SOHAN LAL AND ORS.

v.

STATE OF RAJASTHAN

AUGUST 21, 1990

[K.N. SAIKIA AND K. RAMASWAMY, JJ.]

Criminal Procedure Code, 1973: Sections 216, 319 and 398—Expression of 'any person not being accused'—Interpretation of—Courts taking fresh cognizance of offences—Validity of.

One 'S' lodged a First Information Report alleging that the appellants and two others were pelting stones at the house of informant, thereby causing damage to it and injuring three women who were sitting at the chowk of the house. After completing investigation the police framed charges under sections 147, 323, 325, 335 and 427 IPC and forwarded the charge sheet to the Judicial Magistrate under section 173 Cr.P.C. Taking cognizance and after hearing the arguments, the Judicial Magistrate discharged appellants 4 and 5 of all the charges and ordered that appellants 1, 2 and 3 be charged only under section 427 IPC.

Later, the Assistant Public Prosecutor submitted an application to the Magistrate under Section 216 Cr. P.C. signed by one of the Prosecution Witnesses, for amending the charge claiming that a *prima facie* case under sections 147, 325 and 336 IPC was made out. After hearing the parties, the Magistrate allowed the said application. This order was challenged before the High Court by way of Revision Petitions. The Petitions were dismissed by the High Court, holding that it was not a case of reviewing the order of discharge passed by the Magistrate, but was a case of taking cognizance of the offence on the basis of evidence recorded by the Magistrate himself, which was not prohibited in law. It was also held that under section 319 Cr. P.C. the Magistrate was fully competent to take cognizance of the offences on the basis of evidence recorded by him though for the same offences order of discharge was passed by him earlier.

Aggrieved at the aforesaid order of the High Court, the appellants have preferred these appeals, by special leave.

On behalf of the appellants it was contended that the Magistrate

committed error of jurisdiction in passing the subsequent order and that he could not have revised his own order discharging the appellants. It was also contended that s. 319 Cr. P.C. was applicable only to a person not being the accused, and so the accused could not have been discharged.

The Respondent-State contended that the Magistrate found enough materials for taking cognizance and framing charges under sections 147, 323, 325 and 336 IPC and he had jurisdiction to do so under section 319 Cr. P.C. irrespective of the application under s. 216 Cr. P.C. filed by the Assistant Public Prosecutor.

Allowing the appeals,

HELD: 1.1. Under Section 216 Cr. P.C., 'and to any charge' means the addition of a new charge. An alteration of a charge means changing or variation of an existing charge or making of a different charge. Addition to and alteration of a charge or charges implies one or more existing charge or charges. When the appellants 4 and 5 were discharged of all the charges and no charge existed against them, naturally an application under s. 216 Cr. P.C. was not maintainable in their case. The Magistrate therefore while disposing of the application under s. 216 Cr. P.C. only had no jurisdiction to frame charges against the appellants 4 and 5. In his order the Magistrate did not say that he was proceeding *suo motu* against them though he said that s. 319 Cr. P.C. was also clear in this connection. [815B-D]

1.2. As regards appellants 1, 2 and 3, they were already accused in the case. Section 216 Cr. P.C. envisages the accused and the additions to and alterations of charge may be done at any time before judgment is pronounced. The Magistrate on the basis of the evidence on record was satisfied that charges ought also to be framed under the other sections with which they were charged in the charge sheet. That was also the prayer in the Assistant Public Prosecutor's application. However, the Magistrate invoked his jurisdiction under s. 319 Cr. P.C. [815E-F]

2. The provisions of s. 319 had to be read in consonance with the provisions of s. 398 of the Code. Once a person is found to have been the accused in the case he goes out of the reach of s. 319. Whether he can be dealt with under any other provisions of the Code is a different question. In the case of the accused who has been discharged under the relevant provisions of the Code, the nature of finality to such order

and the resultant protection of the persons discharged subject to revision under s. 398 of the Code may not be lost sight of. This should be so because the complainant's desire for vengeance has to be tempered with. [824E-F]

Chandra Deo Singh **v.** *Prokash Chandra Bose & Anr.,* **[1964] 1 SCR 639;** *Joginder Singh & Anr.* **v.** *State of Punjab and Anr.,* **[1979] 2 SCR 306;** *Municipal Corporation of Delhi* **v.** *Ram Kishan Rohtagi & Ors.,* **[1983] 1 SCR 884;** *Dr. S.S. Khanna* **v.** *Chief Secretary, Patna & Ors.,* **[1983] 2 SCR 724; relied on.**

State **v.** *Gangaram Kalite,* **AIR 1965 Assam and Nagaland 9; approved.**

Saraswatiben **v.** *Thakurlal Himmatlal & Anr.,* **AIR 1967 Gujarat 263;** *Amarjit Singh @ Amba* **v.** *The State of Punjab,* **Punjab Law Reporter Vols. 85 (1983) p. 324, disapproved.**

General view of the Criminal Law of England by James Stephen, **p. 99 referred to.**

3. The Assistant Public Prosecutor's application under s. 216, in so far as the appellants 1 to 3 were concerned, could be dealt with under s. 216. Appellants 3 & 5 could be dealt with neither under s. 216 nor under s. 319. The order of the Magistrate as well as that of the High Court in so far as the appellants 4 and 5 are concerned, are set aside. [824G-H]

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal Nos. 452-53 of 1990.

From the Judgment and Order dated 23.3.1989 of the Rajasthan High Court in S.B. Cr. R. No. 426 and 325 of 1982.

Badridas Sharma, Manoj Jain, H. Shekhar, Anil Kumar Gupta, Indra Makwana, Prem Sunder Jha, Lahoty and Ms. Meeta Sharma for the Appearing Parties.

The Judgment of the Court was delivered by

K.N. SAIKIA, J. Special leave granted.

These two criminal appeals are from the common Judgment of

A the High Court of Rajasthan dated 23.3.1989 in S.B. Criminal Revision No. 426 of 1982 filed by the appellants Nos. 1, 2 and 3 and S.B. Criminal Revision No. 325 of 1982 filed by the appellants Nos. 4 and 5 herein.

On 21.4.1980 one Shanti Lal lodged a report at Bikaner Police B Station stating therein that the appellants and two others namely Uttam Chand and Hanuman Chand at about 2 P.M. that day were pelting stones at the informant's house causing damage to it and that Durgabai, Tara and Sunita who at the relevant time were sitting at the chowk of the house were injured. After recording F.I.R. No. 22 dated 21.4.1980 and on completion of investigation police framed charges C under s. 147, 323, 325, 336 and 427 I.P.C. and the charge sheet was forwarded to the Judicial Magistrate No. 2 Bikaner under s. 173 Cr. P.C. After taking cognizance and after hearing the arguments, the Judicial Magistrate, Bikaner by his order dated 3.10.1980 in Criminal Case No. 165 of 1980 had been pleased to discharge the appellants Nos. 4 and 5, namely, Bijya Bai and Jiya Bai of all the charges levelled D against them. Appellants Nos. 1, 2 and 3, namely, Sohan Lal, Padam Chand and Vishnu were ordered to be charged only under s. 427 I.P.C. on the basis of site inspection and injury report:

On 25.2.82 the Assistant Public Prosecutor submitted an application to the Magistrate under s. 216 Cr. P.C. signed by Durga Bai E stating:

> "The accused have been charged under s. 427 I.P.C., whereas from the entire evidence and the medical evidence *prima facie* case under various sections i.e. 147, 325 and 336 I.P.C. is made out. Hence it is prayed that accused be F charged in accordance with the evidence and the charge be amended in the light of the evidence."

After recording the plea of the accused persons, prosecution led evidence and examined P.W. 1 Shanti Lal, P.W. 2 Sampat Lal, P.W. 3 Chagan Lal on 12.5.82 and P.W. 4 Durga Bai on 8.7.82.

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The learned Magistrate on 8.9.82 after referring to the aforesaid application submitted by A.P.P. dated 25.2.82 and hearing the A.P.P. and the learned advocate for the accused and discussing the evidence and observing that if any accused was discharged of any charge under any section then there would be no bar for taking fresh cognizance H and reconsideration against him according to s. 216 Cr. P.C. and that

the provision of s. 319 Cr. P.C. was also clear in that connection, recorded the following order: A

> "Hence cognizance for offences under ss. 147, 427, 336, 323, 325 I.P.C. is taken against accused Sohan Lal, Padam Chand, Smt. Vijya Bai, Jiya Bai, Vishnu, Hanuman Chand and Uttam Chand. Orders for framing the charges against B accused Sohan Lal, Padam Chand, Vishnu under the aforesaid sections are passed and accused Smt. Jiya Bai, Vijya Bai, Uttam Chand and Hanuman Chand be summoned through bailable-warrants in the sum of Rs.500 each. File to come on 20.10.82 for framing the amended charge against the accused present. Exemption from C appearance of accused Vishnu Chand and Padam Chand is cancelled until further order. The advocate for the accused shall present the said accused in the Court in future."

The above order was challenged in the aforesaid two criminal revision petitions in the High Court of Rajasthan and the same were D dismissed by the order under appeal. According to the learned Single Judge the question that arose for consideration in those revision petitions was whether a Magistrate was competent to take cognizance of the offence after recording some evidence against the accused persons who had been earlier discharged of those offences. It was urged by the revision petitioners that having once discharged them it was not open E to the Magistrate to proceed against them and the only remedy was to go in revision and the Magistrate could not review his own order. The learned Judge dismissed the petitions taking the view that it was not a case of reviewing the order of discharge passed by the Magistrate but was a case of taking cognizance of the offence on the basis of the evidence recorded by the Magistrate himself which was not in any way F prohibited in law, and that under the provisions of s. 319 Cr. P.C. the Magistrate was fully competent to take cognizance of the offences on the basis of evidence recorded by him though for the same offences order of discharge was passed by him earlier.

Mr. B.D. Sharma, the learned counsel for the appellants, firstly, G submits that the learned Magistrate while deciding the application dated 25.2.82 submitted by the A.P.P. under s. 216 Cr. P.C. committed error of jurisdiction in passing an order far beyond what was prayed in the application and could not have revised his own order of discharging the appellants. Secondly, s. 319 Cr. P.C. was applicable only to a person not being the accused and the appellants having been H

A accused but discharged could not have been charged as was done in this case. Counsel submits that the High Court having failed to notice this fact if this order is allowed to stand it will cause grave miscarriage of justice to the appellants.

The learned counsel for the State supports the impugned order
B submitting that the learned Magistrate found enough materials for taking cognizance and framing charges against the appellants after examining P. Ws. 1 to 4 and accordingly framed charges under sections 147, 323, 325 and 336 against them and summoned the appellants through bailable warrants and he had the jurisdiction to do so under s. 319 Cr. P.C. irrespective of the application under s. 216 Cr. P.C. filed
C by the A.P.P.

We may now proceed to examine the contentions. From the application submitted by the A.P.P. dated 25.5.82 there could be no doubt that what he prayed for was the charging the accused in addition to s. 427 I.P.C. whereunder they were already charged, under ss. 147,
D 323, 325 and 336 I.P.C. of which they were already discharged. This application *ex facie* did not envisage the appellants Vijya Bai and Jiya Bai who were wholly discharged under all the above sections.

Under s. 219 Cr. P.C. the court may alter charge. It says:

E "216. Court may alter charge.

(1) Any court may alter or add to any charge at any time before judgment is pronounced.

(2) Every such alteration or addition shall be read and
F explained to the accused.

(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the
G Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.

(4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the
H court, to prejudice the accused or the prosecutor as

aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary. A

(5) xxxxx

Add to any charge means the addition of a new charge. An alteration of a charge means changing or variation of an existing B charge or making of a different charge. Under this section addition to and alteration of a charge or charges implies one or more existing charge or charges. When the appellants Vijya Bai and Jiya Bai were discharged of all the charges and no charge existed against them, naturally an application under s. 216 Cr. P.C. was not maintainable in their case. In cases of appellants Sohan Lal, Padam Chand and Vishnu C against whom the charge under s. 427 I.P.C. was already in existence there of course could arise the question of addition to or alteration of the charge. The learned Magistrate therefore while disposing of the application under s. 216 Cr. P.C. only had no jurisdiction to frame charges against the appellants Vijya Bai and Jiya Bai. In his order the learned Magistrate did not say that he has proceeding *suo motu* against D Vijya Bai and Jiya Bai though he said that s. 319 Cr. P.C. was also clear in this connection.

As regards the other three appellants, namely, Sohan Lal, Padam Chand and Vishnu they were already accused in the case. Section 216 Cr. P.C. envisages the accused and the additions to and E alterations of charge may be done at any time before Judgment is pronounced. The learned Magistrate on the basis of the evidence on record was satisfied that charges ought also to be framed under the other sections with which they were charged in the charge sheet. That was also the prayer in the A.P.P.'s application. However the learned Magistrate invoked his jurisdiction under s. 319 Cr. P.C. which says: F

"319. Power to proceed against other persons *appearing to be guilty of offence*—

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not G being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may H

A be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence B which he appears to have committed.

(4) Where the Court proceeds against any person under sub-section (1) then—

(a) the proceedings in respect of such person shall be commenced afresh, and the witnesses reheard; C

(b) subject to the provisions of clause (a), the case may proceed at if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

D

The crucial words in the section are, 'any person not being the accused.' This section empowers the Court to proceed against persons not being the accused appearing to be guilty of offence. Sub-ss. 1 and 2 of this section provide for a situation when a Court hearing a case against certain accused person finds from the evidence that some E person or persons, other than the accused before it is or are also connected in this very offence or any connected offence; and it empowers the court to proceed against such person or persons for the offence which he or they appears or appear to have committed and issue process for the purpose. It provides that the cognizance against newly added accused is deemed to have been taken in the same F manner in which cognizance was first taken of the offence against the earlier accused. It naturally deals with a matter arising from the course of the proceeding already initiated. The scope of the section is wide enough to include cases instituted on private complaint.

There could be no doubt that the appellants 1, 2 and 3 were the G accused in the case at the time of passing the impugned order by the Magistrate and as such s. 319 Cr. P.C. would not cover them. Could appellants 4 and 5 be brought under that section.? Were they accused in the case? Precisely when a person can be called the accused?

Generally speaking, to accuse means to allege whether the H person is really guilty of the crime or not. Accusation according to

Black's Law Dictionary means a formal charge against a person, to the effect that he is guilty of a punishable offence laid before a Court or Magistrate having jurisdiction to inquire into the alleged crime. In this sense accusation may be said to be equivalent of information at common law which is mere allegation of prosecuting officer by whom it is preferred.

In the Code of Criminal Procedure 1973, hereinafter called the Code, the expression 'the accused' has been used in a narrower sense. Chapter XII of the Code deals with information to the police and their power to investigate. Section 154 deals with information in cognizable cases and section 155 with information as to non-cognizable cases and investigation of such cases.

Section 167, dealing with procedure when investigation cannot be completed in 24 hours, says:

> "(1) Whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of 24 hours fixed by section 57, and there are grounds for believing that the *accusation or information* is well founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to case, and shall at the same time *forward the accused* to such Magistrate.
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> (2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of *the accused* in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order *the accused* to be forwarded to a Magistrate having such jurisdiction."
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> (Emphasis ours)

Thus the words 'the accused' have been used only in respect of a case where there are grounds for believing that the accusation or information is well founded. 'Information' and 'accusation' are synonimously used.

A Chapter XV deals with complaints to Magistrate. Section 200 provides for examination of complainant. Section 202 deals with postponement of issue of process and says in sub-section (1) that any Magistrate, on receipt of a complaint of an offence which he is authorised to take cognizance or which has been made over to him under section 192, may, if he thinks fit, postpone the issue of process B against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding. Thus we find that the expression "the accused" has been used in relation to a complaint case under this section even before issue of process. It also appears that in the Code C the expression "the accused" is used after cognizance is taken by the Magistrate.

Chapter XVI of the Code deals with commencement of proceedings before Magistrates. Section 204 dealing with issue of process uses the expression "the accused". Under sub-section (1) thereof if in the D opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding and the case appears to be—(a) a summons-case, he shall issue his summons for the attendance of the accused, or (b) a warrant-case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction him-E self) some other Magistrate having jurisdiction. Under sub-section (2), no summons or warrant shall be issued against the accused under sub-section (1) until a list of the prosecution witnesses has been filed. Thereafter the expression 'the accused' has been used in subsequent sections. Thus one is referred to as 'the accused' even before issue of process.

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Section 273 provides for evidence to be taken in presence of the accused in the course of trial or other proceedings. The explanation to the section says that "accused" includes a person in relation to whom any proceeding under Chapter VIII (Security for keeping the peace and Good Behaviour) has been commenced under this Code.

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In *Chandra Deo Singh* v. *Prokash Chandra Bose & Anr.*, [1964] 1 SCR 639, during the pendency of the first complaint on which the Magistrate directed an inquiry, the nephew of the deceased filed a complaint alleging that the respondent No. 1 had committed the murder. The Sub-Divisional Magistrate directed the First Class Magis-H trate to inquire into that complaint and also to report. During the

inquiry, apart from the witness produced by the complainant respondent No. 1 was allowed to be represented by a counsel and two persons who had been named in the First Information Report alongwith respondent No. 1 were examined with court witnesses. The First Class Magistrate after conducting the inquiry under section 203 Cr. P.C., 1898 made a report stating that a *prima facie* case had been made out against the persons mentioned in the first complaint. He made another report on the second complaint stating that no *prima facie* case has been made against respondent No. 1. The Sub-Divisional Magistrate directed the initiation of committal proceedings against the persons mentioned in the first complaint. On a revision application filed by the complainant of the second complaint the Sessions Judge directed the Sub-Divisional Magistrate to conduct further inquiry against respondent No. 1 who took the matter in revision to the High Court. The Revision Applications by respondent No. 1 and three others were allowed wherefrom there was an appeal to this Court by certificate. The main contentions of the appellant before this Court were that the respondent No. 1 had no locus standi to appear and contest a criminal case before the issue of process. This Court held:

> "It seems to us clear from the entire scheme of Chapter XVI of the Code of Criminal Procedure (1898) that an accused person does not come into the picture at all till process is issued. This does not mean that he is precluded from being present when an enquiry is held by a Magistrate. He may remain present either in person or through a counsel or agent with a view to be informed of what is going on. But since the very question for consideration being whether he should be called upon to face an accusation, he has no right to take part in the proceedings nor had the Magistrate any jurisdiction to permit him to do so."

Joginder Singh & Anr. v. *State of Punjab and Anr.*, reported in 1979 (2) SCR 306 is an authority for the proposition that the expression "any person not being the accused" clearly covers any person who is not being tried already by the Court. A criminal complaint was registered against 5 persons including the 2 appellants. The police having found that the two appellants were innocent chargesheeted the remaining 3 persons and they were committed to trial. At the trial evidence having shown the appellants' involvement in the crime the prosecution moved an application that they be tried along with the three accused and the Sessions Judge directed the appellants to stand trial together with other accused. Their revision application in the

A High Court was dismissed. In their appeal in this Court it was *inter alia* submitted that Section 319 Cr. P.C. was inapplicable to the facts of this case because the phrase "any person not being the accused" occurring in the section excluded from its operation an accused who had been released by the police. This Court rejected the contention holding that the said expression clearly covered by person who has not been tried B already by the Court and the very purpose of enacting such a provision like section 319 clearly showed that even a person who had been dropped by the police during investigation but against him evidence showing his involvement in the offence came before the criminal court were included in the said expression.

C *In Municipal Corporation of Delhi* v. *Ram Kishan Rohtagi & Ors.*, [1983] 1 SCR 884, under the Food Adulteration Act, the respondent No. 1 was Manager of the company and the respondent No. 2 to 5 were the directors of the company including the company. The High Court quashed the proceedings against the directors as also against the manager. This court set aside a part of the Judgment of the High Court D which quashed the proceedings against the manager respondent No. 1. It was held that where the allegations set out in the complaint did not constitute any offence and the High Court quashed the order passed by the Magistrate taking cognizance of the offence there would be no bar to the Court's discretion under section 319 Cr. P.C. if it was made out on the additional evidence laid before it. Section 319 gives E ample powers to any Court to take cognizance against any person not being an accused before it and try him along with the other accused. This Court clearly observed:

> "In these circumstances, therefore, if the prosecution can at any stage produce evidence which satisfies the court that F the other accused or those who have not been arrayed as accused against whom proceedings have been quashed have also committed the offence the Court can take cognizance against them and try them along with the other accused. But we would hasten to add that this is really an extraordinary power which is conferred on the Court and should be G used very sparingly and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken. More than this we would not like to say anything further at this stage. We leave the entire matter to the discretion of the Court concerned so that it may act according to law. We would, however, make H it plain that the mere fact that the proceedings have been

quashed against respondent Nos. 2 to 5 will not present the court from exercising its discretion if it is fully satisfied that a case for taking cognizance against them has been made out on the additional evidence led before it." A

It was pointed out that under the Cr.P.C. 1973 the Court can take cognizance against persons who have not been made accused and try them in the same manner along with other accused. In the old Code, Section 351 contained a lacuna in the mode of taking cognizance if a new person was to be added as an accused. The Law Commission in its 41st Report (para 24.81) adverted to this aspect of the law and section 319 of the present Code gave full effect to the recommendation of the Law Commission by removing the lacuna which was found to exist in section 351 of the old Code. B C

In *Dr. S.S. Khanna* v. *Chief Secretary, Patna & Ors.*, reported in 1983 2 SCR 724 this Court had to consider whether a person against whom a complaint was filed along with some other persons and who after an enquiry under s. 202 of the Code was not proceeded against by the Court, could be summoned at a later stage under s. 319 of the latter Code to stand trial for the same or a connected offence or offences along with the other persons against whom process had been issued earlier by the Court. It was held that having regard to the nature of the proceedings under s. 202 of the Cr. P.C. it may be difficult to hold that there is a legal bar based on the principle of issue estoppel to proceed under s. 319 against a person complained against on the same material, if the Court has dismissed a complaint under s. 203. But the Court did not express any final opinion on the question. In that case, however, the Magistrate decided to take action under s. 319 of the Code on the basis of fresh evidence which was brought on record in the course of proceedings that took place after the enquiry contemplated under s. 202 of the Code was over. It was further held that even when an order of the Magistrate declining to issue process under s. 202 was confirmed by a higher Court the jurisdiction of the Magistrate under s. 319 remained unaffected, if other conditions were satisfied and the *autre fois* principle adumbrated in s. 300 of the Code could not, however, apply to such a case. D E F G

In the instant case, Vijya Bai and Jiya Bai were discharged by the Magistrate of all the charges and the three other appellants were discharged of the sections other than section 427 I.P.C. After the police submitted charge sheet against them the order of discharge, according to Mr. B.D. Sharma, could not be taken to be one under H

s. 203 but under s. 245 which is included in Chapter XIX and deals with trial of warrant cases by the Magistrates. This submission has not been refuted. That section says:

> "245. When accused shall be discharged.—(1) If, upon taking all the evidence referred to in s. 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."

If that was so, the question is what would be the effect of the order of discharge? Should the protection resulting from such an order of discharge be allowed to be taken away by allowing the same Magistrate to take cognizance of the offence or offences against them at a later stage of the trial, without further enquiry where the order of discharge was not challenged or even if the order of discharge was taken in revision and the same was affirmed by the revisional court? Section 397 empowers the High Court or any Sessions Judge to call for examining the records or any proceedings before any inferior criminal court within its jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed etc. Section 398 empowers the High Court or the Sessions Judge to order inquiry. It says:

> "On examining any record under s. 397 or otherwise, 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, and the Chief Judicial Magistrate may himself make or direct any subordinate Magistrate to make, further inquiry into any complaint which has been dismissed under s. 203 or sub-section (4) of s. 204, or into the case of any person accused of an offence who has been discharged.
>
> Provided that no Court shall make any direction under this section for inquiry into the case of any person who has been discharged unless such person has had an opportunity of showing cause why such direction should not be made."

Thus this provision empowers the Courts to direct further inquiry into any complaint which has been dismissed under s. 203 or sub-section (4) of s. 204 or in the case of any person accused of the offence who has been discharged and no such order shall be made unless such person has had an opportunity of showing cause why such direction should not be made.

The question therefore is whether the necessity of making a further inquiry as envisaged in s. 398 could be obviated or circumvented by taking resort to s. 319. As has already been held by this Court, there is need for caution in resorting to s. 319. Once a person was an accused in the case he would be out of reach of this section. The word "discharge" in s. 398 means discharge of an offence relating to the charge within the meaning of ss. 227, 239, 245 and 249. Refusing to proceed further after issue of process is discharge. The discharge has to be in substance and effect though there is no formal order. The language of the section does not indicate that the word "discharge" should be given a restricted meaning in the sense of absolute discharge where the accused is set at liberty after examination of the whole case. The cases of appellants 4 and 5 would be one of total discharge. But it could not be said that they were not some of the accused in the case, or that cognizance was not taken of the offences against them. A person may be accused of several offences and he may be discharged of some offences and proceeded against for trial in respect of other offences. This was the position regarding appellants 1, 2 & 3, who were partially discharged.

The High Court did not subscribe to the view taken in *State* v. *Gangaram Kalite* reported in AIR 1965 Assam and Nagaland 9. Therein a chargesheet having been filed aginst 9 accused persons in his Court the Sub-Divisional Magistrate called for report from the police and on receipt of the final report ordered the discharge of the accused persons on 26.6.1961. Subsequently on 22.8.1961, without any fresh chargesheet or a complaint, Sub-Divisional Magistrate decided to proceed afresh against the accused persons and ordered summons to be issued to them, fixing a later date for evidence. On a reference by the Additional District Magistrate, calling into question the procedure followed by the Sub-Divisional Magistrate a single bench of the High Court of Assam and Nagaland on the basis of Section 241-A of the old Code of the Criminal Procedure held that assuming that the discharge order had been validly passed, the Magistrate became *functus officio* so far as the case was concerned and unless there was a fresh complaint or a fresh chargesheet no action in the matter could have been taken by the Sub-Divisional Magistrate. It was observed that as the order

A passed was an order of discharge and not one of acquittal, a fresh complaint could under law have been entertained by the Magistrate and in the absence of any such complaint, any attempt to go back on the order of discharge passed by him and to revive the case, as if the case had not been discharged, would amount in law to a review of the Judgment of the Magistrate which was not permissible having regard B to section 369 of the Code of Criminal Procedure. Section 369 provided that no Court when it had signed its Judgment, shall alter or review the same, except to correct clerical errors.

The High Court in the instant case followed the decision in *Saraswatiben* v. *Thakurlal Himatlal & Anr.*, reported in AIR 1967 Gujarat 263, holding that if at one stage on the evidence before him C the Magistrate found that there was no *prima facie* case against the accused, subsequently on enquiry as a result of further evidence if he felt that there was *prima facie* case against the accused whom he had discharged under section 251-A (2) Cr. P.C., it was open to him to frame a charge against the accused and that it was not necessary to D take cognizance again and the Magistrate did not become *functus officio*. The same view was taken in *Amarjit Singh @ Amba* v. *The State of Punjab*, reported in Punjab Law Reporter Vol. 85 (1983) p. 324.

The above views have to yield to what is laid down by this Court in the decisions above referred to. The provisions of s. 319 had to be E read in consonance with the provisions of s. 398 of the Code. Once a person is found to have been the accused in the case he goes out of the reach of s. 319. Whether he can be dealt with under any other provisions of the Code is a different question. In the case of the accused who has been discharged under the relevant provisions of the Code, the nature of finality to such order and the resultant protection of the F persons discharged subject to revision under s. 398 of the Code may not be lost sight of. This should be so because the complainant's desire for vengeance has to be tempered with though it may be, as Sir James Stephen says; "The Criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite." (General view of the Criminal Law of England, p. 99). The A.P.P.'s application G under s. 216, in so far as the appellants 1 to 3 were concerned could be dealt with under s. 216. Appellants 4 & 5 could be dealt with neither under s. 216 nor under s. 319. In that view of the matter the impugned order of the Magistrate as well as that of the High Court in so far as the appellants 4 & 5, namely, Vijya Bai and Jiya Bai are concerned, have to be set aside which we hereby do. The appeals are allowed to that H extent.

G.N. Appeals allowed.