

**G. Palanisamy Vs. State Represented by Its Inspector of Police,district Crime Branch**

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**SooperKanoon Citation :** [sooperkanoon.com/783331](http://sooperkanoon.com/783331)

**Court :** Chennai

**Decided On :** Feb-03-2003

**Reported in :** 2003CriLJ4792

**Judge :** A. Packiaraj, J.

**Acts :** Code of Criminal Procedure (CrPC) - Sections 173(2) and 319

**Appeal No. :** Criminal Revision Petition No. 539 of 2001

**Appellant :** G. Palanisamy

**Respondent :** State Represented by Its Inspector of Police,district Crime Branch

**Advocate for Def. :** V. Arul, Government Adv.

**Advocate for Pet/Ap. :** A. Ramesh, Adv. for ;Ram and Ram

**Disposition :** Revision allowed

**Judgement :**

ORDER

**A. Packiaraj, J.**

1. This revision has been filed against the order passed by the Judicial Magistrate, No.II, Cuddalore in CrI.M.P. No.1111 of 2000 in CC No.200 of 1997, allowing the petition filed by the respondent herein under Section 319 Cr.P.C to add the petitioner as a accused, in the above CC.

2. The brief facts of the case is as follows :-

a)Thiru.Muthukumarasami,Sub Inspector of Police, Crime Branch, was directed in the year 1992, to enquire into the affairs of Cuddalore District Motor Transport and Fuel Bills Maintaining Section as it was informed that some irregularities were committed by the officers concerned. Accordingly, he conducted a preliminary investigation and gave a report, on the basis of which, CBCID took up the matter and investigated the incident and later filed a final report against one C.Gajendran, who was working as a constable in the armed reserved force, South Arcot District at Cuddalore from July 1986.

b)According to the final report, between the period 1.1.1989 and 22.2.1992 the accused's services were utilized in the motor transport and fuel bills maintaining section at District Police Office, Cuddalore and the accused used to prepare contingent bills, which were due to various petrol bunk owners and later the same were presented before the Husur Treasury for orders. Thereafter, when the Demand Draft for the respective bills were received in the cash section, the accused used to collect them in the disguise of disbursing them to the respective owners and used to get stamped signatures of the owners for their disbursement and in this manner he has committed a misappropriation of Rs.14732/-. In the process he has used the claim twice and therefore the accused was prosecuted for offence under section 409, 468 and 420 IPC.

c)Cognizance was taken by the Judicial Magistrate-II, Cuddalore. PW-1, Mr.Muthukumarasami, who conducted the preliminary investigation and filed a compliant was examined on 11.2.1999. PW-2, Mr.Shoukath Ali, was examined on 14.9.1999 and he deposed that he was the Superintendent during the period 22.1.1992 and 6.5.1992 and that the preliminary investigation was done under his supervision. He further explained the procedure adopted in getting the petrol bills disbursed. While so giving evidence, he has stated that as far as the disbursement

of bills relating to the petrol is concerned, the Personal Assistant of the Superintendent, Office Assistant and the petitioner are the three persons who could have been responsible for committing the offence. It is on the basis of this opinion evidence that the prosecution has sought for inclusion of the petitioner as an accused.

d)A counter was filed on behalf of the accused but the same was rejected and the learned Magistrate has passed orders allowing the petition, filed by the prosecution and included the petitioner as an accused.

3. The learned counsel for the petitioner would now argue that the Magistrate has failed to note that the power conferred under section 319 Cr.P.C is a special and extra ordinary power, required to be exercised only in exceptional cases, when compelling necessity exists. The power should not be exercised merely because some witness points out that there are some allegations against others or in the alternative, one of the witnesses suspects that the offence must be committed with the connivance or the negligence of another person and that the person who is suspected to have been negligent must be added.

4. In the present case, there is absolutely no evidence produced by the prosecution against the petitioner, as found in the records furnished to the court under 173(2) Cr.P.C and even PW-2, Thiru. Shoukath Ali, has not stated anything in his statement when he was examined by the Investigating Officer in relation to the complexity of the petitioner herein. But for the first time in court when he gave evidence, he has opined that the accused/Gajendran has committed fraud because of the negligence of the other two persons, of whom one is the petitioner herein. Solely on the basis of this statement, the prosecution has filed a petition under section 319 Cr.P.C and the Magistrate has allowed that. The evidence, according to the learned counsel for the petitioner, is in the form of an opinion of an particular individual namely PW-2, and even he too only says that the offence could have been committed with the connivance of the petitioner and another. Therefore, this being an opinion of an individual, cannot be equated to a positive evidence incriminating a person.

5. In support of his argument, the learned counsel brought to my notice a decision of the Supreme Court rendered in *Micheal Machoda and another vs. CBI and another* reported in AIR 2000 SCW 734. Their Lordships have held thus:

But even then, what is conferred on the court is only a discretion as could be discerned from the words, 'the Court may proceed against such person'. The discretionary power so conferred should be exercised only to achieve criminal justice. It is not that the court should turn against another person whenever it comes across evidence connecting that another person also with the offence. A judicial exercise is called for keeping a conspectus of the case, including the stage at which the trial has proceeded already and the quantum of evidence collected till then and also the amount of time which the court had spent for collecting such evidence. It must be remembered that there is no compelling duty on the court to proceed against other persons.

13. In *Municipal Corporation of Delhi Vs . Ram Kishan Rohtagi* : this court has struck a note of caution, while considering whether prosecution can produce evidence to satisfy the Court that other accused against whom proceedings have been quashed or those who have not been arrayed as accused, have also committed an offence in order to enable the Court to take cognizance against them and try them along with the other accused. This was how learned Judges then cautioned:

'But we would hasten to add that this is really an extra-ordinary power which is conferred on the Court and should be used very sparingly and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken.' 14. The Court while deciding whether to invoke the power under section 319 of the Code, must address itself about the other constraints imposed by the first limb of sub-section (4), that proceedings in respect of newly added persons shall be commenced afresh and the witnesses re-examined. The whole proceedings must be re-commenced from the beginning of the trial, summon the witnesses once again and examine them and cross-examine them in order to reach the stage where it had reached earlier. If the witnesses already examined are quite a large in number the Court must seriously consider whether

the objects sought to be achieved by such exercise is worth wasting the whole labour already undertaken. Unless the Court is hopeful that there is reasonable prospect of the case as against the newly brought accused ending in conviction of the offence concerned we would say that the Court should refrain from adopting such a course of action.'

6. On the basis of this decision, the learned counsel would say that in the present case, there is no evidence worth the name against the petitioner and as such, the Magistrate has erred in adding him as an accused in view of section 319 Cr.P.C.

7. I see considerable force in the argument of the learned counsel and on going through the evidence that has been adduced in the court below, I see that though three witnesses have been examined it is only Thiru.Shoukath Ali, PW-2 who spoke so when he narrated the procedures. He was of the opinion that offence could have been committed due to negligence of, or the third persons could joined to commit the fraud.

8. However, the Magistrate failed to see that on the basis of the preliminary enquiry made by PW-1 as well as PW-2, the investigating agency has investigated the matter, culled out the evidence only in relation to Thiru.Gajendran and there is absolutely no evidence against the petitioner herein. Adding a person on the basis of some suspicion created by one of the witnesses would be a travesty of justice. The evidence of Shoukath Ali examined as PW-2 is bereft of any positive material to show that the petitioner has had any role to play in the claim made twice for the same bills. Therefore I hold that the evidence given by PW-2 that he suspects the petitioner herein to have been involved in the commission of offence, would not be sufficient to array the petitioner as an accused. Hence I set aside the order of Judicial Magistrate, No.II, Cuddalore made in CrI.M.P. No.1111 of 2000 in CC No.200 of 1997. In the result, the revision is allowed. CrI.M.P.No.2553 of 2001 is closed.