

**Bashir and ors. Vs. the State of Raj.**

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**SooperKanoon Citation :** [sooperkanoon.com/768910](http://sooperkanoon.com/768910)

**Court :** Rajasthan

**Decided On :** Dec-07-2000

**Reported in :** 2001(4)WLN346

**Judge :** Mohd. Yamin, J.

**Appeal No. :** S.B. Criminal Misc. Petition No. 219 of 2000

**Appellant :** Bashir and ors.

**Respondent :** The State of Raj.

**Disposition :** Petition allowed

**Judgement :**

**Mohd. Yamin, J.**

1. By this petition under Section 482 Cr.P.C, the petitioners have challenged the order framing charges against them for offences under Sections 147, 148, 323, 324/149, 427 & 395 IPC by the learned Additional Sessions judge, Deeg by his order dated 27.3.2000. They have also challenged the orders dated 10.3.2000 and 15.3.2000.

2. The factual matrix of the case is that it was alleged that on 10.3.1988 at about 10.00 am. when the informant Rajendra prasad was sitting at his shop in company of his brothers Hotilal, Kanhaiyalal and Dharmendra, the accused persons namely

Chhaju Khan, Bannu Khan, Nasru Khan, Zakir Khan, Mumrej Khan, Razak Khan, Kallu, Nannu, Ramesh Mishtri and four others who were unknown came to the shop. Nasru Khan was armed with a pistol while Mumrej had a farsa and the rest had lathies and jellies. All of them came and opened assault with an intention to kill. Mumrej dealt a blow on the person of Hotilal resulting an injury on his head. Hotilal is the real brother of complainant who was present at the shop at the relevant time. The rest of the brothers who were present at the shop were also assaulted by all of the above-named persons. They all received injuries. The accused persons took away a sum of Rs. 600/- along with some papers which were lying in the cash box. The case box itself was taken away. The showroom (shop) was also damaged resulting in glass pieces falling in the sweets lying there, rendering the sweets to be useless.

3. A case was registered under various sections. On the other hand accused petitioner Rujjal also got registered a case against the complainant party for offences punishable under Sections 147, 148, 149, 323, 324, 427 & 379 IPC. After due investigation chargesheets were submitted in both the cross cases. In the present case against the petitioners, no chargesheet was submitted against Bashir, Babu, Sultan and Rujjal and the chargesheet was submitted against other accused petitioners for offences under Sections 147, 148, 149, 323, 324 & 427 IPC. The complainant party was aggrieved at the hands of the investigating agency and submitted a protest petition seeking addition of Section 395 IPC. At the same time, another application also came to be filed by complainant Rajendra Prasad seeking for re-addition of accused petitioners Babu, Bashir, Sultan and Rujjal on account of their names being dropped from the list of the accused persons by the investigating agency. The learned Magistrate while deciding above-mentioned application and protest petition re-added Sultan, Babu, Bashir and Rujjal as accused persons and also took cognizance for the offence under Section 395 IPC. Then he committed the case to the Court of Sessions and the learned Additional Sessions Judge framed charges including the charge under Section 395 IPC against all the accused petitioners.

4. Learned counsel for the petitioners submitted that the learned Magistrate committed grave error by taking cognizance for offence under Section 395 IPC as

also re-adding the names of Babu, Bashir, Sultan and Rujjal without complying with the procedure laid down under Chapter XV of the Code of Criminal Procedure. He drew my attention to Section 202 Cr.P.C. which is as follows:

202. (1) Any Magistrate, on receipt of a complainant of an offence of which he is authorised to take cognizance or which has been made over to him under Section 192, may, if he thinks fit, postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made--

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session; or

(b) where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath under Section 200.

(2) In an inquiry under Sub-section (1), the Magistrate may, if he thinks fit, take evidence of witnesses on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(3) If an investigation under Sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by this Code on an officer in charge of a police station except the power to arrest without warrant.

It is provided under Sub-section (2) of this section that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

5. Learned counsel for the petitioner Mr. Bajwa submitted that before proceeding under Section 395 IPC, the learned magistrate was required to follow the procedure given in this Sub-section This was not followed, therefore, the order of taking cognizance and then resultant order of committal and thereafter order of framing charge are illegal.

6. The second limb of the argument of learned Counsel for the petitioner is that so far as Babu, Bashir, Sultan and Rujjal are concerned, they could have been added as accused only as per provisions of Section 319 of the Code of Criminal procedure. Once the police had submitted final report or they could be called to face trial, only after the provisions of Section 202(3) Cr.P.C. were followed.

7. To these arguments, learned Counsel for the opposite party and the learned Public Prosecutor submitted that a petition was filed against the order taking cognizance and the same was rejected by the learned Additional Sessions Judge. That being so, even then there is no bar under Section 482 Cr.P.C. to look into the matter of the cognizance as well as other orders passed by the learned Magistrate and by the learned Additional Sessions Judge.

8. In case of Krishan and anr. v. Krishnaveni and anr. : 1997 CriLJ1519 , it was held that second revision before the High Court after dismissal of first one by the Court of Sessions is barred under Section 397(3) of the Code of Criminal Procedure, but inherent power of the High Court is still available under Section 482 Cr.P.C. Such a power must be exercised sparingly so as to avoid needless multiplicity of procedure, unnecessary delay in trial and protraction of proceedings. Even otherwise, Section 483 Cr.P.C. provides that every High Court shall so exercise its superintendence over the Courts of Judicial Magistrates subordinate to it as to ensure that there is an expeditious and proper disposal of cases by such Magistrates. Therefore, the powers of this Court are wide enough to see that the Magistrate passes a proper order. It was contended by the learned Counsel for the complainant that the learned Magistrate when took cognizance for offence under Section 395 IPC, he looked into the statements recorded under Section 164, Cr.P.C. but it may be stated that the statement recorded under Section 164 Cr.P.C. does not become the statement under Section 203 of the Code of Criminal

Procedure when Chapter XV of the Cr.P.C. postulates a procedure that in case a complaint is made the Magistrate shall, follow the procedure given in Section 203 of the Cr.P.C., therefore, when the learned Magistrate took cognizance of offence under Section 395 IPC against other accused persons then Babu, Bashir, Sultan and Rujjal, he acted illegally. He could not have added Section 395 IPC without following the procedure laid down in Section 203 Cr.P.C. when a protest petition was submitted by the complaint himself, therefore, the order of committal of the accused persons for offence under Section 395. IPC cannot be maintained. So far as addition of Babu, Bashir, Sultan and Rujjal is concerned, their names could not have been added by the learned Magistrate firstly because procedural fault was committed by him by not recording the evidence of all the witnesses as provided under Section 203 Cr.P.C. and then secondly their names could not have been added unless provisions of Section 319 Cr.P.C. were followed which provides that where, in the course of an 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.

9. The Hon'ble Supreme Court in case of Raj Kishore Prasad v. State of Bihar and Anr. : 1996 CriLJ2523 has held that Magistrate has no such power to add the names of person in addition to one facing commitment. In case of Ranjit Singh v. State of Punjab : 1998 CriLJ4618 , it has been held that only the Court of Sessions has power to array a new person or persons as accused under Section 319 and this power cannot be invoked prior to evidence collection stage. Even in a latest judgment of Hon'ble Supreme Court in case of Kishori Singh and Ors. v. State of Bihar and Anr. JT 2000 (7) SC 564, it has been held that the persons named in the FIR but not chargesheeted and the offence is triable by the Sessions Judge, the Magistrate could not have issued process against such persons not chargesheeted though named in the FIR. Such persons could be arrayed as 'accused persons' only in exercise of power under Section 319 Cr.P.C. when some evidence or materials are brought as record during the course of trial.

10. In view of these judgments, the order of the learned Magistrate adding the four persons as accused cannot be termed as a correct order and has to be set aside

on both the grounds i.e. firstly procedure under Section 203 Cr.P.C. was not followed and secondly they were arrayed in contravention of Section 319 Cr.P.C. Consequently, the order of commitment and order of framing charges are liable to be quashed.

11. Learned counsel for the respondent cited decision in case of Rakesh Kumar Jain v. State through CBI, New Delhi : 2000 CriLJ3973 , in which the petitioner filed an application under Section 245 Cr.P.C. in the trial court for being discharged on the grounds that the order of prosecution had not been passed by an appropriate authority and that the cognizance could not have been taken as according to him the complaint was barred by limitation. The application was rejected by Magistrate and the revision filed in the High Court was dismissed. This case related to the offences under the Official Secrets Act, 1923 which provided taking of previous consent or sanction of the appropriate Government and the time required for obtaining such consent or sanction was to be excluded. The facts of this citation are entirely different and it does not apply to the facts of the present case.

12. Consequently, the petition is hereby allowed. The order of taking cognizance under Section 395 IPC, the order of commitment and the order of framing charges against the petitioners are hereby set aside. The case is remanded back to the learned Magistrate to hold inquiry as per provisions under Section 203(2) Cr.P.C. and if he finds that a case under Section 395 IPC is made out then he will pass necessary order against accused persons against whom offence under Section 395 IPC is made out and then, if necessary, shall commit the case to the learned Sessions Judge.