

(2012) 03 PAT CK 0142

In the Patna High Court

Case No : Criminal Miscellaneous No. 296 of 2011

Kamru Jama and Others

APPELLANT

Vs

The State of Bihar and Another

RESPONDENT

Date of Decision : 14-03-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 319, 319(1)
Penal Code, 1860 (IPC) — Section 147, 323, 337, 341, 504

Citation : (2012) 2 PLJR 806

Hon'ble Judges : Shivaji Pandey, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Shivaji Pandey, J.—Heard learned counsel for the petitioners, for the State and for the informant. In the present case, petitioners are challenging the order dated 17th July, 2010 passed by Judicial Magistrate, 1st Class, Ara in G.R. No. 2566 of 2007/Tr. No. 3200 of 2008 whereby and whereunder notices have been issued to the petitioners in terms of Section 319 of the Code of Criminal Procedure Code (for short, "the Code") on the ground that there are sufficient materials against the petitioners which have come in course of trial.

2. This order was challenged by the petitioners in Cr. Revision No. 151 of 2010 and learned Sessions Judge, Bhojpur, Ara after considering the material on the record and also examining the evidence which has come during the trial, dismissed the revision application and against that the present Cr. Misc. Application has been filed making a prayer to quash the order of Sessions Judge as well as the order of the Judicial Magistrate, 1st Class, Ara.

3. In the present case, an FIR was lodged by one Jiyaaur Rahman against (1) Kamru Jama, (2) Shamshu Jama, (3) Sadru Jama, (4) Nasru Jama, (5) Sharafat, (6) Ekrarul Haque, (7) Abdul Hasan, (8) Kamarat Ali, (9) Riyazuddin, and (10) Salamat Ali. The allegation made in the FIR is that the ancestral house of the informant was standing over plot no. 3867, appertaining to Khata No. 40,

measuring an area of 2 decimals and the said land was recorded in the name of grand-father of the informant, namely Animul Haque. It has been said that the neighbors of the informant, namely, petitioner Kamru Jama and Abbas Ali have been laying claim over the said land forcibly with respect to which, a case was also instituted in court which was decided in favour of the informant and due to the said reasons, parties became annoyed and attempted to harass the informant. On the alleged date of occurrence, the accused persons entered into the house and hurled abuses and challenged that even though the informant had won the case, it is hardly any matter. When the informant raised alarm, his son Fidaur Rahman @ Arju and his nephew Afroz Alam rushed to the place and they were also assaulted by the accused persons causing them injuries, It has further been averred in the FIR that they entered into the house and took away Rs. 25,000/- but with the intervention of Hafiz, Md. Kalimuddin and Kurban Ali, the matter could be sorted out at the relevant time and the reason has been assigned of old land dispute. In pursuance of this FIR, the case was investigated and charge-sheet was submitted in which Md. Sadru Jama, Sharafat Hussain, Md. Salamat, Ekrarul Haque, Md. Abdul Hasan and Md. Riyazuddin, were charge-sheeted whereas with respect to Shamsu Jama, Nasru Jama, Kamru Jama and Karamat Ali Police submitted final form. Cognizance was taken against those accused and they were sent up for trial for the offences punishable under Sections 147, 341, 323, 337 and 504 IPC. With regard to removal of articles and cash, allegation was found to be false. During the trial, Md. Afroz Ali (P.W. 1), Arju (P.W. 2) and Md. Fidaur Rahman (P.W. 3) were examined and in course of evidence, they have taken the names of petitioners making allegation against them also.

4. The informant of this case, filed an application u/s 319 Cr.P.C. stating therein the fact that during the trial, the witnesses have directly named the petitioners involved in the alleged incident and those statements are sufficient for conviction of the petitioners and, accordingly the court below issued summonses which were challenged but failed before the Sessions Judge.

5. Learned counsel for the petitioners submitted that the court below has wrongly exercised the power u/s 319 of the Code, as there was no sufficient material which may lead to conviction of petitioners and the court u/s 319 of the Code cannot go for a roving enquiry and wrongly issued summons to the petitioners u/s 319 of the Code.

6. The primary object of Section 319 of the Code is that there should have been sufficient materials brought during the enquiry or trial which on its own merit may lead to conviction, but in the present case, there is no material before the trial court in terms of Section 319 of the Code. There may be some evidence which is an exaggeration as those statements have not been recorded by the Police during the investigation and, as such, this Court should quash the notice issued.

7. Learned counsel for the State and informant submitted that in course of trial,

witnesses have directly named these petitioners as persons involved in the alleged occurrence and looking to the material facts which came during trial of this case, there is every likelihood of conviction of the petitioners and, as such, submission advanced by the learned counsel for the petitioners is completely fallacious.

8. Now the basic issue that has been raised in this petition is about the parameter in which the trial court can issue summons to the petitioners who are not facing the trial and this issue is no longer res integra, as this Court as well as the Hon''ble Supreme Court has threadbarely considered the parameter and scope of Section 319 of the Code and to appreciate the applicability of Section 319 of the Code, which is as follows:--

Section 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 reheard;

(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.

9. In support of his contention, learned counsel for the petitioners relied on the following judgments:-

Brindaban Das and Others Vs. State of West Bengal,

Palanisamy Gounder and Another Vs. State Represented by Inspector of Police,

Krishnappa Vs. State of Karnataka,

Kavuluri Vivekananda Reddy and Another Vs. State of A.P. and Another,

Kailash Dwivedi Vs. State of M.P. and Another,

Rakesh and Another Vs. State of Haryana, .

10. Learned counsel for the informant has relied on the judgment reported in 1993(2) BBCJ 500 (Bishwanath Toto & Ors. vs. The State of Bihar) and submitted that the facts of the present case are more nearer to the facts of the aforesaid case and, as such, the case may be decided in terms of the aforesaid judgment.

11. In this regard the off quoted judgment of the Hon''ble Supreme Court in the judgment reported in Michael Machado and Another Vs. Central Bureau of Investigation and Another, has considered essential ingredients for exercise of power u/s 319 of the Code and it has been held that power u/s 319 of the Code, vested in the Court should be used sparingly and the evidence on the basis of which power u/s 319 of the Code is to be invoked should indicate a reasonable prospect of conviction of the person to be summoned.

12. The Court has further held that suspicion of involvement of the person concerned in the offence was not enough, particularly when large number of witnesses had been examined and no evidence on the basis of which conviction could be secured had it been adduced on behalf of prosecution.

13. This issue has further been examined by the Hon''ble Supreme Court in a case reported in the case of Brindaban Das (supra) and the view which has been enunciated in the earlier paragraph has been affirmed in the present case and it will be relevant to quote Para 17 of the judgment which is as follows:-

Para 17: Mr. Ghosh finally referred to the decision of this Court in MCD vs. Ram Krishna Rohtagi which is one of the earlier cases where the scope of Section 319 had been dealt with and thereafter followed in the subsequent cases, wherein it had been observed as follows: (SCC p. 8, para 19)

19. In these circumstances, therefore, if the prosecution can at any stage produce evidence which satisfies the court that the other accused or those who have not been arrayed as accused against whom proceedings have been quashed have also committed the offence the court can take cognizance against them and try them alongwith the other accused. 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. More than this we would not like to say anything further at this stage. We leave the entire matter to the discretion of the court concerned so that it may act according to law, We would, however, make it plain that the mere fact that the proceedings have been quashed against Respondents 2 to 5 will not prevent the court from exercising its discretion if it is fully satisfied that a case for taking cognizance against them has been made out on the additional evidence led before it.

14. So from the reading of the aforesaid two judgments, it is apparently clear that there should be a substantive evidence which should come during the trial, there should be an evidence which may lead to reasonably prospect of conviction of the person to be summoned and the person cannot be arrayed in the category of accused merely on suspicion of involvement of the person concerned in the

offence. In my view these are the three basic guideline which have been given by the Hon''ble. Supreme Court while deciding the issue as to whether the person should be summoned u/s 319 of the Code.

15. In the case of Krishnappa vs. State of Karnataka (supra) the Court has held that u/s 319, the court has a discretionary power and should be exercised sparingly only to achieve the criminal justice and the Court should not turn against another person whenever it comes across evidence connecting other person also with the offence. The Court has further held that a judicial exercise is called for keeping a conspectus of the case, including the stage at which the trial has already proceeded and the quantum of evidence collected till then and also the amount of time which the court had spent for collecting such evidence. The court while examining an application u/s 319 Cr.P.C. has also to bear in mind that there is no compelling duty on the court to proceed against other persons.

16. It is apparent from this judgment that whenever the Magistrate exercises the power u/s 319 of the Code, he has to exercise on the basis of material evidence collected during the enquiry or trial which may show that the evidence is sufficient for conviction of the person summoned. The Court should not go for a roving enquiry but has to look into the material evidence collected during the trial.

17. In another judgment in the case of Palanisamy Gounder vs. State (supra) the Hon''ble Supreme Court has held that if there is a reasonable prospect of the case against such accused ending in their conviction, they may be summoned but a fishing enquiry is not contemplated.

18. Yet in the case of Kailash Dwivedi vs. State of M.P. (supra), the Hon''ble Supreme Court has adopted the same principle as has been enunciated in the case of Michael Machado (supra). The Court while considering the scope of Section 319 Cr.P.C. contemplated that existence of some evidence appearing in the course of trial wherefrom the court on the basis of sufficiency of evidence came during trial can prima facie conclude that the person not arrayed before it is also involved in the commission of crime for which he can be tried with those who have already been summoned and are being tried. It has further held that the evidence for the purpose of Section 319 of the Code should be construed in comprehensive and in broad sense in the context of sufficiency and quality of material evidence which came before the Court during enquiry and trial on the basis of which the Court can conclude that evidences are sufficient which may lead to conviction of persons not arrayed before it, is involved in the commission of the offence. The Court has further held that power u/s 319 of the Code is extraordinary power and should be used very sparingly only for some compelling reason for taking cognizance of other persons against whom action has not been taken. Hon''ble Supreme Court has affirmed the said view in Sarojben Ashwinkumar Shah etc. Vs. State of Gujarat and Another, .

19. In this backdrop of the opinion, that has been given in the judgment, this

Court will have to adjudicate as to whether there are sufficient substantive materials before the Magistrate which may lead to opinion of reasonable prospect of conviction to exercise power u/s 319 of the Code against the petitioners.

20. Now let us examine the case cited by the defence. This Court in the case of Bishwanath Toto & Ors. vs. The State of Bihar (supra) has also considered the scope and object of Section 319 of the Code with regard to issuing summons to the persons who are not facing trial. In this case, the fact was that the petitioners were made accused in F.I.R. but they were not sent up by the Police, the court took cognizance of the case, issued summons against those persons who were charge-sheeted and the others were discharged. Issue was raised as to whether the person who was discharged can be summoned as an accused u/s 319 of the Code. The same question arose as to whether the petitioner who was allegedly discharged by the Magistrate at the time of taking cognizance can be summoned subsequently during the trial on the basis of evidence recorded during trial u/s 319 of the Code and this Court held as follows:--

Para 12: From the bare perusal of the provisions of Section 319(1) of the Code it is clear that if during course of the inquiry or trial evidence on the record shows that the person other than the accused facing the inquiry or trial has committed the offence for which he could be tried alongwith the accused facing the trial, the court may summon such person to face the trial with the accused. The expression "any person not being the accused" refers to such person who is not facing the inquiry or trial as an accused. The word "accused" in this section refers to the person or persons, who is or are facing inquiry or trial at the time when the question for addition of an additional accused is being considered.

21. Basically in this case the Court has held that even if a person was discharged, he can be summoned if there is material against him and can be arrayed as an accused and can be asked to face trial alongwith other accused persons, but this Court has not considered with regard to the nature of evidence which may give a discretion to the Magistrate to summon the person as an accused. There is no doubt and there cannot be any dispute that a person even though was discharged, but if sufficient material has come against him during the enquiry or trial, can be summoned u/s 319 of the Code. But what is the quality of evidence that will give discretion to the Magistrate to call upon the person to face trial was not under consideration before this Court.

22. In view of the discussion as mentioned above, it is amply clear from the judgments of the Hon"ble Supreme Court that the Magistrate/court can exercise discretionary power u/s 319 of the Code when the evidence collected should indicate substantive sufficient evidence and a reasonable prospect of conviction of a person to be summoned, nor merely on suspicion. So the quality and quantity of evidence is important factor for exercising power u/s 319 of the Code and the court has warned that on mere suspicion a person cannot be summoned. The exercise of discretion should be based on material evidence and should not be acted in an arbitrary manner merely because some person has named which

will not give discretion to the Magistrate/court to summon a person u/s 319 of the Code.

23. In the present case, the Magistrate had issued summons u/s 319 of the Code calling upon the person to appear and face trial but the Magistrate while exercising power has not discussed as to whether the material evidence which has been collected during the trial would indicate a reasonable prospect of conviction of a person to be summoned. The Magistrate has not discussed evidence on the basis of which he wanted to exercise his discretion which has been conferred u/s 319 of the Code. This Court would have quashed the order and would have remitted the matter for fresh consideration, but in the present case, the petitioners have filed a Criminal Revision Application, vide Cr. Rev. No. 151 of 2010 and the learned Sessions Court examined the evidence brought during the trial and on consideration of same affirmed the order of the Magistrate. Now it is better to examine as to whether the order passed by the Sessions Judge could be sustained or not. While passing the order, the learned Sessions Judge has considered the evidence of P. Ws. 1, 2 and 3 and after due consideration he has come to a conclusion that there was evidence before the learned Magistrate sufficient to issue summons to petitioner in connection with the alleged offence and they should be tried together alongwith other accused persons and affirmed the view of the learned Magistrate.

24. On request, learned counsel for the petitioners supplied the copies of deposition of witnesses to assess as to whether the Magistrate or the Sessions Court has rightly exercised the power u/s 319 of the Code or not. It appears from Para 1 of the deposition of P.W. 1 Md. Afroz Alam that he has named these petitioners and has also narrated the acts committed by them. Similarly, P.W. 2 Md. Fedaur Rahman has also named the petitioners in Para-2 of his deposition. Similarly, P.W. 3 Md. Zeaur Rahman in Para 1 of his deposition has also named the accused petitioners and active role played by these petitioners while perpetrating the offence.

25. Looking to the aforesaid evidence, the witnesses named the petitioners and the role that has been played by them in commission of the crime, this Court should not mechanically interfere with the order of the learned Magistrate as well as the order of the Sessions Judge. When this Court itself has perused the evidence furnished by the learned counsel for the petitioners, it cannot be said that the materials were not available before the learned Magistrate as well as before the Sessions Judge while affirming the order and this Court is of the view that there is direct evidence against the petitioners and, as such, it cannot be said that the Magistrate has wrongly exercised the power conferred u/s 319 of the Code, as there is sufficient material and reasonable prospect of conviction of the petitioners. In view of the aforesaid facts and circumstances, this petition does not survive and the same is rejected. Any opinion given by this Court is only meant for the purpose of Section 319 of the Code and not otherwise. The Court below will not any way be moved by any observation made in the order.