

(2016) 05 CAL CK 0103
In the Calcutta High Court
Case No : C.R.R. No. 3558 of 2009

Dr. Alope Kumar Jaldata

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 18-05-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 319

Citation : (2017) 1 CalLJ 279

Hon'ble Judges : Malay Marut Banerjee, J.

Bench : Single Bench

Advocate : Mr. Sekhar Basu, Ld. Sr. Adv. Mr. Soubhik Mitter and Mr. Ranadeb Sengupta, Advocates, for the Petitioner; Mr. Manjit Singh, Ld. P.P. and Mrs. Debjani Sahu, Advocates, for the State

Final Decision : Dismissed

Judgement

Malay Marut Banerjee, J.—The opposite party no.2 herein filed a complaint in the Court of the Ld. Addl. Chief Judicial Magistrate, Diamond Harbour on 26th July, 2007 with prayer for a direction upon the police to register a case under Section 156(3) Cr.P.C. Such prayer was allowed and police registered F.I.R. no. 82 of 2007 starting a case under Section 376/313/317 and 120B I.P.C. against accused Pratap Paik and Dr. Alope Jaldata. It may be mentioned that Dr. Alope Jaldata is the petitioner in the revisional application.

2. It further appears that on completion of investigation police submitted charge-sheet under Section 376 I.P.C. against accused Pratap Paik. The other accused Dr. Alope Jaldata was not sent up in the charge-sheet, rather the I.O. made a prayer for his discharge. It also appears that although the opposite party no.1 hereinafter referred to as the prosecutrix initially filed a "Naraji" petition but that was subsequently not pressed. Be that as it may, the case was committed to the Court of Sessions. Charge under Section 376 I.P.C. was framed and the prosecutrix gave evidence as P.W.1 in the Court of the Ld. Addl. District & Sessions Judge, Fast Track, 3rd Court, Diamond Harbour in Sessions Trial No.

10(7) of 2009. On the prayer of the prosecution to proceed against the present revisionist/petitioner under Section 319 Cr.P.C., the Ld. Court below in terms of the impugned order dated 07.09.2009 passed the following order:

"Heard. Perused the evidence adduced by victim, i.e., P.W.1. It appears from the evidence of this victim that this Doctor had terminated her pregnancy without taking her consent so this is a fit case where the prayer of the prosecution to issue warrant of arrest should be allowed".

3. Aggrieved by dissatisfied with the aforesaid order the revisionist/petitioner Dr. Aloke Jaldata has filed this revisional application for setting aside the impugned order on various grounds but the Ld. Senior Advocate Mr. Sekhar Basu appearing for the revisionist/petitioner argued that the matter veers round a question of law as to whether a person who was subjected to investigation and was not sent up in the charge-sheet or in other words, discharged from the case can be proceeded against under Section 319 Cr.P.C. Mr. Basu, the Ld. Senior Counsel argued that although there is no specific order made by the Ld. Magistrate taking cognizance of the offence or committing the case to the Court of Session for discharge of the revisionist/petitioner but when the "Naraji" petition filed on behalf of the prosecutrix was rejected as being not pressed that is tantamount to an order of discharge and so the revisionist/petitioner could not be proceeded against in terms of the provision under Section 319 Cr.P.C.

4. Mr. Basu in support of his contention, first of all, relied on a decision in the case of Sohanlal & Ors. v. State of Rajasthan reported in (1990) 4 Supreme Court Cases 580 where it was held:-

"There is need for caution in resorting to Section 319. Once a person is found to have been the accused in the case he goes out of the reach of Section 319. Whether he can be dealt with under any other provisions of the Code is a different question. In the case of the accused who has been discharged under the relevant provisions of the Code, the nature of finality to 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 tempered with. Section 319 has to be read in consonance with Section 398".

5. Mr. Basu, the Ld. Senior Counsel further argued that a Constitution Bench of the Hon'ble Apex Court has also held the same view. The Ld. Senior Counsel relying on the case of Hardeep Singh v. State of Punjab & Ors reported in JT 2014(1) SC 412 laid emphasis on the concluding lines of that decision which is quoted as under:-

"Q. V Does the power under Section 319 Cr.P.C. extend to persons not named in the FIR or named in the FIR but not chargesheeted or who have been discharged?

A. A person not named in the FIR or a person though named in the FIR but has not been charge-sheeted or a person who has been discharged can be

summoned under Section 319 Cr.P.C. provided from the evidence it appears that such person can be tried along with the accused already facing trial. However, in so far as an accused who has been discharged is concerned the requirement of Sections 300 and 398 Cr.P.C. has to be complied with before he can be summoned afresh".

6. It was argued by Mr. Basu that in view of the ratio decided in the aforesaid decisions the revisionist/ petitioner could not be proceeded against under Section 319 Cr.P.C. and the impugned order is liable to be set aside.

7. The Ld. Public Prosecutor although opposed the prayer for setting aside the revisional application contending that in view of the clear and unambiguous testimony of the prosecutrix the Ld. Court below quite rightly passed the impugned order but he conceded that the rejection of the "Naraji" petition being not pressed is tantamount to discharge of the revisionist/petitioner from this case.

8. I have looked into the Lower Court Records including the depositions of the prosecutrix. Since argument has been advanced with regard to the position of law governing the field I have gone through the decisions relied on by the Ld. Senior Counsel appearing for the revisionist/petitioner. The Constitution Bench of the Hon"ble Apex Court in Hardeep Singh's case elaborately discussed the law governing the field in relation to Section 319 Cr.P.C. and it would only be wise and prudent to reproduce paragraphs 100 to 106 of the judgment and, of course, question no. V and answer thereto given by the Constitution Bench at the concluding lines of the judgment.

"100. In *Joginder Singh & Anr. v. State of Punjab & Anr.* [AIR 1979 SC 339], a three Judge Bench of this Court held that as regards the contention that the phrase "any person not being the accused" occurring in Section 319 Cr.P.C. excludes from its operation an accused who has been released by the police under Section 169 Cr.P.C. and has been shown in Column 2 of the Charge-sheet, the contention has merely to be rejected. The said expression clearly covers any person who is not being tried already by the Court and the very purpose of enacting such a provision like Section 319(1) Cr.P.C. clearly shows that even persons who have been dropped by the police during investigation but against whom evidence showing their involvement in the offence comes before the criminal court, are included in the said expression.

101. In *Anju Chaudhary v. State of U.P. & Anr.* [JT 2012(12) SC 582: 2013 (6) SCC 384] a two-Judge Bench of this Court held that even in the cases where report under Section 173(2) Cr.P.C. is filed in the court and investigation records the name of a person in Column 2, or even does not name the person as an accused at all, the court in exercise of its powers vested under Section 319 Cr.P.C. can summon the person as an accused and even at that stage of summoning, no hearing is contemplated under the law.

102. In *Suman v. State of Rajasthan & Anr.* [JT 2009(14) SC 169 : AIR 2010 SC

518], a two-Judge Bench of this Court observed that there is nothing in the language of this sub-section from which it can be inferred that a person who is named in the FIR or complaint, but against whom charge-sheet is not filed by the police, cannot be proceeded against even though in the course of any inquiry into or trial of any offence, the court finds that such person has committed an offence for which he could be tried together with the other accused. In *Lal Suraj (supra)*, a two-Judge Bench held that there is no dispute with the legal proposition that even if a person had not been chargesheeted, he may come within the purview of the description of such a person as contained in Section 319 Cr.P.C. A similar view had been taken in *Lok Ram (supra)*, wherein it was held that a person, though had initially been named in the FIR as an accused, but not charge-sheeted, can also be added to face the trial.

103. Even the Constitution Bench in *Dharam Pal (CB)* has held that the Sessions Court can also exercise its original jurisdiction and summon a person as an accused in case his name appears in Column 2 of the charge-sheet, once the case had been committed to it. It means that a person whose name does not appear even in the FIR or in the charge sheet or whose name appears in the FIR and not in the main part of the charge sheet but in Column 2 and has not been summoned as an accused in exercise of the powers under Section 193 Cr.P.C. can still be summoned by the Court, provided the court is satisfied that the conditions provided in the said statutory provisions stand fulfilled.

104. However, there is a great difference with regard to a person who has been discharged. A person who has been discharged stands on a different footing than a person who was never subjected to investigation or if subjected to, but not charge-sheeted. Such a person has stood the stage of inquiry before the court and upon judicial examination of the material collected during investigation, the court had come to the conclusion that there is not even a *prima facie* case to proceed against such person. Generally, the stage of evidence in trial is merely proving the material collected during the investigation and, therefore, there is not much change as regards the material existing against the person so discharged. Therefore, there must exist compelling circumstances to exercise such power. The Court should keep in mind that the witness when giving evidence against the person so discharged, is not doing so merely to seek revenge or is naming him at the behest of someone or for such other extraneous considerations. The court has to be circumspect in treating such evidence and try to separate the chaff from the grain. If after such careful examination of the evidence, the court is of the opinion that there does exist evidence to proceed against the person so discharged, it may take steps but only in accordance with Section 398 Cr.P.C. without resorting to be provision of Section 319 Cr.P.C. directly.

105. In *Sohan Lal & Ors. v. State of Rajasthan [JT 1990(3) SC 599 : 1990 (4) SCC 580]*, a two-Judge Bench of this Court held that once an accused has been discharged the procedure for enquiry envisaged under Section 398 Cr.P.C. cannot

be circumvented by prescribing to procedure under Section 319 Cr.P.C.

106. In *Municipal Corporation of Delhi v. Ram Kishan Rhtagi & Ors.* [AIR 1983 SC 67], this Court held that if the prosecution can at any stage produce evidence which satisfies the court that those who have not been arraigned as accused or against whom proceedings have been quashed, have also committed the offence, the court can take cognizance against them under Section 319 Cr.P.C. and try them along with the other accused".

"Q. V Does the power under Section 319 Cr.P.C. extend to persons not named in the FIR or named in the FIR but not chargesheeted or who have been discharged?

A. A person not named in the FIR or a person though named in the FIR but has not been charge-sheeted or a person who has been discharged can be summoned under Section 319 Cr.P.C. provided from the evidence it appears that such person can be tried along with the accused already facing trial. However, in- so- far as an accused who has been discharged is concerned the requirement of Sections 300 and 398 Cr.P.C. has to be complied with before he can be summoned afresh".

9. The Hon"ble Apex Court has categorised 3 different classes of persons against whom the power under Section 319 Cr.P.C. could be exercised. As held by the Apex Court, (1) A person not named in the FIR or (2) A person though named in the FIR but have not been charge-sheeted or (3) A person who has been discharged can be summoned under Section 319 Cr.P.C. provided from the evidence it appears that such person can be tried along with the accused already facing trial. The Hon"ble Apex Court has held that insofar as an accused who has been discharged is concerned the requirement of Section 300 and 398 Cr.P.C. has to be complied with before he could be summoned afresh.

10. The question which poses itself for consideration and which is most pertinent in this revisional application is whether the revisionist/petitioner can come under the category of "a person who has been discharged".

11. Such question can best be answered keeping in mind what has been held by the Supreme Court in *Sohan Lal's* case. The Hon"ble Apex Court in paragraph 30 of the judgment held :-

"..... The word "discharge" in Section 398 means discharge of an offence relating to the charge within the meaning of Section 227, 239, 245 and 249.

Refusing to proceed further after issue of process is discharge. The discharge has to be in substance and effect though there is no formal order".

12. In the present case the revisionist/petitioner was named in the FIR but has not been charge-sheeted. Copy of the charge-sheet in Column 11 A shows number of persons charge-sheeted-1(one) and Column 11B thereto shows number of persons not charge-sheeted-1(one). Column no.13 gives the name

and address of the revisionist/petitioner as particulars of the accused persons not chargesheeted.

13. As yet there was no occasion for the revisionist/ petitioner to have been discharged under Section 227 Cr.P.C. because at the stage of framing of charge he was not there before the Sessions Court as an accused. Section 239 Cr.P.C. has also got no manner of application in the case of the revisionist/petitioner as the said provision appears in chapter XIX relating to trial of warrant case by Magistrates. Similarly, the revisionist/petitioner cannot be held to be a person discharged in accordance with Section 245 Cr.P.C. since the said provision is applicable in cases instituted otherwise than on police report. The revisionist/petitioner was not before the Court in any judicial proceedings instituted upon complaint relating to a compoundable offence or a noncognizable offence and so he could not be discharged within the meaning of Section 249 Cr.P.C.

14. So, simply stated the answer is that the present revisionist/petitioner cannot come within the category of person discharged and the ratio decided in Hardeep Singh's case is of no help to the case of the revisionist/petitioner.

15. In view of what has been analysed and discussed above and when I find that the impugned order is not otherwise incorrect, illegal or improper, I find and hold that the revisional application cannot succeed and is liable to be rejected. The revisional application is accordingly rejected. The impugned order is affirmed.

16. Let a copy of this order with L.C.R. be sent down immediately with a direction upon the Ld. Court below to proceed with the case in accordance with law including against the revisionist/petitioner.

17. Urgent photostat certified copy of this order, if applied for, be supplied to the parties as early as possible.