
(2000) 08 SHI CK 0007

In the High Court Of Himachal Pradesh

Case No : Criminal Reference No. 1 of 2000

State of Himachal Pradesh

APPELLANT

Vs

Jamna Dass and Others

RESPONDENT

Date of Decision : 10-08-2000

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 173, 204, 319, 362
Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 34

Citation : (2001) 1 ShimLC 412

Hon'ble Judges : Kamlesh Sharma, J

Bench : Single Bench

Advocate : Sandeep Kaushik, Asstt. Advocate General, for the Appellant;
Jagdish Vats, for the Respondent

Judgement

Kamlesh Sharma, J.—This reference u/s 395(2) Code of Criminal Procedure has been received from the Additional Sessions Judge, Shimla for the decision of this Court on the following questions of law arising in Sessions Trial No. 31-S/7 of 97:

1. Whether the Court of Additional Sessions Judge, Shimla is competent to review/recall its own order dated 5.11.1998 passed in the application u/s 319 Code of Criminal Procedure whereby Respondents No. 13 and 14, namely, Asha Chauhan and Ram Chand were added as accused to face the trial together with other accused committed to trial by the committal Court?

2. Whether in the facts and circumstances on record it is a fit case for the Additional Sessions Judge to send the report to the High Court for passing appropriate orders in exercise of its inherent powers or revisional powers to direct the committing Magistrate to rectify the committal order by committing to trial the left out accused?

2. The backdrop in which these questions of law have arisen is that FIR No. 27/97 under Sections 302, 147, 148, 149 and 342 IPC was registered against 14 accused persons (Respondents) including Asha Chauhan and Ram Chand at the

instance of Ram Rattan son of deceased Brahma Nand on the allegations that on 2.2.1997 the accused persons trespassed into the land of deceased Brahma Nand with intention and preparation to construct road thereon despite the stay order granted by the Civil Court in favour of deceased Brahma Nand and on his showing resistance the accused persons pelted stones as a result of which he received grievous injuries and ultimately succumbed to them. After investigation the report u/s 173 Code of Criminal Procedure was filed in the Court of Judicial Magistrate Ist Class (1), Shimla only against 12 accused persons and Asha Chauhan and Ram Chand were not arrayed as accused. After committal the case was assigned to the Additional Sessions Judge before whom the Public Prosecutor moved an application for the impleadment of Asha Chauhan and Ram Chand as accused persons, which was allowed on 5.11.1998 on the ground that from the material on record i.e. report u/s 173 Code of Criminal Procedure their positive involvement in the commission of alleged crime is prima facie made out. After they were duly served and represented by counsel, charge against them as well as other accused persons was framed under Sections 147, 148, 342 and 302 read with Section 149 IPC on 5.1.1999 and the case was listed for recording prosecution evidence on 10.5.1999, when an application was filed on behalf of Asha Chauhan and Ram Chand for recalling the order dated 5.11.1998 on the ground that the order impleading them as accused without recording any evidence during the trial and merely passed on the basis of report u/s 173 Code of Criminal Procedure is bad in law as held by the Supreme Court in Ranjit Singh Vs. State of Punjab, The application was opposed by the prosecution. Instead of deciding the application himself, the Additional Sessions Judge has made the reference under consideration.

3. So far the first point of law is concerned, admittedly there is no provision in the Code of Criminal Procedure giving powers to a Criminal Court to alter or review its own order. Learned Counsel appearing for the accused persons has cited a judgment of the Supreme Court in K.M. Mathew Vs. State of Kerala and another, , in which it is held by the learned Judges in para 8:

8. It is open to the accused to plead before the Magistrate that the process against him ought not to have been issued. The Magistrate may drop the proceedings if he is satisfied on reconsideration of the complaint that there is no offence for which the accused could be tried. It is his judicial discretion. No specific provision is required for the Magistrate to drop the proceedings or rescind the process. The order issuing the process is an interim order and not a judgment. It can be varied or recalled. The fact that the process has already been issued is no bar to drop the proceedings if the complaint on the very face of it does not disclose any offence against the accused.

4. This Court may point out that in that case the learned Judges were dealing with the complaint case in which after examining the complainant on oath, summons were issued to the accused who after entering the appearance and before the evidence was recorded, requested the Magistrate to drop the

proceedings against him and the Magistrate had accepted the plea of the accused and dropped the proceedings. Feeling aggrieved the complainant had taken up the matter to the High Court in a revision, which was allowed and the order of the Magistrate was set aside. The learned Judges of the Supreme Court have found that the High Court was too technical in holding that in a summons case there is no question of discharging the accused at an intermediate stage and the Magistrate is bound to proceed under Chapter XXII of the Code of Criminal Procedure when the accused enters appearance. As per the learned Judges of the Supreme Court on careful reading of the provisions relating to the trial of summons case the power to drop the proceedings against the accused cannot be denied to the Magistrate, if on rehearing he finds that there is no allegation in the complaint involving the accused in the commission of alleged crime, as in that case he has no jurisdiction to proceed against the accused.

5. Relying upon the judgment of the Supreme Court in *K.M. Mathew v. State of Kerala and Anr.* (supra) the learned Single Judge of Rajasthan High Court in *Tara Chand v. State of Rajasthan* 1997(3) RCR 765, has held in para 9:

...It may be kept in mind that an order summoning a person as an accused by issuing process u/s 204 Code of Criminal Procedure or making an order u/s 319 Code of Criminal Procedure is passed in his absence, the person so summoned as an accused in a case must, therefore, have a legal right to raise objection against the order passed against him in his absence. That is what this Court had also observed while disposing of Petitioners' petition u/s 482 Code of Criminal Procedure. The learned Sessions Judge was therefore, in error in taking the view that the Magistrate had no jurisdiction to reconsider the order passed by him on 26.7.1988 taking cognizance of the offences against the Petitioners. For that reason the order under revision cannot be sustained.

6. Learned Counsel for the accused persons has further referred to the judgment of Delhi High Court in *Mr. G.K. Chugani v. Dhanwanti* 1986 (2) R.C.R. 515, in which the learned Single Judge has held that if the order passed by the Magistrate is void ab initio and mere nullity, it can be challenged by the aggrieved party anywhere and everywhere and even the Magistrate is entitled to ignore the same and rectify the glaring error, which was certainly of a serious nature resulting in grave miscarriage of justice and by no stretch of imagination such an order can be called a judicial order or a final order within the meaning of Section 362 Code of Criminal Procedure

7. On the other hand, learned Assistant Advocate General has urged that in the absence of any provision in the Code of Criminal Procedure, a Criminal Court has no power to review or recall its own order and the only course open to the aggrieved party is to approach the Revisional Court or the High Court for exercising its inherent powers u/s 482 Code of Criminal Procedure. Referring to Section 362 Code of Criminal Procedure the learned Assistant Advocate General has urged that except to correct a clerical or arithmetical error a Criminal Court cannot alter or review its judgment or final order.

8. After considering the submissions of learned Counsel for the parties this Court finds that in view of the ratio of the judgment in *K.M. Mathew v. State of Kerala and Anr.* (supra) a Criminal Court has the power to alter and review its interim order passed in the absence of the aggrieved person on reconsidering the matter when he puts in appearance and convinces the Criminal Court that the order passed by it is bad in law either for want of jurisdiction or being illegal. Such orders are-Order summoning a person as an accused by issuing process u/s 204 Code of Criminal Procedure or order u/s 319 Code of Criminal Procedure impleading a person as an accused.

9. So far the case in hand is concerned, though accused Asha Chauhan and Ram Chand have sought recall/review of the order dated 5.11.1998 impleading them co-accused u/s 319 Code of Criminal Procedure yet there is a distinction that after putting in appearance they did not object to their impleadment and also framing of charge against them, and filed the application at the stage of recording the prosecution evidence, apparently for the reason that in the meantime the judgment of the Supreme Court in *Ranjit Singh v. State of Punjab* (supra) was delivered. It is held in paras 19 to 22 of that judgment:

9. Thus, once the Sessions Court takes cognizance of the offence pursuant to the committal order the only other stage when the Court is empowered to add any other person to the array of the accused is after reaching evidence collection when powers u/s 319 of the Code can be invoked. We are unable to find any other power for the Sessions Court to permit addition of new person or persons to the array of the accused. Of course it is not necessary for the Court to wait until the entire evidence is collected for exercising the said powers.

20. But then one more question may survive. In a situation where the Sessions Judge notices from the materials produced but before any evidence is taken, that any other person should also have necessarily been made an accused (without which the framing of the charge would be defective or that it might lead to miscarriage of justice) is the Sessions Court completely powerless to deal with such a contingency? One such situation is cited by the learned Judges through an illustration narrated in *Kishun Singh's* case (1993 AIR SCW 771) (supra) as follows (para 15):

Where two persons A and B attack and kill X and it is found from the material placed before the Judge that the fatal blow was given by A whereas the blow inflicted by B had fallen on a non-vital part of the body of X. If A is not challanned by the police, the Judge may find it difficult to charge B for the murder of X with the aid of Section 34 IPC. If he cannot summon A, how does he frame the charge against B?

21. Another instance can be this. All the materials produced by the investigating agency would clearly show the positive involvement of a person who was not shown in the array of accused due to some inadvertance or omission. Should the Court wait until evidence is collected to get that person arraigned in the case?

22. Though such situation may arise only in extremely rare case the Sessions Court is not altogether powerless to deal with such situations to prevent miscarriage of justice. It is then open to the Sessions Court to send a report to the High Court detailing the situation so that the High Court can in its inherent powers or revisional powers direct the committing Magistrate to rectify the committal order by issuing process to such left out accused. But we hasten to add that the said procedure need be resorted to only for rectifying or correcting such grave mistakes.

Therefore, in this background the Additional Sessions Judge is right in making reference to this Court instead of himself allowing that application in view of the law laid down in *Ranjit Singh v. State of Punjab* (supra). The first point of law is answered accordingly.

10. Coming to the second point of law, in view of the discussion hereinabove this Court finds that the Additional Sessions Judge has rightly made a report to this Court to exercise inherent powers or revisional powers for directing the Committing Magistrate to rectify the committal order by issuing process to the left out accused, namely, Asha Chauhan and Ram Chand as after perusing the material on record i.e. report u/s 173 Code of Criminal Procedure this Court is satisfied that there is ample evidence on record, which shows positive involvement of these persons to implead them as accused and the investigating agency has gravely erred in not impleading them in the array of accused. It seems that their names have been omitted on the basis of some supplementary statements of the witnesses recorded u/s 161 Code of Criminal Procedure wherein they have not named Asha Chauhan and Ram Chand accompanying the other accused in the commission of alleged crime but this was not the valid reason for not impleading them as accused, as it is not for the investigating agency to assess the evidence collected by them to decide whether involvement of a person in the commission of alleged crime is established or not to array him as an accused. If there is some positive evidence showing the involvement of a person in the commission of alleged crime, the investigating agency must array him as an accused. The case in hand is an example where the investigating agency has exercised a discretion which is not vested in it. It does not appeal to be a mistake due to some inadvertence or bona fide omission. For meeting with this extra-ordinary situation this Court will follow the course as laid down by the Supreme Court in *Ranjit Singh v. State of Punjab* (supra) and in exercise of its inherent powers set aside the order dated 5.11.1998 passed by the Additional Sessions Judge and direct the committing Magistrate to rectify the committal order by committing Asha Chauhan and Ram Chand to trial and thereafter the Additional Sessions Judge will proceed with the Sessions Trial in accordance with law. Order accordingly. The parties are directed to appear before the committal court on 16.10.2000. The records be sent to the committal. Court at an early date.