Adv.

Disposition : Petition allowed

Judgement :

H.R. Panwar, J.

1. This criminal revision petition under Section 397/401 of the Criminal Procedure Code, 1973 (for short 'the Code' hereinafter) is directed against the order dt. 13.10.2004 passed by Additional Chief Judicial Magistrate, Makrana (for short 'the ACJM' hereinafter) in case arising out of FIR No. 130/2004, Police Station, Makrana whereby the ACJM allowed the applications dt. 6.8.2004 and 16.8.2004 filed by the complainant-non-petitioner No. 2 under Section 190 of the Code and took cognizance of the offences under Section 147, 148, 323, 325, 307 and 302/149 I.P.C. against the petitioners and issued the process by non-bailable warrant. Aggrieved by the order impugned dt. 13.10.2004, the petitioners have filed the instant criminal revision petition.

2. The facts and circumstances giving rise to the instant revision petition are that non-petitioner No. 2 Sahadat alias Khalik lodged a first information report with Police Station, Makrana against the petitioners and eight others on 21.4.2004 at about 6.30 P.M. for the offences under Section 147, 148, 149, 323, 407 and 307 I.P.C. The investigation ensued. As many as 7 accused-persons were arrested by the police. However, during the investigation, injured Ramesh died on 4.5.2004 and therefore, the offence under Section 302 I.P.C. was added. After usual investigation, the police led the challan against accused Mohammed Iqbal, Raju alias Jakir, Shamshad Khan alias Bihari Mulla, Mohammed Salim alias Bandia, Umar Farooque alias Gabru, Ghulam Rasul alias Nanu, Hasamudin, Jamil Ahmed and Mohd. Rajzan for the offences under Sections 147, 148, 323, 325, 307 and 302/149 I.P.C. before the ACJM on 6.8.2004. Non-petitioner No. 2 complainant filed a protest petition on 6.8.2004 protesting therein that the offence against petitioners No. 1 and 2 are also made out and, therefore, requested the ACJM to take cognizance of offences and arraign them as accused. However, during the pendency of the application dt. 6.8.2004, non-petitioner No. 2 filed a second protest petition on 16.8.2004 requesting therein that offences against petitioner No. 3 Mohammed Yousuf and Nawab are made out and, therefore, requested the ACJM to take cognizance of offence against them also and arraign them as accused. By order impugned dt. 13.10.2004, the ACJM took the cognizance of offences against the petitioners and arraigned them as accused along with the accused challenge by the police. The case is exclusively triable by a Court of Sessions.

3. I have heard learned counsel for the parties. I have carefully gone through the order impugned and police challan papers.

4. It is contended by the learned counsel for the petitioners that offences noticed above are exclusively triable by the Court of Sessions and the Magistrate has no jurisdiction to arraign the persons, who were not being challenged by the police, as accused. Learned counsel further contended that after through investigation, the police did not find the petitioners involved in the commission of alleged crime and, therefore, they have not been challenged. Without there being any fresh evidence, it was not open for the Magistrate to arraign the petitioners as accused. According to the learned counsel for the petitioners, the only stage to arraign any person as an accused, in a case exclusively triable by the Court of Sessions, is as envisaged under Section 319 of the Code.

5. Learned counsel has relief on decision of Hon'ble Supreme Court in Raj Kishore Prasad v. State of Bihar and Anr. (1996 SCC (Cri.) 772), Kishori Singh and Ors. v. State of Bihar and Anr (2000(4) Crimes 158 (SC), and also on the decisions of this Court in Banna v. State of Rajasthan 2003(1) R.C.C. 253, Jogendra and Ors. v. State of Rajasthan and Anr. 2001(1) R.C.C. 311 : RLW 2003(1) Raj. 556, Girwar Singh and Ors. v. State of Rajasthan 2001(1) R.C.C. 272, Chhotu Ram v. State of Rajasthan 2001(2) R.C.C. 994, Sukhdas and Ors. v. State of Rajasthan 2001 Cr.L.R. (Raj. 364 : RLW 2001(3) Raj. 1716, Ganesha Ram and Ors. v. State of Rajasthan 2000(2) R.Cr.D. 934 (Raj.) : RLW 2000(2) Raj. 771 and Kan Singh v. State of Rajasthan 2000(1) R.C.C. 238 : RLW 2000(1) Raj. 647.

6. Learned counsel for non-petitioner No. 2 supported the order impugned and contended that under Section 190 of the Code, the Trial Magistrate is competent to take cognizance of an offence against the persons, who have been left out by the police and not challaned even before committing the case to the Court of Session.

7. Learned counsel for non-petitioner No. 2 has relied on a decision of the Hon'ble Supreme Court in SWIL Ltd. v. State of Delhi and Anr. : 2001 CriLJ4173 .

8. I have given my thoughtful consideration to the rival submissions made by the learned counsel for the parties.

9. A question came up for consideration before the Hon'ble Supreme Court in *Raj Kishore Prasad v. State of Bihar and Anr.* (supra) can a Magistrate undertaking commitment under Section 209 of the Code of a case triable by a Court of Session, associate another person as accused, in exercise of powers under Section 319 of the Code, or under any other provision. The Hon'ble Supreme Court while considering the provision of Section 209 of the Code held as under:-

'The present Section 209 is thus the product of the aforesaid expert deliberation followed by legislative exercise. It is thus to be seen prominently that preliminary inquiries then known as 'committal proceedings' have been abolished in cases triable by a Court of Session. The functions left to be performed by the Magistrate, such as granting copies, preparing the records, notifying the public prosecutor etc. Are thus preliminary or ministerial in nature. It is of course true that the Magistrate at that juncture takes cognizance of a sort, but that is solely to perform those preliminary functions as a facilitator, towards placement of the case before the Court of Session, rather than being an adjudicator. It is thus manifest that in the sphere of the limited functioning of the Magistrate, no application of mind is required in order to determine any issue raised, or to adjudge anyone guilty or not, or otherwise to pronounce upon the truthfulness of any version. The role of the Magistrate thus is only to see that the package sent to the Court of session is in order, so that it can proceed straight away with the trial and that nothing is lacking in content, as per requirements of Sections 207 and 208 of the Code of Criminal Procedure. Such proceedings thus, in our opinion do not fall squarely within the ambit of 'Inquiry' as defined in Section 2(g) of the code of Criminal Procedure, which defines that "inquiry' means every inquiry other than a trial, conducted under this Code by a Magistrate or Court,' because of the prelude of its being 'Subject to the context otherwise requiring.' As said before, the context requires the proceedings before a Magistrate to be formal, barely committal in that sense, and that any notion based upon the old state of law of its being an inquiry to which Section 319 could get attracted, has been done away with. Therefore, it would be legitimate for us to conclude that the Magistrate at the stage of Section 209

Cr.P.C. is forbidden to apply his mind to the merit of the matter and determine as to whether any accused need be added or subtracted to face trial before the Court of Sessions.'

It was further held by their Lordships that the power under Section 209 of the Code to summon a new offender was not vested with a Magistrate on the plain reading of the test as well as proceeding not being an 'inquiry' and material not being 'evidence.' When such power was not so vested, his refusal to exercise it cannot be corrected by a Court of Revision, which may be the Court of Sessions itself awaiting the case on commitment, merely on the specious ground that the Court of Sessions can, in any event, summon the accused to stand trial along with the accused meant to be committed for trial before it. Presently it is plain that the stage for employment of Section 319 Cr.P.C. has not arrived. The order of Court of Session requiring the Magistrate to arrest and logically commit the appellant along with the accused proposed to be committed to stand trial before it, is patently illegal and beyond jurisdiction. The case before the Apex Court, Raj Kishore Prasad appellant therein was sought to be impleaded as an accused, but the police, after investigation, did not find his involvement and, therefore, he was not challaned, however, a challan was filed against Avadh Kishore alias Pagalva. Before the Judicial Magistrate, the first informant made an application requiring the Magistrate to exercise his powers to summon Raj Kishore Prasad, appellant therein so as to send him to stand trial alongside the accused sent up by the police, before the Court of Session. The application came to be dismissed by the Magistrate. The first informant challenged the order of Magistrate by revision before the Court of Session. The Session Court allowed the revision and directed the Magistrate issuance of warrant of arrest of Raj Kishore Prasad to face trial. The order came to be challenged by Raj Kishore Prasad before the High Court under Section 482 of the Code. The petition under Section 482 of the Code came to be dismissed by the High Court and the matter was carried to Hon'ble Supreme Court. The Apex Court set aside the orders passed by the Court of Session as well as the High Court and held that in case exclusively triable by a Court of Session, the stage for adding a person, who has not been challaned by the police, is under Section 319 of the Code.

10. In *Kishori Singh and Ors. v. State of Bihar and Anr. (supra)*, the question came up before the Hon'ble Supreme Court regarding taking of cognizance of offence against the accused-persons not named in the charge-sheet but named in the FIR in a case exclusively triable by a Court of Session. The Hon'ble Supreme Court has held that the Magistrate could not have issued process against those persons, who may have been named in the FIR as accused-persons, but not charge-sheeted in the charge-sheet filed by police under Section 173 of the Code. So far as those persons against whom charge-sheet has not been filed, they can be arrayed as 'accused persons' in exercise of powers under Section 319 of the Code when some evidence or materials are brought on record in course of trial or they could also be arrayed as 'accused persons' only when a reference is made either by the Magistrate while passing the order of commitment or by the learned Sessions Judge to the High Court and the High Court, on examining the materials, comes to the conclusion that sufficient materials exist against them even though the police might not have filed chargesheet. In *Kishori Singh's case (supra)* there appellants though were named as accused in the FIR, but had not been chargsheeted when the police, after investigation, filed the chargesheet under Section 173 of the Code. The offence in that case was one which was triable by a Court of Session. The Magistrate in that case came to the conclusion that there appears sufficient grounds to proceed against accused-persons and as such cognizance be taken under Section 302/34, 324 and 448 IPC and Section 24 of the Arms Act. That order came to be challenged by the appellants therein before the Session Judge in revision. The Session Judge held in revision that the order of Magistrate is without jurisdiction and revision was allowed. The matter was carried to High Court by way of appeal. The High Court interfered with the order of Sessions Judge and thereby the appellants therein carried the matter to the Hon'ble Supreme Court. Relying on the decision of *Raj Kishore Prasad v. State of Bihar and Anr. (supra)* and Three Judge Bench decision of the Hon'ble Supreme Court in *Ranjit Singh v. State of Punjab : 1998 CriLJ4618* , Hon'ble Supreme Court held that where offence was triable by Sessions Court, the Magistrate cannot issue process against those persons, who may have been named in the FIR as accused-persons, but not chargsheeted in the chargesheet that was filed by the police under Section 173 of the Code.

11. In *Banna Ram v. State of Rajasthan*, *Jogendra and Ors. v. State of Rajasthan and Anr.*, *Girwar Singh and Ors. v. State of Rajasthan and Anr.*, *Chhotu Ram v. State of Rajasthan*, *Ganesha Ram and Ors. v. State of Rajasthan*, and *Sukhdas and Ors. v. State of Rajasthan (supra)*, this Court has taken a view that in case exclusively triable by the Court Sessions, the cognizance of offence against the persons other than those named by the police in the chargesheet cannot be taken by the committing Magistrate.

12. In *SWIL Ltd. v. State of Delhi and Anr. (supra)* the Hon'ble Supreme Court held that there is no question of referring to the provisions of Section 319 of the code. The provision would come into operation in the course of any enquiry into or trial of an offence. In the case before the Apex Court, neither the Magistrate was holding enquiry as contemplated under Section 2(g) of the Code nor had the trial started. The Magistrate was exercising his jurisdiction under Section 190 of taking cognizance of an offence and issuing process. The Apex Court held that there is no bar under Section 190 of the Code that Once the process is issued against some accused, on the next date, the Magistrate cannot issue process to some other person against whom there is some material on record, but his name is not included as accused in the chargesheet. In *SWIL Ltd's Case (supra)* the offences were under Sections 140, 406, 120-B IPC, which were triable by the Magistrate and, therefore, the decision turns on its own facts and is of no help to non-petitioners. Thus, the instant case on fact and law is squarely covered by two decisions Hon'ble Supreme Court in *Raj Kishore Prasad v. State of Bihar* and *Kishore Singh. v. State of Bihar (supra)* and, therefore, order impugned is not sustainable and deserves to be set aside.

13. Consequently, the revision petition is allowed. Order dt. 13.10.2004 passed by Additional Chief Judicial Magistrate, Makarana arraying the petitioners as accused is hereby set aside. The stay petition also stands disposed of.