

ibrahim Khan Vs. State and anr.

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Court : Rajasthan

Decided On : Feb-12-1999

Reported in : 1999CriLJ2614; 1999(3)WLC406; 1999(1)WLN111

Judge : G.L. Gupta, J.

Acts : Code of Criminal Procedure (CrPC) , 1974 - Sections 173, 190, 190(1), 200, 202, 202(2), 204, 209, 210, 319 and 482; Indian Penal Code (IPC) - Sections 302 and 307

Appeal No. : Cri. Misc. Petn. No. 401 of 1989

Appellant : ibrahim Khan

Respondent : State and anr.

Advocate for Pet/Ap. : D.S. Shishodiya, Sr. Adv. assisted by Manish Shishodiya and; A. Khan, Advs.,;

Disposition : Petition allowed

Judgement :

ORDER

G.L. Gupta, J.

1. This Misc. Petition under Section 482, Cr. P. C. is directed against the order D/- 4-9-89 passed by the learned Sessions Judge, Churu whereby he affirmed the order D/-15-6-89 of the Chief Judicial Magistrate issuing warrant of arrest against the petitioner.

2. The short facts of the case are these: Ayub, respondent No. 2 lodged a First Information Report on 30-9-86 against seven persons in respect of an occurrence which took place in the previous night on which a case under Section 307,1. P. C. was registered. As injured Shafi died during investigation, Section 302, I.P.C. was also added. After the completion of the investigation, the police submitted a challan on 6-12-86 against six persons and filed a Final Report against petitioner Ibrahim Khan. Vide order D/- 29-1-87 the six accused challaned by the police were committed to the Court of Session. Thereafter on 20-4-87 first informant Ayub filed a private complaint before the Magistrate against seven persons (six already challaned by the police and Ibrahim, petitioner). The Magistrate recorded statements of the complainant and his witnesses. The Magistrate vide order D/- 15-6-89 ordered the summoning of the petitioner by a warrant of arrest. This order was challenged by petitioner Ibrahim by filing revision petition before the Sessions Judge, Churu who vide order D/- 4-9-89 dismissed the revision petition. Now this Misc. petition.

3. Mr. Shishodiya learned counsel for the petitioner vehemently contended that under Section 190, Cr. P. C. the Magistrate takes cognizance of the offence/s and once the Magistrate takes cognizance of the offence/s under any of the Clauses (a), (b) or (c) he cannot take cognizance again in respect of same offence/s. He pointed out that the Magistrate had already taken cognizance of the offences in exercise of power under Section 190(1)(b) when the police submitted challan against six persons named in the F. I. R. and contended that after committing the case to the Court of Session the Magistrate had no power to take cognizance against the petitioner on the basis of the private complaint as that amounted to taking of the cognizance twice which is not permissible under Section 190, Cr. P. C. His contention was that if the Sessions Judge is satisfied after evidence is recorded, he may summon the petitioner as additional accused in exercise of power under Section 319, Cr. P. C. but the Magistrate could not do so under

Section 190, Cr. P. C. after he had committed the case to the Court of Session. His further submission was that the Magistrate had examined only 11 witnesses before passing the order of summoning the petitioner whereas he ought to have examined all the witnesses as the case was triable by the Court of Session.

4. The learned Public Prosecutor, on the other hand, contended that the Magistrate had a right to take cognizance against the petitioner in exercise of the power under Section 190(1)(a), Cr. P. C. on the basis of the private complaint, and therefore, the order does not call for interference.

5. There is no merit in the second contention of Mr. Shishodiya that it was incumbent for the Magistrate to have examined all the witnesses named in the list as it was the case exclusively triable by the Sessions Court. In the case of Mahendra Singh v. Kesar Singh 1980 Raj LW 361 this Court has held that it is not necessary for a Magistrate to examine all the witnesses mentioned in the list and the expression 'produce all his witnesses and examine them' in proviso to Sub-section (2) of Section 202, Cr. P. C. mean only such witnesses which the complainant thinks necessary to produce. In the instant case, the complainant desired to examine 11 witnesses only and it cannot be said that there was non-compliance of Section 202, Cr. P. C.

6. There is however merit in the first contention of Mr. Shishodiya that cognizance could not be taken by the Magistrate twice in respect of the same offence. Section 190, Cr. P. C. is reproduced hereunder:--

190. Cognizance of offences by Magistrates.-- (1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under Sub-section (2), may take cognizance of any offence.

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under Sub-section (1) of such offences as are within his competence to inquire into or try.

7. A plain reading of Section 190, Cr. P. C. shows that under Section 190, Cr. P. C. the Magistrate takes cognizance of an offence and not against any particular accused. Therefore, when once cognizance of the offence is taken by the Magistrate; may be on the basis of private complaint or on the basis of the police report or upon information received from any person other than the police officer, he may issue process against under Section 204, Cr. P. C. the accused persons who are alleged to have committed the offence.

8. The cognizance on the basis of the police report is taken when the Magistrate applies his mind to the facts contained in the police report filed under Section 173, Cr. P. C. In the case of a private complaint, the stage of taking cognizance is when the Magistrate embarks upon the enquiry under Sections 200 and 202, Cr. P. C. Once the Magistrate takes the cognizance of the offence either on the basis of the private complaint or on the police report, it is not permissible that subsequently he may take cognizance again of the same offence : See *Suresh v. State of Rajasthan* (1997) 3 Raj LW 1928 (Raj). Not only that, once the case proceeds further either by way of recording of evidence by the Magistrate or commitment to the Sessions, as the case may be, the Magistrate becomes *functus officio* so far as his powers under Section 190, Cr. P. C. are concerned: Vide : *Sheoram v. State of Rajasthan* 1982 Raj LR 550.

9. In the instant case, it is not disputed that after the police submitted challan against six persons the case was committed to the Court of Session. The moment the Magistrate committed the case to the Court of Session under Section 209, Cr. P. C. he became *functus officio* so far as his powers, under Section 190, Cr. P. C. in respect of the offence for which he had taken cognizance is concerned. Therefore, he could not take cognizance of the same offence on the basis of the private complaint filed by Ayub subsequently.

10. The only provision under which additional person can be impleaded as accused in a case after the case is committed to the Court of Session is contained

in Section 319, Cr. P. C. Under that Section, the Sessions Judge has a power to summon additional accused if it appears from the evidence that he had also committed the offence. Vide : Ranjit Singh v. State of Punjab 1998 (5) SCALE 375 : 1998 Cri LJ 4618. That being so, in the instant case, it was not open for the Magistrate to take cognizance of the same offence on the basis of the private complaint for which he had already taken cognizance on the police report and had even committed that case to the Court of Session.

11. The position may be different if during the pendency of the private complaint before the Magistrate it is brought to his notice that in respect of the same occurrence a police case also has been registered. The Magistrate in that case may call the report from the police and proceed under Section 210, Cr. P. C. Similarly, if a police report under Section 173, Cr. P. C. and a private complaint are filed simultaneously, the Magistrate may pass appropriate order of issuing process against the person not challenged by the police provided he has not become functus officio in so far as his powers under Section 190, Cr. P. C. is concerned.

12. In the instant case, the case had already been committed and thereafter the private complaint was filed. As such, the Magistrate could not have acted under Section 190, Cr. P. C. on the basis of the private complaint. That being so, the order of Magistrate taking cognizance on the private complaint of Ayub, and subsequent order of summoning the petitioner are not sustainable. The learned Sessions Judge has obviously erred when he upheld the order of the Magistrate.

13. Consequently, the petition succeeds, and the orders impugned therein are hereby quashed. This order will not prevent the Sessions Judge to pass an order under Section 319, Cr. P. C. against the petitioner, if he is satisfied by the evidence produced before him about the participation of the petitioner in the occurrence.