

(2013) 02 PAT CK 0016

In the Patna High Court

Case No : Criminal Miscellaneous No. 11804 of 2011

Ajit Kumar Pandey

APPELLANT

Vs

The State of Bihar and Another

RESPONDENT

Date of Decision : 08-02-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 319
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2013) 2 PLJR 152

Hon'ble Judges : Shivaji Pandey, J

Bench : Single Bench

Advocate : Ram Chandra Singh and Jitendra Kumar Singh, for the Appellant;
Manoj Kumar for the Opp. Party No. 2 and Mr. Arun Kumar Pandey for the State,
for the Respondent

Final Decision : Allowed

Judgement

Shivaji Pandey, J.—Heard learned counsel for the petitioner, learned counsel for the State and learned counsel for opposite party no. 2. This application has been filed for quashing the order dated 15.2.2011 passed in S.T. No. 496 of 2008, arising out of Dinara P.S. Case No. 206 of 2007 by the learned Additional Sessions Judge-II, Rohtas at Sasaram by which the court below has rejected the petition filed by the petitioner u/s 319 of the Code of Criminal Procedure (hereinafter referred to as "the Code") for issuance of summon upon Haridya Pandey (opposite party no. 2).

2. An F.I.R. was lodged by one Ajit Kumar Pandey, son of Surendra Pandey stating therein that on 17.12.2007 at 10.30 A.M. he for harvesting the paddy crops carried the harvesting machine through the field of Rama Nand Pandey which caused ditch in the field and for that Rama Nand Pandey asked the informant for compensation. The informant gave assurance to compensate the loss caused due to ditch. On 18.12.2007 at about 7 A.M. Santosh Pandey, Binod Pandey, Haridya Pandey, Awadhesh Pandey, Sanjay Pandey, Narad Pandey,

Narendra Pandey, Kamalbash Pandey raided the house of the petitioner-informant armed with lethal weapons. Haridya Pandey was holding rifle, exhorted to kill the informant when upon to save his life he rushed towards his first floor. By that time Santosh Pandey came over the first floor and started firing and one bullet hit the chest of his father and he instantly fell down on the earth. While the informant was carrying his father to the hospital for his treatment but in the way, his father succumbed to the injuries.

3. It appears that the case was registered u/s 302/ 34 of the Indian Penal Code and 27 of the Arms Act.

4. The higher officials of the Police Department investigated the case and found that Haridya Pandey was suffering from paralysis and on the day of the alleged occurrence he was at Hospital.

5. The police after investigation submitted charge-sheet u/s 302/ 34 of the Indian Penal Code against Binod Pandey, Santosh Pandey and Awadhesh Pandey and kept the investigation pending against the accused persons.

6. A supplementary charge-sheet was also filed against Sanjay Pandey, Narad Pandey, Narendra Pandey and Kamles Pandey vide Supplementary Charge-sheet No. 43 of 2008 but no charge-sheet was submitted against Haridya Pandey, opposite party no. 2. After taking cognizance of the offence the court has committed the case to the court of session for its trial where two witnesses, namely, Vijay Pandey and Ajit Kumar Pandey petitioner-informant were examined.

7. After examination of the aforesaid two witnesses an application u/s 319 of the Code was filed before the court below and the court below refused to call opposite party no. 2 to stand the trial on the ground that the allegations whatever mentioned against him are mere instigating the accused persons to open fire and kill the informant's side and no overt act had been attributed either in the First Information Report or in the evidence and in that circumstances the court below refused to summon opposite party no. 2 to face the trial.

8. Learned counsel for the petitioner has submitted that in the First Information Report there is specific allegation against Haridya Pandey that he was not only present but he chased the informant-petitioner and his father. He exhorted fire to kill the informant's side and by chance the bullet hit the father of the informant-petitioner. It has further been submitted that it is not required that every person should actively participate rather even if the person exhorting and assisting in committing crime will be sufficient for holding an inference of likelihood of conviction. He has further submitted that all the persons have raided the house of the petitioner-informant with the common intention to commit the crime against the informant's side and on the exhortation of opposite party no. 2, Santosh Pandey and Binod Pandey opened fire causing bullet injury to the father of the petitioner-informant who ultimately succumbed to the injuries. He has further submitted that P.Ws. 1 and 2 have specifically narrated the whole story

where it has been stated that Haridya Pandey was one of the member of the raiding party alongwith other accused persons and it has been stated that Haridya Pandey and others also chased the petitioner informant to the first floor and on his direction Binod Pandey resorted firing, which caused firearm injury to his father had fallen down and ultimately died. He has further submitted that the materials are so overwhelming there is every likelihood of conviction of Haridya Pandey opposite party no. 2 and the court below wrongly refused to summon him to stand the trial.

9. Learned counsel for opposite party no. 2 objected the argument of learned counsel for the petitioner and has submitted that there is no material whatsoever which could show that opposite party no. 2 had acted any way or participated actively in crime rather if wholesome statement made in the First Information Report and statement of witnesses be taken to be true only it will be apparent that opposite party no. 2 was present at the place of occurrence and was instigating for committing the offence and there is no any evidence whatsoever against opposite party no. 2 to given an inference that on the basis of those material there is any possibility, probability and likelihood of his conviction.

10. For coming to the right conclusion it will be essential to examine the provision of Section 319 of the Code to arrive at right conclusion as to whether the trial court has applied the right principle while exercising the power u/s 319 of the Code and to summon the petitioner to stand the trial. It is relevant to quote Section 319 of the Code which is as follows:--

319. Power to proceed against other persons appearing to be guilty of offence.--

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

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

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

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

(a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard:

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

11. On bare reading of Section 319 of the Code it appears that the court may exercise the power u/s 319 of the Code where in course of enquiry or trial it appears from the evidence that any person not being an accused had committed the said offence for which such person could be tried together with the accused who is already facing criminal trial. The Hon''ble Supreme Court in the case of Michael Machado and Another Vs. Central Bureau of Investigation and Another, has held that the basic requirements for invoking the aforesaid section is that it should appear to the court from the evidence collected during the trial or in the inquiry that some person who was not arraigned as an accused in that case has also committed an offence and for which that person could be tried along with other accused persons already arraigned. The court should not exercise the power in a case of some doubt but should also appear to the court about the involvement of that person in the said crime. In other words the court must have reasonable satisfaction from the evidence already collected regarding two aspects. First is that the other person has committed an offence and second is that in such offence that person could be tried alongwith person already arraigned as an accused. The discretionary power should be exercised only to achieve criminal justice system and the court should not turn against another person whenever it comes across evidence connecting that other accused also with the offence. The court has given guideline, the trial has proceeded and the quantum of evidence collected till then and also the amount of time which the court had spent for collecting the evidence. It has been further held that extraordinary power has been conferred on the court u/s 319 of the Code should be exercised very sparingly and in compelling situation, reasons exist for taking cognizance against the other person. This power should not be exercised only on mere suspicion but the court must be hopeful that there is a reasonable prospect of the case as against the newly added accused ending in being convicted of the offence concerned.

12. This principle has been approved in the case of Guriya @ Tabassum Tauquir and Others Vs. State of Bihar and Another, . In that case the Hon''ble Supreme Court has approved the earlier judgments decided in the cases of Michael Machado and Another vs. Central Bureau of Investigation and Another, reported in (2000) 3 SCC 362 and Joginder Singh and Another Vs. State of Punjab and Another, . On the principle that at any stage of the proceeding on the evidence adduced evidence which satisfied the court that the accused persons or those who have not been arrayed as an accused against whom proceeding has been quashed have also committed the offence the court can take cognizance against him and try them alongwith the accused persons. But the court has given rider that it is an extraordinary power which has been conferred on the court and should be used very sparingly only if compelling reasons exist for taking action against a person against whom action had not been taken. The Hon''ble Supreme Court in paragraph 10 has held as follows:--

10. On a careful reading of Section 319 of the Code as well as the aforesaid two decisions, it becomes clear that the trial court has undoubted jurisdiction to add

any person not being the accused before it to face the trial alongwith the other accused persons, if the court is satisfied at any stage of the proceeding on the evidence adduced that the persons who have not been arrayed as an accused should face the trial. It is further evident that such person, even though had initially been named in the FIR as an accused, but not charge-sheeted, can also be added to face the trial. The trial court can take such a step to add such persons as accused only on the basis of evidence adduced before it and not on the basis of materials available in the charge-sheet or the case diary, because such materials contained in the charge-sheet or the case diary in Sohan Lal vs. State of Rajasthan, the position of an accused who has been discharged stands on a different footing.

13. In the case of Mohd. Shafi Vs. Mohd. Rafiq and Another, the Hon''ble Supreme Court has provided guidelines for summoning the person as an accused who has not been arrayed as an accused in the trial. The court must be satisfied that the person who has been summoned to stand the trial has a satisfaction that there exists a possibility that the accused so summoned is in all likelihood "would be convicted". Such satisfaction can be arrived at inter alia upon completion of the cross-examination of the said witness. For the said purpose, the court concerned may also like to consider other evidence. In this case also the court has given a caution that the power that has been conferred u/s 319 of the Code is an extraordinary power which has been conferred on the court and should be used very sparingly only if compelling reasons exist for taking action against a person against whom action had not been taken. It will be apt to quote paragraph 12 of the said judgment:--

12. From the decisions of this Court, as noticed above, it is evident that before a court exercises its discretionary jurisdiction in terms of Section 319 of the Code of Criminal Procedure, it must arrive at the satisfaction that there exists a possibility that the accused so summoned is in all likelihood would be convicted. Such satisfaction can be arrived at inter alia upon completion of the cross-examination of the said witness. For the said purpose, the court concerned may also like to consider other evidence. We, therefore, of the view that the High Court has committed an error in passing the impugned judgment. It is accordingly set aside. The appeal is allowed.

14. In the case of Lal Suraj @ Suraj Singh and Another Vs. State of Jharkhand, in paragraph 16 of the judgment the Hon''ble Supreme Court has held that the principle of strong suspicion is the criteria for framing of charge as all the materials brought during investigation are required to be taken into consideration but the power u/s 319 of the Code has to be exercised on the basis of evidence brought before the court. The court has held that from the evidence it should appear that the person who has been summoned there should a possibility of the accused of being convicted on the basis of the evidence brought on record even if the same is taken to be correct in its entirety. The court has given a rider on consideration of the provision of Section 319 of the Code that the key words in

this section are "it appears from the evidence""any person"....."has committed any offence". The court should not exercise the power merely because some witnesses have mentioned the name of such person or that there is some material against that person. But it should be exercised only after due consideration that there are strong case against the person who have been summoned to face the trial there is likelihood of ending the trial in conviction against the person so summoned. It will be appropriate to quote relevant portion of the said Judgment:--

9..... A glance at these provisions would suggest that during the trial it has to appear from the evidence that a person not being an accused has committed any offence for which such person could be tried together with the accused who are also being tried. The key words in this section are "it appears from the evidence" "any person" "has committed any offence". It is not, therefore, that merely because some witnesses have mentioned the name of such person or that there is some material against that person, the discretion u/s 319 CrPC would be used by the court. This is apart from the fact that such person against whom such discretion is used, should be a person who could be tried together with the accused against whom the trial is already going on. This Court has, time and again, declared that the discretion u/s 319 CrPC has to be exercised very sparingly and with caution and only when the concerned is satisfied that some offence has been committed by such person. This power has to be essentially exercised only on the basis of the evidence. It could, therefore, be used only after the legal evidence comes on record and from that evidence it appears that the person concerned has committed an offence. The words "it appears" are not be read lightly, on that the court would have to be circumspect while exercising this power and would have to apply the caution which the language of the section demands.

15. In the case of Kailash Vs. State of Rajasthan and Another, the Hon'ble Supreme Court has approved the earlier view as explained hereinabove and has held in affirmance that the power u/s 319 of the Code is an extraordinary power conferred on the court to exercise very sparingly, only in compelling reason and it should be exercised in a situation where there exists a possibility that the accused so summoned is in all likelihood would be convicted, such situation can be arrived at upon completion of the cross-examination of the said witness. The court has also approved the view that a judicial exercise is called for keeping a conspectus of the case including the stage at which the trial has already proceeded and the quantum of evidence collected till then, and also the amount of time which the court had spent for collecting such evidence. The court while examining an application u/s 319 of the Code has to bear in mind that there is no compelling duty on the court to proceed against other persons. In a nutshell, the power u/s 319 of the Code can be exercised keeping in mind all relevant facts and power should not be exercised mechanically on the ground that some evidence had come on record implicating the person sought to be added as an accused.

16. In the case of Brindaban Das and Others Vs. State of West Bengal, the Hon''ble Supreme Court has held that court can exercise the discretionary power u/s 319 of the Code where there was substantive evidence against the accused persons where there would be all probability to secure conviction. The power u/s 319 of the Code is a discretionary power should be exercised very sparingly and with caution. That power can be exercised either on the application made to the court or by the court suo motu. But the test is that there should be overwhelming evidence that has come during the trial which may likelihood of conviction of the person so summoned.

17. In the impugned order the court below has mentioned following judgments but without consideration:--

(i) Krishnappa Vs. State of Karnataka, : [Krishnappa Vs. State of Karnataka, ;
(ii) Kailash Dwivedi Vs. State of M.P. and Another, and; (iii) Ram Singh and Others Vs. Ram Niwas and Another, .

18. In the case of Krishnappa (supra) the Hon''ble Supreme Court was considering the scope of Section 319 of the Code relied on the Michael Machado (supra) case and the Court has expressed the view that power u/s 319 of the Code is discretionary power and should be exercised only to achieve criminal justice system and court should not turn against another person whenever it comes across evidence connecting that other person also with the offence. It has been further held that a judicial exercise is called for, keeping a conspectus of the case including the stage at which the trial has already proceeded and the quantum of evidence collected till then, and also the amount of time which the court had spent for collecting, such evidence. The Hon''ble Supreme Court has further held that while examining an application u/s 319 of the Code has also to bear in mind that there is no compelling duty on the court to proceed against other persons. In nutshell, it means that for exercise of discretion u/s 319 of the Code, all relevant factor is required to be considered and the court is not required to pass a mechanical order on the ground that some evidence had come on record implicating the person sought to be added as an accused. This judgment also supports the view that has been taken by the Hon''ble Supreme Court as mentioned hereinabove.

19. In the case of Kailash Dwivedi (supra) the court has considered the scope of Section 319 of the Code relied on the Michael Machado (supra) case where the court has applied the principle but found that the accused persons on the basis of the material on record did not show that the accused had actively participated in the crime and held that the High Court was not justified in reversing the order of the court below refusing to summon the accused as it was found from the record that no material had come showing his implication in the crime but the principle that has been enunciated in the case of Michael Machado (supra) case has been reiterated.

20. In the case of Ram Singh (supra) the court was considering the scope and

parameter of Section 319 of the Code where the court has considered large number of cases and the court has held that power u/s 319 of the Code has to be essentially exercised only on the basis of the evidence brought on record of the case. The Court can exercise discretionary jurisdiction only after legal evidence came on record and from that evidence it appears that the person concerned has committed the offence. It will be apt to quote paragraph 20 of the aforesaid judgment:--

20. The High Court, in our opinion, however, has committed a serious error in proceeding on the premise that mere existence of a prima facie case would be sufficient to exercise the court's jurisdiction u/s 319 of the Code. We have noticed hereinbefore the importance of the word "appears". What is, therefore, necessary for the court is to arrive at a satisfaction that the evidence adduced on behalf of the prosecution, if unrebutted, would lead to conviction of the persons sought to be added as accused in the case. The High Court furthermore committed a serious error insofar as it failed to take into consideration that when the order dated 29.5.2003 was passed, the learned Judge was in a position to consider the evidence brought on record including the cross-examination of the prosecution witnesses. The High Court did not arrive at any finding that a case has been made out for exercise of such an extraordinary jurisdiction which, in terms of the judgments of this Court, is required to be exercised very sparingly.

21. The court has taken the view that u/s 319 of the Code even persons who have been dropped by the police during the investigation but against whom during trial evidences have come, showing their involvement in the offence are included in the expression "any person not being the accused".

22. From the aforesaid judgments the following test emerges for summoning the person to stand the trial. The persons were not charge-sheeted by the police nor the cognizance was taken against the person concerned but during the trial evidences have come against the persons so summoned and quality and quantity of the evidences which gives an inference of probability or likelihood of conviction, the suspicion even the strong suspicion, cannot be a ground to exercise the discretionary power of the court.

23. Now this case should be considered on the litmus test as having been provided, culled out above from the judgments of the Hon'ble Supreme Court.

24. Let us examine the evidences came during trial of present case which are sufficient to fall under the parameter that has been culled out by the Hon'ble Supreme Court as stated hereinabove.

25. From the beginning of the initiation of this case the petitioner-informant has specifically mentioned the name of opposite party no. 2 who exhorted other accused persons to kill the informant whereupon Santosh Pandey resorted firing which caused the death of Surendra Pandey. During trial one Vijay Pandey has given details of fact that 17-18 months before at 7.30 the informant alongwith elder brother Surendra Pandey and nephew Ajit Pandey were extracting paddy.

By the time Haridya Pandey, Binod Pandey, Santosh Pandey, Narad Pandey, Awadhesh Pandey, Sanjay Pandey, Kamal Nath Pandey and Narendra Pandey came there alongwith gun. Haridya Pandey exhorted to kill the informant, his brother and his nephew whereupon the informant, brother and nephew rushed towards the house but aforesaid persons did not stop there rather they chased the informant, his brother and nephew. It has been alleged that the informant, Surendra Pandey and Ajit Pandey swiftly went to the first floor, by the time Haridya Pandey, Binod Pandey and Santosh Pandey came over there and on the exhortation of Haridya Pandey, Santosh Pandey resorted firing which caused bullet injury to his father Surendra Pandey and ultimately he died.

26. Similarly Ajit Kumar Pandey brother of the informant has been deposed as P.W. 2 and he has also given full description of the incident and has stated that on 18.12.2007 in the morning the informant, this witness and Surendra Pandey were extracting the paddy in the courtyard where eight persons, namely, Haridya Pandey, Narad Pandey, Awadhesh Pandey, Kamalbash Pandey, Binod Pandey, Santosh Pandey, Sanjay Pandey and Narad Pandey came there alongwith rifle and on seeing them the informant party started fleeing from the court-yard but Haridya Pandey exhorted to kill all persons and there is allegation that Haridya Pandey and other accused persons followed the witnesses and the victim to their house. It has been alleged that three persons, namely, Santosh Pandey, Haridya Pandey and Binod Pandey had gone to up-stair and on the exhortation of Haridya Pandey, Santosh Pandey resorted firing whereupon his father late Surendra Pandey succumbed to the firearm injury.

27. It appears aforesaid witnesses were thoroughly cross-examined but nothing in favour of opposite party no. 2 and others could be extracted. On the examination of evidence as stated hereinabove where the witnesses have specifically mentioned the name of opposite party no. 2 which do not show he was mere mute expectator rather it appears from the evidence of witnesses opposite party no. 2 had actively participated alongwith other accused persons, itself shows that there are sufficient on record in giving inference of probability, possibility and likelihood of conviction.

28. In this view of the matter the order dated 15.2.2011 passed u/s 319 of the Code refusing to summon opposite party no. 2 is quashed and the matter is remanded back to the court below to pass the fresh order in accordance with law looking to the scope and parameter of Section 319 of the Code as has been explained hereinabove. Accordingly this application is allowed.