
(2002) 03 AP CK 0130

In the Andhra Pradesh High Court

Case No : Criminal Revision Case No. 946 of 2000

Gangadharanandagiri Swamiji

APPELLANT

Vs

State of A.P. and Others

RESPONDENT

Date of Decision : 21-03-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 190, 190(1), 218, 219, 222
Penal Code, 1860 (IPC) — Section 323, 324, 341, 414
Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 —
Section 3(1)

Citation : (2002) 1 ALD(Cri) 680 : (2002) 2 ALT(Cri) 136 : (2002) 1 APLJ 432 :
(2002) CriLJ 3446

Hon'ble Judges : T. Ch. Surya Rao, J

Bench : Single Bench

Advocate : G. Sreenivasulu Reddy, for the Appellant; Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

T. Ch. Surya Rao, J.—This revision case has been directed against the order dated 8-8-2000 passed by the learned I Additional Judicial Magistrate of First Class, Proddatur, in CrI. M.P. No. 1436 of 2000 in C.C. No. 386 of 1999.

2. The petitioner herein has been sought to be added as an accused in the above case for the alleged offences punishable under Sections 341 and 323 of the Indian Penal Code and u/s 3(1)(x) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 ("the Act" for brevity). Under the impugned order under the C.C. has been converted into a Preliminary Registered Case (PRC), and the petitioner has been summoned to appear before the Court as an accused to face trial. The petitioner now seeks to assail the same in this revision case.

3. The Sub-Inspector of Police, Proddatur Urban, registered a case against two persons including the revision petitioner u/s 324 of the Indian Penal Code and u/

s 3(1)(x) of the Act, on a complaint lodged by one M. Vijaya Kumar. Eventually, after the investigation, he laid the charge-sheet against one Sanivarapu Vijayabhaskar Reddy, the second respondent herein, only u/s 341 of the Indian Penal Code omitting the petitioner. During the course of the trial, P.W. 1 the de facto complainant had been examined and he deposed on oath that the revision petitioner abused him touching his caste, beat him and asked the other accused to tie him. The Assistant Public Prosecutor filed a memo immediately thereafter requesting the Court to add the charge u/s 3(1)(x) of the Act and to summon the revision petitioner as an accused in the case. A notice has been issued to the counsel of the petitioner. After having heard on either side, under the impugned order, the learned Magistrate ultimately directed the petitioner to be added as an accused and converted the C.C. into a PRC inasmuch as the offence punishable u/s 3(1)(x) of the Act is triable exclusively by the Special Court.

4. Despite the notice the second respondent, de facto complainant, failed to appear before this Court.

5. The learned Counsel appearing for the revision petitioner contends that the chief-examination of the witness alone cannot be construed as evidence so as to invoke Section 319 of the Code of Criminal Procedure ("the Code" for brevity). It is his further contention that the power u/s 319 of the Code can be invoked only for the offence for which the cognizance has already been taken against the other accused and the Court is not competent to take cognizance of any fresh offence when the additional accused is sought to be impleaded. Although, the contention appears to be two fold, the learned Counsel is very much vehement as regards the second contention. Even otherwise, recently the Apex Court in *Rakesh and Another Vs. State of Haryana*, of Cri LJ held thus:

The contention that the term "evidence" as used in Section 319 Cr.P.C. would mean evidence which is tested by cross-examination cannot be accepted. The question of testing the evidence by cross-examination would arise only after addition of the accused. There is no question of cross-examining the witness prior to adding such person as accused. The section does not contemplate an additional stage of first summoning the person and giving him an opportunity of cross-examining the witness who has deposed against him and thereafter deciding whether such person is to be added as accused or not. Once the Sessions Court records a statement of the witness it would be part of the evidence. There being no cross-examination, it would be a prima facie material which would enable the Sessions Court to decide whether the powers u/s 319 should be exercised or not. The word "evidence" occurring in Sub-section (1) is used in a comprehensive and broad sense which would also include the material collected by the investigating officer and the material or evidence which comes before the court and from which the court can prima facie conclude that the person not arraigned before it is involved in the commission of the crime.

Therefore, the first contention of the learned Counsel appearing for the revision petitioner merits no consideration.

6. Apropos the second contention, the historical background of Section 319 of the Code, the provision germane in the contest for consideration, needs to be considered for better understanding of the matter. The corresponding provision in the old Code of 1898 is Section 351. Section 351 of the old Code may be extracted herein below thus:

351. Detention of offenders attending Court.- (1) Any person attending a criminal Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of inquiry into or trial of any offence of which such Court can take cognizance and which, from the evidence may appear to have been committed, and may be proceeded against as though he had been arrested or summoned.

(2) When the detention takes place in the course of any inquiry under Chapter XVIII or after a trial has been begun, the proceedings in respect of such person shall be commenced afresh, and the witnesses reheard.

(Emphasis is mine)

7. From a perusal of the above extracted provision, it is obvious that from the evidence if any person who is attending the Court appears to have committed any offence of which such Court can take cognizance he may be detained for the purpose of enquiry into or trial and in respect of that person the proceeding shall have to be commenced afresh and the witnesses re-heard. The provision is undoubtedly not hedged with any limitations save and except the one pertaining to the power to take cognizance by the Court. The expression used, inter alia, in the Section is "any offence of which such Court can take cognizance and which, from the evidence, may appear to have been committed" clearly indicates two aspects, namely, (i) that it shall appear from the evidence a person who is attending the Court has committed an offence; and (ii) that the offence is such that the Court can take cognizance. If the Court can take cognizance of the offence notwithstanding the fact that it is a different offence than the one for which the cognizance has already been taken and the trial has been in the process, the Court can detain the accused and as against that accused the proceeding shall be commenced afresh and the witnesses re-heard. The Section is found wanting in two situations, namely, the situation where the person who appears to have committed an offence during the course of the enquiry into or trial was not attending the Court; and the manner in which the cognizance will be taken as against that person. So as to make the Section fairly a comprehensive one realizing the two grey areas, the Law Commission in its 41st report recommended for suitable amendment of the said provision. It is expedient to extract herein below the relevant recommendation of the Law Commission thus:

24.80. It happens sometimes, though not very often, that a Magistrate hearing a case against certain accused finds from the evidence that some person, other than the accused before him, is also concerned in that very offence or in a connected offence. It is only proper that a Magistrate should have the power to

call and join him in the proceeding. Section 351 provides for such a situation, but only if that person happens to be attending the Court. He can then be detained and proceeded against. There is no express provision in Section 351 for summoning such a person if he is not present in Court. Such a provision would make Section 351 fairly comprehensive, and we think it proper to expressly provide for that situation.

24.81. Section 351 assumes that the Magistrate proceeding under it has the power of taking cognizance of the new case. It does not, however, say in what manner cognizance is taken by the Magistrate. The modes of taking cognizance are mentioned in Section 190, and are apparently exhaustive. The question is, whether against the newly added accused, cognizance will be supposed to have been taken on the Magistrate's own information u/s 190(1)(c), or only in the manner in which cognizance was first taken of the offence against the accused.... The question is important, because the methods of inquiry and trial in the two cases differ. About the true position under the existing law, there has been difference of opinion, and we think it should be made clear. It seems to us that the main purpose of this particular provision is, that the whole case against all known suspects should be proceeded with expeditiously and convenience requires, that cognizance against the newly added accused should be taken in the same manner as against the other accused. We, therefore, propose to recast Section 351 making it comprehensive and providing that there will be no difference in the mode of taking cognizance of a new person is added as an accused during the proceedings. It is, of course, necessary (as is already provided) that in such a situation the evidence must be reheard in the presence of the newly added accused.

(Emphasis is mine)

8. It is obvious from the above excerpted report that the Law Commission made two recommendations, namely, (i) to add an accused who is not before the Court but concerned with that offence or in any connected offence and (ii) the procedure or mode of taking cognizance as against the newly added accused. These two additions, in the view of the Law Commission, would make the provision fairly a comprehensive one. Pursuant to the said recommendation. Section 319 of the Code has been enacted amending the same in a suitable manner, which may be extracted herein below thus:

319. Power to proceed against other persons appearing to be guilty of offence.-

(1) Where, in the course of any 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.

(2) Where such person is not attending the Court, he may be arrested, or summoned, as the circumstances of the case may require, for the purpose

aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under Sub-section (1), then-

(a) the proceedings in respect of such person shall be commenced afresh, and the witness re-heard;

(b) Subject to the provisions of Clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced.

(Emphasis is mine)

Sub-section (1) of Section 351 of the old Code is akin to Sub-section (3) of Section 319 of the present Code. Similarly, Sub-section (2) of Section 351 of the old Code is akin to Clause (a) of Sub-section (4) of Section 319 of the present Code. Clause (b) thereof is a new provision. Sub-sections (1) and (2) of Section 319 are the two additions to Section 351 of the old Code. Thus, Section 319 of the present Code seeks to fill up the gap created in Section 351 of the old Code. It is obvious from a perusal of the said section that any person not being the accused before the Court who appears to have committed an offence during the course of any enquiry into or trial of an offence for which cognizance has already been taken, whether that person is attending the Court or not, he can be summoned and if he is added as an accused pursuant to the said decision of the Court, the mode of taking cognizance qua the newly added person is the same as in the case of the already arraigned accused. In other words, he is deemed to have been an accused when the Court has taken cognizance of the offence earlier. For this purpose, a legal fiction is created in Clause (b) of Sub-section (4) of Section 319 of the Code.

9. A critical examination of Sub-section (1) of Section 319 of the Code shows that it should appear to the Court during the course of enquiry into or trial of an offence that any person not being the accused has committed an offence for which such person could be tried together with the accused and it should appear so from the evidence. The said Section envisages two requirements, namely, (i) that some other person, who is not arraigned as an accused in that case has committed an offence; and (ii) that for such offence, that person could as well be tried along with the already arraigned accused vide Michael Machado and Another Vs. Central Bureau of Investigation and Another, .

10. In view of the contention that the newly added accused shall be tried for the offence already taken cognizance against the other accused alone, the second requirement requires further elucidation. The expression "has committed any offence for which such person could be tried together with the accused" has to be considered in the first instance in the above backdrop. The words "any offence"

used inter alia in the above excerpted expression may apparently sound that it need not necessarily be the one for which the cognizance has already been taken by the Court and the process of trial is on. However, those words shall not be read in isolation so as to mean any other offence. The whole expression as excerpted herein above shall have to be read together and understood. If it is so read, the words "any offence" are not all comprehensive but they are hedged with a limitation that the offence shall be such that the newly added person could be tried together with the already arraigned accused. If that offence is the same offence, which the newly added person appears to have committed, there cannot be any difficulty. But, if that offence is a different offence which the newly added person appears to have committed, then the Court shall see whether the accused and the newly added person could be tried jointly for that offence or not. In this context, the words "could be tried together" used inter alia in the above excerpted expression gain significance. This automatically arouses the necessary curiosity as to when two persons could be tried together. In this context, Chapter XVII of the Code which deals with "Charges" is germane to be considered. It is in two parts. Part-A deals with form and content of charges and Part-B pertains to joinder of charges and joinder of accused. We are not concerned with Part-A in this judgment. Part-B contains Sections 218 - 223. Sections 218 - 222 deal with joinder of charges in respect of various offences committed by a single person. Section 223, however, deals with plurality of persons, who can be tried together, in other words, the joint trial of more than one person.

11. Section 223 of the Code, therefore, is a relevant provision to be considered and the same may be extracted, insofar as it is relevant for the present purposes, herein below thus:

223. What persons may be charged jointly.- The following persons may be charged and tried together, namely.-

(a) persons accused of the same offence committed in the course of the same transaction.

(b) persons accused of an offence and persons accused of abetment of, or attempt to commit, such offence;

(c) persons accused of more than one offence of the same kind, within the meaning of Section 219 committed by them jointly within the period of twelve months;

(d) persons accused of different offences committed in the course of same transaction;

(e) persons accused of an offence which includes theft, extortion, cheating, or criminal misappropriation, and persons accused of receiving or retaining, or assisting in the disposal or concealment of property possession of which is alleged to have been transferred by any such offence committed by the first named persons, or of abetment of or attempting to commit any such last-named

offence;

(f) persons accused of offences under Sections 411 and 414 of the Indian Penal Code (45 of the 1860), or either of those sections in respect of stolen property the possession of which has been transferred by one offence;

(g) person accused of any offence under Chapter XII of the Indian Penal Code (45 of 1860) relating to counterfeit coin and persons accused of any other offence under the said Chapter relating to the same coin or of abetment of or attempting to commit any such offence, and the provisions contained in the former part of this Chapter shall, so far as may be, apply to all such charges:

Provided that where a number of persons are charged with separate offences and such persons do not fall within any of the categories specified in this section, the Magistrate may, if such persons by an application in writing, so desire, and if he is satisfied that such persons would not be prejudicially affected thereby, and it is expedient so to do, try all such persons together.

12. A perusal of the said provision shows that the persons accused of the same offence committed in the course of the same transaction, the persons accused of an offence and the persons accused of an abetment or attempt to commit such offence, the persons accused of more than one offence of the same kind, the persons accused of different offences committed in the course of same transaction can be charged jointly. Clause (d) of Section 223 clearly envisages joint trial of persons who have committed different offences but in the course of the same transaction. Thus it is obvious as to when two persons could be tried together albeit for different offences but committed in the course of the same transaction.

13. Applying the said test, if we consider the expression "has committed any offence for which such person could be tried together with the accused", it is obvious that the newly added accused need not necessarily be for the same offence but it could be for a different offence or a connected offence, but the crucial condition being that offence shall be such that both the persons could be tried jointly. In other words, there shall not be any mis-joinder of persons and the newly arraigned accused could be tried for a different offence but the different offence should be committed in the course of the same transaction.

14. When Section 319 of the Code came to be incorporated in the amended form in the new Code with an intention to cover up the gap contained in Section 351 of the old Code, the background under which the Section came to be incorporated, though not decisive, is very much germane for consideration in interpreting the provision. The intention is obvious, as can be seen from the 41st report of the Law Commission, that an accused can be added for the offence already taken cognizance of by the Court and also for any connected offence. Now, in the course of the same transaction, if different offences are committed by the different accused and when the person left out is sought to be added as an accused before Court when it appears during the course of the evidence his

involvement in the offence, if that person is left out on the ground that he cannot be tried for a different offence than what has already been taken cognizance of, by the Court, the very purpose of amending the Section would get frustrated. The main purpose of this provision is that the whole case against all known suspects should be proceeded with expeditiously and that being the main object when both the persons - one arraigned as accused before the Court and the order (other) who is left out by the investigating agency - could be tried together for different offences but committed in the course of the same transaction and in the course of the evidence it so appears to the Court that left out accused has committed an offence and he could be tried along with the accused already before the Court, there is no point in saying that he cannot be added as an accused for a different offence although the said offence has been committed in the course of the same transaction along with the other accused. In such a case, despite the fact that the Court is satisfied from evidence that a person other than the accused before it has committed a different offence than the offence for which the Court had already taken cognizance qua the other accused, the Court has no option except to leave the offence without conducting any trial and the offender unpunished. Taking a hypothetical situation here that when more than one accused with the common intention of committing theft trespassed into a dwelling house and while committing the offence of theft in the course of the same transaction, one out of them committed an assault outraging the modesty of woman member of the house and as a matter of that even an offence of rape and, if for any reason, that offence had not been detected during the course of the investigation but had come to light during the course of the trial of the case, the Court shall have to proceed against that person who appears to have committed that offence of outraging the modesty of woman or as matter of that rape during the course of the same transaction while committing theft in the dwelling house. If on the premise that the offence that appears to have committed is an altogether different offence and, therefore, the person cannot be added as an accused, as regards the offence of outraging the modesty of woman or rape though disclosed during the course of trial, the Court shall have to remain as a mute spectator and the grave offence of outraging the modesty of woman or rape would go unpunished. Certainly that cannot be the object in incorporating the provision of Section 351 under the old Code and the amended provision of Section 319 under the present Code.

15. The learned Counsel appearing for the revision petitioner seeks to place reliance upon a Judgment of the Kerala High Court in Annamma Cherian Vs. State of Kerala, Justice K.G. Balakrishnan, as his Lordship then was, was of the view that inasmuch as Clause (b) of Sub-section (4) of Section 319 of the Code creates a legal fiction that the case against the newly added accused may be proceeded as if he had been an accused when the Court took cognizance of the offence upon which the trial was commenced; the newly added accused shall, therefore, be tried only for the offence that had already been taken cognizance by the Court in respect of the other accused but not for any fresh offence.

16. In *Kumari Misra Vs. Chander Roshni Dubey and Others*, a learned single Judge of the Allahabad High Court held in para 8 thus at page 2158 of Cri LJ:

8. The power u/s 319 can be invoked only for the offence already taken cognizance against other accused and the court is not competent to take cognizance of any fresh offence, if any additional accused is impleaded u/s 319, Cr.P.C....

17. In the former judgment it is obvious that Clause (b) of Sub-section (4) of Section 319 of the Code has been considered dehors the other provision under Sub-section (1) thereof. Clause (b) of Sub-section (4) of Section 319 of the present Code, in my considered view is procedural in nature since it envisages the procedure as to the manner in which the cognizance can be taken qua the newly added accused. In the latter judgment a learned single Judge of the Allahabad High Court while summing up the case made a passing observation that the power u/s 319 could be invoked only for the offence already taken cognizance. Certainly, it was not germane in the context obtaining from the facts of that case for decision. In both the above referred judgments the back drop in which Section 319 in the amended form came to be incorporated in the Code has not been considered. With due respect and for the reasons enumerated herein above I cannot concur with the same. If a person is added as an accused invoking the provisions of Sub-section (1) of Section 319 of the Code for the reasons discussed hereinabove, I see no inconsistency in between Sub-section (1) and Clause (b) of Sub-section (4) of Section 319. Even for the different offence said to have been perpetrated in the course of the same transaction, the legal fiction works out and the offence could legitimately be deemed to have been taken cognizance of by the Court along with the other accused.

18. Having regard to the above discussion, I am of the considered view that a person can be added as an accused invoking the provisions u/s 319 of the Code not only for the same offence but also for even a different offence but that offence shall be such that in respect of which both the accused could be tried together. In other words, the test enjoyed u/s 223 of the Code should be satisfied and that is the only limitation engrafted on the power of the Court to add a new person as an accused during the course of an enquiry into or trial of an offence. Therefore, the second contention of the learned Counsel appearing for the revision petitioner also merits no consideration.

19. This then takes us to the other question whether the person could added as an accused for an offence which is exclusively triable by a Court of Session. Here, in the instant case, according to the facts initially the crime has been registered for the offence punishable u/s 324 of the Indian Penal Code and u/s 3(1)(x) of the Act. The Investigating Officer, however, laid the charge-sheet against one accused only for the offences punishable under Sections 323 and 341 of the Indian Penal Code. The facts disclosed that the said offences are said to have been committed by the persons mentioned in the First Information Report in the course of the same transaction at one and the same time. During the course of

the evidence of PW 1, it has been disclosed that the left out accused has committed an offence. In view of the provisions of Section 223 of the Code, the left out persons could be tried along with the accused already on record and it is not a case of mis-joinder of charges or mis-joinder of persons. Had the Court below applied its mind to the facts of the case, the initial cognizance could have been taken against the left out accused even though he has not been arrayed as accused by the Investigating Agency and nothing prevents the Court at that stage from issuing summons to him by taking cognizance of the case against him also. Vide *M/s. SWIL Ltd. Vs. State of Delhi and Another*, . Now that the Court has taken cognizance only against the accused already arrayed before it by the Investigating Agency without considering the material on record and without caring to know as to why the other person is left out when at a later point of time it is disclosed that he (left out person) too has committed an offence albeit that offence is exclusively triable by a Court of Session, I do not see any reason as to why he shall not be added. It may be mentioned here that the case which is pending before the Court is one triable by a Judicial Magistrate of First Class and it is not exclusively triable by a Court of Session. Had it been a case where it is exclusively triable by a Court of Session, the hands of the learned Magistrate are tied or fettered and he cannot do anything in the matter except to see whether the package sent by the prosecuting agency is in order before committing the case to the Court of Session. In that view of the matter, now the hands of the learned Magistrate are not fettered here. The case against the proposed accused being exclusively triable by a Court of Session and in view of the legal fiction contained in Clause (b) of Sub-section (4) of Section 319 of the Code, that case is taken cognizance of against the proposed accused along with the other accused in the first instance itself, I see no legal bar for taking cognizance of that offence which is exclusively triable by a Court of Session. Here, in this case, the learned Magistrate has issued summons to the revision petitioner and simultaneously directed the case to be registered as Preliminary Registered Case. Such course adopted by the learned Magistrate by no stretch of the imagination can be considered as illegal. In that view of the matter, the decision of the Apex Court in *Raj Kishore Prasad Vs. State of Bihar and another*, , sought to be relied upon by the learned Counsel appearing for the revision petitioner has no application to the present facts. I, therefore, see no illegality or material irregularity that has been committed by the learned Magistrate under the impugned order.

20. For the foregoing reasons, the Criminal Revision Case fails and is dismissed.