

(2016) 06 AHC CK 0063
In the Allahabad High Court
Case No : Criminal Revision No. 3790 of 2015.

**Kanhaya Lal Gupta - Revisionist @HASH State of U.P. and another -
Opposite Party**

Date of Decision : 06-06-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 319
Dowry Prohibition Act, 1961 — Section 3, Section 4
Penal Code, 1860 (IPC) — Section 304, Section 498A

Citation : (2016) 97 ACrC 99 : (2016) 11 ADJ 6

Hon'ble Judges : Ravindra Nath Kakkar, J.

Bench : Single Bench

Advocate : Ravindra Nath Rai and Ashok Kumar Rai, Advocates, for the Revisionist; Govt. Advocate, for the Opposite Party

Final Decision : Dismissed

Judgement

Ravindra Nath Kakkar, J. - This criminal revision has been preferred against the judgment and order dated 13.7.2015, passed by Additional Sessions Judge, 3rd Basti in Session Trial No. 46/15 (State v. Shivaji and others), under Section 498-A, 304B I.P.C. and 3/4 Dowry Prohibition Act, whereby the court below has rejected the application filed against the opposite party no. 2- Jagdish Prasad s/o Sri Ram Adhar for summoning him under Section 319 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "Cr.P.C."), which is under challenge in this revision.

2. Facts, in brief, are that revisionist-applicant's daughter Mamta was married on 18.5.2013 with accused Shivaji Agrahari. Opposite party no. 2-Jagdish Prasad is real elder brother of the deceased father of Shivaji. He along with other co-accused demanded the additional dowry. Opposite party no. 2- Jagdish Prasad was the Mediator of the alleged marriage. Rs. 3 lac & fifty thousand along with a motorcycle was given in the marriage as a dowry, but there was an additional demand of Rs. 5 lacs as dowry. Due to this demand of dowry, his daughter Mamta was physically and mentally tortured. On 20.9.2013. Mamta was burnt by pouring kerosene oil by all these accused persons.

3. An FIR was registered against all the accused persons, namely, Shivaji Agrahari, Om Prakash, Shanti Devi and Jagdish Prasad, but in connivance with the Investigating Officer the charge sheet has not been filed against accused-Jagdish Prasad. The charge sheet was only filed against accused Shivaji, Om Prakash and Shanti Devi. The prosecution has produced Kanhayia Lal and Pawan Kumar Agrahari as witnesses before the court below who had stated in their statement about the involvement of Jagdish Prasad for the demand of dowry. The applicant-revisionist prayed for summoning the accused-Jagdish Prasad along with the other co-accused, against which an objection was filed stating therein that the application for summoning the accused had only been filed for causing delay and harassment of the other accused in the trial.

4. After hearing both the parties learned Additional Sessions Judge, Court No. 3, Basti rejected application no. 27-Kha of Sections 319 Cr.P.C. Being aggrieved, this revision has been preferred.

5. Learned counsel for the revisionist contended that on perusal of the statement of P.W.1 Kanahiya Lal and P.W.2 Pawan Kumar involvement of the opposite party no. 2 Jagdish Prasad is established and learned court below has illegally rejected the application against opposite party no. 2 on the basis of the statement recorded under Section 161 Cr.P.C. by the Investigating Officer. Opposite party no. 2 being head of the family and was retired as a Lekhpal from Revenue Department, he has settled the marriage of Shivaji with the daughter of informant. Subsequently, a demand of Rs.5 lacs was raised and due to the non-fulfilment of the same the deceased was tortured. Jagdish Prasad continuously started torturing the deceased along with the other co-accused due to non-fulfilment of the dowry. Hence, he actively participated in causing burn injuries to the deceased. Being an influential person he succeeded in getting a final report by the Investigating Officer in his favour. The learned court below after examining the evidence of P.W.1 and P.W.2 had illegally rejected the application under Section 319 Cr.P.C. filed in S.T. No. 46 of 2014, under Sections 498A, 304-B and 3/4 Dowry Prohibition Act. Therefore, he prayed that the revision be allowed and the order of the learned trial court be rejected.

6. Learned A.G.A. rebutting the arguments advanced by the learned counsel for the revisionist stated that the trial court has rightly rejected the application filed by the revisionist under Section 319 Cr.P.C. There is no illegality or jurisdictional error in the order impugned. Prima facie, it is established by the testimony of P.W.1 and P.W.2 that the accused Jagdish Prasad is living separately with the other co-accused and during investigation husband, brother-in-law (devar) and mother-in-law of the deceased found to be involved in the offence against whom charge sheet has been filed. The learned court below has clearly given a finding that opposite party no. 2 Jagdish Prasad is a retired Lekhpal and he is living separately along with his nine children. As a family member being the elder brother of the deceased father of Shivaji, he was mediator of the alleged marriage and played the role of in-laws. There was a dying declaration of the

deceased which does not support the presence and involvement of the accused Jagdish Prasad, therefore, the court below has rightly rejected the application of the revisionist-applicant. The revision is without merit and is liable to be dismissed.

7. I have considered the submissions raised by both the parties and have gone through the records.

Section 319 Cr.P.C. is as follows :-

"319 Cr.P.C. - Power to proceed against other persons 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 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."

8. It is an established preposition of law that the trial court will take certain steps to all such persons who is an accused only on the basis of evidence adduced before it and not on the basis of the material available in the charge sheet or case diary because of the fact that such material contained in a charge sheet or the case diary do not constitute evidence. The Apex Court in the case of Hardeep Singh and others v. State of Punjab and others, (2014) 3 SCC Page 92 made the following observations :-

87. In Pyare Lal Bhargava v. The State of Rajasthan, AIR 1963 SC 1094, a four-Judge Bench of this Court was concerned with the meaning of the word "appear". The court held that the appropriate meaning of the word "appears" is "seems". It imports a lesser degree of probability than proof. In Ram Singh and ors. v. Ram Niwas and anr., (2009) 14 SCC 25, a two-Judge Bench of this Court was again required to examine the importance of the word "appear" as appearing in the Section. The Court held that for the fulfilment of the condition that it appears to

the court that a person had committed an offence, the court must satisfy itself about the existence of an exceptional circumstance enabling it to exercise an extraordinary jurisdiction. What is, therefore, necessary for the court is to arrive at a satisfaction that the evidence adduced on behalf of the prosecution, if un-rebutted, may lead to conviction of the persons sought to be added as an accused in the case.

88. At the time of taking cognizance, the court has to see whether a prima facie case is made out to proceed against the accused. Under Section 319 Cr.P.C., though the test of prima facie case is the same, the degree of satisfaction that is required is much stricter. A two-Judge Bench of this Court in *Vikas v. State of Rajasthan*, 2013 (11) SCALE 23, held that on the objective satisfaction of the court a person may be "arrested" or "summoned", as the circumstances of the case may require, if it appears from the evidence that any such person not being the accused has committed an offence for which such person could be tried together with the already arraigned accused persons.

9. In *Hardeep Singh* (supra), the Hon''ble Apex Court has elaborately explained the scope and extent of the powers of the courts under the criminal justice system to arraign any person as an accused during the course of inquiry or trial as contemplated under Section 319 of Cr.P.C.

10. The Hon''ble Apex Court has also held that apart from evidence recorded during trial, any material that has been received by the court after cognizance is taken and before the trial commences, can be utilised only for corroboration and to support the evidence recorded by the court to invoke the power under Section 319 Cr.P.C. The "evidence" is thus, limited to the evidence recorded during trial.

11. Regarding the degree of satisfaction required for invoking the power under Section 319 Cr.P.C. the Hon''ble Apex Court observed that the word "appear" means "clear to the comprehension", or a phrase near to, if not synonymous with "proved". It imparts a lesser degree of probability than proof.

12. What is, therefore, necessary for the court is to arrive at a satisfaction that the evidence adduced on behalf of the prosecution, if un-rebutted, may lead to conviction of the persons sought to be added as an accused in the case. In *Rajendra Singh v. State of U.P. and another*, AIR 2007 SC 2786, the Hon''ble Apex Court observed as follows:-

"Be it noted, the court need not be satisfied that he has committed an offence. It need only appear to it that he has committed an offence. In other words, from the evidence it need only appear to it that someone else has committed an offence, to exercise jurisdiction under Section 319 of the Code. Even then, it has a discretion not to proceed, since the expression used is "may" and not "shall". The legislature apparently wanted to leave that discretion to the trial court so as to enable it to exercise its jurisdiction under this section. The expression "appears" indicates an application of mind by the court to the evidence that has come before it and then taking a decision to proceed under Section 319 of the

Code or not."

13. In *Sarabjit Singh and another v. State of Punjab and another.*, AIR 2009 SC 2792, while explaining the scope of Section 319 Cr.P.C., the Hon'ble Apex Court observed as under :-

".....For the aforementioned purpose, the courts are required to apply stringent tests; one of the tests being whether evidence on record is such which would reasonably lead to conviction of the person sought to be summoned Whereas the test of prima facie case may be sufficient for taking cognizance of an offence at the stage of framing of charge, the court must be satisfied that there exists a strong suspicion. While framing charge in terms of Section 227 of the Code, the court must consider the entire materials on record to form an opinion that the evidence if un-rebutted would lead to a judgment of conviction. Whether a higher standard be set up for the purpose of invoking the jurisdiction under Section 319 of the Code is the question. The answer to these questions should be rendered in the affirmative. Unless a higher standard for the purpose of forming an opinion to summon a person as an additional accused is laid down, the ingredients thereof. viz. (i) an extraordinary case, and (ii) a case for sparingly (sic sparing) exercise of jurisdiction, would not be satisfied."

(Emphasis added)."

14. Power under Section 319 Cr.P.C. is a discretionary and an extraordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

15. In the light of the above legal position, I have considered the contentions raised by both the parties and also perused the record.

16. It is an admitted fact that the first information report is lodged against four persons, namely, Shivaji, Om Prakash, Shanti Devi and Jagdish Prasad under Sections 498-A, 304-B IPC and 3/4 Dowry Prohibition Act. Amongst the accused persons, Shivaji is the husband of the deceased and Om Prakash is the brother-in-law (devar), Shanti Devi is the mother-in-law of the deceased and Jagdish Prasad is elder brother of the deceased father of husband-Shivaji. It is also an admitted fact that after completion of the investigation charge sheet has been filed only against the named accused Shivaji (husband) Om Prakash (devar), Shanti Devi (mother-in-law) on the basis of collection of evidence/material under Section 161 Cr.P.C., excluding the name of Jagdish Prasad. It is also an admitted fact that during investigation, dying declaration of the deceased Mamta was recorded and before recording the dying declaration the doctor had certified the fit state of mind of the deceased. It is also an admitted fact that the named accused Jagdish Prasad is the real elder brother of the deceased father of the

husband Shivaji and he has played an active role of Samadhi/in-laws (mediator) from the side of the husband.

17. Admittedly, the death of the deceased was an unnatural death and was within seven years of marriage. As per the prosecution story, the death was caused due to the demand of additional dowry of Rs. 5 lakh and a motorcycle by all the four accused persons whose names are mentioned in the First Information Report and due to non-fulfilment of the alleged demand, deceased Mamta was set on fire by pouring kerosene oil on her body and all the accused persons played active role in causing death of deceased Mamta.

18. I have perused the records and given thoughtful consideration on the evidence of PW-1 Kanhaiya Lal and PW-2 Pawan Kumar whose statements were recorded before the trial court. PW-1 Kanhaiya Lal is the father of the deceased Mamta, who is the complainant of the case and has lodged the First Information Report. PW-2 Pawan Kumar is the real nephew of PW-1 Kanhaiya Lal. From a perusal of the evidence/oral testimony of PW-1 and PW-2 it transpires that accused Jagdish Prasad is living separately in a house along with his family members in village Madahi, whereas the incident took place in a town of Mahrajganj and distance between the two places is about 10 kms. In this regard it is important to mention that PW-1 Kanhaiya Lal who is the author of the FIR and complainant of the case and also the father of the deceased mentioned two addresses of accused Jagdish Prasad, i.e., Madahi and Mahrajganj and stated that at the time of the incident, accused Jagdish Prasad resided at the place of the occurrence which under the facts and circumstances of the case does not inspire confidence of the Court and on this point there is a statement that at the time of the incident, accused Jagdish Prasad was also present at the scene of the occurrence and played active role by pouring kerosene oil on the body of deceased Mamta and set her on fire is not believable. Moreso, from any angle of the case Jagdish Prasad being member of a separate family and being elder brother of the deceased father of the husband cannot be a beneficiary of the additional dowry. It is also stated that the dying-declaration recorded prior to the death of the deceased does not show the presence or involvement of accused Jagdish at the time of the incident or at the place of the occurrence. Since the dying declaration does not establish the presence or involvement of accused Jagdish, factum of separate living of accused Jagdish is proved. So far as the involvement of accused Jagdish in commission of the alleged offence is concerned, he is not the beneficiary of the additional dowry. Hence, the statements of PW-1 and PW-2 recorded during the trial is neither cogent nor credible or trustworthy on this point.

19. Keeping all the facts and circumstances as stated above, the legal proposition as above mentioned, there is no merit in the arguments raised by the learned counsel for the revisionist. The impugned order does not suffer from any infirmity or perversity hence does not require any interference.

20. Accordingly, the impugned order rejecting the application of the revisionist

under Section 319 Cr.P.C. is confirmed and the revision being devoid of merit is dismissed.

Let a certified copy of the judgment be transmitted to the court concerned for compliance.