

CASE AND COUNTER CASE - AMALGAMATION OR CLUBBING OF CRIMINAL CASES

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CASE AND COUNTER CASE

1. 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.

2. The different kind of cases and counter cases may be as follows:-

- a. Case originating out of political rivalry, shooting, etc., especially in times of election or other politically charged periods;
- b. Disputes arising out of property matters especially where arrests have been made U/sec. 107 and 116 of Cr.P.C. ;
- c. Cases originating out of communal clashes;
- d. Cases originating out of clashes between two or more fractions;
- e. Cases originating out of matrimonial disputes fall in within the domine of law ie., U/sec. 498-A of IPC;

TRIAL PROCEDURE

3. 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) in **Goriparthi Krishtamma - 1929 Madras Weekly Notes 881**. made a suggestion 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, **IN Krishna Pannadi vs. Emperor AIR 1930 Madras 190** made an exhortation to the then legislature to provide a mechanism as a statutory provision for trial of both cases by the same court.

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 Cr.P.C 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.** Reported in (1990) **Supp SCC 145** the procedure to be followed in such a situation has been succinctly described by the Supreme Court thus: "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.

4. 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 cannot 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. (2003) 9 SSC 426 between **State of MP vs Mishri Lal** 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 make up his mind regarding guilt or otherwise of the parties on the basis of the “entire case” and just not 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

5. 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 **2003 9 SSC 426 between State of MP vs Mishri Lal** 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 advis and cognizance is taken by the magistrate, both the cases can be tried together.

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

6. 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.P.C. 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.P.C. 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.P.C. is recorded 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.

AMALGAMATION OR CLUBBING OF CRIMINAL CASES:-

6. Whether a common trial can be held irrespective of two cases, one on the basis of charge sheet filed by the police and on the other based on the protest petition, which has been treated as a complaint.

Sec. 210 of Criminal Procedure Code provides the procedure to be followed when there is a complaint case and police investigation in respect of the same offence. Sub section (1) of 210 provides that, when a case instituted otherwise than a police case, namely, a complaint case, the Magistrate is informed during the course of enquiry or trial that an investigation by the police is in progress in relation to the offence, which is the subject matter of enquiry or trial held by him, the Magistrate is required to stay the proceedings of such enquiry or trial and to call for a report on the matter from the police officer conducting the investigation. Sub Section (2) provides that if a report is made by the investigating officer U/sec. 173 and on such report, cognizance of an offence is

taken by the Magistrate against any person, who is an accused in a complaint case, the Magistrate shall inquire into or try the two cases together, as if both the cases had been instituted on a police report. Sub section (3) provides that the police report does not relate to any accused in the complaint case or if the Magistrate does not take cognizance of any offence on a police report, he shall proceed with the inquiry or trial which was stayed by him, in accordance with the provisions of the code.

7. Sec. 219 of Criminal Procedure Code provides that three offences of same crime within year may be charged together.

a. When a person is accused of more offences than one of the same kind committed within space of 12 months;

b. Offences are of the same kind, when they are punishable with the same amount of punishment;

8. Sec. 223 of Criminal Procedure Code provides that what persons may be charged jointly.

a. Persons accused of same offence committed in the course of same transaction;

b. Persons accused of an offence and persons accused of abatement of, or attempt to commit, such offence;

c. Persons accused of more than one offence of the same kind within the meaning of sec. 219 committed by them jointly within the period of 12 months;

d. Persons accused of different offence committed in the course of same transaction;

e. Persons accused of theft, extortion, cheating or criminal misappropriation or breach of trust and receivers of stolen property;

f. Persons accused of Sec. 411 and 414 of IPC;

g. Persons accused of any offence under section XII of IPC relating to counter feet coin, of abatement or attempt to commit such offence;

9. As per the above statutory provisions and as per the Judge made law, in the decision of the Hon' ble Apex Court in Harjinder Singh vs. State of Punjab and Ors, 1985 (1) SCC, 422, where in it is held that clubbing of two cases, one on a police challan and the other on a complaint, was not permissible and if the prosecution versions in two cases were materially different, contradictory and mutually exclusive, should not be consolidated, but should be tried together evidencing with the two cases being recorded separately, so, the both cases could be disposed off simultaneously. In Pal @ Palla vs. State of Utter Pradesh decided on 22 September, 2010, the Hon' ble Apex Court held that the trial court shall proceed to here the two cases simultaneously, but separately and take evidence separately except in respect of all witnesses who would not be affected either by the provisions article 20 (2) of constitution or 300 Cr.P.C., and pointed out that the provisions of sec. 210 of the Code to the factual situation of the said case. In Kuldeep Yadav and Ors vs. State of Bihar decided on 11 th April, 2011, the Hon' ble Supreme Court discussed about the Harjinder Singh' s case Supra, Balbir vs State of Haryana and another, 2001 SCC 285, Laluprasad vs. State of Bihar CBI, 2003, 11 SCC 786 and so also Pal @ Palla' s case and held that though both the FIRs (11/97 and 12/97) were investigated by the very same IO, he had not acted in good discipline and not drawn the attention of trial judge about the cross cases arising about the same incident. According to the Balbir vs. State of Haryana and another, where in the Hon' ble Supreme Court held that the primary condition is that person should have been accused either of same offence or of different offences "Committed in the course of same transactions". The expressions advisedly used is "in the course of same transaction". That expression is not akin to saying "in respect of same subject matter". For several offences to be part of same transaction, the test which has to be applied is whether they are so related to one another in point of purpose of case and affect, or as a principal and subsidiary, so as to result in one continuous action. Thus, where there is a commonality of purpose or design, where there is a continuity of action, then all those persons involved can be accused of same or different offences "committed in the course of same transaction". Further held that when two commitments are made before court of sessions pertaining to the same offence and pertaining to the same victim, one giving one version against one

accused and the other giving another against a different accused, in such cases, the most appropriate procedure to be followed by the Sessions Judge should be the same as followed in the present case i.e., the two trials were separately conducted one after the other by the same court before the same Judge and Judgments in both cases were separately pronounced on the same day. If in a case the accused is alleged to have killed a person without any junction with the accused in other case, then it can't be treated as the same offence or even different offences committed in the course of same transactions. If such two diametrically opposite versions are put to joint trial, the confusion which it can cause in the trial would be inculcable. It would then be a mess and then there would be no scope for a fair trial, hence, the attempt to bring the two trials under the umbrella of 223 of Code has only to be foiled as untenable. In *Laluprasad vs. State of Bihar*, the Hon' ble Supreme Court held that amalgamation of cases U/sec. 223 is discretionary on the part of trial Magistrate and he has to be satisfied that persons would not be prejudicially affected and that it is expedient to amalgamate cases. In *State of AP vs. Kandimalla Subbayya* AR 1961 SC 1241 where in the Hon' ble High Court held that, several accused persons could be tried together at one trial in respective all offences committed by them, if all such offences are committed in the course of same transaction. However, though to such case U/sec. 223 would apply it would be desirable that the charge suitably split off, so, the accused persons will not be prejudice in answer of charges and depending themselves. In the light of observation made herein before and according to the provisions of sec. 210, sec. 219 and sec. 223 of Criminal Procedure Code, the police case and private complaint can be amalgamated or clubbed under the factual situation and some times it can be tried separately one after other, but should be disposed off simultaneously. The object of the Sec. 210 is intended to ensure that private complaint do not interfere with the course of justice, which prevents harassment to the accused and obviates anomalies which might arise from taking cognizance of same offence more than once. According to the sec. 223 of code in clear terms provides that, persons accused of the same offence committed in the course of same transactions, or persons accused of different offences committed in the course of same transaction may be charged and tried together (*Vivek Gupta vs. CBI*, 2004, SCC (Cri) 50).

