

(1990) 03 OHC CK 0011

In the Orissa High Court

Case No : Criminal Revision No. 544 of 1989

Bira Kishore Mohapatra

APPELLANT

Vs

Sundar Bhoi alias Bati Mundia and Others

RESPONDENT

Date of Decision : 30-03-1990

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173, 193, 227, 228, 319
Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 323

Citation : (1990) 70 CLT 72

Hon'ble Judges : K.P. Mohapatra, J

Bench : Single Bench

Advocate : B. Naik, for the Appellant; J.P. Misra, for Opp. party Nos. 1 to 5, for the Respondent

Final Decision : Allowed

Judgement

K.P. Mohapatra, J.—Leaving aside technicalities, the Petitioner in this Criminal Revision has challenged the order of the learned Sessions Judge, Sambalpur, refusing to summon opposite party Nos. 1 to 5, take cognizance of offences under Sections 147, 148, 323, 447 and 302 read with Section 149, I.P.C. and frame charges against them along with the other accused committed for trial for the selfsame offences.

2. On 15-7-1988 at about 1.30 p.m. murder of One Satyabrata Mohapatra was committed. The case was investigated and charge-sheet was submitted against 12 accused persons for having committed offences under Sections 147, 148, 323, 447 and 302 read with Section 149, I.P.C. In due course, all of them were committed to the Court of Sessions for trial. Opposite party Nos. 1 to 5 were not charge-sheeted and so there was no question of their commitment to the Court of Sessions. On 6-6-1989 a petition was filed before the learned Sessions Judge stating thereto that there are prima facie materials against opposite party Nos. 1 to 5 and so they should be summoned so that charges can be framed against them along with the accused committed. The petition was rejected.

3. As on today charges have not been framed against the accused. The question that has been raised for consideration by Mr. B. Naik, learned Counsel appearing for the Petitioner, is that apart from the provisions of Section 319, Code of Criminal Procedure, the learned Sessions Judge has ample power to summon opposite party Nos. 1 to 5 so as to take cognizance of offences and frame charges against them for the offence of murder and other allied offences, if he would find that there are sufficient materials to suspect that they were involved in the crime. The argument is countered by Mr. J.P. Misra, learned Counsel appearing for opposite party Nos. 1 to 5, on the ground that the learned Sessions Judge has no such power u/s 193, Code of Criminal Procedure. He can exercise the powers only u/s 319, Code of Criminal Procedure and that too very sparingly.

4. It is well known that even if charge-sheet has not been submitted against a person, if there are prima facie materials against him for having committed an offence, a Magistrate can summon and proceed against him according to law. The Sessions Judge, in my opinion, cannot be placed in a more disadvantageous position than that of a Magistrate. If it will be said that the Sessions Judge has no such power, then by manipulation many a culprit will escape from the clutches of law and the Sessions Judge, before whom the entire record is present, will become helpless in punishing the guilty. These views are undoubtedly supported by good authority.

5. To begin with, I recall the observation of a learned Judge of this Court in *Dhruba Charan Rout Vs. State of Orissa*, , which is as follows:

...Section 193 empowers a Court of Session to take cognizance of an offence as a Court of original jurisdiction only when the case is committed to it by a Magistrate under the Code.

I lay emphasis on the specific observation that the Court of Sessions is a Court of original jurisdiction for certain categories of cases. In 1979 R.L.W. 157, *Harjiram v. The State of Rajasthan*, it was held

...From the provisions under Sections 227 and 228, Code of Criminal Procedure it would appear that the Sessions Judge is required to consider the record of the case and the documents submitted therewith and is further required to hear the submissions of the accused and the prosecution. It may be stated that even at this stage, without any evidence being recorded by the Sessions Judge at the trial, if the Sessions Judge finds that there is some material against certain persons, who are not the accused before him, he may direct that those persons may be brought before him for trial, as the case already stands committed to him and he is empowered and competent to take cognizance of the offence. The bar u/s 193 would not come in his way as the case stands committed to him and he is required to take cognizance of the offence and as such on the basis of the police papers submitted to him, he may proceed even against those persons, who are not before him as accused.

The same view was taken by a Full Bench of the Patna High Court in *Sk. Latfur*

Rahman and Others Vs. The State, , where it was held:

To finally conclude, in answer to the question posed at the outset, it is held that the Court of Sessions prior to the framing of the charge can without itself recording evidence, summon a person as an additional accused on the basis of the documents in the final report of the investigating Officer u/s 173 of the Code independently of the provisions of Section 319 thereof and further that the substitution of Section 319 of the new Code in place of Section 351 of the old one has not wrought any radical change in the law by making the former as the sole repository of such power.

Mr. Misra, however, cited a contrary decision of the Allahabad High Court in 1982 All.L.J. 331, Harish Chandra v. State of U.P., in which a learned Judge held that where in the Sessions trial an order summoning a person other than the accused was passed by the Sessions Judge even before the commencement of the Sessions trial the order was without jurisdiction. It was further held that the only provision empowering the Court to summon a person other than the accused is contained in Section 319. No such power is conferred on the Sessions Court by Section 193 which is a disabling provision rather than an enabling one. An order u/s 319 can be passed only in the course of the trial which means after the trial has commenced and if after the commencement of trial, it appears to the trial Court on the evidence recorded by it that some person, other than the person before the Court, is also concerned in the commission of the offence. It cannot be said that such an order could be passed by the Sessions Judge on the basis of the case diary. The word "evidence" in Section 319 includes nothing except the evidence adduced during the trial and as such does not include the case diary. With respect, I am unable to agree with the view expressed by the learned Judge of the Allahabad High Court and find the reasonings assigned by the Rajasthan and Patna High Courts more legal and convincing. On review of these decisions, I am clearly of the view that if the Sessions Judge finds, on consideration of materials available in the case diary and other records placed before him, that there is prima facie case against a person not being an accused, he can summon him, take cognizance of the offence and frame charge against him along with those who have been committed for trial.

6. In this case, the learned Sessions Judge, on the face of the petition filed by the Petitioner, did not even look to the records in order to find out if there is any prima facie material against opposite party Nos. 1 to 5 so that they can be proceeded against. In that view of the matter, it would be mete and proper that the case be remanded to him so that after giving opportunity to the, prosecution, the accused and opposite party Nos. 1 to 5, he should consider the materials available in the case diary and other documents so as to find if there is any prima facie material against opposite party Nos. 1 to 5 or any of them. If he would find that there is no prima facie case; he need not take any further action. But if on the other hand, he would find that there is a prima facie case against all or any of these persons implicating them in the commission of the offences

referred to above, he shall be free to proceed against them in accordance with law.

7. In the result, the Criminal Revision is allowed and the impugned order of the learned Sessions Judge dated 6-6-1989 rejecting the petition is set aside. The case is remitted to him for disposal afresh according to law in the light of the observations made above. The lower Court records be sent back forthwith.

Revision allowed.