

(2014) 01 AHC CK 0203
In the Allahabad High Court
Case No : Criminal Revision No. 3036 of 2012

Haji Shafiq Ahmad

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 22-01-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 169, 319, 319(1), 319(4)

Citation : (2014) 1 ACR 745 : (2014) 2 ADJ 734 : (2014) 85 ALLCC 25

Hon'ble Judges : Vijay Prakash Pathak, J

Bench : Single Bench

Advocate : Arvind Agrawal, Rajiv Gupta and Rajiv Lochan Shukla, Advocate for the Appellant; R.L. Shukla, Advocate for the Respondent

Judgement

Vijay Prakash Pathak, J.—Heard Shri Arvind Agrawal, learned counsel for the revisionist as well as Shri Rajiv Lochan Shukla, learned counsel for the opposite parties No. 2 and 3 and learned AGA for the State.

Present revision has been filed with the prayer to quash the impugned order dated 16.6.2012 passed by Additional Sessions Judge, Court No. 2, Firozabad in Sessions Trial No. 134 of 2009 (State v. Parvej Akhtar and others), by which the application 135B moved by the revisionist u/s 319 Cr.P.C. to summon the opposite parties No. 2 and 3 to face trial alongwith other co-accused has been rejected.

The brief facts of the case are that the revisionist being complainant/informant in aforesaid sessions trial moved an application before the trial Court u/s 319 Cr.P.C. to summon the opposite parties No. 2 and 3 to face trial alongwith other co-accused, which was rejected by the trial Court vide order dated 4.6.2011, against which a criminal misc. application u/s 482 Cr.P.C. No. 24021 of 2011 was filed before this Court and this Court vide order dated 29.7.2011 had set aside the order dated 4.6.2011 with the direction that in case the revisionist moves an application alongwith certified copy of this order before Additional Sessions Judge, Court No. 2, Firozabad within a period of 15 days, the matter shall be

considered and decided expeditiously. It appears that in compliance of the said order dated 29.7.2011 passed by this Court, an application to summon the opposite parties No. 2 and 3 was again moved by the revisionist on 9.8.2011, on which the trial Court has observed that in the facts and circumstances of the case, where the prosecution version and the statements of the witnesses during investigation are contradictory and some persons named in the FIR have been exonerated and others have been added in the charge-sheet, the Court is of the opinion that before deciding this application u/s 319 Cr.P.C., the statements of witnesses regarding facts are necessary to be examined and accordingly the matter was fixed for evidence vide order dated 24.9.2011. It appears that against the said order dated 24.9.2011, the revisionist moved a criminal misc. application u/s 482 Cr.P.C. No. 38596 of 2011, which was dismissed by this Court vide order dated 28.11.2011 with the liberty to the revisionist to file a revision against the impugned order. Thereafter, the revisionist filed a criminal revision No. 5384 of 2011, which has been decided by this Court vide order dated 13.1.2012 dismissing the said revision with the observation that the revision itself was not maintainable as the revisionist has challenged the interlocutory order. It appears that thereafter the revisionist again filed a criminal misc. application u/s 482 Cr.P.C. No. 14056 of 2012 before this Court which has been allowed vide order dated 26.4.2012 allowing the said application and the order dated 24.9.2011 passed by the trial Court was quashed and the trial Court was directed to decide the application filed u/s 319 Cr.P.C. in aforesaid sessions trial by taking into consideration the evidence on record within a month from the date of production of certified copy of the order before it. It appears that the application 135B moved by the revisionist u/s 319 Cr.P.C. to summon the opposite parties No. 2 and 3 has been considered and dismissed by the trial Court vide order impugned dated 16.6.2012 with the observation that the witness (P.W. 1), complainant Haji Shafiq Ahmad is trying to conceal the truth and his statement appears to be mala fide against some persons and he is trying to save some person and in alternate wants to implicate others.

2. Learned counsel for the revisionist has contended that the revisionist being son of the deceased had got lodged an FIR on 26.8.2008 at 8.30 a.m. in respect of the occurrence of the same day at 7.30 a.m. implicating Parvez Akhtar, Zafar Akhtar (opposite party No. 2), Azhar Akhtar (opposite party No. 3) and Naushad Ali as accused, but the Investigating Officer has illegally exonerated the opposite parties No. 2 and 3 while submitting the charge-sheet. It is further contended that during the trial the complainant/revisionist, who has been examined as P.W. 1 before the trial Court has given clear-cut testimony regarding active participation of opposite parties No. 2 and 3 in the murder of his father, whereas the learned trial Court has illegally rejected the application moved by the revisionist to summon the opposite parties No. 2 and 3 on the basis of some minor contradictions. It is further contended that the learned trial Court has illegally not considered the application moved by the revisionist u/s 319 Cr.P.C. in compliance of the order dated 29.7.2011 passed by this Court in application u/s

482 Cr.P.C. No. 24021 of 2011 and wrongly fixed another date with the observation that the said application shall be considered after the statements of other witnesses of fact and the said application has only been considered when another order dated 26.4.2012 was passed by this Court in application u/s 482 Cr.P.C. No. 14056 of 2012, which shows that the trial Court was adamant in not summoning the opposite parties No. 2 and 3 on the application moved by the revisionist. It is further contended that the trial Court has decided the application moved by the revisionist u/s 319 Cr.P.C. by the order impugned on the basis of minor contradictions in the statement of P.W. 1, revisionist and it appears that he has passed the order impugned as if he was deciding the trial itself. It is further contended that from the perusal of the statement of P.W. 1, Haji Shafiq Ahmad (revisionist), it is crystal clear that the opposite parties No. 2 and 3 alongwith their father, co-accused Parvez Akhtar had fired shot upon the deceased due to which he died on the spot and hence prima facie offence was made out against the opposite parties No. 2 and 3 and from the statement of P.W. 1, they are likely to be convicted by the trial Court but the learned trial Court has illegally dismissed the application moved by the revisionist by not summoning the opposite parties No. 2 and 3 to face trial.

3. On the other hand, learned AGA and learned counsel for the opposite parties No. 2 and 3 have supported the order impugned dated 16.6.2012 passed by the trial Court and have contended that the trial Court after considering the entire material passed a detailed order and found that the statement of P.W. 1 was not of such type by which the opposite parties No. 2 and 3 are likely to be convicted. It is also contended that the learned trial Court after considering the statement of P.W. 1, who has given contradictory statements, found that the statement of witness P.W. 1 was not of such nature on the basis of which the opposite parties No. 2 and 3 were likely to be convicted and hence the order has rightly been passed by the learned trial Court rejecting the application moved by the revisionist.

4. I have considered the said arguments advanced on behalf of the parties" counsel and have perused the impugned order alongwith all other materials available on record.

In view of Section 319 of Criminal Procedure Code (hereinafter referred to as the "Code") any person not being the accused may be summoned to face trial alongwith accused if in the course of an inquiry into, or trial of, an offence, it appears from the evidence to the Court that such person has committed any offence.

Section 319 of the Code reads as under:

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 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.

5. Hon'ble Apex Court in its verdict *Sarojben Ashwinkumar Shah etc. Vs. State of Gujarat and Another*, has considered and elaborated the ambit and scope of Section 319 of the Code and after considering and discussing a catena of decisions given by itself including *Joginder Singh and Another Vs. State of Punjab and Another*; *Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others*; *Michael Machado and Another Vs. Central Bureau of Investigation and Another*; *Shashikant Singh Vs. Tarkeshwar Singh and Another*; *Krishnappa Vs. State of Karnataka*; *Palanisamy Gounder and Another Vs. State Represented by Inspector of Police, and Guriya @ Tabassum Tauquir and Others Vs. State of Bihar and Another*, has held that the legal position can be culled out from the material provisions of Section 319 of the Code and the decided cases of this Court is this:

(i) The Court can exercise the power conferred on it u/s 319 of the Code suo motu or on an application by someone.

(ii) The power conferred u/s 319(1) applies to all Courts including the Sessions Court.

(iii) The phrase "any person not being the accused" occurring in Section 319 does not exclude from its operation an accused who has been released by the police u/s 169 of the Code and has been shown in Column 2 of the charge-sheet. In other words, the said expression covers any person who is not being tried already by the Court and would include person or persons who have been dropped by the police during investigation but against whom evidence showing their involvement in the offence comes before the Court.

(iv) The power to proceed against any person, not being the accused before the Court, must be exercised only where there appears during inquiry or trial sufficient evidence indicating his involvement in the offence as an accused and

not otherwise. The word "evidence" in Section 319 contemplates the evidence of witnesses given in Court in the inquiry or trial. The Court cannot add persons as accused on the basis of materials available in the charge- sheet or the case diary but must be based on the evidence adduced before it. In other words, the Court must be satisfied that a case for addition of persons as accused, not being the accused before it, has been made out on the additional evidence let in before it.

(v) The power conferred upon the Court is although discretionary but is not to be exercised in a routine manner. In a sense, it is an extraordinary power which should be used very sparingly and only if evidence has come on record which sufficiently establishes that the other person has committed an offence. A mere doubt about involvement of the other person on the basis of the evidence let in before the Court is not enough. The Court must also be satisfied that circumstances justify and warrant that other person be tried with the already arraigned accused.

(vi) The Court while exercising its power u/s 319 of the Code must keep in view full conspectus of the case including the stage at which the trial has proceeded already and the quantum of evidence collected till then.

(vii) Regard must also be had by the Court to the constraints imposed in Section 319(4) that proceedings in respect of newly - added persons shall be commenced afresh from the beginning of the trial.

(viii) The Court must, therefore, appropriately consider the above aspects and then exercise its judicial discretion.

6. Hon''ble Apex Court in its decision Lok Ram Vs. Nihal Singh and Another, , has held that power u/s 319 of the Code can be exercised by the Court suo motu or on an application by someone including the accused already before it. If it is satisfied that any person other than the accused has committed an offence he is to be tried together with the accused. Such person, even though had initially been named in the FIR as an accused, but not charge-sheeted, can also be added to face the trial. It has also been held that the power is discretionary and such discretion must be exercised judicially having regard to the facts and circumstances of the case. Undisputedly, it is an extraordinary power which is conferred on the Court and should be used very sparingly and only if compelling reasons exist for taking action against a person against whom action had not been taken earlier.

7. Hon''ble Apex Court in its another verdict given in Rajendra Singh Vs. State of U.P. and Another, , while considering the scope and ambit of Section 319 of the Code has held that there is no reason to describe the power as an extraordinary power or to confine the exercise of it only if compelling reasons exist for taking cognizance against any other person against whom action has not been taken. After all, the section only gives power to the Court to ensure that all those apparently involved in the commission of an offence are tried together and none left out. There is no reason to curtail this power of the Court to do justice to the

victim and to the society. It is left to the judicial discretion of the Court, judicially trained, to decide to proceed or not to proceed against a person in terms of Section 319 of the Code.

8. In another verdict given in Ram Singh and Others Vs. Ram Niwas and Another, , the Hon"ble Apex Court has held that the application u/s 319 of the Code would be maintainable not only during the pendency of an inquiry but also in course of trial. In the event it appears from the evidence that any person not being an accused has committed any offence for which he could be tried together with the accused the Court may proceed against him for the offence which he appears to have committed. The provision of Section 319 of the Code confers an extraordinary power upon a Court to summon a person who, at the relevant time, was not being tried as an accused, subject, of course, to fulfilment of the condition that it appears to the Court that he had committed an offence. A finding to that effect must be premised on the evidence that had been brought on record. It has also been held that what is necessary for the Court is to arrive at the satisfaction that the evidence adduced on behalf of the prosecution, if unrebutted, would lead to conviction of the person sought to be added as accused in the case.

9. Now coming to the facts of the present case, it is noteworthy that the opposite parties No. 2 and 3 namely Zafar Akhtar and Azhar Akhtar were named in the FIR got lodged by Haji Shafiq Ahmad, complainant/revisionist. In the FIR it has been alleged that Parvez Akhtar and his sons Zafar Akhtar and Azhar Akhtar (opposite parties No. 2 and 3) made indiscriminate firing from their weapons upon the father of the revisionist, who died on the spot. It has also been alleged in the FIR that there was hand of one Naushad Ali in committing the said crime. The complainant/informant Haji Shafiq Ahmad (revisionist) in his statement u/s 161 Cr.P.C. has also stated the same facts. After investigation in the matter the charge-sheet was submitted against Parvez Akhtar, the father of opposite parties No. 2 and 3 and Anish Ahmad alongwith three others i.e. Chhotu, Manish @ Bhura and Bhagwan Singh @ Pyare and the involvement of opposite parties No. 2 and 3 and Naushad Ali was found to be false.

10. During trial, the complainant/informant Haji Shafiq Ahmad, revisionist has been examined as P.W. 1. In his statement he has categorically stated that incident is of 26.8.2008 at 7.30 in the morning and on that day when he alongwith his father Haji Atik Ahmad (deceased) and maternal uncle Mahir Mohammad went to purchase furniture for the marriage of his daughter at 6.30 a.m. in the Ram Leela ground and when they were returning at 7.30 and came near Dharm Shala, at that time Parvez Akhtar, Zafar Akhtar (opposite party No. 2), Azhar Akhtar (opposite party No. 3) came on a motorcycle, which was being driven by Zafar Akhtar and after stopping their motorcycle, Parvez Akhtar called his father and as and when his father reached near Parvez Akhtar; Parvez Akhtar, Zafar Akhtar, Azhar Akhtar took out their tamanchas and fired at him, who fell down on the spot and died.

After the statement of P.W. 1 Haji Shafiq Ahmad, revisionist, an application u/s 319 Cr.P.C. was moved on his behalf to summon the accused Zafar Akhtar and Azhar Akhtar, opposite parties No. 2 and 3 respectively to face trial alongwith accused, who were already facing trial. The said application was rejected by the trial Court vide order dated 4.6.2011 after considering the material collected during investigation by the Investigating Officer.

Challenging the said order dated 4.6.2011 passed by the trial Court, the revisionist filed a criminal misc. application u/s 482 Cr.P.C. No. 24021 of 2011, which was decided by this Court vide order dated 29.7.2011 and it was opined after perusing the order impugned as well as the averments as contained in the petition that the matter requires reconsideration and accordingly after setting aside the order dated 4.6.2011 passed by the trial Court it was directed that if the revisionist moves an application alongwith certified copy of the order before the trial Court within a period of 15 days, the matter shall be considered and decided expeditiously.

11. In pursuance of the said order of this Court dated 29.7.2011, the revisionist again moved an application on 9.8.2011 stating therein about the order passed by this Court with the prayer to summon the opposite parties No. 2 and 3 to face trial. The said application was considered by the trial Court and vide order dated 24.9.2011, the trial Court has observed that all the witnesses of fact mentioned in the charge-sheet are necessary to be examined before deciding the application u/s 319 Cr. P.C. and accordingly the matter was fixed for evidence.

Challenging the said order, a criminal misc. application u/s 482 Cr.P.C. No. 38596 of 2011 was filed by the revisionist, which was dismissed with a liberty to the revisionist to file a revision against the impugned order by the order dated 28.11.2011 passed by this Court.

Thereafter, a criminal revision No. 5384 of 2011 was filed which was decided by this Court vide order dated 13.1.2012 and the revision was dismissed as not maintainable due to challenging of an interlocutory order.

Thereafter, again the revisionist filed an application u/s 482 Cr.P.C. No. 14056 of 2012 before this Court which has been allowed by this Court vide order dated 26.4.2012 and the order dated 24.9.2011 passed by the trial Court was quashed and the trial Court was directed to decide the application filed by the revisionist u/s 319 Cr.P.C. by taking into consideration the evidence on record within a month and thereafter the learned trial Court decided the application moved by the revisionist u/s 319 Cr.P.C. by the order impugned and rejected the same with the observation that there are contradictions in the statements of the complainant Haji Shafiq Ahmad, P.W. 1 as the witness arbitrarily in his statement added a person to be involved in the occurrence, but on the next date, he scored out his name, which shows that for some reason firstly he wants to implicate a person and thereafter he tried to save him. Due to said contradictions, the Court is bound to think that the witness is trying to conceal the truth and for some

persons his statement is mala fide and he is trying to save some persons and in alternate he wants to implicate others. The learned trial Court has considered certain contradictions found in the statement of the complainant Haji Shafiq Ahmad, P.W. 1 and gave the aforesaid findings.

12. I have perused the order impugned and found that the learned trial Court has considered such contradictions which were not likely to be considered for the purposes of deciding an application u/s 319 Cr.P.C.

For example the learned trial Court has stated in the order impugned that regarding the incident the complainant Haji Shafiq Ahmad (revisionist), who had got lodged the FIR has mentioned in the FIR that among his father Haji Atik Ahmad (deceased) and brother Taufiq Ahmad on the one hand and Parvez Akhtar, Naushad Ali on the other, a civil suit was going on in respect of a property in which Naushad Ali and Parvez Akhtar were creating pressure upon his father that the said land belongs to them and he should quit himself from the said land and as such the said motive about the incident has been mentioned in the FIR but during investigation the evidence which has been collected, it was found that the actual dispute was not with relates to the property but one Anish Ahmad had relation with the sister of Haji Shafiq Ahmad (complainant), in which Haji Atik Ahmad was making hindrance and when Haji Atik Ahmad was going to purchase furniture for the marriage of his daughter, Anish Ahmad, Parvez Akhtar and others got murdered him and during investigation the involvement of accused Zafar Akhtar and Azhar Akhtar (opposite parties No. 2 and 3) and Naushad Ali was found to be false.

The contradiction which has been mentioned by the trial Court is that the P.W. 1 has stated that he had no talk with his father as to how many cases were going on in the Civil Court and what were being done in the Court and he has not gone to do pairavi in the case alongwith his father.

The another contradiction which has been stated by the trial Court is that on page 14 of his statement P.W. 1 has stated that in the murder of his father, there was hand of Naushad Ali Siddiqi and on his saying and help, his father was murdered, but on the next date the witness has stated that Naushad Ali and Anish were not on the spot, whereas in the FIR Naushad Ali is said to be mastermind of the murder and Anish was not named in the FIR. Subsequently, on page 17, the witness has stated that he did not disclose the name of Anish to be present on the spot.

It is not out of place to mention here that in the FIR itself, the said Naushad Ali is not alleged to be present on the spot, but the only allegation has been made against him that he was having hand in committing murder of father of the complainant/revisionist.

13. Learned trial Court has also stated that P.W. 1 has deposed in his cross-examination that Anish was standing catching hold his father in the Gali and hence it has been held that this witness in his statement adds the involvement of

the accused named in the FIR for committing the murder, but on the next date he denied their involvement and as such his statement is not stable regarding the number of accused and their involvement.

14. The next contradiction which has been stated by the learned trial Court is that according to the statement of the PW 1, police came on the spot after an hour of the incident and he went with his father to hospital before the police came, but subsequently he stated that on his information police had immediately come and when police had come the dead body of his father was lying on the spot and the police sent the same unsealed to the hospital.

15. Learned trial Court has also observed that the application 135-B (under Section 319 Cr.P.C.) has been moved by Shri O.P. Agrawal, learned counsel on behalf of the prosecution. The complainant has right to engage a private counsel, but on his application there should have counter-sign made by ADGC (Criminal) which has not been done as the private counsel is engaged only to assist the ADGC.

16. In my opinion, the said observation of the trial Court that the application u/s 319 Cr.P.C. was moved by the private counsel, who was engaged only to assist the ADGC and the application should have been countersigned by ADGC does not appear to be proper as has been held by Hon''ble Apex Court in Lok Ram v. Nihal Singh and others (supra) that the power u/s 319 Cr.P.C. can be exercised by the Court suo motu or on an application by someone including the accused already before it.

17. A perusal of the impugned order shows that the learned trial Court has considered the statement of PW1 in such a manner as he was deciding the trial as a whole. The observation of the learned trial Court that implicating someone at a time and subsequently denying his involvement affects the truthfulness of the statement of the witness, does not appear to be proper in the facts and circumstances of the present case after considering the statement of Haji Shafiq Ahmad, P.W. 1 as a whole and at the stage of deciding the application u/s 319 Cr.P.C.

18. It is pertinent to mention here that regarding the involvement of opposite parties No. 2 and 3 in the crime, the statement of P.W. 1 Haji Shafiq Ahmad, revisionist is fully intact and if for some accused there is minor contradiction regarding his involvement, it cannot be said that the said contradiction affects the truthfulness of the entire statement of the witness. The trial Court has although considered the decisions of the Hon''ble Apex Court given in Ram Singh and Others Vs. Ram Niwas and Another, ; Sarabjit Singh and Another Vs. State of Punjab and Another, ; Mohd. Shafi Vs. Mohd. Rafiq and Another, , but did not visualize the proposition and observation made by the Hon''ble Apex Court in the said cases in its proper perspective. In my opinion while deciding the application u/s 319 Cr.P.C., the trial Court may not analyse the evidence of a witness in such a manner as to decide the trial itself. For the purposes of deciding the application

u/s 319 Cr.P.C. the existence of prima facie case about involvement of accused to be summoned may be considered in the light of evidence adduced on behalf of prosecution before the Court. The duty of the Court is not only to protect the innocent but also to punish the guilty.

In the present matter, opposite parties No. 2 and 3 were named in the FIR itself and their act of firing alongwith co-accused Parvez Akhtar has also been alleged in the FIR which has been corroborated by Haji Shafiq Ahmad, complainant in his statement u/s 161 Cr.P.C. and also in the statement before the Court where he has been examined as P.W. 1. There may be some contradictions in the statement of P.W. 1 before the trial Court in respect of some other accused but due to same his statement cannot be disbelieved as a whole. The observation of the trial Court in respect of doubting the truthfulness of the statement of P.W. 1 does not appear to be proper as at this stage the said observation may prejudice the prosecution case in respect of trial of other co-accused and accordingly the impugned order cannot be sustained and is liable to be set aside.

In view of aforesaid considerations, this revision is allowed and the order impugned dated 16.6.2012 is hereby set aside and the matter is sent back to the trial Court to reconsider the application moved by the revisionist u/s 319 Cr.P.C. for summoning the opposite parties No. 2 and 3 in accordance with law and in the light of the observations made above.