
(2013) 07 AHC CK 0242

In the Allahabad High Court

Case No : Criminal Miscellaneous No. 2446 of 2012

Jagdish @ Ganga Charan Dwivedi

APPELLANT

Vs

State of U.P. and Another

RESPONDENT

Date of Decision : 12-07-2013

Acts Referred:

Citation : (2013) 82 ALLCC 803

Hon'ble Judges : Vishnu Chandra Gupta, J

Bench : Single Bench

Advocate : V.K. Shahi, for the Appellant; Anoop Srivastava, Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

Vishnu Chandra Gupta, J.—Heard Sri V.K. Shahi, learned Counsel for the petitioner, Sri Anoop Srivastava, learned Counsel for the opposite party No. 2 and Sri Anurag Verma, learned AGA for the State. Challenge in this petition u/s 482 of Criminal Procedure Code (for short "Cr.P.C") is an order dated 29.5.2012 passed by learned Additional Sessions Judge, Court No. 1, Unnao in S.T. No. 635 of 2008 (State v. Manna Lal and others) by virtue of which the petitioner Jagdish @ Ganga Charan Dwivedi was summoned u/s 319 Cr.P.C. to face the trial under sections 323, 324, 506 and 304 IPC along with other co-accused already facing trial.

2. The brief facts for deciding the petition are that the opposite party No. 2 lodged the First Information Report against present applicant and two other Munna Lal and Dhani for alleged incident occurred on 6.9.2007 at 4.30 p.m., under sections 323, 324, 506 and 328 IPC. Later on case was converted u/s 304 IPC on account of death of injured. The matter was investigated but no charge-sheet has been filed against the petitioner.

3. An application has been moved u/s 319 Cr.P.C. to summon the present accused. The same was dismissed vide order dated 23.3.2009.

4. Aggrieved by the aforesaid order the opposite party No. 2 filed a petition u/s 482 Cr.P.C. having Crl. Misc. Case No. 1128 of 2009 which was finally disposed of vide order dated 17.10.2011 with direction that in case the petitioner moved a fresh application u/s 319 Cr.P.C. after cross-examination of PW 1, the same shall be considered and disposed of by the Trial Court in accordance with law. After conclusion of the cross-examination of PW 1 another application has been moved u/s 319 Cr.P.C. by the opposite party No. 2. This time the application moved by opposite party No. 2 was allowed by the Trial Court vide order dated 29.5.2012 impugned in this petition, and petitioner was summoned to face the trial.

5. It has been submitted by the learned Counsel for the petitioner that the Court below has not considered the law laid down by the Apex Court in Sarojben Ashwinkumar Shah etc. Vs. State of Gujarat and Another, .

6. On the contrary the learned Counsel appearing for opposite party No. 2 and learned AGA supported the impugned order and submitted that the Court has followed the directions in Sarojben's case (supra) and only after that the order was passed.

7. It has been further submitted by learned Counsel for the opposite party No. 2 that while granting interim order on 13.4.2009 by this Court in the earlier petition that Investigating Officer in spite of the fact that all the witnesses supported the prosecution case, did not file the charge-sheet against the petitioner and other co-accused. The weapon attributed to Jagdish the petitioner, was said to have been used in commission of crime as is evident from the post-mortem examination. The Court further observed in interim order that surprisingly enough despite of all the incriminating circumstance against Jagdish, the investigating officer has not arrayed him as an accused in the charge-sheet. It was further submitted that during the course of trial the evidence adduced is sufficient to establish guilt of the accused, if the same evidence remained uncontroverted.

8. While replying the argument advanced by learned Counsel for the opposite party No. 2, the learned Counsel for the petitioner submits that when final order was passed in any petition the interim order merge in the final order. Moreover, petition u/s 319 Cr.P.C. could be disposed of on the basis of evidence adduced during trial and not on the basis of report of investigating officer or the material collected during investigation or statement recorded u/s 161 Cr.P.C.

9. In this case PW 1 Ram Prakash in his deposition during stated that on 6.9.2007 at about 4.30 p.m. he and his brother Chandra Prakash were going to their house after returning back from Unnao. At Sidhu crossing his brother Chandra Prakash met with Sarvesh and thereafter Chandra Prakash and Sarvesh proceeded to the house on motorcycle. Chandra Prakash was pillion rider. He reached on the spot after hearing screams of his brother Chandra Prakash and Sarvesh along with Surya Narayan, Radhey Shyam and other villagers. He saw that Chandra Prakash was bleeding. He was having several injuries on his left

hand both legs below knee joint and other parts of the body. He took his brother to PHC from where he was referred to Unnao hospital. He got scribed the application from Vivek and put his signature thereon and gave in the police station. On the basis of which first information report was lodged.

10. However, in the examination-in-chief, he also stated that when his brother reached along with Sarvesh near Ajay Public School all the three accused persons were concealing themselves there and waiting for his brother. They emerged out and got the motorcycle stopped. The present petitioner Jagdish assaulted Sarvesh and his brother Jagdish with the spare and other accused person assaulted with lathi and kick and fits with intent to kill his brother.

11. Learned Counsel for the petitioner submitted that from the perusal of the entire statement of PW 1 it appears that he is not eye-witness of the incident and he reached after the incident on the spot. Learned Counsel for the opposite party No. 2 submitted that from the evidence on record it could not be inferred that PW 1 has not witness the incident.

12. In the latest judgment of Apex Court (Sarojben Ashwin Kumar Shah v. State of Gujarat and another, the Supreme Court had an occasion to consider several authorities of the Apex Court and drawn certain guidelines for exercising the jurisdiction by Courts u/s 319 Cr.P.C. The relevant portion of the judgment in Para 16 is reproduced herein below:--

The legal position that 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 addition 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 the 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 be 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.

13. In view of the above, the matter could be scanned on the basis of judgment rendered by the Apex Court in Sarojben's case (supra) and other judgments of Hon'ble Supreme Court.

14. The impugned order could be judged on the strength of the evidence recorded during trial. Only PW 1 Ram Prakash, informant has been examined. He is in his statement categorically stated that he and his brother Chandra Prakash came back from Unnao with bus and were going to house. At Sidur crossing Sarvesh took the motorcycle of Ramesh Sarvesh was driving the motorcycle and his brother Candra Prakash sitting as pillion rider. When these persons reached near Ajay Public School the accused assaulted his brother and also Sarvesh after stopping the motorcycle. On the cries of Sarvesh and his brother he (PW 1 Ram Prakash) Surya Narayan, Radhey Shyam and other persons of the village reached there, where he found that Chandra Prakash was killed on the spot. At that time accused persons were running from the spot. He stated that first of all he reached on the spot and thereafter Surya Narayan and Radhey Shyam. He further categorically stated that he saw that Chandra Prakash received injuries on the left hand both legs below knee joint and other part of the body. This is the statement in the examination-in-chief of PW 1.

15. In Sarojben's case (supra) the Apex Court held that 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 addition let in before it. 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 the other person be tried with the already arraigned accused.

16. That in view of the evidence of PW 1, it cannot be said that the evidence given by PW 1 is sufficient to establish that present petitioner has committed the offence. He is not eye-witness the other witness yet to be examined. Sarvesh would be the best witness who was accompanying with the deceased and was said to be present on the spot and could state before the Court what happened at the spot. Therefore, this Court is of the view that for allowing the application u/s 319 Cr.P.C., there is no sufficient material on record by which it could be said that the petitioner summoned in all likelihood be convicted on the basis of evidence recorded during trial. The power u/s 319 Cr.P.C. is extraordinary power should used sparingly and only if evidence come on record which sufficiently establishes that the persons summoned has committed an offence. Mere involvement on the basis of evidence adduced during trial or mere doubt of involvement on the basis of evidence let him before the Trial Court is not enough. Hence, the Trial Court has not exercised his discretion in a judicious manner. The Trial Court mechanically and without applying mind to the fact of the case passed the impugned order, which could not be allowed to sustain.

17. Hence this petition deserves to be allowed.

18. The petition is allowed. The impugned order is set aside. Before parting with this case, it would be necessary to mention here that any finding recorded while deciding this petition shall not be binding on the Trial Court during trial or while deciding any fresh application moved u/s 319 Cr.P.C.