
(1989) 03 RAJ CK 0042

In the Rajasthan High Court

Case No : Criminal Revision No"s. 325 and 426 of 1982

Smt. Vijaya Bai and Another etc.

APPELLANT

Vs

State of Rajasthan

RESPONDENT

Date of Decision : 23-03-1989

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173, 190, 239, 251A(2), 319
Penal Code, 1860 (IPC) — Section 147, 323, 325, 336, 369

Citation : (1990) CriLJ 1754 : (1989) 1 RLW 138 : (1989) 2 WLN 296

Hon'ble Judges : M.C. Jain, J

Bench : Single Bench

Advocate : R.P. Vyas, for the Appellant; Suresh and R. Kumbhat and Gopi Kishan Vyas, Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

M.C. Jain, J.—These revisions are directed against the order dated 6-9-82 passed by the learned Judicial Magistrate, first class, No. 2 Bikaner whereby cognizance was taken against the present petitioners of the various offences and also against Uttam Chand and Hanuman for the offences Under Sections 147, 336, 323 and 325, I.P.C. and charges were ordered to be framed against the accused petitioners Vishnu, Padamchand and Sohanlal for the aforesaid offences except offence u/s 427 for which they were already charged.

2. Charge-sheet was presented against all the accused persons for the aforesaid offences after hearing arguments before charge. The petitioners Vijaya Bai and Jia Bai were discharged by the learned Magistrate on 3-10-80. The other accused petitioners in another revision were also discharged of the offences Under Sections 147, 325, 336 and 323, I.P.C. and the three accused persons namely Sohanlal, Padamchand and Vishnu were charged for the offence u/s 427, I. P.C. After recording plea of these three accused persons, the prosecution led evidence. The prosecution examined P.W. 1 Shantilal P.W. 2 Sampatlal. P.W. 3 Chhaganlal and P.W. 4 Durga Bai. On the application of the Assistant Public

Prosecution the learned Magistrate passed the impugned order after taking into consideration the evidence of four witnesses recorded during the trial. Aggrieved against this order these revisions have been preferred.

3. I have heard learned counsel for the petitioners and learned counsel for the respondents and the learned Public Prosecutor.

4. The question that arises for consideration in these revision petitions is whether a Magistrate is competent to take cognizance of the offence after recording some evidence against the accused-persons who have been earlier discharged of those offences as would be evident from the facts stated above. Charge sheet was presented against the present petitioners in both the revision petitions u/s 147, 427, 336, 325 and 323, IPC. Vijaybai and Jabai were discharged of all the offences whereas Sohanlal, Padamchand and Vishnu were discharged of the offence other than Section 427 in respect of which sufficient material was found to proceed against them. The learned Magistrate in the impugned order has considered the evidence of P.W. 1 Shantilal P.W. 2 Sampatlal and P.W. 4 Durgabai, Durgabai had received a grievous injury whereas Sunita and Tara received simple injuries and their evidence is to the effect that all these accused persons demolished the well and pelted stones as a result of which injuries were suffered by Durgabai, Sunita and Tara. The learned Magistrate found prima facie case against all the accused persons for the aforesaid offences also passed the impugned order.

5. Learned counsel for the petitioner submitted that the petitioners having been once discharged, it is not open to the Magistrate to proceed against them. The only remedy available was to go in revision. Learned counsel placed reliance on a decision of Devendra Chandra Paul Vs. Haridas Deb and Others, In the said decision it has been observed that "where a discharge order has been validly passed, the Magistrate becomes functus officio so far as the case is concerned and unless there is a fresh complaint or a fresh charge sheet, no action in the matter can be taken by the Magistrate, A fresh complaint can under law be entertained by the Magistrate. But, in the absence of any such complaint, Any attempt to go back on the orders of discharge passed by him and to revive the case, as if the accused had not been discharged, would amount in law to a review of the judgment of the Magistrate which is not permissible having regard to Section 369. Therefore, the order of the Magistrate sue motu reviving the case and proceeding with the trial of the same on its merits is clearly devoid of jurisdiction and illegal. The proper course to follow is to make a reference to the Sessions Judge or the District Magistrate having jurisdiction, for a revision of the discharge order.

6. Learned counsel for the non-petitioner on the other hand submitted that the aforesaid decision of the Assam and Nagaland does not lay down the correct law. Reference was made to the decision of Gujarat High Court in Saraswatiben Vs. Thakorlal Himatlal and Another, This case has distinguished the aforesaid Assam case and in this case, it has been laid down as under:--

"If at the one stage, on the evidence before him the Magistrate finds that there is no prima facie case against the accused, but subsequently on inquiry as a result of further evidence, if he feels that there is prima facie case against the accused, whom he has discharged u/s 251A(2) of Cr. P.-C., it is open to him to frame a charge against the accused. The Magistrate takes cognizance of offence and not of a case. It is not necessary to take cognizance again u/s 190(c) of Cr. P.C. The cognizance taken on the police report continues until the whole matter is over. The Magistrate does not become functus officio when he continues the cognizance of offence and has not terminated his cognizance by punishing all the persons found to be guilty and acquitting all persons found to be not guilty".

7. A similar question arose for consideration before the Punjab and Haryana High Court. Learned counsel for the non-petitioner cited the case *Amarjit Singh @ Amba v. State of Punjab* reported in (1983) 85 Pun LR 324 : 1983 Cri LJ NOC 98. This decision proceeds on the basis of the language used u/s 319. It was observed in this case as under:--

"The expression "not being the accused" occurring in Section 319, Cr. P.C. immediately given rise to two queries (i) not being the accused before which Court (ii) and at what stage. Section 319, Cr. P.C. authorises a Court to summon a person as an accused if the evidence before it shows that such person had committed any offence for which he could be tried together with the persons who are already being tried as an accused. That means till such time evidence of the kind is before the Court the question of summoning a person not being the accused does not arise, so, it would be at the stage when the evidence is being adduced before the Court that it would consider that the person implicated by the evidence is being tried as an accused before it or not. If such a person is not being tried as an accused, then that person can be summoned to be so tried even though that very Court earlier had discharged him u/s 239, Cr. P.C. on the basis of the material placed before the Court in the form of report u/s 173, Cr. P.C."

8. It may be stated that on account of order of discharge fresh trial is not in any way barred. Order of discharge passed u/s 239, Cr. P.C. does not amount to acquittal as no trial has taken place and as such fresh trial can be held and for the fresh trial, cognizance can be taken on the basis of fresh material. Here the learned Magistrate recorded the evidence of four witnesses and after considering their evidence proceeded to take cognizance of the offences in respect of which order of discharge was passed earlier against the present petitioners in both the revision petitions. In my opinion, it is not a case of reviewing the order of discharge passed by the magistrate earlier. It is a case of taking cognizance of the offences on the basis of the evidence recorded by the magistrate himself. It is not in any way prohibited in law. In my opinion having regard to the language of Section 319, it is permissible and the magistrate is fully competent to take cognizance of the offence on the basis of evidence recorded by him, though for the same offences, order of discharge may have been passed by him earlier.

9. In the above view of the matter, these revision petitions have no force so they are hereby dismissed.