

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 10.07.2015

Date of verdict : 31.07.2015

CORAM

THE HONOURABLE MR. JUSTICE R.SUBBIAH

Crl.R.C.Nos.1451 & 1499 of 2008

S.Jayaraj Petitioner in both Crl.RCs.

Vs.

1.The State of Tamilnadu,
rep. by the Sub-Inspector of Police,
F4 Thousand Lights Police Station,
Chennai-600 006.

2.Mr.Amudhavanan Respondents in both Crl.RCs
(R2 was impleaded as per
order of this Court dt 22.12.2008
in M.P.No.1/2008)

Crl.R.C.No.1451 of 2008 has been filed under Section 397 r/w 401 of Cr.P.C. praying to call for the records pertaining to the orders in M.P.No.122 of 2008 in C.C.No.8711 of 2002 dated 04.08.2008 on the file of the learned XIV Metropolitan Magistrate, Egmore, Chennai and to set aside the same.

Crl.R.C.No.1499 of 2008 has been filed under Section 397 r/w 401 of Cr.P.C. praying to call for the records pertaining to the orders in M.P.No.2953 of 2007 in C.C.No.8711 of 2002 dated 2.1.2008 on the file of the learned XIV Metropolitan Magistrate, Egmore, Chennai and to set aside the same.

For Petitioner : Mr.R.Selvakumar

For Respondents : Mr.M.Mohamed Riyaz,
Govt. Advocate (Crl.Side)
(For R1)

COMMON ORDER

Crl.R.C.No.1451 of 2008 has been filed by the petitioner praying to set aside the order dated 04.08.2008 passed by the learned XIV Metropolitan Magistrate, Egmore, Chennai in M.P.No.122 of 2008 dismissing the petition filed by the petitioner herein to recall the summons issued to the petitioner and to discharge him from the offence.

2.Crl.R.C.No.1499 of 2008 has been filed by the petitioner praying to set aside the order dated 2.1.2008 passed by the learned XIV Metropolitan Magistrate, Egmore, Chennai in M.P.No.2953 of 2007 in C.C.No.8711 of 2002, ordering for reopening of the case and issuance of summons to the petitioner herein/accused.

3.The circumstances, which necessitated the petitioner herein/A1 to file the above said Revision Cases viz., Crl.R.C.Nos.1451 & 1499 of 2008, are as follows:-

3(1)The defacto-complainant is one Amuthavanan and he was working as a Section Supervisor (O) in the Controller of Telecom Store in BSNL Office. On 08.03.2002 at about 3.30 pm, the petitioner/A1 along with two other outsiders entered into the office of the Defacto-complainant and attacked him. Hence, the complaint, dated 08.03.2002, was lodged by the defacto-complainant. After investigation, the charge-sheet has been filed as against the petitioner herein and other accused in C.C.No.8711 of 2002 on the file of the learned XIV Metropolitan Magistrate, Egmore for the alleged offences under Sections 341, 323 r/w 34 IPC.

3(2)During the course of trial, since the Investigating Officer did not turn up to the Court, on 04.07.2007 the learned XIV Metropolitan Magistrate, Egmore, by exercising his powers under Section 258 of Cr.P.C., stopped all further proceedings in C.C.No.8711 of 2002 and discharged the petitioner herein/A1 from all the charges levelled against him under Sections, 341 & 323 IPC. While discharging the petitioner/A1, in the same order dated 04.07.2007 the learned Magistrate has observed as follows:- "Opportunity is given to the respondent to reopen the case if materials are available". Thereafter, the 1st respondent herein/Prosecution has filed a petition in M.P.No.2953 of 2007 in C.C.No.8711 of 2002 under Section 300(5) of Cr.P.C, to reopen the case stating that sufficient materials are available to proceed against the petitioner herein/A1. The said petition was allowed by the learned Magistrate by order dated 02.01.2008 and the case was reopened and issuance of summons to the petitioner/A1 was ordered.

3(3)Since the case was reopened, the petitioner had filed M.P.No.122 of 2008 in C.C.No.8711 of 2002 before the learned XIV Metropolitan Magistrate, Egmore, Chennai, seeking to discharge him from the offence. But, the learned Magistrate has dismissed the said

petition by order dated 04.08.2008. Challenging the same, the petitioner has filed the present CrI.R.C.No.1451 of 2008 before this Court.

3(4) Similarly, challenging the order dated 02.01.2008 in M.P.No.2953 of 2007 in C.C.No.8711 of 2002 passed by the learned XIV Metropolitan Magistrate, Egmore, Chennai, ordering to reopen the case, the petitioner has filed CrI.R.C.No.1499 of 2008 before this Court.

4. The learned counsel for the petitioner submitted that the learned Magistrate, by placing reliance on the judgment reported in 1995 CLJ 2523 (Ram Naresh Singh Vs. State of M.P.), has ordered for reopening of the case, after discharging the accused under Section 258 of Cr.P.C. But, the judgment in 1995 CLJ 2523 has not laid down the correct position of law. In this regard, the learned counsel for the petitioner, by relying upon the judgment delivered by the Gujarat High Court reported in 1995(1) Crimes 176 (State of Gujarat Vs. Maganlal Gordhandas Mer) submitted that the order made under Section 258 of Cr.P.C., is not interlocutory in nature, but it is final in nature. Once the accused is discharged, the case cannot be reopened. In this regard, the learned counsel for the petitioner has also relied upon the judgment in (2014) 3 SCC 92 (Hardeep Singh Vs. State of Punjab).

5. Per contra, the learned Government Advocate (CrI.side) submitted that the discharge order passed by the learned Magistrate without considering the merits of the case shall not be a judgment, so as to debar the Magistrate from reviving the order to re-open the case; that the learned Magistrate by considering the petition filed by the 1st respondent-Prosecution under Section 300(5) of Cr.P.C., reopened the case and issued summons to the accused and as such, no infirmity could be found in the order passed by the learned Magistrate in reopening the case.

6. I carefully heard the submissions made on either side. Before entering into the discussion on the submissions made by the learned counsel for the petitioner as well as the learned Government Advocate, it would be appropriate to extract Sections 258 and 300(5) of Cr.P.C.

258. Power to stop proceedings in certain cases.

In any, summons that case instituted otherwise than upon complaint, a Magistrate of the first class or, with the previous sanction of the Chief Judicial Magistrate, any other Judicial Magistrate, may, for reasons to be recorded by him, stop the proceedings at any stage without pronouncing any judgment and where such stoppage of proceedings is made after the evidence of the principal witnesses has been recorded, pronounce a judgment of acquittal, and in any other case

release, the accused, and such release shall have the effect of discharge.

300. Person once convicted or acquitted not to be tried for same offence.

(1) - (4)

(5) A person discharged under section 258 shall not be tried again for the same offence except with the consent of the court by which he was discharged or of any other court to which the first-mentioned court is subordinate.

A reading of Section 258 of Cr.PC would show that the Magistrate can stop the proceedings at any stage without pronouncing any judgment and if such stoppage of proceedings is made after the evidence of the principal witnesses has been recorded, the Magistrate shall pronounce a judgment of acquittal, and in any other case, the learned Magistrate releases the accused, such release shall have the effect of discharge; once a person is discharged under Section 258 of Cr.P.C., the said person can not be tried for the same offence except with the consent of the Court as per Section 300(5) of Cr.PC. Section 300(5) does not speak about reopening of the case. Therefore, the Magistrate cannot review his own order passed under Section 258 of Cr.PC., by way of reopening the case. In this regard, a reference could be placed in the judgment of Gujarat High Court reported in 1995(1) CRIMES 176 (State of Gujarat Vs. Maganlal Gordhandas Mer), wherein it has been held as follows:-

"18. The jurisdiction conferred under Section 258 is to stop the proceedings at any stage and the consequence of such stoppage of proceedings appearing in the later part of the provision is two fold. It is acquittal where proceedings are stopped after the evidence of the principal witnesses has been recorded and it is discharge when there is stoppage of proceedings before the evidence is recorded. It is not in dispute that in all these cases no evidence has been recorded and upon a plain reading of the aforesaid provision, the effect of stoppage of proceedings of all these criminal cases is discharge and not acquittal. As a necessary consequence the acquittal appeal would not be maintainable. The appropriate remedy, in my opinion, would be to approach this Court by way of a revision under Section 401 read with Section 397 of the Code. Ordinarily I would have dismissed the acquittal appeals on the technical ground which has been successfully canvassed by Mr. Keshwani. But in the present case the position is quite different inasmuch as the learned Magistrate in all these cases has exercised his

jurisdiction not vested in him. This can be seen on a reference to Section 258 of the Code quoted above. All the cases were summons cases instituted upon a complaint in each of the cases and the provision squarely applies to the summons cases instituted otherwise than upon a complaint. This Court had an occasion yesterday, i.e., on February 23, 1994, to decide this point in Criminal Appeal Nos. 611 and 612 of 1988 and Criminal Revision Application No. 155 of 1989. Therefore, the impugned orders are apparently void being outside the jurisdiction of the learned Magistrate. If that is so, it is always open to the prosecution to seek the remedy of revision under Section 397 read with Section 401 of the Code. In all these cases records have already been called for and in view of the aforesaid finding, there is no reason why all these acquittal appeals be not treated as Revision Applications. But, then, to this, Mr. Keshwani vehemently submitted that the nature of the impugned orders is interlocutory and, therefore, these acquittal appeals can neither be treated as Revision Applications nor be entertained as such by virtue of Sub-section (2) of Section 397 of the Code. In support of his submission, he made reference to the following decisions:

One is the decision of the Karnataka High Court in the case of State of Karnataka v. Durgappa 1975 CrL. LJ 749. The provision which was for consideration by Karnataka High Court was Section 259 of Code of Criminal Procedure, 1898 read with Section 403 thereof. Section 258 corresponds to Section 249 of 1898 Code, but following changes have been noted in 'Sarkar on Criminal Procedure, 6th Edition 1990, at page 742:

"(1) The word "summons" has been added and the words "a Presidency Magistrate" and "complaint" have been omitted.

(2) The words "Chief Judicial Magistrate, any other Judicial Magistrate" and other italicised words have been substituted for "District Magistrate, and other Magistrate" and "either of acquittal or conviction and may thereupon release the accused" respectively."

While considering the decision in the case of Durgappa (supra), of the Karnataka High Court the

aforesaid changes shall have to be borne in mind. It has been held by the Karnataka High Court that the stopping of proceedings under Section 249 of the Code can never be regarded as an acquittal for the purpose of Section 403, and order under Section 249 merely stops the proceedings without proceeding to pronounce judgment either acquitting or convicting the accused. When the proceedings are stopped under Section 249 the Magistrate has also power to revive proceedings so stopped. However, that power is discretionary power taking into consideration of the relevant circumstances, in my opinion, this decision would not be applicable so as to support the submission of Mr. Keshwani that the impugned order is interlocutory in nature on the reasoning that the proceedings can be revived. The provision as it stands now clearly indicates the consequences of stoppage of proceedings under Section 258 of the Code. As stated above, such consequences introduced in the new Code ear-mark the distinction between the old provision and new provisio. Even the Calcutta decision in the case of R.N. Ghosh v. The State AIR 1956 Cal 247 referred to by Mr. Keshwani would not be applicable for the same reason. In fact, the legal consequence of an order made under Section 249 (of the old Code) has been stated in para 11 of the citation by the Calcutta High Court. It has been observed:

"The legal effect of an order made under Section 249 is merely stoppage of proceedings and "release" of the accused. It is not even discharge."

Mr. Keshwani, however, made an effort to substantiate his submission by making a reference to Section 300 (5) of the Code which has been introduced in the new Code. That provision reads:

"A person discharged under Section 258 shall not be tried again for the same offence except with the consent of the Court by which he was discharged or of any other Court to which the first mentioned Court is subordinate."

19. In my opinion, the introduction of the aforesaid provision in new Code would further fortify the conclusion that the order made under Section 258 is not interlocutory in nature, but is final in nature. It is submitted that under Section 258 of the Code itself there is a power in the magistrate to revive the proceedings as laid down by the Calcutta and Karnataka High Courts in the aforesaid decisions and Sub-section (5) of Section 300 provides an additional safeguard in

favour of the prosecution for trying an accused who has been discharged under Section 258, of course with the consent of the Court by which the accused was discharged or the Court to which the first mentioned Court is subordinate. I am unable to accept this submission for, as stated above, on account of the earmarked change in the provision contained under Section 258 of the Code, there is no question of revival of proceedings except to file fresh complaint as permitted by Sub-section (5) of Section 300 of the Code. In any case, in my opinion, the order of stoppage of proceedings under Section 258 of the Code can by no stretch of imagination be said to be interlocutory. If the consequence is acquittal, the remedy would be an appeal against such an order by virtue of Section 378 of the Code and if the consequence is discharge, then the remedy would be obviously revision under Section 397 of the Code."

From a reading of the above said judgment, I find that the order of discharge passed under Section 258 of Cr.PC is not an interlocutory order and it is a judgment and the same cannot be revived by reopening the case. Furthermore, there is a clear bar under Section 362 of Cr.PC., for reviewing the final order passed by the Court. Section 362 of Cr.PC., reads as follows:-

"362. Court not to alter judgment.

Save as otherwise provided by this Code or by any other law for the time being in force, no court when it has signed its judgment or final order disposing of a case, shall after or review the same except to correct a clerical or arithmetical error."

Since the release of the accused under Section 258 of Cr.PC, after stoppage of the proceedings, shall have the effect of an order of discharge, the said order is only a final order. When that being so, as per Section 362 of Cr.PC, the Court has no jurisdiction to review or recall the order of discharge. When there is a specific bar to revive the order of discharge, the impugned order passed by the learned Magistrate reopening the case is not legally sustainable. In this regard, a reference could be placed in one more judgment reported in (2014) 3 SCC 92 (Hardeep Singh Vs. State of Punjab), wherein in para 115 it has been observed as follows_

"115. Power under Section 398 Cr.P.C., is in the nature of revisional power which can be exercised only by the High Court or the Sessions Judge, as the case may be. According to Section 300(5) Cr.PC, a person discharged

under Section 258 Cr.PC shall not be tried again for the same offence except with the consent of the Court by which he was discharged or of any other Court to which the first-mentioned Court is subordinate. Further, Section 398 CrPC provides that the High Court or the Sessions Judge may direct the Chief Judicial Magistrate by himself or by any of the Magistrates subordinate to him to make an inquiry into the case against any person who has already been discharged. Both these provisions contemplate an inquiry to be conducted before any person, who has already been discharged, is asked to again face trial if some evidence appears against him. As held earlier, Section 319 CrPC can also be invoked at the stage of inquiry. We do not see any reason why inquiry as contemplated by Section 300(5) CrPC and Section 398 CrPC cannot be an inquiry under Section 319 Cr.P.C. Accordingly, a person discharged can also be arraigned again as an accused but only after an inquiry as contemplated by Sections 300(5) and 298 Cr.PC. If during or after such inquiry, there appears to be an evidence against such person, power under Section 319 Cr.PC can be exercised. We may clarify that the word "trial" under Section 319 Cr.PC would be eclipsed by virtue of above provisions and the same cannot be invoked so far as a person discharged is concerned, but no more."

A reading of the above judgment would show that once the petitioner/accused is discharged, the appropriate course for the prosecution is either to challenge the validity of the said order by filing a revision under Section 397 r/w 401 of Cr.PC., or to file a fresh final report before the concerned Magistrate Court, which had passed the order of discharge, by obtaining the consent of the Magistrate under Section 300(5) of Cr.P.C. The purpose of getting consent under Section 300(5) of Cr.P.C. is to see that a person should not be harassed in successive trials in respect of the same cause of action. When the consent of the Court is being sought for, the learned Magistrate has to conduct inquiry with regard to the order of discharge passed earlier and after getting satisfied with the inquiry, the Magistrate can give consent to the Prosecution to file a fresh final report, if there is a prime facie case against the accused. But, in the instant case, instead of doing so, the learned Magistrate has reopened the case which is legally barred. Hence, the impugned order dated 02.01.2008 passed by the learned Magistrate in M.P.No.2953 of 2007 in C.C.No.8711 of 2002 reopening the case is liable to be set aside.

7. Similarly, the impugned order dated 04.08.2008 passed M.P.No.122 of 2008 in C.C.No.8711 of 2002 dismissing the petition filed by the petitioner to discharge him and recall the summons, is a consequential order; hence, the same is also liable to be set aside.

Hence, the both the impugned orders dated 02.01.2008 and 04.08.2008 are liable to be set aside.

For the foregoing reasons, the Criminal Revision Cases are allowed and the impugned orders dated 02.01.2008 and 04.08.2008 are set aside.

Sd/-
Asst.Registrar (CS III)

/true copy/

Sub Asst. Registrar

ssv

To

1.The XIV Metropolitan Magistrate,
Egmore, Chennai.

2.The Chief Metropolitan Magistrate,
Egmore, Chennai - 8.

3.The Public Prosecutor,
High Court, Madras.

4.The Sub-Inspector of Police,
Thousand Lights Police Station,
Chennai - 6.

+1 cc to Mr.R.Selvakumar, Advocate, sr.39330

ts(co)
kra(18/08)

Crl.R.C.Nos.1451
& 1499 of 2008

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