

(2013) 09 AHC CK 0239
In the Allahabad High Court
Case No : Criminal Revision No. 73 of 2013

Akbal Bahadur Tiwari and Another

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 13-09-2013

Acts Referred:

Citation : (2013) 83 ALLCC 735

Hon'ble Judges : Arvind Kumar Tripathi, J

Bench : Single Bench

Advocate : Indrajeet Shukla, for the Appellant;

Judgement

Arvind Kumar Tripathi, J.—This criminal revision has been filed by Akbal Bahadur Tiwari and another challenging the order dated 14.2.2013 passed by the Additional District and Sessions Judge, Room No. 9, Gonda in Sessions Trial Nos. 56 of 1999 and 42 of 2009 (State v. Vijay Pal and others) arising out of Case Crime No. 341 of 1998, u/s 302 IPC, Police Station Tarabganj, District Gonda by which the learned Court below has allowed the application u/s 319 Cr.P.C. and summoned the revisionists to face trial. Heard Shri Kunwar Mridul Rakesh, learned Senior Counsel assisted by Shri Indrajeet Shukla, learned Counsel for the revisionists and the learned AGA.

2. It was argued by the learned Counsel for the revisionists that while passing the order the Court below has not considered the direction of this Hon'ble Court passed in Writ Petition No. 2403 of 2010 decided on 21.1.2013. It was also argued that all the witnesses in the sessions trial, except the informant, have been declared hostile. They have not supported the prosecution version. It was also submitted that the informant, who was earlier examined as PW-1 has died, then whose evidence is going to be recorded against the revisionists. It was also submitted that the power granted to the Court u/s 319 Cr.P.C. has been misused, and the order is misuse of process of law.

3. Learned AGA has submitted that the Trial Court has dealt with this aspect in

the order, and has held that the statement of the witness (now deceased) will be read u/s 299 Cr.P.C. and that is sufficient to convict the accused persons, hence the order passed by the Trial Court is perfectly justified.

4. It will be apt to mention that this case was being investigated by the CBCID, and charge-sheet was submitted against other accused persons except the revisionists, namely, Akbal Bahadur Tiwari and Yogendra Pratap Tiwari. It will also be apt to mention that the application u/s 319 Cr.P.C. was moved and all the witnesses of fact were examined, and except PW-1, all the witnesses of fact were declared hostile. They have not supported the prosecution version. PW-1, admittedly, is now dead.

5. Previously, when CBCID has filed charge-sheet, they exonerated Akbal Bahadur Tiwari and Yogendra Pratap Tiwari, so an application was moved by the informant for summoning them. This application was allowed by the Judicial Magistrate, Gonda on 10.1.2000. Criminal Revision No. 6 of 2000 was filed before the Sessions Judge, which was transferred to the Civil Judge, NDPS Judge, Gonda, who after hearing the parties, allowed the revision, and quashed the impugned order dated 10.1.2000 vide order dated 5.1.2002. Against this order, the writ petition was filed by Raj Narain Tiwari, which was abated on account of his death vide order dated 21.1.2013. In the meantime, an application u/s 319 Cr.P.C. was moved by Raj Narain Tiwari, when he was alive, for summoning Akbal Bahadur Tiwari and Yogendra Pratap Tiwari. This application was rejected vide order dated 6.3.2009 by the Trial Court. Feeling aggrieved by the above order, Application under sections 482/387/407 Cr.P.C. No. 2403 of 2010 was filed by Kamalendra Tiwari, son of the informant. This petition was allowed, and it was directed that the trial Court is directed to decide the application u/s 319 Cr.P.C. afresh in the light of latest legal position settled by the Hon'ble Apex Court in the case of Sarojben Ashwinkumar Shah etc. Vs. State of Gujarat and Another, . After this, the matter was again heard by the Trial Court, and the Trial Court passed the impugned order. Feeling aggrieved, this criminal revision has been preferred.

6. Before going through the discussions on merit, it will be apt to reproduce the provisions of section 299 Cr.P.C. which reads as under:--

299. Record of evidence in absence of accused.--(1) If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try [or commit for trial] such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions and any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence or cannot be found or his presence cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

(2) If it appears that an offence punishable with death or imprisonment for life has been committed by some person or persons unknown, the High Court or the Sessions Judge may direct that any Magistrate of the first class shall hold an inquiry and examine any witnesses who can give evidence concerning the offence and any depositions so taken may be given in evidence against any person who is subsequently accused of the offence, if the deponent is dead or incapable of giving evidence or beyond the limits of India.

7. A bare perusal of this section clearly reveals that before the provisions of section 299 Cr.P.C. is applied there is two pre-conditions. It is proved that the accused persons have absconded, and there is no immediate prospect of arresting him. If these two conditions are not satisfied, then the provision of section 299 Cr.P.C. is applied.

8. The learned Court below has, in the impugned order, held that even after the death of PW-1, his statement recorded in the trial, will be read u/s 299 Cr.P.C. This clearly goes to show the clear ignorance of law on the part of Trial Court. He is so careless that he has not even bothered to look into the provisions of section 299 Cr.P.C. This carelessness, and scant regard to the provisions of Cr.P.C. has led to this revision.

9. In the case of Hardeep Singh Vs. State of Punjab and Others, , the Apex Court has held in para 75 as under:--

With respect, the above observations do not appear to be in consonance with statutory provisions or previous decisions of this Court. We have reproduced section 319 of the Code in the earlier part of the judgment. Bare reading of sub-section (1) leaves no room of doubt what it requires. It states that for addition of accused, it must appear to the Court from the evidence that any person not being the accused has committed any offence for which such person should be tried along with other accused.

10. The Apex Court again, referring to the decisions, in the cases of Joginder Singh and Another Vs. State of Punjab and Another, , and Krishnappa Vs. State of Karnataka, , has held that such power u/s 319 Cr.P.C. can be exercised only if the Court is satisfied that the accused, so summoned, in all likelihood, would be convicted.

11. The Court below has not considered that all other witnesses of fact have turned hostile, and the informant PW-1 is dead, then how the accused persons, in all likelihood, will be convicted.

12. The Trial Court was also directed by this Court that the orders may be passed considering the recent decision of the Apex Court in the case of Sarojben Ashwinkumar Shah and others (supra). In this case, the Apex Court has also held that the power to proceed against any person, not being accused before the Court, must be exercised only where there appears, during inquiry or trial, sufficient evidence indicating his involvement.

13. A perusal of Trial Court order clearly reveals that the Trial Court has not paid any heed to the directions given by this Court. This also shows scant respect regarding the directions of this Court.

14. The judicial discipline is the backbone of the judiciary. The Trial Court is expected and bound by the judicial directions by the higher Courts. Such disregard will lead to bad situation, which may undermine the respect of judiciary in the eye of general public.

15. As discussed above, the Apex Court has clearly held that the power u/s 319 Cr.P.C. is an exceptional power, and it can be used only when at least there is evidence, if unrebutted, may lead to the conviction of the accused.

16. In the instant case, at the cost of repetition of the witnesses of fact, except the informant, were declared hostile, and PW-1 the informant has also died. This evidence cannot be read u/s 299 Cr.P.C., then the Court below has erred in summoning the accused persons u/s 319 Cr.P.C.

17. One more aspect the Trial Court has not considered. When the total evidence is complete, and the case has reached to the stage of section 313 Cr.P.C. and the defence, then the entire trial has to be started de novo, which in these circumstances, will be an abuse of the process of law. In para 8 of the case of Mayank Chaturvedi and Another Vs. State of U.P. and Another, , it has been held as under:-- In view of the law noticed above, it becomes clear that the power u/s 319 Cr.P.C. is a discretionary power which can be exercised suo motu or on an application by someone. Even though, the power is discretionary but it is not to be exercised in a routine manner. It is an extraordinary power which should be used sparingly and only if evidence has come on record which sufficiently establishes that the other person has committed an offence. A mere doubt about involvement of the other person on the basis of the evidence let in before the Court is not enough. The Court must also be satisfied that the circumstances justify and warrant that the other person be tried with the already arraigned accused. While exercising this power, the Court must keep in view full conspectus of the case including the stage at which the trial has proceeded already and the quantum of evidence collected till then.

In view of the above, this criminal revision is liable to be allowed, and is hereby allowed. The impugned order is quashed. The matter is sent back to the Trial Court to decide the application u/s 319 Cr.P.C. afresh in the light of the observations made above and earlier observations of this Court.