

Criminal Revision

Present:

The Hon'ble Justice Ashim Kumar Roy

Date of judgment: 06.01.2010

C.R.R. No. 1969 of 2009**Alok Kumar Mukherjee
versus
State of West Bengal****Point:**

SECOND COGNIZANCE, ACCUSED NOT CHARGE SHEETED: Whether Court can take cognizance of the self-same offence for the second time on the self-same materials – Police has not charge sheeted, whether court can proceed against such accused-The Criminal Procedure Code, 1973 S. 167(5).

Fact: A case started relating to the offence punishable under Section 120B/224 of the Indian Penal Code against accused/a Bench Clerk, attached to Court who produced custody warrant before the petitioner being the Lock up-in-Charge and got one Bangladeshi Citizen released. Subsequently, a note was discovered endorsed on the custody warrant not to release that Bangladeshi Citizen. Accused filed application under Section 167(5) of Criminal Procedure Code praying for discharge from the case since no charge sheet was submitted within the statutory period. While rejecting such application, the magistrate further directed to issue summons against the petitioner on the basis of incriminating evidentiary materials collected by Police against the petitioner. The petitioner files the instant Criminal Revisional Application challenging the order of issuance of summons against him on the ground 1] that the Ld. Magistrate had no authority to direct issuance of summons against any person not arraigned as accused while considering the application under Section 167(5) of Criminal Procedure Code of an accused named in the F.I.R., and 2] Cognizance of the self-same offence can not be taken twice when once the Magistrate had taken cognizance of offence against a particular accused it was not permissible for Court to take cognizance of offence against another accused, subsequently on the self-same materials.

Held:

It is well settled that the Ld. Court is not bound by the conclusions arrived at by the Police at the end of investigation and it is duty of Court after taking cognizance of offence to find out real offender and if it is found that Police has left out anybody whose complicity clearly transpires from the evidentiary materials, then in that case Ld. Magistrate always has the liberty to proceed against such accused, who has not been charge-sheeted. (Paragraph – 6)

It is correct that Court can not take cognizance of the self-same offence for the second time on the self-same materials which justify taking of cognizance, no prejudice can said to have been caused to anyone and at best the same would be an irregularity which does not vitiate a proceeding. In fact taking cognizance means that judicial notice of commission of any offence on the materials placed before a Court. (Paragraph – 7)

For Petitioner : Mr. Angshuman Chakraborty

For State : Mr. Joy Sengupta

The Court:

A case relating to the offence punishable under Sections 120B/224 of the Indian Penal Code was started against one Bidyut Chatterjee, a Bench Clerk attached to the Court of the Learned Judicial Magistrate, 9th Court, Alipore and one Dolly Howlader, a Bangladeshi National. The allegation as against them are as follows;

“On 1.10.08. the accused Dolly Howlader was brought at Alipore Sadar Court, Bengal Lock Up from custody for her production before the Learned Judicial Magistrate, 9th Court, Alipore in connection with Jadavpur Police Station

Case No. 355 (6) 08, under Section 224 of the Indian Penal Code. When the accused Bidyut Chatterjee, Bench Clerk – 1, attached to the Learned Judicial Magistrate, 9th Court, Alipore along with one Law Clerk, Moloy Chatterjee produced the custody warrant before the Lock Up In-charge and got her released on the strength thereof. The said Dolly Howlader was handed over to the accused Bidyut Chatterjee. Subsequently, it was discovered that there was a note endorsed on the custody warrant for not releasing her from custody as she was a Bangladeshi National.

The aforesaid case gave rise to Alipore Police Station Case No. 241, dated 30.10.08, under Sections 120B/224 of the Indian Penal Code.

2. Since within the statutory period no charge-sheet was submitted, the accused Bidyut Chatterjee moved an application under Section 167 (5) of the Code of Criminal Procedure before the Learned Court below, praying for his discharge from the case. The said application came up for hearing before the Learned Chief Judicial Magistrate, South 24-Parganas, Alipore. When the Learned Magistrate having found that sufficient evidentiary materials showing complicity of the accused Bidyut Chatterjee in the commission of the offence, were collected by the police before the expiry of the statutory period rejected his prayer for discharge under Section 167 (5) of the Code of Criminal Procedure. While passing such order the Learned Magistrate further found that from the evidentiary materials collected by the police sufficient incriminating materials have also been transpired against one Law Clerk, Moloy Chatterjee and the then Lockup In-charge Alok Kumar Mukherjee of the Bengal Lockup, disclosing their

complicity in the commission of the offences. Accordingly, the Learned Magistrate directed issuance of summons against them.

In this criminal revision the accused Alok Kumar Mukherjee challenged the said order of issuance of summons as against him.”

3. The learned advocate Mr. Angshuman Chakraborty in support of this criminal revision urged the following points;

(a) The Learned Magistrate has no authority to direct issuance of summons against any person not arraigned as accused, while considering the application under Section 167 (5) of the Cr.P.C. of an accused named in the FIR.

(b) Earlier the Learned Magistrate took cognizance of the offence relating to the said case on April 21, 2009. Therefore, taking cognizance for the second time by the impugned order passed on May 19, 2009 is absolutely illegal and without jurisdiction.

(c) Cognizance of the self-same offence cannot be taken twice.

(d) Once the Magistrate take cognizance of offence against a particular accused it is not permissible for a Court to take cognizance of offence against another accused, subsequently on the self-same materials.

(e) The accused was the Lockup In-charge and in complete bona fide he released the accused Dolly Howlader on the strength of a custody warrant, the genuinity whereof, he has no reason to doubt as was produced by the accused Bidyut Chatterjee, a Bench Clerk attached to the Court of the Learned Judicial Magistrate, 9th Court, Alipore.

On the other hand, Mr. Joy Sengupta, Learned Counsel, appearing on behalf of the State submitted as follows;

(a) There is no illegality in directing issuance of summons against an accused while disposing of the application under Section 167 (5) of the Code moved by another accused.

(b) The cognizance is taken of an offence not against any offender and once cognizance is taken it becomes the duty of the Learned Court to find out the real offender.

Mr. Sengupta in support of his contention relied on two case laws, viz., Raghubans Dubey Vs. State of Bihar, reported in AIR 1967 SC 1167 and Kishun Singh & Ors. Vs. State of Bihar, reported in 1993 SCC (Cri) 470.

4. Heard the learned advocates appearing on behalf of the parties. Considered their respective submissions. Perused the case laws cited by them. The Xerox Copy of the custody warrant relating to Jadavpur Police Station Case No. 355 (6) 08 be kept with the records.

5. So far as the present petitioner is concerned, it appears from the evidentiary materials collected during investigation that he released the accused Dolly Howlader, a Bangladeshi National from custody at the behest of the accused Bidyut Chatterjee, a Bench Clerk attached to the Court of the Learned Judicial Magistrate, 9th Court, Alipore and another Law Clerk, although there was a specific endorsement on the custody warrant by the Superintendent, Presidency Correctional Home, Kolkata that she should not be released as she was a Bangladeshi National. I have carefully perused the custody warrant which

is the part of the Case Diary and in my opinion, there is no legal scope to overlook such endorsement. In this connection it is pertinent to note as it appears from the record on June 30, 2008 the accused Dolly Howlader was released on bail in connection with Jadavpur Police Station Case No. 355 (6) 08 and on July 2, 2008 the Learned Court below made a record about the receipt of a report from the Superintendent, Presidency Correctional Home, Kolkata to the effect that Dolly Howlader is a Bangladeshi National and all papers regarding her repatriation has been completed and she was awaiting for deportation and as such should not be released. The present petitioner was given temporary charge of the Bengal Lockup from September 15, 2008 to October 4, 2008 and on 1st October, 2008 the said Dolly Howlader was taken out of the custody although the bail order was made on June 30, 2008 more than three months before. As such it cannot be said that no prima facie case has been disclosed against the present petitioner on the materials collected by the police during investigation.

6. It is well settled that the Learned Court is not bound by the conclusion arrived at by the police at the end of investigation and it is the duty of the Court after taking cognizance of offence to find out the real offender and if it is found that police has left out anybody whose complicity clearly transpires from the evidentiary materials, then in that case the Learned Magistrate always has the liberty to proceed against such accused, who has not been charge-sheeted.

7. Now the question, arises for consideration whether after taking cognizance on a police report, a Court can take cognizance for the second time on the same and can direct issuance of summons against any person not charge-

sheeted. So far as the question of taking of cognizance for the second time is concerned it is correct the Court cannot take cognizance of the self-same offence for the second time on the self-same materials. However, if cognizance is taken for the second time on the self-same materials which justify taking of cognizance, no prejudice can be said to have been caused to anyone and at best the same would be an irregularity which does not vitiate a proceeding. In fact taking cognizance does not involve any formal action and taking cognizance means that taking judicial notice of commission of any offence on the materials placed before a Court. In this case I have already found sufficient prima facie materials as against the present petitioner. Therefore, I do not find any illegality or impropriety in the order impugned.

This criminal revision has no merit and accordingly stands dismissed.

Criminal Section is directed to deliver urgent Photostat certified copy of this Judgement to the parties, if applied for, as early as possible.

(Ashim Kumar Roy, J.)