EXTENT OF INTERFERENCE OF THIRD PARTIES INCLUDING DEFACTO COMPLAINANT IN CRIMINAL TRIAL

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My paper is mainly aimed at in examining the extent of interference of third parties, including defacto complainant in Criminal Trial under the current criminal procedural laws.

Before delving into the subject, it is quite apposite to know when trial in a criminal case is said to have commenced. In the case of "Common Cause", A registered society through it's Director V. Union of India and Ors., reported in AIR 1997 SC 1539 : 1996(2) ALD (Cri) 1, the Hon'ble Apex Court has made it clear that the trails before Session Court and Magistrate Court shall be treated to have commenced when charges are framed against the accused. Whereas, in the case of summons cases when the accused is questioned as to whether he pleads guilty or any defence to make.

In order to understand the subject under discussion, one must have an idea as to who are considered to be the parties under Criminal Law and who others are termed as the third parties. As we all know, the accused, alleged to have committed the crime, the prosecution and the victim are considered to be parties to criminal law. According to Sec. 2 (wa) of Cr.P.C, a victim is the person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression “victim” includes his or her guardian or legal heir. However, the victim in a crime is not considered to be a party to the criminal case because crimes are considered to be wrongs committed against society as a whole. Therefore any person other than State and Accused would fall under the category of 3rd Party under the Criminal Law.

Locus standi of 3rd parties in criminal trial:

In the case of Thakkur Ram v. State of Bihar, reported in AIR 1966 SC 911, the Hon'ble Supreme Court ruled that in a case which has proceeded on a police report, a private party has no locus standi. It further ruled that, barring a few exceptions, in criminal matters, the aggrieved party is the State, which is the custodian of the social interests of the community at large, and so it is necessary for the State to take all
steps necessary for bringing the person who has acted against the social interests of the community, to book.

In the case of Akhil Bhartiya Soshit Karamchari Sangh (Railway) v. Union of India, reported in AIR 1981 SC 298, it has been held that “...the narrow concept of ‘cause of action’ and ‘person aggrieved’ and individual litigation is becoming obsolescent in some jurisdictions.”

In the case of Sheo Nandan Paswan v. State of Bihar, reported in AIR 1987 SC 877 it has been held that “It is now settled law that a criminal proceeding is not a proceeding for vindication of a private grievance but it is a proceeding initiated for the purpose of punishment of the offender in the interest of the society. It is for maintaining stability and orderliness in the society that certain acts are constituted offences and the right is given to any citizen to set the machinery of the criminal law in motion for the purpose of bringing the offender to book.”

In the case of A. R. Antulay v. Ramdas Srinivas Nayak, reported in AIR 1988 SC 1531 it has been held that “punishment of the offender in the interests of the society being one of the objects behind penal statutes enacted for the larger good of the society, the right to initiate proceedings cannot be whittled down, circumscribed or fettered by putting it into a strait-jacket formula of locus standi.”

In the case of D. Gopalan v. Shanthi Alias Vennira Adai, decided on 23rd January, 1989, it has been held that “If he can be a complainant for initiation of criminal prosecution, he should equally be entitled to oppose withdrawal of the criminal prosecution which has already been initiated at his instance.”

In the case of Janata Dal v. H. S. Chowdhary, reported in 1991(3) SCC 756 it has been that “Even if there are million questions of law to be deeply gone into and examined in a criminal case of this nature registered against specified accused persons, it is for them and them alone to raise all such questions and challenge the proceedings initiated against them at the appropriate time before the proper forum and not for third parties under the garb of public interest litigants.”

In the case of State of Kerala v. R. Balakrishna Pillai, reported in [1993] 2 Kerala Series 752 it has been held that “Public interest litigant is an alien figure on the landscape of criminal justice system…… The
Supreme Court had never recognized locus standi in third parties in criminal law.

In the case of People’s Union of Civil Liberties (Delhi) v. C.B.I & Ors, reported in 1997 Cr.L.J 3242, it has been held that “A 3rd party has no locus standi to file criminal revision petition against judicial order as a 3rd party is neither complainant nor aggrieved party……….
The state is the master of prosecution and it would be extremely unsafe to accord locus standi to 3rd party to file a criminal revision against a judicial order.”

In the case of Rajubhai Dhamirbhai Baria v. State of Gujarat, reported in 2012 (114) Bom LR 3549, it has been held that “It is a settled position in law that third parties have no locus standi for intervening in criminal trial. If one peruses the scheme of the Code of Criminal Procedure, it will be abundantly clear that third parties do not have any right to intervene either in the trial or at appellate stage in the High Court.”

In the case of Dr. Subramanian Swamy v. Dr. Manmohan Singh, reported in AIR 2012 SC 1185 it has been held that “Punishment of the offender in the interest of the society being one of the objects behind penal statutes enacted for larger good of the society, right to initiate proceedings cannot be whittled down, circumscribed or fettered by putting it into a straitjacket formula of locus standi unknown to criminal jurisprudence, save and except specific statutory exception.”

In the case of Subramaniam Swamy v. Raju, reported in (2013)10 SCC 465 it has been held that “A 3rd party/stranger does not have any right to participate in a criminal prosecution which is primarily the function of the state.”…… “Generally 3rd party has no locus in criminal matters but in certain exceptional situations there is recognition of the limited right of the 3rd Party. In the case of Sunita Devi v. State of Jharkhand, decided in W.P.(Cr.) No. 245 of 2013 it was held that “A person, not a party to the proceeding or associated with the offence, doesn’t have any right to appear before the court.”

In the case of Manzoor Ali Khan v. Union of India, AIR 2014 SC 3194 it has been held that “The society for it's orderly and peaceful development is interested in the punishment of the offender. Therefore, prosecution for serious offences is undertaken in the name of the State representing the people which would exclude any element of private vendetta or vengeance.”
In the light of the authorities cited herein above, it can be safely concluded that the third parties have no locus standi in criminal trial as otherwise it would not only lead to creation of frivolous and vexatious litigation but also cause prejudice to the rights of the accused as otherwise there can not be an end to the litigation.

**However, the recent trend has been to allow for participation by those affected in the criminal-justice-delivery mechanism.**

The role of the Public Prosecutor has become an important subject, with the Supreme Court pulling up the Prosecutor in the infamous Best Bakery case (Zahira Habibulla H. Sheikh v. State of Gujarat, reported in (2004) 4 SCC 158), for ostensibly siding with the accused. Cases of this sort, where the State has a vested interest in the accused, have highlighted public distrust in the handling of prosecution by the State. Demands are often made by the victims to let counsel engaged by them, carry out the prosecution. Further, where the victim is unaware of the functioning of the legal regime and her entitlements under it, she can quite often be exploited and be denied justice.

Section 24 of the Code of Criminal Procedure, 1973 (CrPC) lays down that a Public Prosecutor shall be appointed for conducting prosecution, appeal or other proceeding on behalf of the Government, as the case may be. Section 301 CrPC states that the Public Prosecutor or the Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any court in which that case is under inquiry, trial or appeal. It further states that if in any such case any private person instructs a pleader to prosecute any person in any court, the pleader so instructed shall act under the directions of the Public Prosecutor or the Assistant Public Prosecutor and may with the permission of the court, submit written arguments after the evidence is closed in the case. Section 302 CrPC empowers the Magistrate inquiring into or trying a case to permit the prosecution to be conducted by any person other than a police officer below the rank of inspector. It further states that no person other than the Advocate General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor shall be entitled to do so without such permission. Any person conducting the prosecution may do so personally or through his pleader.

The above sections clearly indicate that there is ample scope in CrPC for introducing the concept of third-party intervention in criminal cases. This may be required when the victim is not in a position to look
after her own interests or is keen to see that the perpetrator of the crime is brought to book. That apart, third-party intervention can also be possible in situations analogous to public interest litigation under constitutional law. This envisages a situation where crimes have been committed but the State machinery is reluctant to prosecute as has been widely claimed in the recent carnage in Gujarat. In such cases public-spirited pleaders can intervene, with the permission of the court, and take up prosecution.

Section 301 came to be interpreted in a number of cases. In Kuldip Singh v. State of Haryana, reported in 1980 Cri LJ 1159 (P&H) the Punjab and Haryana High Court held that, the Court has no role to play as regards a person engaging her own pleader, since the pleader's role is confined to briefing the Public Prosecutor. The Court further held that it only has a say in the matter, if the pleader so engaged by the party, wishes to make a written submission.

In Praveen Malhotra v. State, reported in (1990) 41 DLT 418 (Del) a third party sought to intervene in the matter and present oral arguments against a petition for bail filed by the accused. The petitioners relied on the judgment of the Supreme Court in Arunachalam v. P.S.R. Sadhanantham, reported in (1979) 2 SCC 297, where the Supreme Court had ruled that under Article 136, it can entertain appeals against judgments of acquittal by the High Court at the instance of private parties also, as Article 136 does not inhibit anyone from invoking the Court's jurisdiction. The Court, in the present case, distinguished this case and said that the ruling made by the Supreme Court in the context of Article 136 cannot be relied upon in the context of a third party seeking to intervene in a bail application filed by the accused under Section 439 CrPC, exercising powers under Section 482.

The second decision relied upon by the petitioners in the said case has been rendered between Manne Subbarao v. State of A.P., reported in (1980) 3 SCC 140, where the issue was whether a third party, who is neither the complainant nor the first informant, can appeal to the Supreme Court, against an order of acquittal by the High Court, if the State does not prefer an appeal. The Court ruled that there is no black-letter law that permits the same. However, the criminal-justice system supports the view that a wrong done to anyone is a wrong done to oneself. Justice is outraged when a guilty person is allowed to get away unpunished. It held that access to justice to every bona fide seeker is a democratic dimension of remedial jurisprudence even as public interest litigation, class action and pro bono proceedings are. The Court, in Praveen Malhotra again distinguished this case and said that it
applied only to Article 136. It further stated that both the cases cited involved situations where a third party had sought to go on appeal and that the present case was one where the matter concerned opposition to an application for bail. Therefore it stated that the ratio of the two cited cases could not be applied.

Keeping this limited view in mind the Court referred to the case of Indu Bala v. Delhi Admn. 1991 Cri LJ 1774 (Del) wherein the Delhi High Court took the position that there was no provision in Cr.P.C. allowing a complainant or a third party to oppose the application for grant of bail or anticipatory bail. Hence, the Court ignored two decisions of the Supreme Court and chose to rely on the decision given by a Single Judge of the Delhi High Court. The Court also dismissed the plea of the petitioner to exercise inherent powers under Section 482 to permit intervention, on the ground that Section 482 cannot be used to circumvent the law and to go against the settled law. It added that Section 482 cannot be used as broadly as Article 136. It is interesting to see that the Court did not go into the question of whether intervention could be allowed under Sections 301 and 302 CrPC, in this case.

In the case of P.V. Narashimharao v. State, reported in 1997 Cri LJ 3117 (Del) the petitioner sought to intervene in an appeal filed by the accused against the order of the trial court. The Delhi High Court ruled that there was no provision in Cr.P.C. analogous to Order 1 Rule 10 of the Civil Procedure Code. It further stated that a reading of the section shows that a private party has no role in a proceeding instituted by the State. Hence, the application of the petitioner to intervene was rejected.

In All India Democratic Women’s Assn. v. State, reported in 1998 Cri LJ 2629 (Mad) the High Court of Madras stated that Section 301(2) CrPC gives a third party only a right to assist the prosecution. The prosecution of the criminal proceedings, the Court held, is primary responsibility of the State, and if third parties are allowed to intervene, then there will be a number of associations to represent one party or the other in criminal proceedings, and this would give rise to confusion and chaos.

In Shiv Kumar v. Hukam Chand, reported in (1999) 7 SCC 467, the Supreme Court, attempting to explain the rationale behind Section 301, stated that the reason behind the provision is to provide fairness to the accused, during the trial. It further stated that the duty of the Public Prosecutor is to ensure that justice is done. It stated that if there is some issue that the defence could have raised, but has failed to do so, then
that should be brought to the attention of the Court by the Public Prosecutor. Hence, he functions as an officer of the Court and not as the counsel of the State, with the intention of obtaining a conviction. It stated that if the victim or the informant is allowed to have her own counsel, then the situation would not be the same, since the aim of such a counsel would be to obtain a conviction. It stated that the role of the advocate appointed by the third party to the proceeding would be similar to a junior counsel. The Court cited the decision of Queen Empress v. Durga ILR (1894) 16 All 84 where the Allahabad High Court had ruled that it is the duty of the Public Prosecutor to see that justice is vindicated, and he should not obtain an unrighteous conviction. It also quoted the case of Medichetty Ramakistiah v. State of A.P., reported in AIR 1959 AP 659 where the Court had ruled that prosecution should not mean persecution, and the Prosecutor should be scrupulously fair to the accused and should not strive for conviction in all these cases. It further stated that the courts should be zealous to see that the prosecution of an offender should not be given to a private party. The Court also said that if there is no one to control the situation, there was a possibility of things going wrong. It would amount to a legalised manner of causing vengeance.

In Delhi Domestic Working Women's Forum v. Union of India, reported in (1995) 1 SCC 14 the Supreme Court, inter alia held that the complainants in sexual assault cases would be provided with legal representation. The Court said that it is important to have someone who is well acquainted with the criminal-justice system. The role of the victim's advocate would not only be to explain to the victim, the nature of the proceedings, prepare her for the case and to assist her in the police station and in court, but also to provide her with guidance as to how she might obtain help of a different nature. The Court said that it is important to secure continuity of assistance, by ensuring that the same person, who looked after the complainant's interest in the police station, represent her till the end of the case. This could be interpreted to mean, that an intervener be allowed, to assist the victim.

The Supreme Court went a step further in J.K. International v. State (Govt. of NCT of Delhi) reported in (2001) 3 SCC 462 where it was seized of a matter that involved the interpretation of Section 301. In this case, the accused had moved the High Court seeking quashing of the charges framed. The petitioner, who was the complainant sought to intervene in the case. The Court ruled that a reading of Section 301 makes it clear that the fact that the police have investigated the case, based on the information given by the informant and filed a charge-sheet, on the basis of which cognizance is taken, does not in any way mean that the informant is wiped out from the scenario of the trial. The Court referred to Section 301 and stated that in the case of a trial before
a Court of Session, one needs to read the said section with Section 225, which states that only a Public Prosecutor is empowered to argue the case before the Court. Even in such a situation, a third party is allowed to present written arguments to the court, albeit with the permission of the court. Once such arguments are presented, the Supreme Court ruled that the Sessions Court has a duty to consider the same before deciding the case. The Court then went on to interpret Section 302 and stated that the power under Section 302 was much wider. It empowers the Magistrate to permit a private person to carry on the prosecution. Hence, the Court stated that a third party's role is not negated by Cr.P.C.

A plain reading of Section 301 reveals that though oral submissions before the court cannot be independent of the Prosecutor, a pleader instructed by a private person can definitely file written submissions before the court independent of the Public Prosecutor, if the court so permits. That apart, Sections 301 and 302 cover two different situations. Section 301 envisages a situation where the Public Prosecutor is in charge of a case and a private person instructs his pleader to intervene. In such cases, as has been rightly held, it is the Public Prosecutor under whose overall conduct and supervision the prosecution is carried on. However, Section 302 is concerned with a situation where any person not being a police officer below the rank of inspector, can prosecute a case, with the permission of the court, either himself or through his pleader. This amply signifies that Cr.P.C. contemplates a situation where the whole conduct of the case is with a private person. Thus two levels of intervention by private persons are envisaged under Cr.P.C. One is under the supervision and control of the Public Prosecutor and the other independent of the Prosecutor. Thus clearly, in a case where a private person seeks the permission of the court to intervene, it is the discretion of the court to decide which level of intervention should be allowed in any given case.

Coming next to the objections raised by the courts, it is clear that these are based on legal fictions and assumptions, which lead to distortion of reality, at least in India. The first fiction that operates is that when a crime is committed, it is the society that is affected and the State should hence prosecute the offender. While this may be true, the role of the victim should not be completely negated. While the State may or may not be affected, the victim definitely is. The very assumption that the State derives the right to prosecute because of its being the victim goes to show that law recognises the right of affected persons to prosecute. Since the victim is most directly and substantially affected, she should be allowed to prosecute in the first instance. Only if she is unwilling or unable to do so, should the State take over on the ground that it is an affected party as well. The victim should be allowed to have a major role in the prosecution and in fact, should be allowed to engage her own counsel to carry on prosecution. Alternatively, if
such a radical measure, which would equate a criminal trial to a civil prosecution is problematic, then in all cases, the victim should be permitted to engage her own counsel, who will argue the case, along with the Public Prosecutor. This will ensure that the society, through the State, also has a stake in the matter.

The second fiction, in relation to the Public Prosecutor is that the Public Prosecutor is an officer of the court, and not the counsel of the State, and hence she should be absolutely impartial, and should not work towards a conviction, but should strive to uphold the truth and assist the court in doing the same. This is an idealistic position, and practice has shown that the Prosecutor has basically become the counsel of the State. This is because, ultimately, the Prosecutor is appointed and removed by the State. Hence, she has no choice, but to be briefed by the State and to put forth the views of the State in the court of law. This has very clearly come through in the Best Bakery case, wherein the Public Prosecutors seem to have followed the instructions of the State Government at every step.

If we examine the option that a third party has under Cr.P.C one thing that stands out is that Section 397 empowers the High Court or the Sessions Court to call for the records of any proceeding, before any criminal court inferior to it to satisfy itself as regards the correctness, legality and propriety of any finding, sentence or order, recorded or passed by the lower court. This can be done suo motu or if an application is filed by a party, including a party alien to the proceedings. Hence, the victim or a third party can point out the illegality, impropriety of order at the stage of revision. It makes no sense in allowing this at a later stage of the proceeding, but not at the trial stage itself. Also, as we have seen earlier, the Supreme Court has held that under Article 136 of the Constitution, it can hear the petition filed by a third party in any criminal proceeding. The same logic should be extended to the lower court and to the trial stage. This would also save the time of the High Court and the Supreme Court, which are already facing severe docket explosion.

Another issue that needs to be addressed is whether it makes sense to introduce a concept akin to public interest litigation, in criminal prosecutions. In my opinion it would, since the aim of criminal law is to punish infractions of life and property of individuals. This is similar to the rights guaranteed under the Constitution, which are enforceable using public interest litigation as a tool. As regards the issue of meddlesome interlopers, the court has the discretion to decide as to who should be allowed to intervene and who should not. The court can examine the intention of the party seeking to intervene and her bona
fides, as is clearly evident from a perusal of the sections mentioned above. If it seems that the person is a meddlesome interloper, then a proceeding for malicious prosecution can also be initiated. These steps will ensure that the floodgates of litigation are not opened.

Finally, one of the major aims of punishment under criminal law is deterrence. With abysmal rates of conviction, deterrence is becoming meaningless. The criminal-justice system is becoming overburdened and unreliable. Hence, in my opinion, it makes sense to permit third-party intervention in criminal cases.

Thus, it is seen that under Cr.P.C as it stands today, it is possible to allow third-party intervention in criminal matters. The only problem that arises is with respect to a trial before a Court of Session. Section 302 speaks about trial before a Magistrate. This has to be read with Section 225 Cr.P.C which states that, in every trial before a Court of Session, the prosecution shall be conducted by a Public Prosecutor. Hence, the arguments given above, with respect to the counsel of the victim or a third party conducting a prosecution independently, though theoretically sound, cannot be extended to prosecution in a Court of Session in practice, since Cr.P.C does not allow for it. Hence there is need for an amendment in Cr.P.C to align the prosecution procedures in the Sessions Court with those before the Magistrate.

With this I part with my topic, hoping it would guide the Honourable Judges, manning trial courts.

N.Ramesh Naidu, Principal Junior Civil Judge, Kaidiri
APPLICATION FOR DISCHARGE IN CASES INSTITUTED BASING ON
POLICE REPORTS AND OTHERWISE

Presented by
Ms. A. Manjulatha
Junior Civil Judge,
Gooty.

Introduction:

There are two things against which a judge is to guard, precipitancy and procrastination. Sir Nicholas Bacon, Lord Chancellor of England during 16th century was made to say, which I hope never again to hear, that a speedy injustice is as good as justice which is slow.

We all know very well that hundred guilty may be acquitted but one innocent should not be convicted. The court can arrive at the conclusion on the above aspect only after the completion of trial, but before the commencement of trial there are certain provisions which are beneficial to the accused person to avoid the harassment basing on malicious and vexatious allegation and the complaints lodged by persons for their personal vendetta. The only provisions under the Cr.P.C to avoid long trial process are that person can seek the remedy under section 239 of Cr.P.C before the Magistrate court and under section 227 of Cr.P.C before the sessions court when the case is based on a police report under section 173 Cr.P.C. Whereas in private complaints under section 200 of Cr.P.C, the accused can be discharged under section 245 of Cr.P.C.

The general process of the law is that after completion of investigation the police files the charge sheet against the accused, thereafter the accused is put to trial by the court duly framing charges against him by the concerned court. However there lies a provision under Code of Criminal Procedure under which the accused can be discharged before the charges are framed against him. Discharge application is a remedy provided to a person who has been charged by police on malicious allegations. If false allegations
have been made against him he can file an application for discharge and he would be entitled to discharge if the material provided to the court is baseless.

This application can be filed before the charges have been set out against him. If the Judge contemplates that there are no sufficient grounds available for implementing further proceedings against the accused, the later shall be discharged. The discharge application can only be filed by the accused in warrant cases. Warrant cases consists serious crimes that are punishable with death or imprisonment for more than two years. A warrant is a document or order that empowers the police to arrest a person holding criminal charges.

**Contents in application for Discharge under section 239 Cr.P.C:**

The following points fall for consideration.

- Depending upon the nature of the offence, it has to be asserted
- That no material particulars of the offence have been specified in the FIR and charge sheet i.e. vagueness in allegations in the FIR and charge sheet
- The FIR and charge sheet allegations have not been supported by evidence,
- That the version of the prosecution has not been supported by any of the statements of witnesses for the prosecution
- Contradictons present in the versions of the prosecution and witnesses
- The allegations in the charge sheet are new and different from complaint allegations and these new allegations were not communicated to the accused enable him to defend by producing supporting evidence.
**Procedure:**

**Applicable law**

Section 239 Cr.P.C: When the accused shall be discharged:

1. If, upon considering the police report and the documents sent with it under section 173 Cr.PC 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.

**Applicability of Discharge:**

Discharge as under section 239 Cr.P.C is applicable to warrant cases (cases of serious in nature) instituted by police:

1. Practically it is observed most often than not, the charge sheet filed by the police can be assailed in the courts

2. The foremost principle to be observed that when the police filed the charge sheet often the material particulars relevant to the offence alleged are missing

**For example:**

1. The accusation leveled in the charge sheet is simply is instant the accused charged under section 120 (B)/420/467 of IPC

2. The courts have unanimously held that in such circumstances as the police have failed to state the details as to how the offence was committed i.e. material particulars of the offence the accused is entitled to be discharged.
Thus if the vital elements of the crime such as common intent in criminal conspiracy; Dishonest intention in cheating; wrongful economic gain in forgery are not made out in the charge sheet under respective section of law, then the court can discharge the accused as no primafacie is made out.

**Documents to be perused by the court to discharge the accused:**

It is further pertinent to mention that at the stage of framing of charges, the prosecution evidence does not commence, therefore the Magistrate has to generally consider the material as placed before him by the investigating police officer.

To put it differently, if the court were to think that the accused might have committed the offence the court 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 have to be accepted to ascertain whether the offence is well founded. The crystallized judicial view is that the court cannot conduct a deep roaming enquiry into the evidence at this stage. The court has to consider the material viz., the complainants allegations + witnesses statements + charge sheet prepared during the investigation.

*While filing an application for discharge the accused may keep the following points in view.*

1. Whether the report submitted by the police does not contain effective facts and evidence

2. Whether material facts of the case cannot be determined to prove the alleged offence or offences
3. Whether the accusation upon him are unsubstantiated and weight

4. Whether the prosecution has not provided with any witnesses

After examining these facts and material, if the Magistrate thinks that these grounds are sufficient to discharge the accused the application for the discharge is accepted. The remedy for the accused under section 239 Cr.PC is available if the report submitted by the police does not conclude any primafacie case. The court has the power to discharge the accused before framing of charges in warrant cases instituted upon police report.

**Discharge application in private complaints:**

Cases instituted otherwise than on police report.

Sub-section (1) of section 245 Cr.P.C enables the Magistrate to discharge an accused after taking all the evidence produced by the prosecution. Since his order is subject to revision he is required to record his reason in writing. The Magistrate cannot pass an order of discharge until he examines all the witnesses of the prosecution and such an order passed only after examining the complainant, and not all the witnesses will be illegal, the same was observed in Yasodha Bai vs. Bhaskar 1972,74 BOM LR 717.

Section 245 (1) Cr.P.C begins with the words that, "If, upon taking all the evidence, the Magistrate considers...". If, in the above provision of law shows that the Magistrate should consider the evidence adduced under section 244 Cr.P.C and if he sees that no case has been made out against the accused, if unrebutted, would warrant a conviction, then he can discharge the accused from the case under section 245(1) Cr.P.C otherwise the court has to frame charge under Section 246(1) Cr.P.C.
It is pertinent to note that under section 245 (2) Cr.P.C, at any previous stage of the case, if the charge is groundless, he can discharge the accused.

There is a clear difference in sections 245(1) and 245(2) of Cr.P.C

- As contemplated under section 245(1) of Cr.P.C the Magistrate has the advantage of the evidence led by the prosecution before him under section 244 and he has to consider whether if the evidence remains unrebutted, the conviction of the accused would be warranted. If there is no discernible incriminating material in the evidence then the Magistrate proceeds to discharge the accused under section 245 (1) Cr.P.C.

- The situation under section 245(2) Cr.P.C is however different.

  - There, under sub-section (2) the Magistrate has the power of discharging the accused at any previous stage of the case i.e. even before such evidence is led.

  - However for discharging an accused under section 245(2) Cr.P.C the Magistrate has to come to a finding that the charge is groundless.

  - There is no question of any consideration of evidence at that stage because there is none.

  - The Magistrate can take this decision before the accused appears or is brought before the court or the evidence is led under section 244 Cr.P.C.

  - The words appearing section 245 (2) Cr.PC “at any previous stage of the case” clearly bring out this position.

Now the question "what is that "previous stage". 
The previous stage would obviously be before the evidence of the prosecution under section 244 Cr.P.C is completed or any stage prior to that.

Such stages would be under section 200 Cr.P.C to section 204 of Cr.P.C.

Under section 244 Cr.P.C, and on appearance of accused, the Magistrate proceeds to hear the prosecution and take all such evidence, as may be produced in support of the prosecution. He may at that stage even issue summons to any witnesses on the application made by the prosecution.

Thereafter comes the stage of section 245 (1) of Cr.P.C, where the Magistrate takes the task of considering all the evidence taken under section 244 Cr.P.C, and if he comes to the conclusion that no case against the accused has not been made out, the Magistrate proceeds to discharge the accused.

The situation under section 245 (2) Cr.P.C, however is different as Magistrate has the power to discharge the accused at any previous stage of the case.

As stated above the situation comes under section 200 Cr.P.C to 204 Cr.P.C and till the completion of the evidence of prosecution under section 244 Cr.P.C thus the Magistrate can discharge the accused even when the accused appears in pursuance of the summons or a warrant and even before the evidence is led under section 244 Cr.P.C makes an application for discharge. So the application for discharge can be entertained at any previous stage and the Magistrate has power to discharge the accused under section 245 (2) at any previous stage i.e. before the evidence is recorded under section 244 Cr.P.C.

**Discharge of accused under section 227 of Cr.P.C before the court of Sessions:**
When the accused appears on brought before the court in pursuance of committal order of the case under section 209 Cr.P.C, the prosecutor shall open his case by describing the charge brought against the accused and stating by what evidence he proposes to prove the guilt of the accused.

Section 227 Cr.P.C reads as "If, upon consideration 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 no sufficient ground for proceeding against the accused, he shall discharge the accused and record the reasons for so doing.

In the case of T.V Sarma vs. R.Neeraiah AAIR 1980 (FB) 219, 225 observed that the sessions judge is bound to discharge the accused in the following cases:

a) where the evidence produced is not sufficient

b) Where there is no legal ground to proceed against the accused

c) Where no sanction has been obtained

d) where the prosecution is clearly barred by limitation; or

e) where he is precluded from proceeding because of a prior judgment of High Court.

In P.Viswanathan vs. A.K Barman 2003 Cr.LJ 949 (959) Kal Division Bench, observed that the discharge of an accused under section 227 of Cr.P.C does not tantamount to acquittal of an accused.

a) under chapter XVI (section 204 to 210 Cr.P.C) which includes 209 Cr.P.C under which the case to be committed to the court of sessions by a Magistrate, there is
no provision which empowers the Magistrate to discharge the accused. Power of discharge can be exercised only by the trial court and the court of judicial Magistrate is not the trial court in respect of the offences exclusively triable by a Court of Sessions and the same was observed in a case Sanjay Gandhi vs. Union of Indian AIR 1978 SC 514.

b) In a case which is triable by a Court of Sessions, the Magistrate is not empowered to look into the evidence collected by the police and to see whether or not it is a triable case against the accused. Whether the case is triable or not is the power vested with the Sessions Judge who alone can exercise the power of discharge under this section, the same was observed in Prahallad Singh vs. State of Raj 1990 Cr.L.J 1688 (Raj).

In Criminal Procedure Code 1898 there was no material of recording reasons for discharging the accused at initial stage and the same is added in the new code which contains a new provision which requires that if a Magistrate discharges the accused at the initial stage on finding the charge to be groundless, he has to record his reasons for doing so. In the case Sanakrananda Nayaka vs. State of Orissa 2001 (1) Crimes 564 (569) it was held that the Magistrate is obliged to record his reasons if he decides to discharge the accused.

The provisions of section 239 Cr.P.C are applicable to only warrant cases. The criminal case under section 138 NI Act for dishonor of cheque is a summons case and so Section 239 Cr.P.C would not be applicable the ratio observed in Bhiwani Denim and Apparels limited vs. Miss. Bhaskar Industries Limited 2003 Cr.L.J NOC 31 and 2002 (1) MPLJ 243 M.P.
Some of the Observations of the Hon'ble Apex court and Hon'ble High Courts:

In R.Balakrishna Vs. State 1996 Crl.LJ 757 (Ker) held that a combined reading section of 239 Cr.P.C and 240 Cr.P.C makes it abundantly clear that before charge is framed, a trial court is expected to consider the materials placed before it to decide whether the charges should be framed against the accused. When the accused argues for his discharge, the trial court is left with no other alternative except to consider the contentions raised by the accused and thereafter shall pass a reasoned order.

In Pramatha AIR 1960 SC 810 the Hon'ble Court observed that the word refers to discharge in relation to specific offence for which the accused has been charged. It does not necessarily mean that he cannot be proceeded against for some other offence, if there is primafacie evidence to establish that charge. Further it is observed that the order of discharge passed under section 239 has a reference only to such offences mentioned in the charge sheet which are triable as warrant cases under Chapter 20 and does not effect in any way the charges of offences triable under Chapter 20 which may also be included in the charge sheet submitted by the police and for trial of such offences as a summons case and the Magistrate should follow the procedure under Chapter 20.

In Saraswathi Ben AIR 1967 Gujarath 263 held that if at one stage the accused is discharged because there is no primafacie case against him the Magistrate does not become functus officio if in proceeding with the case against others he finds that there is a primafacie case against the discharged accused.

In State vs. Jitendra 1987 Crl.LJ 1768 held that the accused cannot be discharged without-
a) considering police report and documents under section 173 Cr.P.C

b) hearing parties; and

c) affording to prosecution opportunity of being heard.

In Kanti Badra Shah vs. State of West Bengal (2000) 1 SCC 722 held that section 239 Cr.P.C required a Magistrate to record his reasons for discharging the accused but there is no such requirement if he forms the opinion that there is ground for presuming that the accused had committed the offence which he is competent to try. In such a situation he is only required to frame a charge in writing against the accused. Even in a trial before a Court of Session the Judge is required to record reasons only if he decides to discharge the accused under section 227 of the code. But if he is to frame the charge, he may do so without recording his reasons therefor.

In Sakuntala Devi 1979 Cr.L.J NOC 206 (Delhi) and A.K. Chatterjee Vs. State 1982 Cr.L.J NOC 126 held that at the stage of framing of the charge in warrant case instituted on police report the Magistrate may examine an accused if necessary but such an examination as only to be with reference to the documents sent by the police under section 173 Cr.P.C. The object of such examination is only to offer to the accused an opportunity to explain any circumstance appearing against him. so the examination of the accused is mandatory.

In R.S. Nayak Vs. A.R. Antulay AIR 1986 SC 2045 and 1986(2) SCC 716 and 1986 Cr.L.J 1922, 1948 observed what is the meaning of "groundless". The obligation to discharge the accused under section 239 Cr.P.C arises when the Magistrate considers the charge the accused to be groundless. Groundless in section 239 Cr.P.C means that the materials placed before the court do not make out or are not sufficient to make out
a primafacie case against the accused, i.e. absence of any ground for presuming that the accused has committed an offence.

In State of Karnataka vs. L. Muniswamy AIR 1977 SC 1489 observed that for the purpose of determining whether there is sufficient ground for proceeding against an accused the court possess a comparatively wider discretion in exercise of which it can be determine the question whether the material thereof, if unrebutted is such on the basis of conviction can be said reasonable to be possible.

**Conclusion**

Sections 227, 239 and 245 of Cr.P.C are meant for protection and these are essential provisions of the law. They safe guard the persons against whom the false allegations have been made. No one should be punished for the offence which is not committed by him. Now a days, being Presiding Officers of the court we are receiving so many private complaints, we have no chance to stop some frivolous litigations filed by the persons except to record their statements and also the witnesses, thereafter we have to take cognizance with the alleged offences. If we find no ground to proceed further we can dismiss the complaint as there is no basis to proceed further, this is available in private complaints, but there is no such power in a case basing on police report. We have to take cognizance and give a number, thereafter if we find the material placed does not have any relevancy to the ingredients of the alleged offences then the court can proceed under section 245, 239 and 227 of Cr.P.C. The main object of these provisions is to stop the protracted nature of trial in baseless complaints filed by the persons for their personal vendettas to harass the persons to appear before the court until completion of the trial which ends with no convictions.

**For Example:**
The cases instituted in the faction places, the defacto complainant who is the victim of the case may implead so many people against whom he has personal grudges to harass them in the guise of lodging compliant though he suffered from one or two accused persons. Likewise we all experience in a case under section 498-A of I.P.C the defacto complainant impleading all the relatives of the husband as accused though they may be involved or not with an intention to harass all the persons along with her husband or with the main accused. So sections relating to the discharge under Cr.P.C would give protection to the persons who are shown as accused and did not commit any alleged offences. They may file application for discharge or the court after careful observation on the documents filed by the police or the evidence on record in private cases the court may suo-motu discharge the accused persons when there is no suspicion that those accused persons may get acquittal after trial owing to groundless allegations.
CASE AND COUNTER CASE

Presented by
Sri V. Venkateswara Rao
Addl. Senior Civil Judge,
Ananthapurm

Introduction:

The expression “counter cases” is generally used with reference to cases instituted against two opposite parties. For example the accused in one case generally figure as the prosecution witnesses in the other case and vice-versa.

One of these cases may arise out of a police charge-sheet whereas the other may arise out of a private complaint. Sometimes both the cases arise out of private complaint.

Very rarely it happens that both the cases arise out of police charge-sheets. A case is described as “counter” to another strictly when it presents a version regarding the same incident different from the one presented in the other case by the other party.

But if the prosecutions in both the cases allege that the two incidents are different from each other, that the incident happened at different places and at different times or that one is the sequel to the other, they are not strictly case and counter case, but they are two independent cases.

Even in such a case it is expedient that the trial of both the cases should be conducted simultaneously and the judgment in both the cases should be delivered on the same day.

The High Court of Andhra Pradesh has recently held that the same public prosecutor should not conduct both the case and its counter and that he has to choose only one of the two cases and conduct the prosecution in it.

The desirability by deciding case and counter case Emphasized by one and the same court was emphasised by the Hon’ble Supreme Court in its judgment in Sudhir v. State of M.P 2001 2 ALT Crl. 79 SC.

The following observation of the Hon’ble Supreme Court underlines the importance of the case and the counter case being tried together.

“It is a salutary practice, when two criminal cases relate to the same incident, they are tried and disposed of by the same Court by pronouncing judgments on the same day. Such two different versions of the same incident resulting in two criminal cases are compendiously called “case and counter case” by some High Courts as “cross cases” by some other High Courts. Way back in nineteen hundred and twenties a Division Bench of Madras High Court (Waller and Cornish, JJ.) made a suggestion (In Re Goriparthi Krishthamma2) that “a case and counter case arising out of the same affair should always, if practicable, be tried by the same Court; and each party would represent themselves as having been the innocent victims of the aggression of the other.”
The principle underlying such a requirement is not difficult to discern. It needs to be noted that when a case and a counter case are filed in relation to an incident, same individuals answer the description of victims in one case, and of accused, in another case. Whatever be the permissibility of the same individual playing the role of a plaintiff and defendant in the suits filed in relation to the same subject matter, almost irreconcilable situations emerge when they figure as victims and culprits, in relation to one and the same incident, in two different cases.

In Citation 2004-JCR-4-158, 2004-AIR (SC)-0-4320, 2004 (TLS)40121
Coram : Sri N. SANTOSH HEGDE, Sri. S. B. SINHA AND Sri. A. K. MATHUR, JJ.
Criminal Appeal 411 Of 2002 (September 10, 2004)
UPKAR SINGH VS. VED PRAKASH

Sri. Santosh Hegde, J. held in the above citation that Emphasis supplied. Accused persons can file counter cases and emphasized here under as:

IT is clear from the words emphasized hereinabove in the above quotation, this Court in the case of T. T. Antony vs. State of Kerala and Ors. has not excluded the registration of a complaint in the nature of a counter case from the purview of the Code. In our opinion, this court in that case only held any further complaint by the same complainant or others against the same accused, subsequent to the registration of a case, is prohibited under the code because an investigation in this regard would have already started and further complaint against the same accused will amount an improvement on the facts mentioned in the original complaint, hence will be prohibited under Section 162 of the Code. This prohibition noticed by this Court, in our opinion, does not apply to counter complaint by the accused in the 1st complaint or on his behalf alleging a different version of the said incident and appeal allowed.

Criminal procedure code, 1973 – s. 154, 162, 156(3) - indian penal code, 1860 - s. 452, 506, 147, 148, 307/149 - appellant and first respondent have lodged separate complaints giving different versions complaint of respondent was registered by the concerned police - petition u/s. 156(3) before the judicial magistrate – order of the magistrate directing the registration of a complaint – against the respondents concerned police registered criminal case u/s. 147, 148, 149 and 307 ipc – revision by respondent – order set aside by asj – appeal to high court – high court declined to interfere - once a fir registered on the complaint of one party a second fir is not registrable and no investigation based on the said second complaint could be carried out – appeal – alleged that filing a counter complaint is permissible - learned magistrate was justified in directing the police concerned to register a case and investigate the same and report back – both the learned additional sessions judge and the high court erred in coming to the conclusion that the same is hit by s. 161 or 162 of the code - s. 161 or 162 of the code does not refer to registration of a case - impugned orders of high court and learned additional sessions judge are set aside and that of the magistrate restored – appeal allowed.

In the notable Judgment in the following
Sudhir & Ors Vs. VS [2001] Insc 56 (2 February 2001)
Sri. K.T. Thomas & Sri.R.P. Sethi. Sri. Thomas, J
Appeal (crl.) 136 of 2001
L.T.J
Leave granted.

A grey area is sought to be replenished with a judicial pronouncement. A case and counter case, both were committed to the Court of Sessions as both cases involve offences triable exclusively by Sessions Court. But after hearing the preliminary arguments the Sessions Judge felt that in one case no offence triable exclusively by a Court of Sessions is involved, whereas in the other case a charge for offences including one triable exclusively by the Sessions Court could be framed. Is it necessary, in such a situation, that the Sessions Court should transfer the former case to the Chief Judicial Magistrate for trial as envisaged in Section 228(1) of the Code of Criminal Procedure (for short the Code). This is the core issue which has come up to the fore in these appeals.

For understanding the question better it is necessary to have a short resume of the facts.

An encounter took place on the night of 18.2.1996, at a particular place near Bhitar Bazar, Sagar, Madhya Pradesh, in which firearms and other weapons were used and persons were injured. The details of the incident are not relevant and hence skipped. Two rival versions reached the police station regarding the above incident and two First Information Reports were registered upon those rival versions by the officer-in-charge of the police station.

FIR No.92 of 1996 was registered against 24 persons arrayed in it as accused (for convenience this can be referred to as the first case) and FIR No.93 of 1996 was registered against six persons (this can be referred to as the second case for convenience). Both cases were investigated together by the police and ultimately challans were laid in both cases alleging offences under Section 307 read with Section 149 besides some other offences of the Indian Penal Code in both the cases. The Magistrate before whom the challans were filed completed the inquiry proceedings and committed both cases to the Sessions Court for trial. Thus far the two cases flocked together side by side.

In the Sessions Court the first case was taken up under Section 227 of the Code and the court framed charge against the accused for offences under Section 307 read with Sections 149, 147 and 427 IPC. When the preliminary arguments in the second case were heard under Section 227 of the Code the Sessions Judge found that no offence triable exclusively by a Court of Sessions need be included in the charge and hence he framed a charge as envisaged in Section 228(1)(a) of the Code for the offence under Section 324 read with Section 149 and certain other counts of the Indian Penal Code. Thereafter he
transferred the second case for trial to the Chief Judicial Magistrate as provided in Section 228(1) of the Code.

The accused in the first case moved the High Court in revision contending that no offence under Section 307 IPC is made out against them and further contended that the court should have included the offence under Section 307 IPC also in the charge framed in the second case. A Single Judge of the High Court dismissed the revision petition by order dated 30.6.2000, in which the learned Judge observed, inter alia, thus:

The charge in each criminal case is framed on the basis of materials available in the records of that particular case. Merely because the charge for offence under section 307 IPC has not been framed in the counter case, the petitioners do not become entitled to be discharged for the offence under that section in view of the materials placed before the learned Judge.

In the meanwhile, the State of Madhya Pradesh moved the High Court in revision challenging the order by which the Sessions Court declined to frame charge under Section 307 IPC as against the accused in the second case. The said revision petition was separately dealt with by the High Court and the same learned Single Judge dismissed the said revision on the same day by a separate order. He made the following reasoning:

The facts in the counter case warranted the framing of charge under section 307 IPC against the complainant and his companions and simply because a charge under section 307 IPC has been framed against the complainant and his companions, they cannot claim, on ground of parity, that such charge should also be framed against the respondents, especially when the materials placed in the present case do not warrant framing of charge under section 307 IPC against the respondents. It is the settled law that charge is to be framed on the basis of material available in that particular case and the Judge or Magistrate should not be influenced by any other consideration. Under the circumstances, the impugned order needs no interference by this Court on the ground of parity as contended by the learned counsel for the petitioner and the complainant.

The above two orders passed by the High Court are being challenged now in separate appeals by special leave, and both these appeals were heard together and they can be disposed of together by a common judgment now.

It is a salutary practice, when two criminal cases relate to the same incident, they are tried and disposed of by the same court by pronouncing judgments on the same day.

Such two different versions of the same incident resulting in two criminal cases are compendiously called case and counter case by some High Courts and
cross cases by some other High Courts. Way back in nineteen hundred and twenties a Division Bench of the Madras High Court (Waller and Cornish, JJ) made a suggestion (In Re Goriparthi Krishtamma - 1929 Madras Weekly Notes 881) that a case and counter case arising out of the same affair should always, if practicable, be tried by the same court; and each party would represent themselves as having been the innocent victims of the aggression of the other.

Close to its heels Jackson, J, made an exhortation to the then legislature to provide a mechanism as a statutory provision for trial of both cases by the same court (vide Krishna Pannadi vs. Emperor - AIR 1930 Madras 190). The learned judge said thus:

There is no clear law as regards the procedure in counter cases, a defect which the legislature ought to remedy. It is a generally recognized rule that such cases should be tried in quick succession by the same Judge, who should not pronounce judgment till the hearing of both cases is finished.

We are unable to understand why the legislature is still parrying to incorporate such a salubrious practice as a statutory requirement in the Code. The practical reasons for adopting a procedure that such cross cases shall be tried by the same court, can be summarised thus:

(I) It staves off the danger of an accused being convicted before his whole case is before the court.

(2) It deters conflicting judgments being delivered upon similar facts; and

(3) In reality the case and the counter case are, to all intents and purposes, different or conflicting versions of one incident.

In fact, many High Courts have reiterated the need to follow the said practice as a necessary legal requirement for preventing conflicting decisions regarding one incident.

This court has given its approval to the said practice in Nathi Lal & ors. vs. State of U.P. & anr. {1990 (Supp) SCC 145}. The procedure to be followed in such a situation has been succinctly delineated in the said decision and it can be extracted here:

We think that the fair procedure to adopt in a matter like the present where there are cross cases, is to direct that the same learned Judge must try both cross cases one after the other. After the recording of evidence in one case is completed, he must hear the arguments but he must reserve the judgment.
Thereafter he must proceed to hear the cross case and after recording all the evidence he must hear the arguments but reserve the judgment in that case.

The same learned Judge must thereafter dispose of the matters by two separate judgments. In deciding each of the cases, he can rely only on the evidence recorded in that particular case. The evidence recorded in the cross case cannot be looked into. Nor can the judge be influenced by whatever is argued in the cross case. Each case must be decided on the basis of the evidence which has been placed on record in that particular case without being influenced in any manner by the evidence or arguments urged in the cross case. But both the judgments must be pronounced by the same learned Judge one after the other.

How to implement the said scheme in a situation where one of the two cases (relating to the same incident) is charge-sheeted or complained of, involves offences or offence exclusively triable by a Court of Sessions, but none of the offences involved in the other case is exclusively triable by the Sessions Court. The magistrate before whom the former case reaches has no escape from committing the case to the Sessions Court as provided in Section 209 of the Code. Once the said case is committed to the Sessions Court, thereafter it is governed by the provisions subsumed in Chapter XVIII of the Code. Though, the next case cannot be committed in accordance with Section 209 of the Code, the magistrate has, nevertheless, power to commit the case to the Court of Sessions, albeit none of the offences involved therein is exclusively triable by the Sessions Court.

Section 323 is incorporated in the Code to meet similar cases also. That section reads thus:

If, in any inquiry into an offence or a trial before a Magistrate, it appears to him at any stage of the proceedings before signing judgment that the case is one which ought to be tried by the Court of Session, he shall commit it to that Court under the provisions hereinbefore contained and thereupon the provisions of chapter XVIII shall apply to the commitment so made.

The above section does not make an inroad into Section 209 because the former is intended to cover cases to which Section 209 does not apply. When a magistrate has committed a case on account of his legislative compulsion by Section 209, its cross case, having no offence exclusively triable by the Sessions Court, must appear to the magistrate as one which ought to be tried by the same Court of Sessions. We have already adverted to the sturdy reasons why it should be so. Hence the magistrate can exercise the special power conferred on him by virtue of Section 323 of the Code when he commits the cross case also to the Court of Sessions.
Commitment under Section 209 and 323 might be through two different channels, but once they are committed their subsequent flow could only be through the stream channelised by the provisions contained in Chapter XVIII.

Now we have to deal with the powers of the Sessions Court in the light of Section 228 of the Code which says that when the Sessions Court, after hearing under Section 227, is of opinion that none of the offences presumed to have been committed by an accused is triable by a Court of Sessions he is to transfer the case for trial to the Chief Judicial Magistrate.

In this context, we may point out that a Sessions Judge has the power to try any offence under the Indian Penal Code. It is not necessary for the Sessions Court that the offence should be one exclusively triable by a Court of Sessions. This power of the Sessions Court can be discerned from a reading of Section 26 of the Code. When it is realised that the Sessions Judge has the power to try any offence under the Indian Penal code and when a case involving offence not exclusively triable by such court is committed to the Court of Sessions, the Sessions Judge has to exercise a discretion regarding the case which he has to continue for trial in his court and the case which he has to transfer to the Chief Judicial Magistrate. For this purpose we have to read and understand the scope of Section 228(1) in the light of the above legal position. The sub-section is extracted below:

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, and thereupon the Chief Judicial 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.

The employment of the word may at one place and the word shall at another place in the same sub-section unmistakably indicates that when the offence is not triable exclusively by the Sessions Court it is not mandatory that he should order transfer of the case to the Chief Judicial Magistrate after framing a charge. In situations where it is advisable for him to try such offence in his court there is no legal obligation to transfer the case to the Chief Judicial Magistrate. One of the instances for not making the transfer is when a case and counter case have been committed to the Sessions Court and one of those cases involves an offence exclusively triable by the Sessions Court and the other does not involve any such offence.
In the present case, the Sessions Judge ought not have transferred the second case to the Chief Judicial Magistrate as he did, but he himself should have tried it in the manner indicated in Nathi Lal (supra). To facilitate such a procedure to be adopted we have to set aside the order passed by the Sessions Judge in the second case. We do so. Resultantly, we allow the appeal arising out of S.L.P.(Crl) No.4007 of 2000, and set aside the order of the High Court as well as the order passed by the Sessions Court by which the case was transferred to the Chief Judicial Magistrate. We direct the Sessions Court concerned to try and dispose of the first case and the second case in the manner set out in Nathi Lals case (supra). In view of the above direction, the impugned order in the appeal arising out of S.L.P. (Crl.) No.3840 of 2000, will remain undisturbed.

TRIAL OF CROSS CASES: ISSUES AND CHALLENGES

Two different versions of the same incident resulting into two criminal cases are described as “case and counter case” by some High Courts or just “cross cases” by some others. Incidences of Cross cases are very common in trial courts. Almost in every serious criminal case we find a cross version by the Defence which requires a separate trial on its own right. Sometimes the cross version represents the truth, in most cases they are false and raised just to impede speedy trial and to defeat the prosecution and secure acquittal by making the trial complicated and confusing.

TRIAL PROCEDURE

Trial of cross cases presents a variety of ticklish practical issues and challenges. Courts have been responding to them differently. Way back in a Division Bench of the Madras High Court (Waller and Cornish, JJ) made a suggestion 1 that “a case and counter case arising out of the same affair should always, if practicable, be tried by the same court, and each party would represent themselves as having been the innocent victims of the aggression of the other.”

Next year Jackson, J, made an exhortation to the then legislature to provide a mechanism as a statutory provision for trial of both cases by the same court 2. The learned judge said thus:

"There is no clear law as regards the procedure in counter cases, a defect which the legislature ought to remedy. It is a generally recognized rule that such cases should be tried in quick succession by the same Judge, who should not pronounce judgment till the hearing of both cases is finished."

Unfortunately we do not have any legislative response to this problem as yet. This situation came to be adverted to by the Supreme Court thus:

“We are unable to understand why the legislature is still parrying to incorporate such a salubrious practice as a statutory requirement in the Code.”
There is no provision in CrPC or in the Evidence Act dealing exclusively with trial of cross cases. The judiciary has evolved a procedure to fill this gap. In Nathi Lal & ors. vs. State of U.P. 4 the procedure to be followed in such a situation has been succinctly describe by the Supreme Court thus:

In Re Goriparthi Krishtamma - 1929 Madras Weekly Notes 881
See Krishna Pannadi vs. Emperor AIR 1930 Madras 190

Sudhir vs State (2001)2SCC688
(1990) Supp SCC 145

"We think that the fair procedure to adopt in a matter like the present where there are cross cases, is to direct that the same learned Judge must try both cross cases one after the other. After the recording of evidence in one case is completed, he must hear the arguments but he must reserve the judgment. Thereafter he must proceed to hear the cross case and after recording all the evidence he must hear the arguments but reserve the judgment in that case. The same learned Judge must thereafter dispose of the matters by two separate judgments. In deciding each of the cases, he can rely only on the evidence recorded in that particular case. The evidence recorded in the cross case cannot be looked into. Nor can the judge be influenced by whatever is argued in the cross case. Each case must be decided on the basis of the evidence which has been placed on record in that particular case without being influenced in any manner by the evidence or arguments urged in the cross case. But both the judgments must be pronounced by the same learned Judge one after the other.

In State of M.P vs Mishrilal 6 both the parties lodged an FIR against each other in respect of the same incident. The Supreme Court while giving guidance as to the procedure to be adopted in such cases has observed as follows:-

“It would have been just fair and proper to decide both the cases together by the same court in view of the guidelines devised by this Court in Nathilal's case (supra). The cross- cases should be tried together by the same court irrespective of the nature of the offence involved. The rational behind this is to avoid the conflicting judgments over the same incident because if cross cases are allowed to be tried by two courts separately there is likelihood of conflicting judgments.” In sum, the procedure prescribed by the apex court and various High Courts in this regard is that both the cases must be tried separately and independently by the same judge and decided on the basis of evidence led in that case only without being influenced by the materials and evidence led in the other case. The procedure laid down is that first the evidence should be recorded in one case and both the parties must be heard but judgment should not be pronounced. Immediately thereafter the other case should be taken up for recording of evidence. Once the hearing is complete in both the
cases both the cases should be decided simultaneously by separate judgments. The impression is that if we follow the above referred procedure major concern of fair trial to both the parties would be adequately addressed.

Though this procedure appears very simple and innocuous in theory, bristles with numerous difficulties and ticklish practical problems when cross cases are taken up for trial in actual practice. Firstly, it requires a lot of repetitive work: both the parties virtually repeat the entire evidence in both the cases. This makes the process very cumbersome and time consuming. At the same time, it is almost impossible to insulate the mind of the judge from being influenced at least indirectly by the evidences and inferences in the other case. Humane nature and psychology can not be negated in toto. In the very nature of the things the judge would be influenced by the evidence led in the other case and inferences drawn in one case would be used knowingly or unknowingly in the other case. Secondly, the repetition of entire evidence in both the cases would invariably give rise to a lot of contradictions. No person can repeat the same statement. Some subtraction or addition is bound to be there giving opportunity to the guilty party to take advantage of technicalities.

The mandated procedure requires that once the entire evidence is complete in one case, evidence should be recorded in the other case and then after hearing the arguments both the case should be decided by the same judge on same day by different judgments. The rationale behind the suggested procedure is that the accused should not be punished before his entire case is before the court. A close look at the procedure and the objective behind it would clearly suggest that it is expected of the judge that he should makeup his mind regarding guilt or otherwise of the parties on the basis of the “entire case” and not just on the basis of the case of the parties in each individual case. The other objective of the mandated procedure i.e. avoidance of chances of conflicting decisions too can only be achieved if decision is taken on the basis of “whole case” and not as two independent cases. It is submitted that the objectives cannot be achieved unless the two versions are treated as two versions of the same case and not as two independent cases.

INVESTIGATION IN CROSS CASES:
Investigation in cross cases too presents vexed and complicated issues. The Supreme Court has emphasized that in cross cases investigation should be conducted by one and the same investigation officer. In State of MP vs Mishri lal 7 the Supreme Court has emphasized the point by observing that “In the instant case, the investigating officer submitted the challan against both the parties. Both the complaints cannot be said to be right. Either of them must be false. In such a situation, legal obligation is cast upon the investigating officer to make an endeavour to find out the truth and to cull out the truth from the falsehood.

Unfortunately, the investigating officer has failed to discharge the obligation, resulting in grave miscarriage of justice.”

Despite very clear direction of the apex court, we find numerous instances where
investigation is done by two different investigating officers. Two charge sheets are filed by the police holding each other aggressor in their respective cases. Often cognizance is taken on the basis of both charge sheets and charges and framed in both the cases. In the very nature of things, both the parties cannot be aggressor. If both the cases are investigated by one and the same investigating officer truthfully, sincerely and objectively it would not be difficult to find as to who was the aggressor. Ideally, only one charge sheet should be filed by the police indicating clearly as to who was the aggressor and the cross case should end up in a final closure report. It must be left to the aggrieved party to choose his future course of action. If the aggrieved party files a protest petition or a complaint as per the legal advice and cognizance is taken by the magistrate, both the cases can be tried together.

RECORDING OF STATEMENT U/S 313 of Cr P C.

Another issue that frequently arises in disposal of cross cases is one relating to recording of the statement of accused under Section 313 of Cr.PC. The procedure prescribed by the apex court and various High Courts requires that once the evidence is over in one case the other case should be taken up for recording of evidence. The question remains whether the statement under Section 313 Cr.PC. should be recorded once evidence in both the cases is complete or it should be recorded just after completion of evidence in first case and once the statement under Section 313 Cr.PC is recorder in the first case, other should be taken up for recording of evidence. The object of statement under section 313 is to provide an opportunity to the accused to explain the circumstances appearing against him in the case. If the accused in the first case is required to give statement under Section 313 of Cr P C before his case is taken up for evidence it may lead to premature disclosure of his case which may cause prejudice to him. Though there are no clear-cut guidelines in this regard, it would be desirable if the statement under section 313 is recorded once the evidence in both the cases is complete and the whole case of the parties is before the court. Suggestions that follow would resolve the issue pertaining to recording of statement under section 313 Cr.P.C. as well.

SUGGESTIONS

It is suggested that by a suitable amendment to the Code of Criminal Procedure and the Evidence Act providing for a scheme of consolidation of cross cases should be introduced. The salient features of consolidation would be as follows:-

Both the cases must be investigated by one and the same IO who should as far as possible state which party was the aggressor. He should try to come up with one charge sheet.

If two charge sheets are filed in any case or in cases where the accused has filed a complaint case as a counter case, both the cases must be consolidated and treated as one case in which rival parties have different versions.

Rule of evidence applicable should be preponderance of probabilities vis a vis parties instead of proof beyond reasonable doubt. This is because the happening
of incident is admitted to by both the parties with the rider that each has his own version. In such a situation rule of evidence should be preponderance of probability instead of proof beyond doubt. Both the cases should be consolidated and evidence should be recorded in one case which should be marked as leading case. The case registered first should be made leading case. The evidence recorded in the leading case should be read in both the cases. In fact the two cases must be treated as one for all practical purposes.

Both the cases should be disposed of by a single common judgment.

The procedure suggested would make the trial of cross cases easier and smooth, without being unfair to either of parties. This may be criticized on the ground that the established principles of criminal jurisprudence are being given a go by inasmuch as evidence recorded in one case is being used in another case as also the rule of proof in criminal cases is not being strictly followed. But a closer look would reveal that the criticism has no force. If parties are different and the evidence is not being recorded in the presence of the other party against whom it is going to be used then one can legitimately say that such type of evidence should not be used. But if the rival parties have different versions and in presence of both the parties evidence is being recorded, then perhaps there cannot be any grievance on this count.

It may also be argued that only the procedure prescribed by the apex court and various High Courts can guarantee compliance with the fundamental norms of a fair criminal trial including the protection given to the accused in Article 20, 21 and 22 of the Constitution.

Fair trial requires that the accused should not be compelled to disclose his case before the entire case of the prosecution is out and that the right of accused to keep silent throughout the trial should not be compromised. The argument is that if both cases would be consolidated and evidence is recorded in one case the status of the accused vis a vis a fair criminal trial would be compromised and protection given to an accused would melt down. True, if the cases are ‘consolidated’ as we understand the term in civil jurisdiction, many aspects of fair criminal trial as we recognize them would vanish. But that is the demand of situation which arises because of peculiar character of a cross case. As regards premature disclosure of Defence case, in cross cases the accused come up with disclosure of his case right from the very beginning of the case. So the argument that the accused would be compelled to disclose his defence before the prosecution case is out, loses vigour. The requirement is that the accused shall not be compelled to disclose his version, but, if he has already made his Defence version known to the whole world voluntarily how can it be said that he is being compelled to disclose his case before the evidence of prosecution is over?

Rights of an accused vis a vis a fair criminal trial must be respected, but, at the same time, we should not be hyper technical and far away from realities. The criticism that consolidation of cross cases would compromise with the concept of fair criminal trial is more imaginary than real. Fairness demands that cross cases should be tried as one.
Amalgamation of Clubbing of criminal Cases.

CONCLUSION:-

There cannot be clubbing of criminal cases, as there is no provision for that in the Code.

Clubbing up of two police cases. Section 210 Cr.PC. only prescribes for clubbing up of a G.R. case with a complaint case.

The Magistrate can took cognizance in both the cases & committed them to the Court of Session. There is no provision in the Criminal Procedure Code for clubbing up of cases except u/s 210, Cr.P.C., which provides for clubbing up where there is a complaint case & police investigation in respect of same offence.

However move for clubbing the complaints is not in expediency of a speedy trial but to further delay the trial.

The entire process of investigation, prosecution and trial of case and counter case needs to be put in order. At the investigation stage, the general practice should be a single charge sheet. However, as a check, the reasons for single or separate charge sheet must be put into writing by the Investigating Officer under the supervision of the Superior Officer. As a rule, a single Investigating Officer must be there. In sensitive cases, there can be more than one Investigating Officer. What constitutes sensitive matters should be left to the discretion of the Superior Officer who must be entrusted with the responsibility of assigning a case to a single Investigating Officer or to separate Investigating Officers. In either case, the reasons for the same should be put into writing. If there are more than one charge sheet/ or in case of sensitive matters, a second opinion can be had from another Investigating Officer and the reports of both the Investigating Officers should be compared. In case of significant divergence, it should be referred to a third authority who should give a speaking decision. In all cases, the Prosecuting Officer should be two. If any individual is aggrieved by lying of single charge sheet, he should have the right to prefer a private complaint which should be heard as a counter case. The present method of the same Judge hearing both the cases is a sound one. Further, reserving the judgment of both the cases till the arguments are done is also sound. Also, the method of linking the cases should be resorted to and evidence put in one case.
should be employed in another and Judge should have the option of giving a single or separate Judgment after evaluation of all the evidence put on record. To render this legally proper and correct, the right of cross examination across cases should be allowed. Further, Judges should employ their discretionary power under section 303 of Cr. P.C to examine accused as and when required.
POWER AND RESTRICTIONS UNDER SECTION 309 AND 311 OF Cr.P.C.

M.HARI NARAYANA
SENIOR CIVIL JUDGE
GOOTY.

The topic assigned to me is with regard to powers and restrictions of the Courts to postpone or adjourn the proceedings (Section 309 of Cr.P.C) and to summon material witness or examine person present (Section 311 of Cr.P.C). The petitions filed under Section 309 of Cr.P.C are popularly known as ‘adjournment petitions’ whereas the petitions filed under Section 311 of Cr.P.C in common parlance are called as ‘witness recall petitions’.

Coming to the powers and restrictions, in relation to Section 309 Cr.P.C the court has power to postpone or adjourn the proceedings but the only restriction is not to exercise such power in a casual manner. A reading of 309(1) of Cr.P.C clearly indicates that the trial or inquiry shall be held as expeditiously as possible and if examination of witnesses once commenced the same has to be continued from day to day until all the witnesses in attendance were examined unless there was some exigency. It also mandates that if the court adjourns the matter of examining the witnesses beyond the following day, necessary reasons to be recorded. If the court postpones the commencement of inquiry or trial, after taking cognizance, from time to time, reasons have to be recorded. Proviso to section 309 Cr.P.C also mandates that if the witnesses were present, no adjournment shall be granted without examining them except for special reasons to be recorded in writing. Explanation I of Sec.309 also empowers the court to remand the accused if the evidence obtained in a case raises a suspicion that the accused may have committed an offence and further evidence may be obtained by remand. The section also enables the courts to impose costs as
against the prosecution and also against the accused if adjournment is being sought unnecessarily. Thus, a bare reading of the above section clearly indicates the power of the court with regard to postponement and adjournment of trial or inquiry and such power to be exercised cautiously but not in a casual manner.

If the trial was not commenced after framing of charges because of non production of the witnesses by the prosecution what has to be done. In the cases of Common Cause (I), Common Cause (II) and Raj Deo Sharma (I) and Raj Deo Sharma (II) and other related cases (AIR 1996 SC 1619, AIR 1997 SC 1539, AIR 1998 SC 3281, AIR 1999 SC 3524, AIR 1992 SC 1701), the Hon'ble Supreme Court laid a dicta that if trial was not commenced for a period of two years after charges were framed, the accused have to be discharged or acquitted. However, the ratio laid down in the above said judgments was over ruled in the case of P. Ramachandra Rao v. State of Karnataka (A.I.R.2002 SC 1856).

Coming to the powers and restrictions of the court in recalling and summoning of witnesses, the Court has ample power to do so by virtue of Section 311 of Cr.P.C. Section 311 of Cr.P.C. enables that any court at any stage of inquiry or trial or other proceedings, summon any person as a witness or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined and the court shall summon, examine, recall or re-examine any such person if his evidence appears it to be essential to the just decision of the case.

A reading of the above section clearly indicates that the unrestricted discretionary powers are essentially intended to ensure that every necessary and appropriate measures is to be taken by the court to keep the record straight and to clear any ambiguity in so far as the
evidence is concerned so also to ensure that no prejudice is caused to any one.

The above observations were made by the Hon'ble Supreme court in a catena of decisions. Thus the purport and object of this provision is to enable the court to determine the truth and to deliver just decision duly collecting relevant facts and proof of those facts. To reach such just decision, the court can examine any person, if present in the court, either cited or not and either summoned or not by exercising the powers vested with it. Though such unbridled powers are vested with the courts, the same have to be exercised judicially but not capriciously, arbitrarily and also improperly. If those powers are exercised casually it may lead to undesirable results and it may be used as a weapon to destroy the very strong case of the prosecution.

With regard to the restrictions while exercising the powers under Section 311 of Cr.P.C, the Hon'ble Supreme court in a judgment reported in NATASHA SINGH VS CBI (State) (2013) 5 SCC 741 categorically held that an application under Section 311 of Cr.P.C must not be allowed to fill up lacune of the prosecution or of the case of defence or to the disadvantage of the accused or to cause serious prejudice to the defence of the accused or to give an unfair advantage to the opposite party. The Hon'ble Supreme court also cautioned that the additional evidence must not be received as a disguise for retrial or to change the nature of the case against either of the parties. The power has to be exercised if the evidence that is likely to be tendered by a witness is a genuine one. Therefore the powers vested with the Court under Section 311 of Cr.P.C have to be exercised in order to meet the ends of justice for strong and valid reasons and same must be exercised with great caution and care.
The very use of words in the section; “by any court”, “at any stage”, or “in any inquiry or in any other proceedings” or “any person summoned or not summoned” clearly indicates that the section was expressed in the widest possible terms conferring with unfettered powers and without putting any limitations on the powers of the court. Therefore, while exercising the powers vested under section 311 Cr.P.C the paramount consideration is “whether summoning or recalling the witness is essential to the just decision of the case or not”.

The Hon’ble Supreme court in a famous judgment Zahara Habibullah Shaeikh and another Vs State of Gujarat (AIR 2006 SC 1367) underlined the concept of Section 311 of Cr.P.C as under:

"The object underlying Section 311 of the code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the court to summon a witness under the section merely because the evidence supports the case of the prosecution and not that of the accused. The section is a general section which applied to all proceedings, enquiries and trial under the Code and empowers the Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In section 311 the significant expression that occurs is "at any stage of any inquiry or trial or other proceedings under this Code". It is, however, to be borne in mind that the Section confers a very wide power on the court on summoning witnesses but the discretion conferred on it is to be exercised judiciously. As the wider the power, the greater is the necessity for application of judicial mind".

The above analysis clearly indicates that the powers vested in the courts are absolutely discretionary in nature and they have to be exercised judicially and judiciously.
exercised cautiously, judiciously but not casually with an object to do justice not only in the point of justice and the prosecution but also from the point of view of an orderly society and as such the same have to be exercised only for strong and valid reasons and not to dilute the spirit of the powers vested with the courts. Thus it indicates that though the courts have discretion it has to be exercised to achieve the object of rendering justice to the public at large.

I conclude my presentation with the quote of Justice Coke.

"Discretion is a science or understanding to discern between falsity and truth, between right and wrong, between shadows and substance, between equity and colourable glosses and pretenses, and not to do according to their wills and private affections".

3.8.2019

(M.HARI NARAYANA)