
The State of Maharashtra and others Vs Rajkumar Singh and others

Criminal Writ Petition No. 1051 of 1997

Court: Bombay High Court

Date of Decision: Dec. 1, 1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) â€” Section 244, 245, 246, 319, 482#Railway Property (Unlawful Possession) Act, 1966 â€” Section 3

Citation: (1999) 5 BomCR 349 : (1999) 1 MhLj 821

Hon'ble Judges: D.G. Deshpande, J

Bench: Single Bench

Advocate: M.P. Galeria, app, for the Appellant; Y.R. Singh and P.M. Pradhan, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

D.G. Deshpande, J.

Heard learned A.P.P. for the State-petitioner on whose behalf the petition is filed and Mr. Y.R. Singh for the

accused-respondents. R.P.F. Kurduwadi filed a complaint u/s 3-A of the Railway Property (Unlawful Possession) Act originally against three

accused. This complaint was filed u/s 244 of the Criminal Procedure Code as a case instituted otherwise than on a police report. The trial

Magistrate recorded evidence of three witnesses and on application filed by the prosecution issued notice to the present respondents why they

should not be joined as accused Nos. 4 to 7 in that case. The accused/respondents appeared before the Magistrate and applied for quashing the

notice on the ground that firstly, there was no material in the evidence of the prosecution so as to attract the provisions of section 319 of the

Criminal Procedure Code and secondly, on the basis of two rulings of Calcutta High Court and Karnataka High Court, reported in Gulam Mondal

Vs. Nazam Hossain and Others, , and Sannarevanappa Bharamajappa Kalal alias Kuncharkar & others v. State of Karnataka, respectively, the

Magistrate accepted the contention raised by the respondent/accused and quashed the notice. The complainant/Inspector, R.P.F., Solapur filed a

revision before the Additional Sessions Judge, Solapur, but the Illrd Additional Sessions Judge (S.Y. Padhye) dismissed the revision. The State

has, therefore, filed this petition.

2. The learned A.P.P. for the State produced the copies of the statements of three witnesses recorded by the the trial Magistrate. These witnesses

include one Jogendersing Surajsing Jat, P.W. No. 2 and one Vinod Kumar Khajansingh Choudhari, P.W. No. 3. Both these witnesses are the

members of R.P.F. (so also all the respondents/accused are in R.P.F.). From the evidence of these two witnesses, the learned A.P.P. contended

that there was more than sufficient evidence before the Magistrate to issue the"" notice to the respondent u/s 319 of the Criminal Procedure Code.

He also contended that the Magistrate did not consider the provisions of sections 244, 245 and 246 of the Criminal Procedure Code and also the

provisions of section 319, and wrongly interpreting the case of Karnataka High Court and Calcutta High Court while quashing the notice issued by

him. He, therefore, contended that both the orders of the Magistrate as well as the Additional Sessions Judge are liable to be quashed.

3. On the other hand it was contended by advocate for the respondents that it was not open to the trial Court to issue any notice u/s 319 of the

Criminal Procedure Code on the basis of the statements made by the witnesses before the Magistrate (which, according to the Counsel for the

accused, did not amount to evidence. He contended that the evidence meant not only examination-in-chief but also cross-examination and since in

the instant case there was no cross-examination of the witnesses, their statements before the Court could not be considered as evidence for

invoking the provisions of section 319 of the Criminal Procedure Code. He also placed reliance on both the aforesaid judgments of the Calcutta

High Court and Karnataka High Court which were accepted in his favour by the trial Court as well as the Sessions Court. Therefore, according to

him, there is no merits in this petition and same is liable to be rejected.

4. I do not find any force in the submissions made by the Counsel for the accused. Even though the judgment of the Calcutta High Court supports

his view, so far as Karnataka High Court is concerned, the Magistrate has not given citation and has only given the names of the parties and what

appears from the reproduction of the said judgment is that if the witnesses were not submitted in cross-examination after the examination-in-chief,

then Court is to be precluded from acting on such incomplete evidence. It is well settled principle of law that if the witnesses are not offered for

cross-examination, their evidence cannot be considered at all. In the instant case, there is no question of not offering witnesses for cross-

examination. Therefore, the Karnataka High Court judgment is of no help to the accused/respondents.

5. So far as judgment of Calcutta High Court is concerned, the facts disclose that the Additional Sessions Judge, Burdwan in a complaint case

refused to entertain the complainant's application for issuing summons to two persons for joining them as the accused in his private complaint.

According to the complainant, he had examined two witnesses in his support and in the evidence of those witnesses sufficient material was brought

on record to issue notice to the proposed accused u/s 319 of the Criminal Procedure Code. The Calcutta High Court rejected his application on

two grounds viz. that there was inordinate delay in filing the complaint and in applying for issuance of summons to two more accused, and

secondly, on the ground that the evidence of the prosecution witness was not yet complete as only his examination-in-chief was recorded. Since

the submissions made by the Counsel for the accused/respondent is based on this judgment of the Calcutta High Court, it is necessary to refer to

sections 319, 244, 245 and 246 of the Criminal Procedure Code to find out as to what is meant by word "Evidence" with reference to this section.

6. Section 319 of Cr.P.C. provides that ""where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence"" The

question is whether the use of word evidence in this section can only mean as contended by the Counsel for the respondents/accused, i.e. the

evidence recorded in examination-in-chief and followed and completed by cross-examination or whether evidence in any form coming before the

Court.

7. If wordings of section 319 are considered, the power is given to the Court to join a person as an accused at any stage of inquiry into or trial of,

an offence. If the contention of the Counsel for the respondents/accused is accepted, then it would mean that even at the stage of inquiry an

accused has right of cross-examination and no steps can be taken by the Magistrate on the basis of evidence recorded or on the basis of

statements of witnesses made before the Magistrate on oath.

8. This argument is nullified by the provisions of sections 244, 245 and 246 onwards. Section 245 of the Cr.P.C. prescribes, procedure to be

followed in the case instituted otherwise than on a police report. It says that ""when, in warrant case instituted otherwise than on a police report, the

accused appears or is brought the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced. Section

245 further provides that ""If, upon taking all the evidence referred to in section 244 the Magistrate considers that no case is made out against

the accused, the Magistrate shall discharge him."" Section 246 provides that ""If, when such evidence has been taken, and the Magistrate is of

the opinion that the accused has committed an offence triable by him, he shall frame a charge against the accused.

9. It would be clear that the word Evidence has been used in all these three sections 244, 245 and 246 and if use of the word "Evidence is

considered with reference to the procedural stages that are required to be followed by the Magistrate, it cannot be said that also the word

evidence includes and covers the evidence recorded by the Magistrate in examination-in-chief followed by cross-examination. If section 244 is

properly interpreted it is clear that as soon as the accused is produced or brought before the Magistrate, he has to hear the prosecution and to take

all the evidence which may be produced in support of the prosecution. Section 245 also refers to the evidence recorded by the Magistrate and

empowers him to discharge the accused, if no case is made out against the accused. If the submissions of Counsel for the accused/respondent are

accepted, that the evidence only means and covers examination-in-chief and cross-examination, then it would mean that an order for discharge by

the Magistrate u/s 245 cannot be passed by him with reference to the evidence recorded by the Magistrate, which is by way of examination-in-

chief. For all these reasons the submissions made by the respondents/ accused advocate cannot be accepted and I am unable to agree with the

view expressed by the Calcutta High Court which has not considered the provisions of section 244, 245 and 246 of the Criminal Procedure Code.

10. It was further contended by the Counsel for the respondents that the Magistrate could have invoked the provisions of section 319 against the

present accused only after three witnesses of the prosecution were cross-examined by the original accused No. 1, 2 and 3 and the Magistrate had

framed the charge. If wordings of section 319 of the Cr.P.C. are again considered, no doubt that even after cross-examination of the witnesses

and framing of the charge, the Magistrate could have issued the notice to the present accused u/s 319 of the Cr.P.C. because section 319 does not

impose any condition on the Magistrate and does not lay down that this power can be invoked only at the particular stage and inquiry or trial. The

Court or Magistrate can invoke this power at any stage of inquiry and trial provided there is an evidence on record. Therefore, even if, it was open

to the Court to allow the original accused to cross-examine the witnesses, frame the charge and then to issue notice to the present respondents, the

Court did not commit any illegality in issuing the notice to the respondents before framing of the charge. Since both the courts have mainly relied

upon the judgments of the Calcutta High Court and Karnataka High Court no fault can be found with their reasonings, however, those orders

cannot be sustained. Hence the order :

ORDER

The petition is allowed.

Rule is made absolute.

Both the orders of the trial Judge as well as the Additional Sessions Judge in favour of the respondents are quashed. Trial to proceed, according to

law.

10. Petition allowed.