

Vishwanath and ors. Vs. the State

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Court : Rajasthan

Decided On : Jul-11-1995

Reported in : 1996CriLJ1955; 1996WLC(Raj)UC261

Judge : M. Kapur, J.

Acts : Indian Penal Code (IPC) - Sections 147, 148, 149, 323, 324 and 452; Code of Criminal Procedure (CrPC) , 1974 - Sections 216, 227, 239, 245, 249, 319 and 398

Appeal No. : Criminal Revn. Petn. No. 260 of 1994

Appellant : Vishwanath and ors.

Respondent : The State

Advocate for Def. : D.P. Pujari, Adv.

Advocate for Pet/Ap. : S.P. Tyagi, Adv.

Disposition : Petition allowed

Judgement :

ORDER

M. Kapur, J.

1. The short point which arises in this revision is whether cognizance can be taken against those accused who have already been discharged for some offences. The learned Magistrate has relied upon Smt. Vijay Bai v. State of Rajasthan, 1990 Cri LJ 1754, of this Court in holding that after discharge of some accused persons, if fresh material is found against them then the Magistrate is competent to take cognizance and such an order would not amount to review of the discharge order.

2. On the basis of FIR lodged on 11-10-1981, by one Amrelal at Police Station Laxmangarh, a case under Sections 147, 148, 149, 323 and 452 I.P.C. was registered against four petitioners and one Nathmal. After investigation the police submitted a final report but on the protest petition filed by the complainant the trial Court took cognizance for the aforesaid offences against the petitioners and Nathmal. Thereafter arguments were heard on the question of framing of charge and charge against Nathmal was framed under Sections 452, 323 and 324 I.P.C. while all the four petitioners were discharged. The revision petition before this Court against the discharge of the petitioners was also dismissed.

3. In the year 1992 Nathmal died and thereafter the complainant moved an application under Section 319 Cr.P.C. for taking cognizance against the petitioners on the basis of the statements of the witnesses examined during the trial. On this application the Magistrate took cognizance against the petitioners by his order dated 16-4-1994, and the same has been challenged in this revision petition.

4. The learned Magistrate relied upon Vijai Bai's case, and after examining the evidence took cognizance against the petitioners of the offences for which they were earlier discharged.

5. In Vijai Bai's case it was held that when some of the accused persons had been discharged and after the prosecution led evidence it was found that there was fresh material on the basis of which the Court could proceed against the discharged accused then the Court could take cognizance against them. It was held that the order of discharge under Section 239 Cr.P.C. does not amount to acquittal as no trial has taken place and as such fresh retrial can be held for which cognizance can be taken on the basis of the material and this would not amount to reviewing the earlier order of discharge passed by the Magistrate. In this case

there were two sets of accused. One set was of those accused against whom cognizance was taken for some of the offences while the other set of accused was discharged of all the offences. After some prosecution evidence the APP moved an application for taking cognizance against the accused who were fully discharged. The revision filed by the accused were dismissed on the aforesaid reasonings.

6. This case was taken to the Supreme Court by the accused petitioners by two appeals *Sohanlal v. State of Rajasthan*, : 1990 CriLJ2302 , and the legal position was examined and the view of this Court has not been affirmed. The relevant provisions which were considered are Section 216 which provides for altering the charge and Section 319 Cr.P.C. which confers power on the Court to proceed against persons other than accused who appear to be guilty of offences. It has been held that Section 216 Cr.P.C. is not maintainable against persons who have already been discharged of all the charges. 'Add to any charge means' the addition of a new charge. An alteration of a charge means changing or variation of an existing charge or making of a different charge. After the discharge of an accused of all the charges, no charge exists against him, hence the application under Section 216 Cr.P.C. was not maintainable in their case. Addition or alteration of a charge could be made only in the case of an accused against whom charge was already in existence. Referring to Section 319 Cr.P.C. it was observed that this section empowers the Court to proceed against the persons, not being the accused appearing to be guilty of offence. This provision provides for a situation when a Court hearing a case against certain accused person finds from the evidence that some person or persons, other than the accused before it, is or are also connected in this very offence or any connected offence and it empowers the Court to proceed against such person or persons for the offence which he or they appears or appear to have committed, and issue process for the purpose. This section further provides that the cognizance against the newly added accused is deemed to have been taken in the same manner in which cognizance was first taken of the offence against the earlier accused. This section naturally deals with a matter arising in the course of proceedings already initiated. But in resorting to Section 319 Cr.P.C. it must be examined whether a person against whom Court wants to proceed was earlier an accused in the case or not. When once a person

is found to have been accused in the case he goes out of reach of Section 319 Cr.P.C. 'The accused who has been discharged under the relevant provisions of the Code, the nature of finality of such order and the resultant protection of the persons discharged subject to revision under Section 398 of the Code, may not be lost sight of. This should be so because the complainant's desire for vengeance has to be tampered. with.' The word 'discharge' in Section 398 means discharge of an offence relating to the charge within the meaning of Sections 227, 239, 245 and 249. The word discharge should not be given a restricted meaning in the sense of absolute discharge where the accused is set at liberty after examination of the whole case. The accused who were discharged were accused in the case and when once a person is accused, he is out of the ambit of Section 319 Cr.P.C. which specifically says that the Court can proceed against a person not being accused. Person may be accused at any stage of the proceedings and after discharge he does not lose that character.

7. In view of the authoritative pronouncement of the Supreme Court in the case relied upon by the trial Court has been set aside. A person who has once been an accused in the case and discharged, cognizance against him cannot be taken under Section 319 Cr.P.C. even if on the basis of the material produced before the Court during the trial it is found that the accused appear to be guilty of some offence. The discharge is Subject to the provisions of Section 398 Cr.P.C. and in this case even the revision petition against the discharge of the petitioners had been dismissed.

8. The petition is allowed. The order of the trial Court dated 16-4-994, is set aside.