
(1988) LW(Cri) 449

Madras High Court

Case No: Criminal R.C. No. 788 of 1983 and Criminal R.P. No. 771 of 1983

Ramasubramanian

APPELLANT

Vs

State

RESPONDENT

Date of Decision: July 3, 1987

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 173, 190, 204, 207, 223
- Evidence Act, 1872 - Section 132
- Penal Code, 1860 (IPC) - Section 409

Citation: (1988) LW(Cri) 449

Hon'ble Judges: David Annoussamy, J

Bench: Single Bench

Advocate: N.T. Vanamamalai for S. Ashokkumar and S. Pannerseivam, for the Appellant; P.G. Thamaraiselvi for the Public Prosecutor, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

David Annoussamy, J.

This is a criminal revision petition by a witness against whom it was decided by the Court to proceed under S. 319 of the Code of Criminal Procedure.

2. The essential facts which are relevant for the disposal of this case are as follows: A. final report was filed by P.W.13, Inspector of Police, Tanjore, on 30-6-1976 to the effect that an offence under S. 409 of the India Penal Code appeared to have been committed by the Accountant of the I.T.T., Tanjore. The Sub-Divisional Judicial Magistrate, Tanjore took up the matter for trial and in respect of the said charge 13 witnesses were examined on behalf of the prosecution and 83 exhibits were marked, 13 exhibit: were marked on the side of the defence. The accused was also examined under S. 313 of CrI.P.C. Thereafter it appears that the accused has filed an application that the petitioner herein, who was the

Principal of the Institution at the time of the commission of the offence, should also be arrayed as an accused. That application was returned by the Magistrate, calling upon the accused to state the provision of law under which it was filed. Subsequently, on 25-7-78 the Assistant Public Prosecutor filed an application praying the court to invoke S. 319 of Code of Criminal Procedure against the petitioner. He has not stated in that petition what were the elements on record which were incriminating the petitioner. It is not also known whether the petitioner was given notice of the said application. It is true that under S. 319 of Crl.P.C., the Court can even without an application of the Public Prosecutor, implicate a person other than the accused. The Court passed an order on 25-7-1978 arraying the petitioner who was P.W.3 as the second accused in the case, under S. 319 of Code of Criminal Procedure Against that order Cr.R.C. No. 125 of 1979 was filed by P.W.3. That revision petition was disposed of by this Court on 21-11-1980 and it was observed that the order was laconic and did not contain all the elements that it should and therefore the matter was remitted to the trial Court for fresh disposal. The trial Court took up the matter again and after giving P.W.3 an opportunity of being heard, passed an order dated 11-8-1983 arraying again the petitioner (P.W.3) as the second accused in the case. Against that second order the present revision is filed.

3. The case of the revision petitioner is that the order passed by the Magistrate is illegal and that at any rate the materials on record do not justify an order under S. 319 of Crl P.C. The way in which the matter has, been dealt with by the Magistrate indicates that the relevant provisions of the Code of Criminal Procedure have been over, looked or misunderstood. What the court does under S. 319 of Code of Criminal Procedure corresponds to what it will do in normal course under Ss. 190 and 204 of Code of Criminal Procedure viz., taking cognizance of an offence and issuing summons. For the first step the court would have before it usually the first information report and for the second step the final report tiled by the investigating officer under S. 173 of Crl.P.C, which would show that a particular offence appeared to have been committed by some person. In fact even under S. 319 of Code of Criminal Procedure the same phrase as in S. 173, Code of Criminal Procedure is used, i.e., "it appears from the evidence that any person not being the accused has committed any offence"". In other words, if an application is filed by the Public Prosecutor, it should contain in substance the same elements as a final report under S. 173, Code of Criminal Procedure If the court proceeds suo motu it should prepare a list of statements of witnesses and documents which would incriminate the newly added accused. If the latter has already tendered evidence, the Magistrate, has to make sure that the evidence which would become inadmissible under S. 132 of the Evidence Act is eschewed. Lastly, the court should not lose sight of the fact that the person newly added should be susceptible of being tried together with the accused already on trial. Therefore it should satisfy itself whether the conditions embodied in S. 223, Code of Criminal Procedure are fulfilled. Then as soon as the accused becomes available to the Court he should be supplied with copies of all statements and documents to be used against him, as provided under S. 207, Crl.P.C, that the accused could prepare his defence effectively in this trial. Thereafter the

prosecution and the accused will have to be heard and if before framing charge the accused prays for being discharged under S. 239, Code of Criminal Procedure his application should be considered.

4. Normally when an order has been passed under S. 319, Code of Criminal Procedure this Court would not be inclined to interfere till the stage of S. 239 or 240 has gone through so that there is opportunity for the accused to get discharged at the hand of the trial court itself. In this case, it appears that the matter has already come once in this Court and the occurrence has taken place in the year 1975. It will not be proper to remit back the matter again. So, I shall proceed to examine whether this is a fit case for invoking the provisions of S. 319 of Code of Criminal Procedure, In this case, the trial court instead of listing the statements of witnesses and the documents with the gist thereof and stating that it would appear therefrom that an offence under S. 409 I.P.C. has been committed by the petitioner along with the accused has proceeded to write a judgment analysing and discussing the materials available as if it was an order for discharge or acquittal or conviction.

5. Learned Public Prosecutor was helpful enough to cull out from the judgment the materials which were available before the Magistrate for passing the order he did. The materials are as follows:

1. The cross examination of P.W.I to the effect that P.W.3 has the duty to verify daily the accounts maintained by the accused.

2. The evidence of P. Ws. 8 to 10 to the effect that they wrote to the petitioner complaining that the money due to them by the institution was not paid.

3. Ex D13, which is the report of the Auditor to the effect that P.W.3 has not discharged properly his supervisory duty as far as the accounts maintained by the accused are concerned; and

4. The statements made by P.W.3 himself in his cross examination to the effect (a) that he has allowed both the keys to be in the custody to keep one key with him, (b) that he has got a duty to check and verify the accounts daily and (c) that if he had discharged his supervisory duty properly the occurrence would not have taken place.

6. As far as the 4th material is concerned, a question would arise, whether it will not be hit by S. 132 of the Evidence Act. Even otherwise the materials now available, even if they are proved, would show that he has not been negligent in the discharge of the duty or that he was guilty of dereliction of duty for which administrative disciplinary action could be taken against him. But there is nothing to disclose in those materials that he has become guilty of an offence under S. 409 of I.P.C. Further, it is to be noted that it is P.W.3, who initiated the whole proceedings against the Accountant/accused by preferring a complaint. Another question would also arise in this case regarding the transposing of P.W.3 as an accused at this stage. If he is so transposed all the evidence he has

adduced against the accused would be of no avail as far as the prosecution against the first accused is concerned. It has been held by this Court in *Bhagat Dolia v. State* 1976 L.W. (CrL.) 177 that the Court while exercising its power under S. 351 (now S. 319, Code of Criminal Procedure) has a duty to see that in its attempt to bring all offender to justice, its action does not become a self defeating one, and that it would become self-defeating by way of obliteration of evidence tendered against the main offender in the case. It is seen that in this case P.W.3 had not only been at the source of the prosecution against the accused, but also that he has been the main witness in the trial and that documents Exs. P4 to P63 have been marked through this witness. It appears also in this case that the accused after successfully inducing the prosecution to array P.W.3 as an accused has filed on 4-9-1978 another application to transpose P.W.1 as well as an accused. If this trend is continued, the whole prosecution against the main accused will necessarily collapse. Therefore, taking into account the materials available against P.W.2 and the circumstances of the case, it would not be just and proper for the Magistrate to array P.W.3 as an accused.

7. In the result, the order of the Court below is set aside and the revision is allowed.