

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT  
CHANDIGARH**

**CRR No. 4240 of 2014(O&M)**

**Date of Decision :29.01.2015**

**Sonu alias Ramesh Kumar**

**.....Petitioner**

**Versus**

**State of Punjab and another**

**..... Respondents**

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**CORAM : HON'BLE MR. JUSTICE AJAY TEWARI**

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Present: Mr. A.K.Walia , Advocate  
for the petitioner.

Ms.Amarjit Kaur Khurana, Addl. AG, Punjab.

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- i. Whether Reporters of local papers may be allowed to see the judgment?
- ii. To be referred to the Reporters or not?
- iii. Whether the judgment should be reported in the Digest?

**AJAY TEWARI, J. (Oral)**

This petition has been filed against the order summoning the petitioner under Section 319 Cr.P.C. As per the allegations in the FIR, the prosecutrix was repeatedly raped by Sandeep and Raj Kumar alia Rajesh. Subsequently, when the petitioner and Pawan came to know about this, they used to whistle at her and some time caught her hand and some time pulled her *chunni*.

Learned counsel for the petitioner has argued that the petitioner cannot be tried along with the main accused because the action attributed to

him constitutes a completely different transaction and different offences. As per him, only those persons who are covered within the parameters of Section 223 of the Cr.P.C. can be tried and charged jointly. Section 223 of the Cr.P.C. is in the following terms:-

“223. What persons may be charged jointly. The following persons may be charged and tried together, namely:-

(a) persons accused of the same offence committed in the course same transaction;

(b) person accused of an offence and persons accused of abetment of, or attempt to commit, such offence;

(c) person accused of more than one offence of the same kind, within the meaning of section 219 committed by them jointly within the period of twelve months;

(d) persons accused of different offences committed in the course of the same transaction;

(e) persons accused of an offence which includes theft, extortion, cheating, or criminal misappropriation, and persons accused of receiving or retaining, or assisting in the disposal or concealment of, property possession of which is alleged to have been transferred by any such offence committed by the first named persons, or of abetment of or attempting to commit any such last- named offence;

(f) persons accused of offences under sections 411 and 414 of the Indian Penal Code (45 of 1860 ). or either of those sections in respect of

stolen property the possession of which has been transferred by one offence;

(g) persons accused of any offence under Chapter XII of the Indian Penal Code relating to counterfeit coin and persons accused of any other offence under the said Chapter relating to the same coin, or of abetment of or attempting to commit any such offence; and the provisions contained in the former part of this Chapter shall, so far as may be, apply to all such charges: Provided that where a number of persons are charged with separate offences and such persons do not fall within any of the categories specified in this section, the Magistrate may, if such persons by an application in writing, so desire, and if he is satisfied that such persons would not be prejudicially affected thereby, and it is expedient so to do, try all such persons

together.”

Learned counsel has relied upon **Balbir v. State of Haryana and another** reported as AIR 2000 Supreme Court 11 wherein their lordships have held as follows:-

“11. According to Shri D.D. Thakur the case against the appellant and the case against Guria should have been consolidated together for a joint trial. He made an endeavour to show that two cases in respect of the murder of one person could be brought within the ambit of Section 223 of the Code (which corresponds to Section 239 of the old Code of 1898). As per that provision, all persons falling under any one of the seven categories enumerated therein can be charged and tried together. Out of those seven categories enumerated in the section we need not even advert to those categories indicated with placitum (b), (c), (d), (e), (f) of the Section as they are not relevant in this context. We would, therefore, extract clauses (a) and (d) in Section 223 as under:

"The following persons may be charged and tried together, namely:-

- (a) persons accused of the same offence committed in the course of the same transaction;
- (d) persons accused of different offences committed in the course of the same transaction."

In both the aforesaid clauses the primary condition is that persons should have been accused either of the same offence or of different offences "committed in the course of the same transaction". The expression advisedly used is "in the course of the same transaction". That expression is not akin to saying "in respect of the same subject matter" It is pertinent to point out that the same expression is employed in Section 220(1) of the Code also (corresponding to Section 235(1) of the old Code). The meaning of the expression "in the course of the same transaction" used in Section 223 is not materially different from that expression used in Section 223(1). It is so understood by this Court in *State of Andhra Pradesh v. Cheemalapati Ganeswara Rao & Anr.*, [1964] 3 SCR, 297. The following observation in the said judgment is contextually quotable:

"The series of acts which constitute a transaction must of necessity be connected with one another and if some of them stand out independently, they would not form part the same transaction but would constitute a different transaction or transactions. Therefore, even if the expression "same transaction" alone had been used in S.235 (1) it would have meant a transaction consisting either of a single act or of a series of connected acts. The expression 'same transaction' occurring in cls. (a), (c) and (d) of S.239 as well as that occurring in S.235(1) ought to be given the same meaning according to the normal rule of construction of statutes."

12. For several offences to be part of the same transaction, the test which has to be applied is whether they are so related to one another in point of purpose or of cause and effect, or as principal and subsidiary, so as to result in one continuous action. Thus, where there is commonality of purpose or design, where there is continuity of action, then all those persons involved can be accused of the same or different offences "committed in the course of the same transaction."

13. But if in one case the accused is alleged to have killed a person without any junction with the accused in the other case, then it cannot be treated as the same offence or even different offences "committed in the course of the same transaction". If such two diametrically opposite versions are put to joint trial the confusion which it can cause in the trial would be incalculable. It would then be a mess and then there would be no scope for a fair trial. Hence the attempt to bring the two cases under the umbrella of Section 223 of the Code has only to be foiled as untenable."

Learned counsel has also relied upon **Amar Singh and another**

**v. The State** reported as AIR 1954 Punjab 106 wherein their lordships held as follows:-

"8. "The same offence" in section 239(a) of the Code of Criminal Procedure means an offence arising out of the same act or series of acts and cannot mean anything else 'Nga Sar Kee v. The King', AIR 1939 Rang 390(C). There one accused was charged with having murdered a certain person at a certain place and another was charged with having murdered the same

person at the same place and at the same time, and both were prosecuted, as in the present case, because there was evidence against both, but such evidence against them was mutually exclusive, and it was held that it could not be said that those persons were charged with the same offence committed in the course of the same transaction within the meaning of section 239 of the Code of Criminal Procedure, and it was also held that there was no provision in the 'Code under which these two persons could be tried together or that such a trial was a mere irregularity curable under section 537 of the Code. Following -'25 Mad 61(PC) (B), that court held that this was an illegality.

There are other cases of that Court where the same view was taken: see-'Intaj Khan v. Emperor,AIR 1934 Rang 193(D) where it was held that two persons accused of the same offence ought not to be tried together if the prosecution case against them is mutually exclusive. In an older Burma case – 'Azim-ud-Din v. Emperor', 14 Cri.L.J 563(Low Bur) (E) where two accused were tried together on a charge of having caused grievous hurt to a person, and the allegation was that either one or the other had committed the offence, it was held that the words “same offence” in section 239 of the Code of Criminal Procedure implied that both the accused should have acted in concert or association and did not apply to a case like the present and that the two accused ought to have been tried separately as required by the provisions of Section 233 of the Code.

11. Their Lordships of the Privy Council in – 'AIR 1938 PC 130 at p. 134(A)', have stated the law in the following terms:

“But the charges have to be framed, for better or worse, at an early stage of the proceedings. It would be paradoxical if no one could tell till the end of the trial whether the trial was legal or illegal.”

Thus in order to determine whether several persons can be jointly tried as having committed the same offence or not the Court has to look to the accusation i.e. the case set out by the prosecution in the charge itself, and if it can be held that the accused persons have committed the same offence in the course of the same transaction then they can be joined together, not

otherwise, and it is not necessary to consider that the final result of the case would be.”

Keeping in view the exposition of law it has to be held that the present petitioner does not come within any of the categories mentioned in Section 223 of the Code of Criminal Procedure. Consequently he cannot be summoned to face trial in the present case. This, however, cannot mean that an independent action cannot be brought against him for the actions attributed to him.

With these observations this petition is allowed and the order summoning the petitioner to face charge with the other accused relating to the rape of the prosecutrix is set aside.

**( AJAY TEWARI )**  
**JUDGE**

**January 29, 2015**  
**sunita**