
(1993) 05 PAT CK 0029

In the Patna High Court

Case No : Criminal Misc. No. 15192 of 1992

Bishwanath Tato and Others

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 18-05-1993

Acts Referred:

Citation : (1993) 05 PAT CK 0029

Judgement

Nagendra Rai, J.—The petitioners, four in number, have filed the present application for quashing the order dated 1-9-1992, passed by the 1st Additional Sessions Judge, Rohtas at Sasaram, in Sessions Trial No. 234/87, rising out of Sheosagar P.S. Case No. 77/86, by which he has summoned the petitioners u/s 319 of the Code of Criminal Procedure (hereinafter referred to as "the Code") to face the trial for the offence under Sections 147, 148, 149, 307, 380 of the Indian Penal Code and Section 27 of the Arms act. At the time of admission, the learned Single Judge of this Court ordered that the application be heard by a Division Bench and that is now the matter has been placed before us for disposal.

2. The facts giving rise to the present application are as follows. One kapildeo Tato of village Gajawandha lodged a fardbeyan on 8-10-1936 at about 3-10 a.m. before the officer-in-charge, Dehri Police Station, alleging inter alia, that in the same night after taking his meal he was sleeping at his Dalan along with his son Madan Mohan Prasad. At about 10 p.m. he heard some sound of whispering outside the Dalan. He flashed the torch and in the light of the same he saw accused Baban Dusadh, Kishun Dusadh, Lalsaheb Dusadh, these petitioners and other unknown persons. Petitioner Bishwanath Tato and accused Baban Dusadh were armed with big guns and the others were armed with small guns and Bhala. Petitioner Bishwanath Tato fired towards the informant causing injury on his chest, as a result of which he fell down. After the informant fell down, the petitioner Bishwanath Tato and other accused persons entered into his Dalan and took away Radiocum-tape recorder and one wrist watch and fled away towards the west.

3. On the basis of the said Fardbeyan Sheosagar police, within whose jurisdiction the lace of occurrence fell, lodged the first information report against these four petitioners and the other named accused persons for the offence under Sections 147, 148, 149, 307, 380 of the Indian Penal Code and section 27 of the Arms Act being Sheosagar P.S. Case No. 77/88.

4. The police after investigation submitted charge-sheet against accused Babban Dusadh, Lal Saheb Dusadh and Satyanarain Dusadh only and did not send up these petitioners. The Judicial Magistrate, 1 st Class, Saran, by order dated 23-6-1987 took cognizance of the offence under Sections 147, 148, 149, 307, 380 of the Indian Penal Code and Section 27 of the Arms Act and ordered for issuance of summons against those accused persons who have been charged-sheeted and discharged the petitioners on the ground that they were not sent up by the police.

5. On 9-8-1987, the case was committed to the Court of Session and hereafter the case was transferred to the Court of 1st Additional Session Judge, Sasaram for trial, where it was numbered as Sessions Trial No. 234/87. Before the trial Court the prosecution examined two witnesses, namely, Lallan Dusadh and Madan Mohan Prasad, both sons of Kapildeo Tato, the informant, and in their evidence both the witnesses named these petitioners as persons who participated in the crime. Thereafter, the Additional Public Prosecutor made a prayer before the trial Court to summon the petitioners to face the trial as there was evidence on the record to show that they have committed crime along with the accused already facing trial. The 1st Additional Sessions Judge after perusal of the evidence of the witnesses and the case diary found that these petitioners have also committed the offence and, accordingly, summoned them u/s 319 of the Code to face the trial by the impugned order.

6. Learned Counsel appearing for the petitioners submitted that the petitioners were accused in this case at the stage of the investigation and once they have been discharged by the learned Judicial Magistrate by order dated 23-6-1987 they cannot be summoned to face the trial in exercise of power u/s 319 of the Code. The learned Counsel in support of his submission relied on a judgment of the Supreme Court in the case of Sohan Lal and others Vs. State of Rajasthan, .

7. Learned Counsel appearing on "behalf of the State, on the other hand contended that there was no question of discharge in this case as the petitioners were not sent up by the police at the time of submission of final form, He also contended that during the course of enquiry of trial if it appears to the Court concerned from the evidence on the record that the persons other than the accused, who are facing enquiry of trial, have committed the crime the court in exercise of power u/s 319 of the Code can summon them to face the trial along with the accused who are already facing the trial. In the present case from the evidence on the record, it is clear that the petitioners had participated in the crime and for that the learned Sessions Judge had rightly summoned them to face the trial u/s 319 of the Code.

8. The question for determination in this case is as to whether the petitioners, who are alleged to have been discharged by the Magistrate at the time of taking cognizance can be summoned subsequently during the trial on the basis of the evidence recorded by the trial Court in exercise of power u/s 319 of the Code.

9. Section 319 of the present Criminal Procedure Code corresponds to Section 351 of the Code of Criminal Procedure, 1898. Section 351(1) provided that any person attending a criminal court, although not under arrest or upon a summons, may be detained by such Court for the purpose of inquiry into or trial of any offence of which such Court can take cognizance and which, from the evidence, may appear to have been committed, and may be proceeded against as though he had been arrested or summoned. According to the aforesaid provision, a person who appears to have committed an offence and not an accused from before could be detained for facing the inquiry and trial only if he was present in Court. If he is not present in court, even if, there is evidence on the record to show that a person has hand in the crime, the trial Court has no power to summon him to face the trial.

10. In spite of the aforesaid limitation on the power to summon an additional accused during trial or inquiry the Supreme Court in the case of Raghubans Dubey Vs. State of Bihar, , held that summoning of an additional accused is part of the proceeding initiated by taking cognizance of offence. In the said case it was held as follows :

... In our opinion, once cognizance has been taken by the Magistrate, he takes cognizance of an offence and not the offenders ; once he takes cognizance of an offence it is his duty to find out who the offenders really are and once he comes to the conclusion that apart from the persons sent up by the police some other persons are involved, it is his duty to proceed against those persons. The summoning of the additional accused is part of the proceeding initiated by his taking cognizance of an offence...

11. The Law Commission in its 41st Report (vide para 24.80) noticed that the old Section 351 conferred power upon the Magistrate to summon a person as additional accused only if he is attending the Court and there was no provision for summoning a person as an accused on the basis of the evidence on the record if he is not present in Court and, accordingly, recommended that a comprehensive provision should be made under the new Code to provide that if there is evidence on the record to show that a person other than the accused facing the inquiry or trial has also committed, the crime then he should be summoned to face the inquiry or trial. On the basis of the aforesaid recommendation Section 319(1) has been enacted. It also recommended that there should be no difference in the mode of taking cognizance if a new person is added as an accused. However, in such a situation the evidence must be recorded in the presence of newly added accused. The aforesaid recommendations have been incorporated in the new Code u/s 319(4) (a) and (b) of the Code. It is useful to quote Section 319, which runs as follows :

Section 319(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 any such Court for the purpose of the enquiry 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.

12. From the bare perusal of the provisions of Section 319(1) of the Code it is clear that if during course of the inquiry or trial evidence on the record shows that the person other than the accused facing the inquiry or trial has committed the offence for which he could be tried along with the accused facing the trial, the Court may summon such person to face the trial with the accused. The expression "any person not being the accused" refers to such person who is not facing the inquiry or trial as an accused. The word "accused" in this section refer to the person or persons who is or are facing inquiry or trial at the time when the question for addition of an addition of accused is being considered.

13. The scope of Section 319(1) came for consideration before the Supreme Court in the case of Joginder Singh and Another Vs. State of Punjab and Another, , wherein, it was held that the aforesaid section applies to all the courts including the Court of Session and if it appears to the Sessions Court from the evidence on the record that any person not an accused before it has committed the crime, it has power to add him an accused to face the trial. In Paragraph 6 it was held as follows :-

A plain reading of Section 319(1), which occurs in Chapter XXIV dealing with general provisions as to inquiries and trial, clearly shows that it applies to all the Courts including a Sessions Court and as such a Sessions Court will have the power to add any person, not being the accused before it, but against whom there appears during the trial sufficient evidence indicating his involvement in the offence, as an accused and direct him to be tried along with the other accused....

It was further held that the cognizance is taken of the offence and not of the offenders and once the Sessions Court is properly seized of the case as a result of the committal order against some accused, it can add any person not an accused before it in exercise of power u/s 319(1) of the Code and direct him to be tried along with other accused. With regard to the meaning of the word "any person not being an accused" occurring in Section 319, the apex Court held as follows :-

...The said expression clearly covers any person who is not, being tried already by the Court and the very purpose of enacting such a provision like Section 319(1) clearly shown that even persons who have been dropped by the police during investigation but against whom evidence showing their involvement in the offence comes before the Criminal Court are included in the said expression.

(Emphasis added)

14. The scope of Section 319 of the Code again came for consideration before the apex Court in the case of *Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others*, and there the case of *Joginder Singh (supra)* was noticed and followed and it was held that the provisions of Section 319(1) give ample powers to any Court to take cognizance and add any person not being an accused before it and try him along with the other accused. It was held as follows :

If the prosecution can at any stage produce evidence which satisfies the Court that the other accused or those who have not been arrayed as 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. But, we would hasten to add that this is really an extraordinary power which is conferred on the Court and should be used very sparingly and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken....

15. In the case of *Dr. S.S. Khanna Vs. Chief Secretary, Patna and Another*, the question for consideration before the Supreme Court was an accused after an enquiry u/s 202 of the Code and the order refusing to summon him has been upheld by the revisional Court, can be summoned later on during the trial on the basis of the evidence adduced. Dealing with the said question it was held in the said case that "even if a person not summoned after an enquiry u/s 202 of the Code and if during course of trial it appears from the evidence on record that he has committed an offence then he could be tried along with the other accused persons, even if the order declining to issue summon against him u/s 202 is confirmed by a higher courts."

16. Recently, the scope of Section 319 of the Code also came up for consideration before the Supreme Court in the case of *Kishun Singh and Ors. v. State of Bihar*, in Criminal Appeal No. 24 of 1993, disposed of on 11-1-1993. In that case it was held that even a person who has been discharged earlier could

also be summoned in exercise of power u/s 319 of the Code, provided, from the evidence on the record it appears that he has committed an offence along with other accused facing the trial. It is apt to quote the following passage from the aforesaid judgment.

On a plain reading of Sub-section (1) of Section 319 there can be no doubt that it must appear from the evidence tendered in the course of any inquiry or trial that any person not being the accused has committed any offence for which he could be tried together with the accused. This power, it seems clear to us, can be exercised only if it so appears from the evidence at the trial and not otherwise, Therefore, this Sub-section contemplates existence of some evidence appearing in the course of trial where from the Court can prime, facie conclude that the person not arraigned before it is also involved in the commission of the crime for which he can be tried with those already named by the police. Even a person who has earlier been discharged would fall within the sweep of the power conferred by Section 319 of the Code. Therefore, strcto sensu, Section 319 of the Code cannot be invoked in a case like the present one where no evidence has been led at a trial where from it can be said that the appellants appear to have been involved in the commission of the crime along with those already sent up for trial by the prosecution.

But then it must be conceded that Section 319 covers the post cognizance stage where in the course of an enquiry or trial the involvement or complicity of a person or persons not named by the investigating agency has surfaced which necessitates the exercise of the discretionary power conferred by the said provision. Section 319 can be invoked both by the Court having original jurisdiction as well as the Court to which the case has been committed or transferred for trial. The sweep of Section 319 is, therefore, limited, in that, it is an enabling provision which can be invoked only if evidence surfaces in the course of an inquiry or a trial disclosing the complicity of a person or persons other than the person or persons already arraigned before it

(Emphasis added).

17. Thus, it is clear that the expression "any person not being an accused" occurring in Section 319(1) of the Code has been interpreted to mean a person not being an accused before the Court holding inquiry or trial. The aforesaid expression includes the persons who have not been sent up by the police during the investigation or against whom the proceeding has been quashed at the initial stage by the superior Court or who has not been summoned to face the trial, after enquiry u/s 202 of the Code or who have been discharged earlier in the proceeding. Such class of persons may be summoned as an accused to face the trial along with other accused already facing the trial, if the evidence adduced during the inquiry and trial shows their complicity in the crime in question.

18. Learned Counsel for the petitioners, however, relied upon a judgment of the

Supreme Court in the case of Sohan Lal (supra) and contended that according to the said decision if a person having been an accused earlier has been discharged by the Court then he cannot be summoned subsequently to face the trial even if the evidence comes on the record in exercise of power u/s 319 of the Code. According to him, as in the present case the petitioners have been discharged earlier, their-case has been fully covered by the aforesaid decision. In support of his submission he relied upon the following observations made in paragraph 33 of the judgment which runs as follows :

The provisions of Section 319 had to be read in consonance with the provisions of Section 398 of the Code. Once a person is found to have been the case he goes out of the reach of Section 319. Whether he can be dealt with under any other provisions of the Code is a different question. In the case of the accused who has been discharged under the relevant provisions of the Code, the nature of finality to such order and the resultant protection of the persons discharged subject to provision u/s 398 of the Code may not be lost sight of.

I am unable to agree with the submissions advanced on behalf of the petitioners. Sohan Lal's case (supra) has been noticed by the Supreme Court in the case of Kishun Singh (supra) and it has been held that the view taken in the case of Jogender Singh (supra) has been reiterated in the Sohan Lal's case and the conclusion arrived at by the Bench in the Sohan Lal's case (supra) with regard to the scope of Section 319 has been quoted in the judgment of Kishun Singh (supra), which runs as follows :

Section 319 empowers the Court to proceed against persons not being the accused appearing to be guilty of offence. Sub-sections (1) and (2) of this section provide for a situation when a Court hearing a case against certain accused person finds from the evidence that some person or persons, other than the accused before it, is or are also connected in this very offence any connected offence; and it empowers the Court to proceed against such person or persons for the offence which he or they appears or appear to have committed and issue process for the purpose. It provides that the cognizance against newly added accused is deemed to have been taken in the same manner in which cognizance was first taken of the offence against the earlier accused. It naturally deals with a matter arising from the course of the proceeding already initiated. The scope of the section is wide enough to include cases instituted on private complaint.

19. The paragraph relied upon by the learned Counsel for the petitioners is pot the conclusion arrived at in Sohan Lal's case (supra) and it is clear from the law laid down in Kishun Singh's case (supra) that even a person who has been discharged earlier can also be summoned to face the trial if the evidence recorded during the course of the trial shows his complicity in the crime in question. Accordingly, the submission advanced on behalf of the petitioners has no force.

20. So far as the present case is concerned, the order of the learned Magistrate

discharging the petitions is not an order of discharge in the eye of law. If a person is not sent up by the police to face the trial then the order not issuing the summons against the persons not sent up by the police after taking cognizance of an offence does not amount to discharge in the eye of law. In the case of Raghubans Dubey (supra) it has been held by the Supreme Court that there could not be any question of discharge when the appellant was not sent up upon the charge-sheet submitted by the police.

21. Thus, it is clear that the petitioners were not discharged earlier, on the other hand, they were not sent up by the police. The evidence recorded during course of trial shows that they have participated in the crime and as such the trial Court was justified in law in summoning the petitioners to face the trial along with other accused persons who were already facing the trial. Even assuming for the sake of argument that the order of discharge passed by the learned Magistrate was a discharge in the true sense even then the order passed by the Court below does not suffer from any illegality, as the petitioners can be added as an accused during the trial, as held by the Supreme Court in the case of Kishun Singh (supra).

22. Accordingly, I do not find any merit in this application and the same is dismissed.

G.C. Bharuka, J.

23. I agree