

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

121

CRM-M No.23031 of 2017
Decided on:14.09.2018

Jagdish Singh

....petitioner

Versus

State of Punjab

.....respondent

CORAM: HON'BLE MR.JUSTICE ARVIND SINGH SANGWAN

Present: Mr.Amit Jhanji, Advocate
for the petitioner

Mr.Sidakmeet Sandhu, AAG Punjab

ARVIND SINGH SANGWAN, J. :

Prayer in this petition is for quashing of the order dated 10.05.2017 (Annexure P11), passed by Judge, Special Court, Jalandhar, vide which an application filed by the prosecution under Section 193 Cr.P.C. was allowed and the petitioner was summoned as an accused in FIR No.12 dated 01.02.2013, under Sections 22/61/85 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, "NDPS Act"), as well as for quashing of the order dated 01.06.2017 (Annexure P12), vide which the proclamation under Sections 82 of the Code of Criminal Procedure (for short, "Cr.P.C.), was initiated against the petitioner.

While issuing notice of motion, on 03.07.2017, the operation of the impugned order dated 10.05.2017 was stayed.

Learned counsel for the petitioner submits that the petitioner was working as a driver in United Arab Emirates (UAE) and was holding residenceship of UAE. It is further submitted that as per the allegations in

the FIR (Annexure P2), it is alleged that on 01.02.2013, the police party was present near Naugajja gate on patrolling duty, when one motorcycle bearing No.PB-08-CD-1334, driven by a clean shaven young man was seen coming from opposite side and was signalled to stop. The driver tried to take a U-Turn, but was over powered by the police officials and on inquiry, he disclosed his name as Jagdish Singh @ Jaggi and thereafter, on suspicion, he was given a notice under Section 50 of the NDPS Act, for being searched by the Investigating Officer or by some Gazetted Officer or by a Magistrate, to which he opted to be searched by the Investigating Officer. On search, intoxicant powder was recovered from a polythene envelop out of which samples were drawn and thereafter, on completion of the investigation, the accused was formally arrested.

Learned counsel for the petitioner submits that thereafter, on 15.02.2013, SHO, Police Station Kartarpur, on the recommendation of SP/D (Rural), Jalandhar, moved an application for discharge of the petitioner/accused. In the application dated 15.02.2013 (Annexure P3), it is stated that during the investigation, it has come on record that 270 gms.of intoxicant powder recovered from the petitioner was in fact handed over to him by real accused Jaswant Singh @ Bobby son of Bhajan Singh, resident of Naugajja, Police Station Kartarpur by posing it to be a medicine of his father and on conducting the inquiry by the senior officers, the petitioner was declared innocent. In the aforesaid backdrop, it was prayed that the petitioner be discharged from the case.

Thereafter, Judge, Special Court, on 16.02.2013, recorded the statement of ASI Gian Ishwar, Police Station Kartarpur, who deposed as under:

“Stated that enquiry into this case was conducted by SHO Inderjit Singh and DSP (D) Sh.Rajinder Singh. In the said enquiry, accused Jagdish Kumar was found innocent and it is requested to discharge the accused.”

The Judge, Special Court, thereafter on 16.02.2013, passed the following order:

“Prosecution has moved an application for the discharge of accused which is forwarded by S.P.(D) (Rural), Jalandhar. In the said application, it has been submitted that during investigation, accused was found innocent. In this regard, statement of ASI Gian Ishwar, belt No.219, P.S.Kartarpur has also been recorded.

In view of the contents of application as well as statement of ASI Gian Ishwar, accused Jagdish Singh son of Amarjit Singh be discharged from custody. Ahlmad to retain these papers in his safe custody and be put up as and when challan is presented.”

Learned counsel for the petitioner has further submitted that later on a complaint dated 20.04.2013 (Annexure P6) was given by Gurinderjit Kaur, wife of jaswant Singh, who was found to be the actual accused and the same was marked for an inquiry. Upon this, the Senior Superintendent of Police, Jalandhar (Rural) passed an order on 23.04.2017 (Annexure P7), that the investigation be conducted by a Special Investigating Team, in this regard.

Learned counsel for the petitioner submits that thereafter, an inquiry was conducted and the concluding part of the inquiry report dated 19.07.2013 (Annexure P8) is as under:

“After registration of this case, Jagdish Singh @ Jaggi's father Amarjit Singh had submitted a complaint

regarding innocence of his son. In connection with said complaint, Superintendent of Police (D) had directed Inspector Inderjit Singh, SHO Police Station Kartarpur to conduct thorough enquiry and bring true facts on record, who after conducting verification had mentioned in his zimni No.5 dated 13.02.13 that narcotic powder recovered in the case was in fact of Jaswant Singh @ Bobby s/o Sh.Bhajan Singh, caste Jat, resident of village Naugajja and he wanted to get it delivered at his house through Jagdish Singh on the pretext of it being a medicine. In last para of Zimni No.5 recorded by Inspector Inderjit singh, it was written that as per investigation conducted by him, Jagdish Singh @ Jaggi was innocent in the case and investigating officer was directed to discharge him in the case and to arrest real accused Jaswant Singh @ Bobby in the case. Zimni No.5 by SHO, Police Station Kartarpur is attached with the complaint. In continuation of it, Sh.Rajinder Singh, P.P.S.Superintendent of Police (D), Jalandhar (Rural) had recorded Zimni No.6 dated 15.02.13, who had also consented with verification of investigation by SHO Police Station Kartarpur and had directed investigating officer to arrest accused Jaswant Singh @ Bobby s/o Bhajan Singh, caste Jat, resident of village Naugajja in the case at the earliest.

Jaswant Singh @ Bobby's wife Gurinderjit Kaur has submitted a complaint regarding implicating her husband Jaswant Singh @ Bobby in the case without any reason and in this connection, the complainant produced some persons of the village and their statements were recorded. Jagdish Singh @ Jaggi was also joined in the enquiry. Gurinderjit Kaur and persons accompanying her stated Jaswant Singh @ Bobby to be innocent in the case. Jagdish Singh @ Jaggi informed that on 01.02.2013 at about 9.30 AM, he was going on

his motorcycle from Kishangarh to his village and on the way, Jaswant Singh @ Bobby met him, who handed over an envelope to him and asked to deliver the said envelope at his house because it contained medicine of his father. Complainant Gurinderjit Kaur was asked to produce Jaswant Singh @ Bobby in the enquiry into complaint time and again but she did not produce Jaswant Singh. It is impossible to arrive at any conclusion without joining Jaswant Singh @ Bobby in the enquiry. But Superintendent of Police (D) has already found Jaswant Singh @ Bobby as accused in the case on conducting of enquiry into the matter and has directed the investigating officer vide zimni No.6 dated 15.02.13 to get discharged Jagdish Singh @ Jaggi in the case and to arrest Jaswant Singh @ Bobby in the case and we agree with the same. Jaswant Singh @ Bobby is an accused in the case and it is recommended to arrest him in the case.”

It is thus submitted that even subsequent to discharge of the petitioner, in a detailed inquiry conducted by the police, it is held that petitioner was found innocent and in fact Jaswant Singh @ Bobby is the actual accused involved in the FIR.

Learned counsel for the petitioner submits that thereafter, the aforesaid Jaswant Singh @ Bobby was declared a proclaimed offender vide order dated 16.02.2016 and after recording prosecution evidence in the proceedings under Section 299 Cr.P.C., the file was consigned to record room. Thereafter, the accused Jaswant Singh @ Bobby was re-arrested on 10.08.2016 and the trial against him commenced, on presentation of challan.

Learned counsel for the petitioner further argued that thereafter, the public prosecutor moved an application under Section 319 Cr.P.C. for summoning the petitioner as an additional accused. However, on

01.11.2016, by making a statement, the public prosecutor had withdrawn the application under Section 319 Cr.P.C, praying for summoning the petitioner as an additional accused.

Thereafter, the learned trial Court, vide impugned order dated 10.05.2017 (Annexure P11) summoned the petitioner as an accused while exercising the power under Section 193 Cr.P.C. The trial Court while passing the said order had relied upon the proceedings recorded under Section 299 Cr.P.C. and based on the statement of PW1 ASI Gian Ishwar Singh, who had produced on record certain documents Ex.P1 to Ex.P11, i.e. consent memo, recovery memo, FIR, site plan and the arrest-cum-intimation memo as well as the search memo of the petitioner and the application for taking judicial remand.

The present petition has been filed challenging the aforesaid impugned order dated 10.05.2017 as well as the subsequent order dated 01.06.2017, vide which on receiving the report of the notice issued to the petitioner, by way of non bailable warrants, a report was received that the petitioner is residing abroad, therefore, he may be summoned through proclamation.

Reply by way of affidavit of Deputy Superintendent of Police, Sub Division Kartarpur, District Jalandhar, has been placed on record.

Learned counsel for the appellant has argued that once an application for discharge was made by the prosecution, it amounts to acquittal of the petitioner, as the prosecution has not moved any application reserving its right to discharge the petitioner for a limited purpose i.e. discharge from custody and rather had filed an application dated 15.02.2013, followed by the statement of the investigating officer

(Annexure P4) that the petitioner has been found innocent, so he may be discharged.

It is further argued that the statement of the Investigating Officer (Annexure P4) and the order dated 16.02.2013 (Annexure P5) passed by the Judge, Special Court, Jalandhar, clearly show that the petitioner was unconditionally discharged from the case, therefore, at a subsequent stage, summoning the petitioner in exercise of the power under Section 319 Cr.P.C. is illegal as the prosecution has not filed any appeal against the order of discharge.

Learned counsel for the petitioner has relied upon **2013(3) RCR (Criminal) 787, Dharam Pal and others vs. State of Haryana and another**, wherein before the Constitutional Bench of the Hon'ble Supreme Court, the following questions were framed:

“The questions which require the consideration of the Constitution Bench are as follows:

(i) Does the Committing Magistrate have any other role to play after committing the case to the Court of Session on finding from the police report that the case was triable by the Court of Session?

(ii) If the Magistrate disagrees with the police report and is convinced that a case had also been made out for trial against the persons who had been placed in column 2 of the report, does he have the jurisdiction to issue summons against them also in order to include their names, along with Nafe Singh, to stand trial in connection with the case made out in the police report?

(iii) Having decided to issue summons against the Appellants, was the Magistrate required to follow the procedure of a complaint case and to take evidence before committing them to the Court of Session to stand trial or whether he was justified in issuing summons

against them without following such procedure?

(iv) Can the Session Judge issue summons under Section 193 Cr.P.C. as a Court of original jurisdiction?

(v) Upon the case being committed to the Court of Session, could the Session Judge issue summons separately under Section 193 of the Code or would he have to wait till the stage under Section 319 of the Code was reached in order to take recourse thereto?

(vi) Was Ranjit Singh 's case (supra), which set aside the decision in Kishun Singh 's case(supra), rightly decided or not?

The Hon'ble Supreme Court while deciding the questions No.

(iv) to (vi) has held as under:

26. Questions 4, 5 and 6 are more or less inter- linked. The answer to question 4 must be in the affirmative, namely, that the Session Judge was entitled to issue summons under Section 193 Cr.P.C. upon the case being committed to him by the learned Magistrate. Section 193 of the Code speaks of cognizance of offences by Court of Session and provides as follows :-

“193. Cognizance of offences by Courts of Session.- Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code.”

The key words in the Section are that “no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code.” The above provision entails that a case must, first of all, be committed to the Court of Session by the Magistrate. The second condition is that only after the case had been committed to it, could the Court of Session take cognizance of the offence exercising

original jurisdiction. Although, an attempt has been made by Mr. Dave to suggest that the cognizance indicated in Section 193 deals not with cognizance of an offence, but of the commitment order passed by the learned Magistrate, we are not inclined to accept such a submission in the clear wordings of Section 193 that the Court of Session may take cognizance of the offences under the said Section.

27. *This takes us to the next question as to whether under Section 209, the Magistrate was required to take cognizance of the offence before committing the case to the Court of Session. It is well settled that cognizance of an offence can only be taken once. In the event, a Magistrate takes cognizance of the offence and then commits the case to the Court of Session, the question of taking fresh cognizance of the offence and, thereafter, proceed to issue summons, is not in accordance with law. If cognizance is to be taken of the offence, it could be taken either by the Magistrate or by the Court of Session. The language of Section 193 of the Code very clearly indicates that once the case is committed to the Court of Session by the learned Magistrate, the Court of Session assumes original jurisdiction and all that goes with the assumption of such jurisdiction. The provisions of Section 209 will, therefore, have to be understood as the learned Magistrate playing a passive role in committing the case to the Court of Session on finding from the police report that the case was triable by the Court of Session. Nor can there be any question of part cognizance being taken by the Magistrate and part cognizance being taken by the learned Session Judge.*

28. *In that view of the matter, we have no hesitation in agreeing with the views expressed in Kishun Singh's case (supra) that the Session Courts has jurisdiction on committal of a case to it, to take cognizance of the offences of the persons not named as offenders but whose complicity in the case would be evident from the materials available on*

record. Hence, even without recording evidence, upon committal under Section 209, the Session Judge may summon those persons shown in column 2 of the police report to stand trial along with those already named therein.

29. *We are also unable to accept Mr. Dave's submission that the Session Court would have no alternative, but to wait till the stage under Section 319 Cr.P.C. was reached, before proceeding against the persons against whom a prima facie case was made out from the materials contained in the case papers sent by the learned Magistrate while committing the case to the Court of Session.*

30. *The Reference to the effect as to whether the decision in Ranjit Singh 's case (supra) was correct or not in Kishun Singh 's case (supra), is answered by holding that the decision in Kishun Singh's case was the correct decision and the learned Session Judge, acting as a Court of original jurisdiction, could issue summons under Section 193 on the basis of the records transmitted to him as a result of the committal order passed by the learned Magistrate.*

31. *Consequent upon our aforesaid decision, the view taken by the Referring Court is accepted and it is held that the decision in the case of Kishun Singh vs. State of Bihar and not the decision in Ranjit Singh Vs. State of Punjab lays down the law correctly in respect of the powers of the Session Court after committal of the case to it by the learned Magistrate under Section 209 Criminal Procedure Code.*

32. *The matter is remitted to the Three-Judge Bench to dispose of the pending Criminal Appeals in accordance with the views expressed by us in this judgment.*

Learned counsel for the petitioner has also relied upon **2014(1)**

RCR (Criminal) 623, "Hardeep Singh vs. State of Punjab and others",

wherein the Constitutional Bench of the Hon'ble Supreme Court has framed

the following questions:

“5. On the consideration of the submissions raised and in view of what has been noted above, the following questions are to be answered by this Bench:

(i) What is the stage at which power under Section 319 Cr.P.C. can be exercised?

(ii) Whether the word "evidence" used in Section 319(1) Cr.P.C. could only mean evidence tested by cross-examination or the court can exercise the power under the said provision even on the basis of the statement made in the examination-in-chief of the witness concerned?

(iii) Whether the word "evidence" used in Section 319(1) Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?

(iv) What is the nature of the satisfaction required to invoke the power under Section 319 Cr.P.C. to arraign an accused? Whether the power under Section 319(1) Cr.P.C. can be exercised only if the court is satisfied that the accused summoned will in all likelihood convicted?

(v) Does the power under Section 319 Cr.P.C. extend to persons not named in the FIR or named in the FIR but not charged or who have been discharged?

The Hon'ble Supreme Court, with regard to the status of an accused, who stands discharged, has observed as under:

“103. Even the Constitution Bench in *Dharam Pal (CB)* has held that the Sessions Court can also exercise its original jurisdiction and summon a person as an accused in case his name appears in Column 2 of the chargesheet, once the case had been committed to it. It means that a person whose name does not appear even in the FIR or in the chargesheet or whose name appears in the FIR and not in the main part of the chargesheet but in Column 2 and

has not been summoned as an accused in exercise of the powers under Section 193 Cr.P.C. can still be summoned by the court, provided the court is satisfied that the conditions provided in the said statutory provisions stand fulfilled.

104. *However, there is a great difference with regard to a person who has been discharged. A person who has been discharged stands on a different footing than a person who was never subjected to investigation or if subjected to, but not charge-sheeted. Such a person has stood the stage of inquiry before the court and upon judicial examination of the material collected during investigation; the court had come to the conclusion that there is not even a prima facie case to proceed against such person. Generally, the stage of evidence in trial is merely proving the material collected during investigation and therefore, there is not much change as regards the material existing against the person so discharged. Therefore, there must exist compelling circumstances to exercise such power. The Court should keep in mind that the witness when giving evidence against the person so discharged, is not doing so merely to seek revenge or is naming him at the behest of someone or for such other extraneous considerations. The court has to be circumspect in treating such evidence and try to separate the chaff from the grain. If after such careful examination of the evidence, the court is of the opinion that there does exist evidence to proceed against the person so discharged, it may take steps but only in accordance with Section 398 Cr.P.C. without resorting to the provision of Section 319 Cr.P.C. directly.*

It is, thus argued by learned counsel for the petitioner that the trial Court, has adopted a wrong approach in not considering or referring to the order dated 16.02.2013, vide which the petitioner was discharged as the case of the petitioner stands on a different footing with a person who was

never subjected to investigation or if subjected, was not chargesheeted. Therefore, learned counsel for the petitioner has submitted that the impugned order dated 10.05.2017 (Annexure P11) passed by the trial Court is without considering the fact that he was discharged by the Court.

The learned counsel further submitted that even the procedure adopted by trial Court is not correct and has relied upon **2007(1) RCR (Criminal) 266, M.C.Mehta vs. Union of India and others**, wherein the Hon'ble Supreme Court has held as under:

“In the case of Abhinandan Jha & Ors. v. Dinesh Mishra this Court held that when a cognizable offence is reported to the police they may after investigation take action under Section 169 or Section 170 Cr. PC. If the police thinks that there is no sufficient evidence against the accused, they may, under Section 169 release the accused from custody or, if the police thinks that there is sufficient evidence, they may, under Section 170, forward the accused to a competent Magistrate. In either case the police has to submit a report of the action taken, under Section 173, to the competent Magistrate who considers it judicially under Section 190 and takes the following action:

(a) If the report is a charge-sheet under Section 170, it is open to the Magistrate to agree with it and take cognizance of the offence under Section 190(1)(b); or decline to take cognizance. But he cannot call upon the police to submit a report that the accused need not be proceeded against on the ground that there was no sufficient evidence.

(b) If the report is of the action taken under Section 169, then the Magistrate may agree with the report and close the proceedings. If he disagrees with the report, he can give directions to the police under Section 156(3) to

make a further investigation. If the police, after further investigation submits a charge-sheet, the Magistrate may follow the procedure where the charge-sheet under Section 170 is filed; but if the police are still of the opinion that there was no sufficient evidence against the accused, the Magistrate may or may not agree with it. Where he agrees, the case against the accused is closed. Where he disagrees and forms an opinion that the facts mentioned in the report constitute an offence, he can take cognizance under Section 190(1)(c). But the Magistrate cannot direct the police to submit a charge-sheet, because the submission of the report depends entirely upon the opinion formed by the police and not on the opinion of the Magistrate. If the Magistrate disagrees with the report of the police he can take cognizance of the offence under Section 190(1)(a) or (c), but, he cannot compel the police to form a particular opinion on investigation and submit a report according to such opinion.

This judgment shows the importance of the opinion to be formed by the officer in charge of the police station. The opinion of the officer in charge of the police station is the basis of the report. Even a competent Magistrate cannot compel the concerned police officer to form a particular opinion. The formation of the opinion of the police on the material collected during the investigation as to whether judicial scrutiny is warranted or not is entirely left to the officer in charge of the police station. There is no provision in the Code empowering a Magistrate to compel the police to form a particular opinion. This Court observed that, although the Magistrate may have certain supervisory powers under the Code, it cannot be said that when the police submits a report that no case has been made out for sending the accused for trial, it is open to the

Magistrate to direct the police to file a charge-sheet. The formation of the said opinion, by the officer in charge of the police station, has been held to be a final step in the investigation, and that final step has to be taken only by the officer in charge of the police station and by no other authority.

The learned State counsel, on the basis of the affidavit filed by the Deputy Superintendent of Police, Sub-Division, Kartarpur, District Jalandhar (Rural) has however, opposed the prayer of the petitioner on the ground that the petitioner was apprehended at the spot and recovery of contraband was made from him. However, it is not disputed that as per the inquiry conducted by Deputy Superintendent of Police (D) Jalandhar (Rural), it is found that the intoxicant powder recovered from the petitioner was in fact given to him by Jaswant Singh @ Bobby and on the basis of the investigation, the SHO, Police Station Kartarpur was directed to submit an application for discharge of the petitioner.

After hearing learned counsel for the parties, I find merit in the present petition.

A perusal of the application dated 15.02.2013 (Annexure P3), filed for discharge of the petitioner shows that the police has sought the discharge of the petitioner from the case. Even the statement of ASI Gian Ishwar (PW4), is to the effect that the petitioner is to be discharged from the case. Even subsequently, when the inquiry was conducted on the application filed on behalf of the other accused Jaswant Singh @ Bobby, the earlier inquiry report was re-affirmed by the Senior Superintendent of Police, Jalandhar (Rural). In view of the same, the trial Court was required to pass a detailed order explaining the compelling circumstances to exercise the power under Section 193 Cr.P.C . and to record its satisfaction that the

conditions provided in the statutory provisions of Section 193 Cr.P.C. stand fulfilled.

The summoning of petitioner on the basis of proceedings initiated under Section 299 Cr.P.C. against co-accused Jaswant Singh @ Bobby, who was later on declared as a proclaimed offender, cannot be made sole basis to invoke power under Section 193 Cr.P.C., as per the other enabling provisions of Cr.P.C. as held by Hon'ble Supreme Court.

In view of the same, the present revision petition is allowed, the impugned order dated 10.05.2017 is set aside and the matter is remanded back to the trial Court to pass a fresh order in the light of the guidelines issued by the Hon'ble Supreme Court in Dharam Pal's, Hardeep Singh's and M.C.Mehta's cases (Supra) after affording opportunity of hearing to the petitioner. The petitioner is directed to appear before the trial Court on 04.10.2018. Since the impugned order dated 10.05.2017 is set aside, the subsequent order dated 01.06.2017 initiating proclamation proceedings against the petitioner is also set aside.

The trial Court will release the petitioner on interim bail subject to his furnishing bail/surety bonds, to its satisfaction, till a fresh order is passed.

(ARVIND SINGH SANGWAN)
JUDGE

14.09.2018

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Whether speaking/reasoned
Whether reportable-

Yes/No.
Yes/No