Atal kaushik et al. International Journal of Recent Research Aspects ISSN: 2349-7688, Vol. 4, Issue 4, December 2017, pp. 471-473

The Cognizance of Offence and the Power to Call

Atal kaushik

BALLB , LLM, Kurukshetra University

Abstract: **Now days, it became a matter of day to day court practice that accused who are directly or indirectly responsible for commission crime easily escape the boundaries of Penal Law. As their name were not found in complaint itself or in FIR. But if the names were mentioned in complaint or in FIR then the name of such accused where not found a place in charge sheet filed by investigating agency under section 173 (2) of Cr.P.C., in Such a situation the Code of Criminal Procedure itself provides Power to proceed against other persons appearing to be guilty of offence In the course of any inquiry into, or trial of, an offence. The Power can be evoked by the Court Suo – muto, if a Magistrate hearing a case against certain accused finds from the evidence that some person, other than the accused before him, is also concerned in that very offence or in a connected offence or where such an action is not taken suo – muto then it can be proceeded upon an application under section 319 of Code of Criminal Procedure.**

Keywords: **Call, Power, cognizance**

I. INTRODUCTION

The section springs out of the doctrine judex damnatur cum nocens absolvitur (Judge is condemned when guilty is acquitted) it llows the court to proceed against any person who is not an accused in a case before it. Thus, the person against whom summons are issued in exercise of such powers, has to necessarily not be an accused already facing trial. He can either be a person named in Column 2 of the charge sheet filed under Section 173 Cr.P.C. or a person whose name has been disclosed in any material before the court that is to be considered for the purpose of trying the offence, but not investigated. He has to be a person whose complicity may be indicated and connected with the commission of the offence. In Raghubans Dubey v. State of Bihar,[1] The hon'ble Supreme Court held that once cognizance has been taken by the magistrate, he takes cognizance of an offence and not the offenders; once he takes cognizance of an offence it is his duty to find out who the offenders really are and once he comes to the conclusion that apart from the persons sent up by the police some other persons are involved, it is his duty to proceed against those persons. The summoning of the additional accused is part of the proceeding initiated by his taking cognizance of an offence.

II. THE COGNIZANCE OF OFFENCE THE BY MAGISTRATE

The Code of Criminal Procedure under section 190 speaks about the Cognizance of offences taken by a Magistrate of 1st class, also provides that a 2nd class magistrate may also be empowered by the chief Judicial Magistrate to take cognizance of offences, information of which received by them through :-

1. Complaint
2. Upon police Report
3. Information received through any person other than a police officer
4. Upon his own knowledge.

What actually the section postulates is the "Cognizance of the offence by Magistrates". What is taking cognizance has not been defined in the code. The word 'cognizance' thus merely means "became aware of and when used with the reference to a court or Judge it means "to take notice judicially".[2] Whereas Section 200 of the Code provides for the Examination of Complainant by Magistrate after taking Cognizance upon his complaint. Thus in the light of all above it is quite clear that a Complaint is to be filled under section 190 of the Code so that the Magistrate may take cognizance of it. Also section 190(1) (a) specify that Cognizance is to be taken by the Magistrate upon receiving of complaint upon which he take cognizance under the section. It was held in Kishun Singh v State of Bihar,[3] that when the Magistrate take notice of the accusations and applies his mind to the allegations made in the Complaint or the Police report or information and on being satisfied that the allegations, if proved, would constitute an offence,

[1] AIR 1967 SC 1167

[2] Ajit Kumar Palit v State of West Bengal, (1963) I Cri L.J 797

[3] (1993) 2 SCC 16

decides to initiate judicially proceedings against the alleged offender, he is said to have taken cognizance of the offence. In Raghubans Dubey v. State of Bihar,[4] this Court held that once cognizance has been taken by the Magistrate, he takes cognizance of an offence and not the offenders; once he takes cognizance of an offence it is his duty to find out who the offenders really are and once he comes to the conclusion that apart from the persons sent up by the police some other persons are involved, it is his duty to proceed against those persons. The summoning of the additional accused is part of the proceeding initiated by his taking cognizance of an offence.

According to Section 200 of the Cr.P.C when a Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate: Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses.

III. ISSUE OF PROCESS AGAINST THE ACCUSED.

A Process can be issued when there appear some evidence against a person not proceeded against and the stage of the proceedings is irrelevant. Where the complainant is circumspect in proceeding against several persons, but the court is of the opinion that there appears to be some evidence pointing to the complicity of some other persons as well, Section 319 Cr.P.C. acts as an empowering provision enabling the court/Magistrate to initiate proceedings against such other persons.. In Kalyan Kumar Gogoi v. Ashutosh Agnihotri & Anr.,[5] it was heald by the Hon'ble Court that the word "evidence" is used in common parlance in three different senses: (a) as equivalent to relevant, (b) as equivalent to proof, and (c) as equivalent to the material, on the basis of which courts come to a conclusion about the existence or non-existence of disputed facts. Though, in the definition of the word "evidence" given in Section 3 of the Evidence Act one finds only oral and documentary evidence, this word is also used in phrases such as best evidence, circumstantial evidence, corroborative evidence, derivative evidence, direct evidence, documentary evidence, hearsay evidence, indirect evidence, oral evidence, original evidence, presumptive evidence, primary evidence, real evidence, secondary evidence, substantive evidence, testimonial evidence, etc. In Poonam Chand Jain v Fazru,[6] it was observed that Section 204 is a preliminary stage of trial contemplated in chapter XX of the code. Such an order made at a preliminary stage being an interlocutory order, same cannot be reviewed or reconsidered by the Magistrate, there being no provision under the code for review of an order by the same court. Hence it is impermissible for a Magistrate to reconsider his decision to issue process in the absence of any specific provision to recall such order. In was held in Kalish Chudhariu v State of UP,[7] that while issuing process section 204 of Cr.P.C , the Magistrate must, in Brief , set out the allegations made in the petition of the complaint, and materials brought on record and must state that in his opinion process should be issued. If at a subsequent stage, he satisfied that process should not have been issued, he can re-call it.

IV. CAUTION TO BE TAKEN BY THE COURT

The degree of satisfaction required for invoking the power under Section 319 Cr.P.C. is explained by the Supreme Court in case of Sarabjit Singh & Anr. v. State of Punjab & Anr.,[8] while explaining the scope of Section 319 Cr.P.C., a two - Judge Bench of this Court observed that for the aforementioned purpose, the courts are required to apply stringent tests; one of the tests being whether evidence on record is such which would reasonably lead to conviction of the person sought to be summoned. Whereas the test of prima facie case may be sufficient for taking cognizance of an offence at the stage of framing of charge, the court must be satisfied that there exists a strong suspicion. While framing charge in terms of Section 227 of the Code, the court must consider the entire materials on record to form an opinion that the evidence if unrebutted would lead to a judgment of conviction. Whether a higher standard be set up for the purpose of invoking the jurisdiction under Section 319 of the Code is the question. The answer to these questions should be rendered in the affirmative. Unless a higher standard for the purpose of forming an opinion to summon a person as an additional accused is laid down, the ingredients thereof viz. (i) an extraordinary case, and (ii) a case for sparingly (sic sparing) exercise of jurisdiction, would not be satisfied. Further Section 204 of the Code provides that If in the 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

[4] AIR 1967 SC 1167
[5] 2011 SC 760
[6] AIR 2005 SC 38
[7] 1994 Cr.L.J 67 (All)
[8] AIR 2009 SC 2792

jurisdiction himself) some other Magistrate having jurisdiction.

No summons or warrant shall be issued against the accused under sub- section (1) until a list of the prosecution witnesses has been filed. In a proceeding instituted upon a complaint made in writing every summons or warrant issued under sub- section (1) shall be accompanied by a copy of such complaint. When by any law for the time being in force any process- fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint. Nothing in this section shall be deemed to affect the provisions of section 87.

V. CONCLUSION

The crux of whole concept is that it is the duty of the Court to do justice by punishing the real culprit. Where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial. And the power conferred under Section 319 Cr.P.C. is only on the court. This has to be understood in the context that Section 319 Cr.P.C. empowers only the court to proceed against such person. The word "court" in our hierarchy of criminal courts has been defined under Section 6 Cr.P.C., which includes the Courts of Sessions, Judicial Magistrates, Metropolitan Magistrates as well as Executive Magistrates. The Court of Sessions is defined in Section 9 Cr.P.C. and the Courts of Judicial Magistrates has been defined under Section 11 thereof. The Courts of Metropolitan Magistrates has been defined under Section 16 Cr.P.C. The courts which can try offences committed under the Indian Penal Code, 1860 or any offence under any other law, have been specified under Section 26 Cr.P.C. read with First Schedule. The explanatory note (2) under the heading of "Classification of Offences" under the First Schedule specifies the expression 'magistrate of first class' and 'any magistrate' to include Metropolitan Magistrates who are empowered to try the offences under the said Schedule but excludes Executive Magistrates. The court is the sole repository of justice and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency. The desire to avoid trial is so strong that an accused makes efforts at times to get himself absolved even at the stage of investigation or inquiry even though he may be connected with the commission of the offence. It was observed that when a complaint is filed before a magistrate the magistrate may simply order an investigation by the police. The police may then investigate the case and submit the report to the magistrate. In such a situation, when the magistrate then proceeds with the case. a question of some impontaT1 arises as to whether the magistrate had taken cognizance of the offence on the complaint before sending it for investigation or whether the case was sent to the police without taking 'cognizance' of the offence and the cognizance was taken only on the report submitted by the police. There are certain advantages to the complainant if cognizance was taken on a complaint. For instance, in the event of an acquittal of the accused in a complaint case, the complainant gets a right of appeal under Section 378(4). It is now well settled that when a petition of complaint is tiled before a magistrates the question whether he can be said to have taken "cognizance" of the offence alleged in the complaint under Section 90(1), depends upon the purpose for which he applies his mind to the complaint. If the magistrate applies his mind to the complaint for the purpose of proceeding with the complaint under the various provisions of Sections 200 to 203 (dealing with examination of complainant postponement of issue of process etc.), he must be held to have taken cognizance of the offences mentioned in the complaint; on the other hand, if he applies his mind to the complaint not for any such purpose, but only for the purpose of ordering an investigation under Section 156(3) of the Code, or for issuing a search warrant under Section 93, he cannot be said to have taken cognizance of the offence.

