
(2010) 09 OHC CK 0018
In the Orissa High Court
Case No : CRLMC. No. 2048 of 2007

Durga Naik ' Daroga Naik and Another	APPELLANT
Vs	
State of Orissa	RESPONDENT

Date of Decision : 17-09-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 319, 482
Penal Code, 1860 (IPC) — Section 302

Citation : (2011) 2 Crimes 170 : (2011) 1 OLR 31 : (2011) 7 RCR(Criminal) 493

Hon'ble Judges : Indrajit Mahanty, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Indrajit Mahanty, J.—The present application u/s 482 Code of Criminal Procedure has been filed by the Petitioner-Durga Naik " Daroga Naik and Ramesh Naik, who have sought to challenge the order dated 4.7.2007 passed by the learned Sessions Judge, Dhenkanal at Angul-Dhenkanal in C.T. Case No. 175 of 2006 (corresponding to G.R. Case No. 158 of 2005 arising out of Dhenkanal Town P.S. Case No. 41 of 2005) whereby, the learned Sessions Judge, Dhenkanal has been pleased to allow an application u/s 319 Code of Criminal Procedure seeking impletion of the present Petitioners, as well as, two others as accused persons and further directed issuance of N.B.W. against the newly added accused persons for facing trial along with the original accused persons, namely, Ranjan Naik and Raju Naik.

2. Shorn of unnecessary details, it would be suffice to note herein that one Ranjan Naik and another Raju Naik have been implicated by the informant as accused persons for the alleged murder of his minor daughter Jyotirmayee Bej. While the original two accused persons are facing trial, P.W.13-Alekha Bej (father of the deceased-Jyotirmayee Bej) was examined and based on the evidence of the said witness; the Public Prosecutor filed an application u/s 319 Code of Criminal Procedure for impletion of four other persons as co-accused persons i.e.

Kalia, Antaryami, Ramesh and Daroga Naik. The present application u/s 482 Code of Criminal Procedure is by Ramesh Naik and Durga Naik " Daroga Naik.

3. The learned Sessions Judge, in the impugned order took into consideration the evidence of Alekha Bej (P.W.13) recorded in course of the trial and impleaded the present two Petitioners, apart from two others. The statement of the said P.W.13 was to the effect that, on 16.2.2005, he had gone to Kamalanagar and returned home around 5.00 P.M. and learnt from his wife that his daughter-Jyotirmayee Bej had not returned from school and some of her friends had brought back her school bag containing her books to the mother of the deceased on being instructed by the teachers of the school. He further states that his wife had extensively searched for their daughter but was not successful. Thereafter on the return of P.W.13 to the village, he along with his wife, further searched to try and locate their missing daughter, but did not succeed. At 7.00 P.M., P.W.13 reported the matter at the local Police Station and, thereafter, continued search for his missing daughter. He further stated that one Ranjan Naik (Prime accused) had a love affair with his (deceased) daughter-Jyotirmayee and his co-villagers on finding the said Ranjan Naik at 7.30 P.M. in the village, and on interrogating him in presence of the informant-P.W.13, disclosed that Kalia Naik of the same village had told him that the other accused Raju Naik had taken the informant's daughter Jyotirmayee to Ranibania. Therefore, the informant went to Ranibania along with the police, but not finding her there returned home at midnight.

The informant-P.W.13 further stated, that while returning home that night, on the way near the house of accused Raju Naik, he saw Rashmi Naik, Sumitra Sahu " Navi, Sabitri Rout, Tarini Naik and Basanti Biswal were talking amongst themselves and while crossing them from a little distance, he heard them stating that the informant was unnecessarily searching for his daughter and that she would not be found or traced. He informed his wife on his return home of this fact and his wife came out of the house and went to the said ladies, accompanied by the informant. When his wife asked the ladies about the whereabouts of their missing daughter-Jyotirmayee, they told her that accused Raju Naik, Ramesh Naik and Sumitra Sahu had brought their daughter-Jyotirmayee and had kept her in the house of Basanti Biswal, the aunt of accused Raju Naik, after the School recess. The ladies further informed that the accused Ranjan Naik, Raju Naik, Kalia Naik, Antara Naik, Ramesh Naik and Durga Naik had forcibly taken her daughter from that house. On learning of the same, the informant and his wife went to the location where the informant's daughter was alleged to have been kept, but did not find her.

4. At about 2 A.M. while they were still searching for their missing daughter by the side of the School, P.W.13 heard certain voices and while focusing torch towards the Railway line, he saw Raju Naik coming towards them holding a "Bhujali" and Ranjan Naik coming towards them holding "Katuri". Seeing the informant and others, It is alleged that those persons, Raju Naik and Ranjan Naik turned back and ran away being followed by the informant and others. He further

stated that they followed the accused persons for a distance of about 150 meters and the said accused Raju Naik and Ranjan Naik shouted "ARE TA BAPA MAA ASILENI PALAI ASA" (The father and mother of Jyotirmayee are coming, let us leave the place). After proceeding for a little distance, the informant claimed to have seen the trunk of the body of the Jyotirmayee lying on the Railway line and nearby he saw Antara Naik, Kalia Naik, Ramesh Naik and Durga Naik " Daroga Naik, who it is alleged that on seeing the informant, ran away and accused Ranjan Naik and Raju Naik also fled away from the spot.

5. It is important to note herein that the present application u/s 482 Code of Criminal Procedure has been filed by one Durga Naik " Daroga Naik and Ramesh Naik. From the evidence of the informant as noted hereinabove, it is clear that apart from the allegation that Durga Naik " Daroga Naik and Ramesh Naik were seen in the company of the other two main accused persons at the spot, where a part of the body of the deceased-daughter Jyotirmayee was found on the Railway track, no other specific allegation is made against the Petitioners.

6. Learned Counsel for the Petitioners contended that the principle of law relating to Section 319 Code of Criminal Procedure has been well settled by a catena of decisions of the Hon''ble Supreme Court. In the case of Michael Machado and Anr. v. Central Bureau of Investigation and Anr. 2000 SCC 609, it has been held as follows:

11. The basic requirements for invoking the above section is that it should appear to the Court from the evidence collected during trial that some other persons, who is not arraigned as an accused in that case, has committed an offence for which that person could be tried together with the accused already arraigned. It is not enough that the court entertained some doubt, from the evidence, about the involvement of another person in the offence. In other words, the court must have reasonable satisfaction from the evidence already collected regarding two aspects. First is that the other persons could as well as be tried along with the already arraigned accused.

12. But even then, what is conferred on the court only a discretion as could be discerned from the words "the court may proceed against such persons". The discretionary power so conferred should be exercised only to achieve criminal justice. It is not that the court should turn against another person whenever it comes across evidence connecting that other person also with the offence. A judicial exercise is called for, keeping a conspectus of the case, including the stage at which the trial has proceeded already and the quantum of evidence collected till then, and also the amount of time which the court had spent for collecting such evidence. It must be remembered that there is compelling duty on the court to proceed against other persons.

7. It is further well settled by the Supreme Court while considering whether the prosecution has produced adequate evidence to satisfy the Court that the other accused against those who have not been arrayed as an accused have also

committed an offence in order to enable the court to take cognizance against them, in the case of Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others, the Hon"ble Supreme Court added a "caution", which is quoted herein below:

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.

8. Reliance was also placed by the learned Counsel for the Petitioner on a judgment of Hon"ble Supreme Court in the case of Lal Suraj " Suraj Singh and Anr. v. State of Jharkhand, (2009) 1 SCC 844. In the said judgment, the Hon"ble Supreme Court considered the scope of Section 319 Code of Criminal Procedure. The Division Bench presided by Hon"ble Justice S.B. Sinha came to hold as follows:

Section 319 Code of Criminal Procedure is a special provision. It seeks to meet an extraordinary situation. It although confers a power of wide amplitude but is required to be exercised very sparingly.

While saying so, the Hon"ble Court has also referred to its earlier judgment in the case of Kailash V. State of Rajasthan which judgment was delivered by Hon"ble Justice Sirpurkar. Paragraph-9 of the said judgment is quoted herein below:

9. A glance at these provisions would suggest that during the trial it has to appear from the evidence that a person not being an accused has committed any offence for which such person could be tried together with the accused who are also being tried. The key words in this section are "it appears from the evidence" "any persons" "has committed any offence". It is not, therefore, that merely because some witnesses have mentioned the name of such person or that there is some material against that person, the discretion u/s 319 Code of Criminal Procedure would be used by the court.

This is apart from the fact that such person against whom such discretion is used, should be a person who could be tried together with the accused against whom the trial is already going on. This Court has, time and again, declared that the discretion u/s 319 Code of Criminal Procedure has to be exercised very sparingly and with caution and only when the court concerned is satisfied that some offence has been committed by such person. This power has to be essentially exercised only on the basis of the evidence. It could, therefore, be used only after the legal evidence comes on record and from that evidence it appears that the persons concerned has committed an offence. The words "it appears" are not to be read lightly, on that the court would have to be circumspect while exercising this power and would have to apply the caution which the language of the section demands.

Reliance was also placed on a judgment of the Hon''ble Supreme Court in the case of *Brindaban Das and Ors. v. State of West Bengal*, (2009) 2 SCC 79 in which a Division Bench of the Hon''ble Supreme Court presided by Hon''ble Justice Altamas Kabir, came to hold as follows:

29. Section 319 Code of Criminal Procedure contemplates a situation where the evidence adduced by the prosecution not only implicates a person other than the named accused but is sufficient for the purpose of convicting the person to whom summons is issued. The law in this regard was explained in *Ram Kishan Rohtagi* case and as pointed out by Mr. Ghosh, consistently followed thereafter, except for the note of discord struck in *Rajendra Singh* case. It is only logical that there must be substantive evidence against a person in order to summon him for trial, although, he is not named in the charge-sheet or he has been discharged from the case, which would warrant his prosecution thereafter with a good chance of his conviction.

9. In the light of the principles of law as noted hereinabove, I have proceeded to peruse the evidence of all prosecution witnesses examined in course of the trial. None of the witnesses examined have whispered a word against the present Petitioners i.e. Durga Naik " Daroga Naik and Ramesh Naik.

P.W.6, Pratap Chandra Rout, Councilor of Ward No. 18 has given his evidence in which he has stated that the informant, Alekha Bej had come and reported him that his daughter had gone to School but she had not returned back after attending the School. The said Pratap Chandra Rout (P.W.6) along with the informant searched for the girl within the village. But since they failed to trace her out, a report was lodged with the police and P.W.6 had scribed the F.I.R. as per narration of the informant-Alekha Bej. He further stated that he read over the contents of the F.I.R. to the informant-Alekha Bej, who signed it finding the same to be correct and the said F.I.R. was marked as Ext.4. He further stated that the informant-Alekha Bej was a fruit vendor having his shop at Dhenkanal Bus Stand and Raju Naik was working as Trolley puller and that he had a good relationship with the family of Alekha Bej. He further stated that Ranjan Naik & Raju Naik (main accused persons facing trial) are friends and while Raju Naik was a Christian by religion, Alekha Bej was a Hindu. He further stated that Raju Naik was having love affairs with deceased Jyotirmayee and that on 16.2.2005 the informant-Alekha Bej called Ranjan Naik and handed him over to the custody of P.W.6-Pratap Chandra Rout, who took him to the Police Station and handed him over to the Police in the same night.

Although accused Ranjan Naik denied having any knowledge regarding the whereabouts of the deceased- Jyotirmayee, he had stated before P.W.6 that one Kalia Naik told them that the girl was at village Ranibania.

Therefore, the police and the informant went to the said village Ranibania but could not trace her. He further stated that on 17.2.2005 the dead body of the deceased was discovered on the Railway line of Rameswarpur. Neither P.w.6 nor

any other witness apart from P.W.13 (informant) stated a word relating to the present Petitioners.

10. From the impugned order it appears that the Trial Court considered the fact that the informant had earlier moved the High Court in WP(CRL) No. 174 of 2005, with a prayer to hand over of the investigation of the case to the C.B.I. or any other independent investigating agency for proper investigation in the case and the fact that such an application was disposed by directing that, if in course of trial any evidence is adduced from the side of the prosecution alleging involvement of other persons, apart from those who have been charge sheeted, the Court may consider it invoking its power u/s 319 Code of Criminal Procedure and the informant was also granted liberty to move an application u/s 319 Code of Criminal Procedure after examination of material witnesses.

11. It appears that the Trial Court was clearly swayed by the observations made by this Court in WP(CRL) 175 of 2005 and clearly failed to exercise its judicial discretion as required u/s 319 of the Code of Criminal Procedure in terms of the judgments referred to hereinabove. From the above, it is clear that the evidence of P.W.13-informant is limited to the extent of alleging that the Petitioners Durga Naik " Daroga Naik and Ramesh Naik were present at the spot, where the dead body of the deceased-Jyotirmayee was found at night. This assertion can at best be treated to be a "suspicious circumstance". But such suspicion by itself is not sufficient or adequate to hold that there is any reasonable prospect of convicting the present Petitioners for an offence u/s 302 I.P.C.

12. In the present case, except the statement of the informant made during his examination-in-chief that the present Petitioners were present along with the main accused persons, there exists no evidence of any complicity of the Petitioners with the crime and, therefore, I am of the considered view that it would not be proper to subject the Petitioners to trial by invoking the jurisdiction u/s 319 Cr.P.C..

13. Accordingly, the application u/s 482 Code of Criminal Procedure filed by the present Petitioners Durga Naik " Daroga Naik and Ramesh Naik is allowed and the order dated 4.7.2007 impugned herein passed by the learned Sessions Judge, Dhenkanal in C.T. (SS) Case No. 175 of 2005, in so far as it relates to the present Petitioners is quashed.