

(1995) 05 OHC CK 0017

In the Orissa High Court

Case No : Criminal Revision No. 723 of 1994

Hrushikesh Pradhan and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 02-05-1995

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 164, 319, 319(4)(1), 398

Citation : (1995) 2 OLR 30

Hon'ble Judges : A. Pasayat, J

Bench : Single Bench

Advocate : S.Ch. Sahu, S.K. Sahu, S.K. Nayak and G.C. Swain, for the Appellant; Additional Government Advocate For Opp. Party No. 1, D. Nayak, R.C. Swain and S. Swain (For informant), for the Respondent

Judgement

A. Pasayat, J.—Petitioners call in question legality of direction given by learned Addl. Sessions Judge, Kendrapara for implection of present petitioners as accused in terms of Section 319 of the Code of Criminal Procedure, 1973 (in short, the "Code").

2. Learned Public Prosecutor filed a petition to implead present petitioners as accused on the ground that evidence already on record clearly indicated their responsibility for offence, for which others were facing trial. Learned Addl. Sessions Judge found that though majority of the witnesses had not stated anything about the alleged role played by the present petitioners during investigation, yet their evidence in Court amply reflected their role in the alleged occurrence. That is why he directed their implection.

3. Mr. S. K. Sahu, learned counsel for petitioners submits that power u/s 319 of the Code is not to be exercised in the routine manner and there has to be careful analysis of material to arrive at an objective conclusion that parties sought to be impleaded also had some role to play. With reference to evidence of some of the witnesses, it is stated that non-application of mind by learned Sessions Judge is apparent because he has concluded these witnesses to have implicated the

present petitioners, though they did not breathe a word about them. With reference to the statements made before the police, it is submitted that a belated attempt is being made to falsely implicate and rope in the petitioners. Learned counsel for State however, submitted that the expression "evidence" as referred to in Section 319 of the Code is relatable to evidence in Court and not what has been stated before police during investigation. According to him, there is ample material to show that petitioners were guilty, and omission of investigating agency to implead them as accused persons has been found to be erroneous by learned Addl. Sessions Judge and he has rightly directed them to be impleaded as accused persons to face trial.

4. Power u/s 319 of the Code can be exercised by the Court suo motu or on an application by someone including accused already before it. If it is satisfied that any person other than accused has committed an offence he is to be tried together with the accused. 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. The word "evidence" in Section 319 contemplates that evidence of witnesses given in Court. Under Sub-section (4) (1) (b) of the aforesaid provision, it is specifically made clear that it will be presumed that newly added person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced. That would show that by virtue of Sub-section (4) (1) (b) a legal fiction is created that cognizance would be presumed to have been taken so far as newly added accused is concerned.

5. Section 319 of the Code aims at bringing into trial all those who are responsible for an offence, if during trial it appears from the evidence that any person not being accused has committed any offence for which he or she can be tried together with the accused. The Court can proceed against such person for the offence which he appears to have committed. Since power exercisable u/s 319 of the Code is an extraordinary power conferred on the Court to do real justice, it should be used with caution and only if compelling reasons exist for proceeding against a person against whom action has not been taken. The Court is not required to evaluate or appraise evidence as it would amount to prejudging the issue. These aspects have been highlighted in *Md. Musaffar Khan and Anr. v. State of Orissa* and Ors. 78 (1994) CLT 1055 : (1994) 7 OCR 804. Statements recorded by police and interrogation by investigator does not constitute evidence. For the purpose of Section 313, neither statements u/s 161 of the Code recorded by investigator or those recorded u/s 164 can be treated as evidence. If prosecution can at any stage produce evidence which satisfies the Court that who have not been arraigned as accused, proceedings have been quashed have also committed offence the Court can take cognizance and try them along with other accused. Persons who have been discharged u/s 245 of the Code of all or some of the charges are accused and hence cannot be

proceeded against u/s 319. Once a person is found to have been accused in the case he goes out of reach of Section 319 as crucial words in the said Section are "any person not being the accused." Whether he can be dealt with under any other provisions of the Code is a different question. In case of an accused who has been discharged under the relevant protection of the persons discharged subject to revision u/s 398 cannot be lost sight of. Provisions of Section 319 are to be read in consonance with other provision like Section 398. (See *Sohan Lal and Ors. v. State of Rajasthan*, AIR 1990 SC 2258 and *Municipal Corporation of Delhi v. Ram Kishan Rohtagi and Ors.*, AIR 1983 SC 67).

6. There is substance in the plea of learned counsel for petitioners that there is some error in the conclusion of learned Addl. Sessions Judge about evidence of PWs 4 to 12 being categorical and specific about the role of present petitioners. The petition was disposed of on the day it was presented (i.e. 31-10-1994). A grievance is made by petitioners that adequate opportunity was not granted to present their side of case to the accused persons. It is really the persons to be impleaded who can make a grievance about impugned action. Whether power u/s 319 is to be exercised or not would depend on circumstances of the case. Learned counsel for petitioners states that a motion shall be made on 21-6-1995 before learned Addl. Sessions Judge, Kendrapara for re-consideration of the matter; and prays that he may be directed to reconsider the matter in the peculiar circumstances of the case. I accept the prayer. If the motion is made, the same shall be disposed of by learned Addl. Sessions Judge in accordance with law. Till disposal of motion, personal attendance of petitioners shall not be insisted upon and on proper application being made, learned Addl. Sessions Judge shall consider the question of their representation through counsel.

The Criminal Revision is disposed of.

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