

Court No. - 85

Case :- CRIMINAL REVISION No. - 3063 of 2021

Revisionist :- Ajeet Singh

Opposite Party :- State of U.P. and Another

Counsel for Revisionist :- Kamlesh Kumar

Counsel for Opposite Party :- G.A.

Hon'ble Dr. Yogendra Kumar Srivastava,J.

1. Heard Sri R. N. Tripathi, holding brief of Sri Kamlesh Kumar, learned counsel for the revisionist and Ms. Sushma Soni, learned Additional Government Advocate appearing for the State-opposite party.

2. The present revision has been filed against the judgment and order dated 26.10.2021 passed by the learned Additional Chief Judicial Magistrate, Room No.18, Allahabad in Criminal Case No. 762 of 2015 (State vs. Ajeet Singh), whereby the learned Additional Chief Judicial Magistrate, Room No.18, Allahabad rejected the application under Section 239 Cr.P.C. filed by the revisionist.

3. Pleadings in the case indicates that the proceedings in the criminal case were initiated pursuant to an FIR lodged on 20.06.2014 registered as Case Crime No. 149 of 2014, under Section 354 of the Indian Penal Code, 1860¹ and upon investigation a police report under Sections 354B, 506 of the Penal Code was placed before the Magistrate. The opposite party no.2 in her statement under Section 161 of the Code of Criminal Procedure, 1973² reiterated the FIR version. An application for discharge under Section 239 of the Code was moved primarily

1 The Penal Code

2 The Code

seeking to contend that there was variance in the statements of the opposite party no.2 under Section 161 and Section 164 of the Code with the F.I.R. version, and accordingly the testimony of the opposite party no.1 was sought to be impeached and discharge was sought.

4. The learned Magistrate on considering the facts and circumstances of the case and material on record and the scope of powers to be exercised under Section 239 of the Code, has held that only in a case where the police report submitted under Section 173 of the Code along with the material evidence and documents appended therewith indicate that there is no material to initiate proceedings that the Magistrate can pass an order of discharge. In the facts of the case the learned Magistrate has held that the minor variation in the statements recorded under Sections 161 and 164 of the Code to contradict the FIR version would not be material inasmuch as the FIR is not supposed to be an encyclopedia of facts.

5. Counsel for the applicant has sought to assail the order passed by the court below by seeking to point out the discrepancy between the statements of the prosecutrix recorded under Sections 161 and 164 of the Code and by asserting that the same are in contradiction with the FIR version. Learned Counsel has also referred to the factual aspects of the case and the defence which is to be set up on behalf of the applicant.

6. Learned Additional Government Advocate submits that at the stage of consideration of discharge under Section 239 of the Code only a *prima facie* case is to be seen and the Magistrate having recorded a satisfaction with regard to the existence of a *prima facie* case there cannot be said to be any material error or illegality in the order which is sought to be assailed.

7. In order to appreciate the rival contentions the relevant statutory provisions may be adverted to. The procedure for trial of warrant cases by Magistrate is provided for under Chapter XIX of the Code and Sections 239 and 240 relate to discharge and framing of charge.

8. The primary consideration at the stage of framing of charge is the test of existence of a *prima facie* case, and at this stage, probative value of materials on record are not to be gone into.

9. The provisions which deal with the question of framing of charge or discharge, relatable to : (i) a sessions trial or, (ii) a trial of warrant case, or (iii) a summons case, are contained in three pairs of sections under the Code. These are Sections 227 and 228 in so far as, sessions trial is concerned; Sections 239 and 240 relatable to trial of warrant cases; and Sections 245 (1) and 245(2) in respect of summons case. The relevant provisions read as follows:-

“227. Discharge.—If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.

228. Framing of charge.—(1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which—

(a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, or any other Judicial Magistrate of the first class and direct the accused to appear before the Chief Judicial Magistrate, or, as the case may be, the Judicial Magistrate of the first class, on such date as he deems fit, and thereupon such Magistrate shall try the offence in accordance with the procedure for the trial of warrant-cases instituted on a police report;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge under clause (b) of sub-section (1), the charge shall be read and explained to the accused, and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried.

239. When accused shall be discharged.—If, upon considering the police report and the documents sent with it under Section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing.

240. Framing of charge.—(1) If, upon such consideration, examination, if any, and hearing, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused.

(2) The charge shall then be read and explained to the accused, and he shall be asked whether he pleads guilty of the offence charged or claims to be tried.

245. When accused shall be discharged.—(1) If, upon taking all the evidence referred to in Section 244, the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.”

10. The aforesaid sections indicate that the Code contemplates discharge of the accused by the court of sessions under Section 227 in a case triable by it, cases instituted upon a police report are covered by Section 239 and cases instituted otherwise than on a police report are dealt with in Section 245. The three sections contain somewhat different provisions in regard to discharge of the accused. As per Section 227, the trial judge is required to discharge the accused if “the Judge considers that there is not sufficient ground for proceeding against the accused”. The obligation to discharge the accused under Section 239 arises when “the Magistrate considers the charge against the accused to be

groundless”. The power to discharge under Section 245(1) is exerciseable when “the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted would warrant his conviction”. Sections 227 and 239 provide for discharge being made before recording of evidence and the consideration as to whether the charge has to be framed or not is required to be made on the basis of the record of the case, including documents and oral hearing of the accused and the prosecution or the police report, the documents sent along with it and examination of the accused and after affording an opportunity to the parties to be heard. On the other hand, the stage for discharge under Section 245 is reached only after the evidence referred to in Section 244 has been taken.

11. Despite the slight variation in the provisions with regard to discharge under the three pairs of sections, the settled legal position is that the stage of framing of charge under either of these three situations, is a preliminary one and test of “*prima facie*” case has to be applied — if the trial court is satisfied that a *prima facie* case is made out, charge has to be framed.

12. The nature of evaluation to be made by the court at the stage of framing of charge came up for consideration in **Onkar Nath Mishra and others Vs. State (NCT of Delhi) and another**³, and referring to the earlier decisions in **State of Maharashtra Vs. Som Nath Thapa**⁴, and **State of M.P. Vs. Mohanlal Soni**⁵, it was held that at that stage the Court has to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged and it is not expected to go deep into the probative value of the material on record. The relevant observations made in the judgment are as follows :-

³ (2008) 2 SCC 561

⁴ (1996) 4 SCC 659

⁵ (2000) 6 SCC 338

"11. It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence. At that stage, the court is not expected to go deep into the probative value of the material on record. What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence.

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13. Then again in State of Maharashtra Vs. Som Nath Thapa, a three-Judge Bench of this Court, after noting three pairs of sections viz. (i) Sections 227 and 228 insofar as sessions trial is concerned; (ii) Sections 239 and 240 relatable to trial of warrant cases; and (iii) Sections 245(1) and (2) qua trial of summons cases, which dealt with the question of framing of charge or discharge, stated thus: (SCC p. 671, para 32)

"32...if on the basis of materials on record, a court could come to the conclusion that commission of the offence is a probable consequence, a case for framing of charge exists. To put it differently, if the court were to think that the accused might have committed the offence it can frame the charge, though for conviction the conclusion is required to be that the accused has committed the offence. It is apparent that at the stage of framing of a charge, probative value of the materials on record cannot be gone into; the materials brought on record by the prosecution has to be accepted as true at that stage."

14. In a later decision in State of M.P. Vs. Mohanlal Soni, this Court, referring to several previous decisions held that: (SCC p. 342, para 7)

"7. The crystallised judicial view is that at the stage of framing charge, the court has to prima facie consider whether there is sufficient ground for proceeding against the accused. The court is not required to appreciate evidence to conclude whether the materials produced are sufficient or not for convicting the accused. "

13. Reiterating a similar view in Sheoraj Singh Ahlawat and others Vs. State of Uttar Pradesh and another⁶, it was observed that while framing charges court is required to evaluate materials and documents on record to decide whether facts emerging therefrom taken at their face value would disclose existence of

⁶ (2013) 11 SCC 476

ingredients constituting the alleged offence. At this stage, the court is not required to go deep into the probative value of the materials on record. It needs to evaluate whether there is a ground for presuming that the accused had committed the offence and it is not required to evaluate sufficiency of evidence to convict the accused. It was held that the court at this stage, cannot speculate into the truthfulness or falsity of the allegations and contradictions, inconsistencies in the statement of witnesses cannot be looked into at the stage of discharge.

14. In the context of trial of a warrant case, instituted on a police report, the provisions for discharge are to be governed as per terms of Section 239 which provides that a direction for discharge can be made only for reasons to be recorded by the court where it considers the charge against the accused to be groundless. It would, therefore, follow that as per the provisions under Section 239 what needs to be considered is whether there is a ground for presuming that the offence has been committed and not that a ground for convicting the accused has been made out. At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offences alleged would justify the framing of charge against the accused in respect of that offence, and it is only in a case where the Magistrate considers the charge to be groundless, he is to discharge the accused after recording his reasons for doing so.

15. The legal position with regard to the principles to be applied while considering a discharge, in the context of the provisions under Section 227 of the Code were considered in **Union of India Vs. Prafulla Kumar Samal and Another**⁷, wherein it was observed as follows:

⁷ (1979) 3 SCC 4

“10. Thus, on a consideration of the authorities mentioned above, the following principles emerge:

(1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced court cannot act merely as a Post office or a mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.”

16. The considerations relevant at the stage of discharge in the context of Section 227 were discussed in a recent decision in the case of **M.E. Shivalingamurthy Vs. Central Bureau of Investigation, Bengaluru**⁸ and referring to an earlier decision in **P. Vijayan Vs. State of Kerala**⁹, and the legal principles governing the exercise of such power were stated as follows:

“Legal principles applicable in regard to an application seeking discharge

17. This is an area covered by a large body of case law. We refer to a recent judgment which has referred to the earlier decisions viz. *P. Vijayan v. State of Kerala* and discern the following principles:

8 (2020) 2 SCC 768

9 (2010) 2 SCC 398

17.1. If two views are possible and one of them gives rise to suspicion only as distinguished from grave suspicion, the trial Judge would be empowered to discharge the accused.

17.2. The trial Judge is not a mere post office to frame the charge at the instance of the prosecution.

17.3. The Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding. Evidence would consist of the statements recorded by the police or the documents produced before the Court.

17.4. If the evidence, which the Prosecutor proposes to adduce to prove the guilt of the accused, even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, “cannot show that the accused committed offence, then, there will be no sufficient ground for proceeding with the trial”.

17.5. It is open to the accused to explain away the materials giving rise to the grave suspicion.

17.6. The court has to consider the broad probabilities, the total effect of the evidence and the documents produced before the court, any basic infirmities appearing in the case and so on. This, however, would not entitle the court to make a roving inquiry into the pros and cons.

17.7. At the time of framing of the charges, the probative value of the material on record cannot be gone into, and the material brought on record by the prosecution, has to be accepted as true.

17.8. There must exist some materials for entertaining the strong suspicion which can form the basis for drawing up a charge and refusing to discharge the accused.

18. The defence of the accused is not to be looked into at the stage when the accused seeks to be discharged under Section 227 CrPC (see *State of J&K v. Sudershan Chakkar*¹⁰). The expression, “the record of the case”, used in Section 227 CrPC, is to be understood as the documents and the articles, if any, produced by the prosecution. The Code does not give any right to the accused to produce any document at the stage of framing of the charge. At the stage of framing of the charge, the submission of the accused is to be confined to the material produced by the police (see *State of Orissa v. Debendra Nath Padhi*¹¹).”

17. The provisions of discharge under Section 239 of the Code fell for consideration in **K. Ramakrishna and others Vs. State of Bihar and Another**¹², and it was held that questions regarding the sufficiency or reliability of the evidence to proceed further are not required to be considered by the trial court under Section 239 and the High Court under Section 482. It was observed as follows:

¹⁰ (1995) 4 SCC 181

¹¹ (2005) 1 SCC 568

¹² (2000) 8 SCC 547

“4. The trial court under Section 239 and the High Court under Section 482 of the Code of Criminal Procedure is not called upon to embark upon an inquiry as to whether evidence in question is reliable or not or evidence relied upon is sufficient to proceed further or not. However, if upon the admitted facts and the documents relied upon by the complainant or the prosecution and without weighing or sifting of evidence, no case is made out, the criminal proceedings instituted against the accused are required to be dropped or quashed. As observed by this Court in *Rajesh Bajaj v. State NCT of Delhi*¹³, the High Court or the Magistrate are also not supposed to adopt a strict hypertechnical approach to sieve the complaint through a colander of finest gauzes for testing the ingredients of offence with which the accused is charge. Such an endeavour may be justified during trial but not during the initial stage.”

18. The ambit and scope of exercise of power under Sections 239 and 240 of the Code, are therefore fairly well settled. The obligation to discharge the accused under Section 239 arises when the Magistrate considers the charge against the accused to be "groundless". The section mandates that the Magistrate shall discharge the accused recording reasons, if after (i) considering the police report and the documents sent with it under Section 173, (ii) examining the accused, if necessary, and (iii) giving the prosecution and the accused an opportunity of being heard, he considers the charge against the accused to be groundless, i.e. either there is no legal evidence or that the facts are such that no offence is made out at all. No detailed evaluation of the materials or meticulous consideration of the possible defences need be undertaken at this stage nor any exercise of weighing materials in golden scales is to be undertaken at this stage - the only consideration at the stage of Section 239/240, is as to whether the allegation/charge is groundless.

19. This would not be the stage for weighing the pros and cons of all the implications of the materials, nor for sifting the materials placed by the prosecution- the exercise at this stage is to be confined to considering the police report and the documents to

¹³ (1999) 3 SCC 259

decide whether the allegations against the accused can be said to be "groundless".

20. The word "ground" according to **Black's Law Dictionary**¹⁴ connotes foundation or basis, and in the context of prosecution in a criminal case, it would be held to mean basis for charging the accused or foundation for the admissibility of evidence. Seen in the context, the word "groundless" would connote no basis or foundation in evidence. The test which may therefore be applied for determining whether the charge should be considered groundless is that where the materials are such that even if unrebutted, would make out no case whatsoever.

21. Counsel for the revisionist has not been able to dispute the aforesaid legal position with regard to the scope of powers to be exercised at the stage of discharge.

22. No material error, illegality and perversity has been pointed out in the order passed by the court below so as to warrant interference in exercise of revisional jurisdiction of this Court.

23. The contention sought to be put forward with regard to minor discrepancies in the material evidence or the other factual aspects of the case including the defence which is sought to be set up on behalf of the accused, cannot be considered at this stage of the proceedings where only the test of a *prima facie* case has to be applied.

24. No other point was urged.

25. The revision stands **dismissed** accordingly.

Order Date :- 26.11.2021

Kirti/Pratima

(Dr. Y. K. Srivastava, J.)

¹⁴ Black's Law Dictionary, 9th Edition