

**(2006) 09 AHC CK 0226**  
**In the Allahabad High Court**

|                                 |    |            |
|---------------------------------|----|------------|
| Brij Nandan Nagaich and Another |    | APPELLANT  |
|                                 | Vs |            |
| State of U.P. and Another       |    | RESPONDENT |

**Date of Decision :** 21-09-2006

**Acts Referred:**

Constitution of India, 1950 — Article 136  
Criminal Procedure Code, 1973 (CrPC) — Section 161, 319, 362, 377, 386  
Evidence Act, 1872 — Section 3, 7, 8  
Penal Code, 1860 (IPC) — Section 120B, 302, 304B, 307, 34

**Citation :** (2007) CriLJ 378

**Hon'ble Judges :** Amar Saran, J

**Bench :** Single Bench

**Final Decision :** Dismissed

## Judgement

Amar Saran, J.—This criminal revision has been filed to challenge an order dated 29-10-2005 passed by the III Addl. Sessions Judge, Jalaun at Orai, in ST No. 92 of 1995; State v. Bhanu Kachhi, summoning the revisionists u/s 319, Cr. P.C. for an offence punishable u/s 302, IPC.

2. The principal ground for challenging the impugned order was that earlier on 5-4-1997, after examination of the informant (brother of the deceased) P.W. 1 Brijesh Kumar, the trial Court had refused to summon the revisionists. Thereafter, after the examination of P.W. 2 Smt. Kanti and P.W. 3 Daya Ram (mother and father of the deceased, respectively) by the impugned order dated 29-1-2005 the revisionists were summoned on the fresh application u/s 319, Cr. P.C. It was argued by the learned Counsel for the revisionists that the said order amounted to a review of the earlier order dated 5-4-1997 which was prohibited u/s 362, Cr. P.C. Also, there was want of legal evidence so as to justify the order dated 29-1-2005 summoning the revisionists.

3. I shall proceed first to consider the question whether there was want of legal evidence for summoning the revisionists. P.W. 1, Brijesh Kumar, had deposed in his evidence in Court on 15-12-1995 that the deceased Rajesh alias Munnu Soni

was his younger brother. On 14-12-1992 at about 6 p.m. two co-accused Bhanu Kachhi and Rajendra Kachhi came to his house and deceptively took away his brother. When his brother did not return back till 7-30 p.m. they searched for him, but they could not find the deceased. The next day the dead-body of the deceased was found lying in a culvert in mohalla Gokhale Nagar. He thereafter lodged the report (Ext. Ka 1). He further stated that there was old enmity between his brother and the revisionists Brij Nandan Nagaich and Priya Nagaich. The assailants Bhanu Kachhi and Rajendra had been hired by these persons who were instrumental in getting his brother murdered. The deceased Munnu Soni had given evidence for the police in a case of 1999 of a theft of a statue against Priya Nagaich, Brij Nandan Nagaich and one Ashok Shukla (who died during trial). The deceased had even complained about the theft of the statue to the DIG, Jhansi, Home Secretary, U.P. Lucknow, DM, Jalaun at Orai, SSP Jalaun at Urai, Home Ministry, Lucknow, whose carbon copies were filed and proved by this witness and the said documents were compositely marked as Ext. Ka. 2. The deceased had given another application that there was danger to his life from Brij Nandan, Priya Nagaich and Ashok Shukla to the higher authorities whose copies were filed as Ext. Ka-3 by the witness. The receipts of the complaints to the higher authorities were filed as Ext. Ka 4 by the witness. However, in spite of the aforesaid deposition by Brijesh Kumar, the learned judge was pleased to reject the first application No. 101 Kha for summoning the revisionists on 5-4-1997.

4. The second witness P.W. 2, Smt. Kanti, who was examined on 10-4-2000 has only deposed that Munnu was taken away by Bhanu Kachhi and Rajendra but she has not deposed anything against the revisionists.

5. The third witness P.W. 3 Daya Ram, the father of the deceased had deposed that Bhanu and Rajendra had taken away his son Rajesh alias Munnu by making an excuse that they were taking him for a loaf. He has further clarified that the aforesaid persons had taken his son, the deceased Munnu, away because the daughter of Brij Nandan Nagaich was in love with the deceased, hence Brij Nandan Nagaich and Ashok Shukla had hired assassins for murdering Munnu and they had thrown the dead body in the culvert. He also reaffirmed that the deceased had given an application against Ashok Shukla and Brij Nandan Nagaich. Bhanu Kachhi was employed by Ashok Shukla. He admits that there were 15-20 criminal cases against his son which included cases u/s 307, theft, dacoity, marpeet, robbery etc. He claims that Ashok Shukla had got his son falsely nominated in the cases. Learned Counsel for the revisionists submitted that the aforesaid material did not constitute any legal evidence against the revisionists.

6. I am not in agreement with the aforesaid submission of the learned Counsel. Evidence u/s 3 of the Evidence Act means and includes all statements which the Court permits or requires to be made before it by witnesses in relation to the matters of fact under enquiry. Such statements are called oral evidence. In

Chapter II of the Evidence Act, 1872, facts which are the occasion, cause or effect of facts in issue, are considered relevant u/s 7 of the Act. Likewise, u/s 8, any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or a relevant fact. An illustration showing the relevancy of motive is the first illustration to Section 8. According to this illustration, when A is tried for the murder of B, the fact that A murdered C, that B knew that A had murdered C, and that B had tried to extort money from A by threatening to make his knowledge public, are relevant. Thus also, as the revisionists are essentially being involved for a conspiracy to commit a crime, there is usually no direct evidence of conspiracy and the same is sought to be inferred from circumstances. The existence of strong motive and the repeated applications that the deceased had been giving against the revisionists and the fact that he was an in-former in a case against the revisionists are all circumstances which could justify an order summoning the revisionists in exercise of power u/s 319, Cr. P.C.

7. Learned Counsel for the revisionists, however, drew my attention to *Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others*, for the proposition that the exercise of the power u/s 319, Cr. P.C. is to be exercised very sparingly and for compelling reasons. There is no dispute about this proposition of law. However, where there is legal evidence, as shown above, and some materials which suggest the involvement of particular accused, there is no reason not to summon the said accused in exercise of powers u/s 319, Cr. P.C. In this connection, it has been held in *Rakesh and Another Vs. State of Haryana*, as follows:

In our view, there cannot be a dispute that powers u/s 319 are to be sparingly used. But that would not mean that when a prosecutrix names three persons who are involved in a serious crime, they are not to be added as accused by exercise of such power.

8. It may be noted that in *Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others*, there were no clear allegations against the managers and directors of being incharge or responsible for the conduct of the business in a case under the Prevention of Food Adulteration Act, it was held that the Court was not justified in summoning them in exercise of powers u/s 319 of the Code. However, so far as the manager who was in charge of the business was concerned, the order of summoning him was held justified. It was, however, provided that the said accused could also be summoned at a subsequent stage if the Court became satisfied that a case for summoning them was made out on the basis of additional evidence led before the Court.

9. Learned Counsel for the revisionists also relied on *Michael Machado and Another Vs. Central Bureau of Investigation and Another*, In the said case, at the penultimate stage, after examining 54 witnesses, the metropolitan magistrate before whom the case was being tried, ordered two more persons to be arrayed as accused. The Apex Court observed that if the order of the magistrate was to be sustained, the proceedings in respect of the newly added persons would have

to re-commence afresh, wasting the enormous amount of time already consumed in the trial. Hence it did not approve the order summoning the two accused persons under Sections 120B, 420, 467, 468 and 471, IPC. It may be noted that in Michael Machado's case (supra), the case of Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others, was also relied on. The circumstances of the Michael Machado and Another Vs. Central Bureau of Investigation and Another, were, therefore, clearly distinguishable from the facts of the present case.

10. Another case cited by the learned Counsel for the revisionists was Lok Ram Vs. Nihal Singh and Another, for the proposition that the jurisdiction u/s 319, Cr. P.C. must be sparingly exercised. The said cases, Michael Machado and Ram Kishan Rohatgi etc. were also cited in Lok Ram's case. However, the Apex Court held that the rejection of the application u/s 319, Cr. P.C. for adding an accused, who was father-in-law, in a case under Sections 304B and 498A read with Section 34, IPC only on the ground that the complainant was an interested witness and that the power is extraordinary and should be exercised for compelling reasons, was not justified and the High Court had rightly interfered in the matter and directed summoning of the appellant. This case, therefore, also does not render much help to the revisionists.

11. Learned Counsel for the revisionists further contended that the statements u/s 161, Cr. P.C. ought not to have been considered for summoning the revisionists. There can be no quarrel with this proposition. However, in the present case, the revisionists have mainly been summoned on the basis of the evidence which was recorded in the Court or the documents produced before it.

12. So far as the contention that the impugned order dated 29-1-2005 summoning the revisionists in exercise of power u/s 319, Cr. P.C. amounted to a review of the earlier order dated 5-4-1997, it may be mentioned that the said order had been passed after two more witnesses, Smt. Kanti and Daya Ram, had been examined as P.Ws. 2 and 3, although it is correct to say that Smt. Kanti had not deposed anything against the revisionists. Moreover, the learned Counsel for the revisionists does not dispute the position that there is no fetter on the power of this Court to set aside an order in its extensive supervisory jurisdiction under Sections 397 and 399 read with Section 401, Cr. P.C. The amplitude of this Court's suo motu Revisional powers have been lucidly explained in Nadir Khan Vs. The State (Delhi Administration), which read as follows:

4. It is well known and has been ever recognised that the High Court is not required to act in revision merely through a conduit application at the instance of an aggrieved party. The High Court, as an effective instrument for administration of criminal justice, keeps a constant vigil, and wherever it finds that justice has suffered, it takes upon itself as its bounden duty to suo motu act where there is flagrant abuse of the law. The character of the offence and the nature of disposal of a particular case by the subordinate Court prompt remedial action on the part of the High Court for the ultimate social good of the community, even though the

State may be slow or silent in preferring an appeal provided, for under the new Code. The High Court as given case of public importance e.g. in now too familiar cases of food adulteration, reacts to public concern over the problem and may act suo motu on perusal of newspaper reports disclosing imposition of grossly inadequate sentence upon such offenders. This position was true and extant in the old Code of 1898 and this salutary power has not been denied by Parliament under the new Code by rearrangement of the sections. It is true, the new Code has expressly given a right to the State u/s 377, Cr. P.C. to appeal against inadequacy of sentence which was not there under the old Code. That however, does not exclude revisional jurisdiction of the High Court to act suo motu for enhancement of sentence in appropriate cases. What is an appropriate case has to be left to the discretion of the High Court. This Court will be slow to interfere with exercise of such discretion under Article 136 of the Constitution.

5. Section 401 expressly preserves the power of the High Court, by itself, to call for the records without the intervention of another agency and had kept alive the ancient exercise of power when something extraordinary comes to the knowledge of the High Court. The provisions u/s 401 read with Section 386(c)(iii), Cr. P.C. are clearly supplemental to those u/s 377 whereby appeals are provided for against inadequacy of sentence at the instance of the State Government or Central Government as the case may be. There is therefore absolutely no merit in the contention of the learned Counsel that the High Court acted without jurisdiction in exercising the power of revision, suo motu, for enhancement of the sentence in this case. The application stands rejected.

13. This Court can, therefore, even suo motu go into the legality or propriety of any finding or order. I therefore think that there was sufficient evidence of conspiracy for summoning the revisionists even on the basis of the evidence of P.W. 1 Brijesh and the documents produced by him before the Court concerned, hence the impugned order dated 29-1-2005 calls for no interference.

14. In this view of the matter, as the ends of justice would be served by passing an order summoning the revisionist in exercise of power u/s 319, Cr. P.C. hence I need not go into the question whether the second order dated 29-1-2005 amounted to a review of the earlier order dated 5-4-1997 and was in violation of Section 362, Cr. P.C.

15. One last submission by the learned Counsel for the revisionists was that by the impugned order dated 29-1-2005 non-bailable warrants had straightway been issued for the appearance of the revisionists. This part of the order appears to be unjustified as only summons should have been issued u/s 87, Cr. P.C. The Court normally issues summons and does not issue non-bailable warrant simultaneously unless it has reason to believe that the accused has absconded and/or will not obey the summons. So long as there is no cause for such an apprehension, the Court below is not justified in straightway issuing non-bailable warrants against the revisionists. In this view of the matter, the order issuing non-bailable warrant shall be substituted with an order issuing summons for the

appearance of the revisionists. If the revisionists, appear before the Court below in pursuance of the order summoning him within a month and apply for bail, the same may be disposed of expeditiously.

16. In this view of the matter, there is no force in this criminal revision which is dismissed. The stay order granted earlier in this case is vacated.

17. The trial Court is directed to proceed with the case expeditiously.

18. The Office is directed to communicate this order to the Court below within 2 weeks.