
(1987) 07 CAL CK 0006
In the Calcutta High Court
Case No : Criminal Rule No. 1328 of 1985

Asit Kumar Roy

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 31-07-1987

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 119, 149, 202, 227, 231

Citation : 92 CWN 446

Hon'ble Judges : Monoranjan Mallick, J

Bench : Single Bench

Advocate : Dipak K. Sengupta and Kartick Ch. Bhattacharya, for the Appellant; Sofia Begum, for the Respondent

Judgement

Monoranjan Mallick, J.—This Rule is directed against the order dated 25.5.85 passed by the learned Additional Sessions Judge, Second Court, Murshidabad in Sessions Serial No. 166 of 1984/ Sessions Trial No. 1 of May, 1985 issuing summons against the present petitioners u/s 319(1) of the Code of Criminal Procedure. Facts are briefly as follows:- One Sisir Pal of village Kalyanpur lodges: a complaint with Kandi Police Station alleging that the petitioners with Sunil Roy, Samar Bagdi, Dilip Bagdi, Biswanath Bagdi and Mangal Bagdi entered into the plot land where the complainant along with his three brothers were transplanting paddy seedling and that there was a quarrel between the parties, that after the intervention of others all of them went to Thana and the matter was settled. It was further alleged in the complaint that on the same day after some time, the petitioners and the abovenamed 4 other persons entered into the land and began to cultivate the same. On being informed, the complainant along with 3 brothers came to the spot and asked the petitioners and other men not to cultivate the land. But, instead of leaving the places, they suddenly caught hold of Balai Paul, complainant's brother and began to assault him and he was suddenly hit by a Ballam and he fell down. All miscreants then left and the victim was taken to Kandi hospital where he died.

2. On the basis of the complaint, police started the investigation and submitted charge-sheet against the petitioners and other accused persons, the petitioners and other accused were committed to the Court of Sessions, Murshidabad, but thereafter, on consideration of the materials on record and the charge-sheet submitted, the learned Addl. Sessions Judge, 2nd Court, Murshidabad, by order dated 14.11.84 framed charge u/s 302/149 against the five accused, namely, Sunil Roy, Samr Bagdi, Dilip Bagdi, Biswanath Bagdi and Mangal Bagdi, but by the same order, the learned Judge discharged the petitioners u/s 227 of the Criminal Procedure Code on the ground that the charge against them was groundless. Subsequently, an application was filed by the additional Public Prosecutor for the State praying for summoning the accused persons in this case. The application was heard on 18.5.85 and on 25.5.85 the learned Judge passed an order summoning the petitioners as accused persons u/s 319(1) of the Code.

3. Being aggrieved, this revision has been filed contending, inter alia, that the learned Judge has failed to appreciate that u/s 319 of the Cr. P. Code, the learned Sessions Judge has no power to recall any accused who has been discharged on perusing all the materials on record, that the learned Judge failed to appreciate that the Public Prosecutor on 14.11.84 himself submitted that no allegation against the petitioners was there and they might be discharged and considering the pros and cons the petitioners were discharged u/s 227 of the Code and there was no new situation in the meantime for which the order of discharge could be recalled putting the petitioners on retrial.

4. The petitioners, therefore, submit that the order dated 25.5.85 passed by the Additional Sessions Judge, 2nd Court, Murshidabad is illegal and without jurisdiction wholly and the same is liable to be set aside and quashed, for ends of justice.

5. The Rule is opposed by the State. It is submitted that the learned Addl. Sessions Judge has power to issue process against the petitioners when subsequently in evidence the names of the present petitioners transpired to be implicated in the alleged offence.

6. On behalf of the petitioners Mr. Sengupta, learned Advocate has referred to me to the decision of this Court in 1980(2) Cal L. J. 33 (Raj Tilak Mitra v. Himanshu Chatterjee). In that decision, the learned Judge has held that a person who is discharged u/s 239 Cr.P.C. cannot be included within the expression "any person not being an accused" as appears in section 319 of the Criminal Procedure Code and with that observation, the learned single judge upheld the order of the learned Magistrate rejecting the application of the revision petitioner to summon some persons u/s 319 of the Code.

7. I find from the judgment passed by the learned judge that the learned Judge relied on the decision of the Supreme Court in AIR 1979 SC 33V Joginder Singh v. State of Punjab. The learned Judge in paragraph 3 has, however, quoted the relevant portion of the judgment of the Supreme Court in which the Supreme

Court has held that the expression "any person not being the accused" occurring in Section 319 of the Code of Criminal Procedure clearly covers any person who is not being tried already by the Court and the very purpose of indicating such provisions like section 319(1) of the Code clearly shows that even persons who has been dropped by the Police during investigation comes within the above expression.

8. In this present case, it is a fact that at the time the charges were being framed against the accused, the learned Add. Sessions Judge accepting the submission made by the Public Prosecutor discharged the present petitioners. I find from the record that even before the evidence was recorded, Additional Public Prosecutor in charge filed an application before the Add. Sessions Judge that there were materials to frame charge against the petitioners even on the police papers. The learned Judge also made some comment in the order-sheet after discharging the present petition u/s 227 Cr.P.C. that it was a fact that there were materials against the present petitioners in police papers. I regret that in the circumstances there can be no doubt that at the time of the framing of the charge, the learned Additional Sessions Judge did not look into police papers properly and relying on the submissions of the Public Prosecutor discharged the petitioners. If he cared to go through the statements recorded by police during investigation he could have framed charges against the present petitioners also. This is a situation created because of non-application of the mind of the Id. Additional Sessions Judge at charge framing stage.

9. However, it is well settled that when some persons have been discharged by the Judge, u/s 227 Cr. P.C. he cannot frame charge against them again on the basis of police papers u/s 319 of the Code and summon them without recording any evidence. In this case I find that even though such an application was filed before recording of evidence the learned Sessions Judge did not pass any order on the said petition filed before evidence was recorded. After evidence of P.W.I was recorded upto examination in chief, a fresh application has been filed for summoning the present petitioners and the Ld. Addl. Sessions Judge by the impugned order summoned them relying not only on the decision of Joginder Singh's case, but also another decision of the Supreme Court in Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others, , I have already indicated that in Joginder Singh's case the Supreme Court held that a person who is not an accused can be summoned u/s 119 of the Criminal Procedure Code after recording of evidence if in evidence his complicity is disclosed. In Joginder Singh's case the Supreme Court was considering the question as to whether a person who has been dropped by Police during investigation and no charge sheet has been submitted against such person, can be summoned u/s 319 of the Code after recording evidence. The Supreme Court answered the point in the affirmative by holding that the Court can do that u/s 519 of the Code "if other conditions are fulfilled. In Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others, , Supreme Court have gone further by observing that if the prosecution has at any stage produced evidence which satisfies the court that the

accused against whom proceedings have been quashed have also committed the offence, the court can take cognizance against them and try them along with the other accused (vide page 71). In the case reported in AIR J 1983 SC 595, the Supreme Court has also held that when the Magistrate, after holding enquiry u/s 202 of the Criminal Procedure Code against several accused, does not issue process against one of them, and dismisses the complain against him and order of dismissal is affirmed by the higher court, the jurisdiction of the learned Magistrate u/s 319 Cr. P.C. remains unaffected if other conditions are satisfied. Therefore the above decisions of the Supreme Court clearly indicate that it is for the court to consider at the time when he has to invoke his jurisdiction u/s 319 of the Criminal Procedure Code as to whether such person is an accused before him at the relevant time. A person against whom FIE has been lodged but against whom police did not wish to proceed and submitted final report, can be summoned under sec. 319 of the Code. That is the decision of the Supreme Court in the case of Joginder Singh referred to above. But in the case of Delhi Municipal Corporation, the Supreme Court has also held that even an accused against provisions be summoned under" Section 319 of the Code and in the case of Dr. S.S. Khanna Vs. Chief Secretary, Patna and Another, the Supreme Court has held that even where the Magistrate dismissed the complaint against an accused he still has The jurisdiction to summon such accused u/s 319 of the code if there is evidence before him to issue such summons. The essential condition for the applicability of the provision of section 319 of the Code is that there is evidence appearing against such person to issue process against him u/s 319 Cr. P.C. In that view of the matter, in view of the above decisions of the Supreme Court, I am unable to accept the contention of the Ld. Advocate for the petitioners that only because the petitioners herein were discharged u/s 227 of the Criminal Procedure Code, the Ld. Add. Sessions judge had not the jurisdiction to issue process against them u/s 319 of the Code, if on taking evidence, he was satisfied that they were also implicated in the above offence. In view of the later Supreme Court decisions reported in Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others, and Dr. S.S. Khanna Vs. Chief Secretary, Patna and Another, it is not possible accept the view of Ld. Single Judge reported in 1980(2) Call LJ 33 that once an accused has been discharged he cannot be summoned u/s 319 Cr. P. C. even if evidence recorded subsequently discloses that he has the complicity in the alleged offence.

10. The second question that remains to be decided is as to whether there is such evidence for the, Ld. Additional Sessions Judge to pass the impugned order. I find that the Ld. Additional Sessions Judge invoked his jurisdiction u/s 319 of the Code of the prayer of the Public Prosecutor in charge, when the evidence of P.W.1 was closed upto the stage of examination-in-chief. When that application was filed, immediately after the close of the examination of the witness in chief and before the accused persons could cross examine the witness the Public Prosecutor in charge applied u/s 319 of the Code and the Ld. Addl. Sessions Judge, on considering the said evidence in examination in chief allowed such

prayer.

11. The question remains as to whether the evidence in examination in chief is "evidence" within the meaning of Section 319 of the Code of Criminal Procedure to give jurisdiction to the Ld. Addl. Sessions Judge to pass an order u/s 319 of the Code. It is clear from the provisions of Indian Evidence Act that it provides for the oral examination of the witnesses, in all three stages that is I) examination in chief, II) cross-examination and (III) re-examination. It is also to be remembered that the Sessions Judge, after framing of the charge has to take evidence of the prosecution witnesses. u/s 231 of the Criminal Procedure Code, it is the duty of the Ld. Sessions Judge on the date so fixed for the purpose of taking evidence to proceed to take of such evidence that may be produced in support of the prosecution. Sub-section (2) of Section 231 of the Code says that the Judge has the discretion to permit the cross examination of any witness to be deferred until any other witness or witnesses have been examined or recall any witness for further cross examination. That clearly indicates that ordinarily in the sessions trial, the examination of a prosecution witness is to be followed by cross examination. Therefore, until and unless the evidence in chief is followed by cross-examination and on the prayer of the prosecution, the re-examination, if any, is ordered, one cannot say that the evidence of the witness is complete. This court also in the case reported in 1987 Cr.L.J. 729 has taken the view that when the Additional Sessions Judge refused to invoke jurisdiction u/s 319 of the Code, when the prosecution made such prayer, after the witness has been examined upto examination in chief, on the ground that the evidence was not complete, the Ld. Addl. Sessions Judge did not commit any illegality. While taking this view the decisions of two other High Courts, one of Gujrat and the other of Punjab, namely, 1982 Cr.LJ 187 (Guj) and 1983 Cr.LJ (NOC) 98 (P&H) were considered. In both the said decisions the High Courts of Gujarat and Punjab and Haryana took the view that the courts could not invoke the jurisdiction of section 319 of the Code when the evidence of a witness was completed upto examination-in-chief stage.

12. In view of the above, I am unable to uphold the order of the Ld. Sessions Judge only on the ground that he invoked the jurisdiction at the time when the evidence of the witness was not completed and only when the examination of the witness was partly held, namely, upto examination in chief.

13. In the result, the order passed by the Ld. Addl. Sessions Judge be hereby set aside. The Ld. Addl. Sessions Judge shall continue with the trial. However, if at any subsequent stage, a proper application u/s 319 of the Code is filed, the Ld. Judge will be at liberty to consider the same on merit. The Rule is thus made absolute.

Let the order be communicated to the Ld. Addl. Sessions Judge at once. Let the records be also sent down at once.