

(2011) 01 CAL CK 0105
In the Calcutta High Court
Case No : C.R.R. 2340 of 2008

Chand Sadagar and Others		APPELLANT
	Vs	
The State of West Bengal and Another		RESPONDENT

Date of Decision : 28-01-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 319, 401, 482
Penal Code, 1860 (IPC) — Section 147, 148, 149, 302, 326

Citation : (2011) 01 CAL CK 0105

Hon'ble Judges : Syamal Kanti Chakrabarti, J

Bench : Single Bench

Advocate : S.S. Roy and Manas Kumar Das, for the Appellant; Barin Roy, for State and D.K. Mukherjee, Ujjwal Kumar Dutta and Rajib Mukherjee for Opposite Party No. 2, for the Respondent

Final Decision : Dismissed

Judgement

Syamal Kanti Chakrabarti, J.—The present application u/s 401 read with Section 482 Code of Criminal Procedure is directed against order No. 12 dated 16.06.2008 passed by the learned Additional Sessions Judge, 2nd Fast Track Court, Lalbagh, Murshidabad.

2. By the said order the learned Court below has disposed of a petition dated 20.03.2008 filed by the prosecution u/s 319 Code of Criminal Procedure for adding and summoning four accused persons namely, Chand Sadagor, Sadek Ali, Usuf Nabi and Mofakkarul @ Mofajjarul Islam and allowed the same on the grounds stated therein.

3. Being aggrieved by and dissatisfied with such order the aforesaid added four accused persons against whom summons have been issued for appearance have filed this revisional application contending inter alia, that in the FIR lodged by the defacto complainant Ajijul Rahaman against fifteen accused persons including the four Petitioners herein it was alleged inter alia, that on 29.06.2003 at about 3:15 p.m. all the fifteen accused persons being armed with fire arms and deadly

weapons entered into the house of one Mojaffar Sk. and accused Chand Sadagor assaulted the father of the said complainant with knife as a result of which his father succumbed to his injuries instantly and accused Mainul, Sadek Ali and Khos Mohammad assaulted Ashinur Bewa, sister of the complainant with knife causing injury on her person and accused Moffajjrul Islam and Usuf Nabi assaulted Tajibur Rahaman with dagger causing injury in his person. Both the injured were shifted to K. P. Hospital for treatment from where they were referred to Berhampore N. G. Hospital. On the basis of such complaint the Lalgola P.S. case No. 127 of 2003 dated 29.06.2003 u/s 147/148/149/326/302 IPC was started. Upon completion of investigation the IO submitted charge sheet against twelve accused persons excluding the present Petitioners and accused Farhad Ali and Milan Sk. Accordingly, the learned Court below took cognizance of the offence against twelve charge sheeted accused persons and the present four Petitioners as well as accused Farhad Ali and Milan Sk. were discharged from the case.

4. It is further submitted that after commitment of the said case before the learned Additional Sessions Court for trial and upon subsequent transfer of the same to the Court of learned Additional Sessions Judge, 2nd Fast Track Court, Lalbagh, charge sheet was framed against twelve charge sheeted accused persons and some witnesses had already been examined. At this stage the learned Public Prosecutor filed an application u/s 319 Code of Criminal Procedure containing, inter alia, that sufficient incriminating materials against the present FIR-named accused are forthcoming in the statement of witnesses recorded u/s 161 Code of Criminal Procedure and in the testimony of P Ws 2, 3 and 4. So he made a prayer to the learned Trial Court for inclusion of names of these accused persons and to issue summons against them which has been allowed and is now being challenged.

5. It is contended on behalf of the aforesaid Petitioners that the learned Trial Judge has not diligently exercised his discretionary power u/s 319 Code of Criminal Procedure and the same is arbitrary. At the time of filing charge sheet there was no allegation against the four Petitioners and at the time of taking cognizance and framing of charge by the learned Trial Court there was no prima facie material against these accused persons and the IO also made a prayer for their discharge. Learned committing and trial Courts below remained silent so long regarding the above matter and as such at a belated stage it is not just and proper to implead the present accused persons. At the time of allowing such prayer and issuing the process the learned Trial Judge has ignored the ratio of the Hon"ble Apex Court in the case of Joginder Singh and Anr. -Vs.- State of Punjab and Ors., AND The Municipal Corporation of Delhi -Vs.- Ramkrishna and Ors. and as such the said order is bad in law and is liable to be quashed.

6. From the impugned order of the learned Sessions Judge it will appear that while considering the prayer he has held inter alia, that four Petitioners herein are all named in the FIR and the IO concerned is silent regarding their conduct at

the time of filing the charge sheet and did not pray for their discharge. At that stage the case was committed and trial began. In course of examination of four witnesses tangible materials regarding involvement of these four Petitioners transpired and therefore, in view of the principles laid down in (2006) 2 C C L R (SC) 131 he has entertained the prayer having been satisfied with the sufficient incriminating materials against present Petitioners also and so they should face the trial and as such added them as co-accused. Moreover, in view of the ratio in (2005) 2 C C L R (Cal) 190 before discharging the FIR-named accused the Court ought to have issued notice to the defacto complainant which has not also been complied with in the instant case leaving the issue undecided so far. Considering all these aspects he has exercised his discretionary power and allowed the prayer u/s 319 Code of Criminal Procedure

7. Having heard the learned lawyers for both the parties present and upon consideration of entire materials on record I find that the present Petitioners were not earlier discharged by the learned Magistrate concerned who took cognizance of the offence and I.O. remained silent in his investigation report so charge was also not framed by the trial Court against them at the initial stage. After examination of four witnesses in course of trial their complicity transpired to the satisfaction of the learned Trial Judge who has exercised his discretionary power u/s 319 Code of Criminal Procedure In the case of Ram Singh and Ors. - Vs.- Ram Niwas and Anr. reported in (2010) 1 SCC 1278 it has been held inter alia, that the word "powers" in Section 319 makes it necessary for Court to arrive at a decision that the evidence adduced on behalf of prosecution, if not rebutted, would lead to conviction of persons sought to be added as accused. Discretionary jurisdiction u/s 319 Code of Criminal Procedure can be exercised only after the legal evidence comes on record and from that evidence it appears that the person concerned has committed an offence. In the light of the above principle if the FIR and testimony of four P Ws examined so far are examined it will appear that sufficient incriminating materials are forthcoming against all these four FIR-named accused. There is no denial of the fact that they are named in the FIR. In the last paragraph of the charge sheet submitted by the IO dated 26.03.2004 it appears that the IO has made the following observation: There is not evidence accused (1) Mafazzarul Isaam @ Badal. (2) Farhad Ali. (3) Milan Sk. (4) Yusuf Nabi. (5) Sadek Ali. (6) Chand Sadagar....

But he has not prayed for their discharge and the committing Magistrate while taking cognizance has not discharged all those six persons. Admittedly the learned Trial Judge also did not frame any charge against those six persons on the basis of the result of investigation made by the IO. Though the I.O. after conclusion of investigation has arrived at a finding that no evidence transpired against six persons, he remained silent regarding their discharge and so I hold that the I.O. has left the matter solely at the discretion of the Court. This in my opinion is not omission on the part of I.O. but a conscious exercise of his free mind for leaving the matter for scrutiny of the Court.

8. The power conferred u/s 319 Code of Criminal Procedure is admittedly purely discretionary of the learned Trying Judge to exercise it, if necessary at any stage. For the purpose of convenience the same is quoted below:

319. Power to proceed against other persons appearing to be guilty of offence. -

(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 such Court for the purpose of the inquiry 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 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.

While examining the prosecution witnesses the learned Trial Judge considered the testimony of PW 2 Ajijul Rahaman, PW 3 Tajibur Rahaman and PW 4 Smt. Ashinur Bewa including their cross examination. It appears that all these three witnesses have categorically stated the presence of Petitioners herein at the place of occurrence and the active part played by them in the alleged murder of the father of the defacto complainant and assault upon his sister and brother. The learned Trial Judge is thus fully satisfied with such findings and exercised his discretionary power u/s 319 Code of Criminal Procedure it can neither be held illegal nor outcome of non-application of his judicial mind. Therefore, at this stage of trial I do not find any illegality or impropriety in the findings of the learned Trial Judge who has rightly allowed the prayer of the prosecution u/s 319 Code of Criminal Procedure after careful consideration of chief and cross examination of those prosecution witnesses.

9. Therefore, I do not find any merit in this application which is accordingly dismissed. Learned Court below is directed to proceed with the trial as per law.

10. Urgent photostat certified copy of this order, if applied for, be supplied to the respective parties, upon compliance of all requisite formalities.