

(2016) 09 BOM CK 0072

In the Bombay High Court

Case No : Criminal Application No. 1077 of 2016

Kishan Govind Patil

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 21-09-2016

Acts Referred:

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

Citation : (2016) 3 AIRBomRCri 799 : (2016) ALLMRCri 5116 : (2017) 1 BomCR(Cri) 479 : (2016) 6 MhLJCrI 358

Hon'ble Judges : Revati Mohite Dere, J.

Bench : Single Bench

Advocate : Mr. S.K. Shinde, P.P. with Ms. P.P. Shinde, A.P.P, for the Respondent No. 1/State; Mr. S.V. Marwadi with Ms. Mallika Ajay Ingale, Advocates, for the Applicants

Final Decision : Disposed Off

Judgement

Revati Mohite Dere, J. - Heard learned Counsel for the applicants and the learned P.P. for the respondent No. 1-State.

2. By this application, the applicants have impugned the order dated 2nd August, 2016 passed by the learned Sessions Judge, Vasai, by which, an application (Exhibit 53) preferred by the prosecution under Section 319 Cr. P. C. came to be allowed and the applicants came to be arraigned as accused in Sessions Case No. 31 of 2007.

3. Mr. Marwadi, learned Counsel for the applicants has impugned the aforesaid order essentially on three counts-

(1) - that the basic requirement of Section 319 Cr. P.C. is that if 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. He submitted that

the case had abated against some of the accused who were charge-sheeted and one accused was acquitted and hence, the basic and essential requirement of Section 319, that there has to be other accused with whom the applicants could be tried with, is not fulfilled;

(2) - that since the applicants (accused) were discharged from the said case under Section 169 of the Cr. P. C, Section 319 could not be directly invoked. According to the learned Counsel an inquiry under Section 300(5) r/w Section 398 Cr.P.C was necessary, in view of the Constitution Bench judgment rendered in the case of Hardeep Singh v. State of Punjab and Ors. (2014) 3 SCC 92 : (AIR 2014 SC 1400) ;

(3) - the procedure which will now have to be adopted, is that the prosecution will have to file a charge-sheet again in the Court of the Magistrate, after which, the Magistrate will commit the case to the Court of Sessions.

4. Mr. Shinde, the learned Public Prosecutor for the State of Maharashtra opposed the application. He submitted that the submission advanced by the learned Counsel for the applicants is contrary to the law and the judgments of the Apex Court. He submitted that the words "could be tried together" under Section 319(1) are only directory and not mandatory. He relied on the judgment of the Apex Court in the case of Shashikant Singh v. Tarkeshwar Singh and Anr., AIR 2002 SC 2031 in support of his submission. According to Mr. Shinde, no inquiry is required to be conducted/directed, inasmuch as, the applicants have been discharged under Section 169 of the Cr.P.C. and not under Section 227 of the Cr.P.C. He submitted that there is a distinction between the two and that the judgment rendered by the Constitution Bench in the case of Hardeep Singh v. State of Punjab and Ors. (supra) clearly shows the distinction between the two. Mr. Shinde further submitted that as far as the procedural aspect is concerned, it is well settled that the learned Sessions Judge will have to follow the mandatory provisions of Section 319(4) of Cr.P.C. i.e. there shall be a *denovo* trial. According to Mr. Shinde, no infirmity can be found in the impugned order passed by the learned Sessions Judge.

5. Perused the papers. The case has a chequered history. The respondent No. 2 in the aforesaid application is the original complainant. According to the respondent No. 2 (original complainant), one Buwa Samant was a great social worker and was interested in the welfare of the Adivasis and that his brother Yadav Mhatre (deceased) was working with the said Buwa Samant and that both were working for the welfare of the Adivasis. According to the respondent No. 2 (original complainant), Buwa Samant was shot down on 17th October, 1973 when he was asleep. In the police inquiry, the respondent No. 2's brother, Yadav Mhatre (deceased) had given a statement to the police and disclosed, that he suspected that Govind Patil (now deceased), Baban Gharat and Atmaram Jadhav were responsible for shooting Buwa Samant. He has alleged that from the said day, Govind Patil and his associates were on inimical terms with his brother Yadav Mhatre and as such had started planning his elimination. He has further

alleged that as his brother Yadav Mhatre (deceased) was apprehending danger to his life, he had lodged a complaint with the Vasai Police and had requested the police to provide him with police protection. According to the complainant, on 29th June, 1987, his brother Yadav Mhatre was assaulted by Govind Laxman Patil (deceased), Kisan Govind Patil, Mahadeo Patil, Baban Bhiva Gharat and Kanti Bhaskar Dhumal and others. Pursuant to the incident, respondent No. 2 lodged an FIR as against Govind Patil (deceased), Kisan M. Patil, Mahadeo Patil, Baban Gharat, Kanti Dhumal, Baban Patil, Atmaram Jadhav, Kisan H. Patil, alleging offences punishable under Sections 302, 307, 147, 148 and 149 of the Indian Penal Code and under Section 25 of the Arms Act. Pursuant to the said FIR, the applicants came to be arrested by the police on 29th and 30th June, 1987. After investigation, charge-sheet was filed against four Adivasis (not the applicants) and a report under Section 169 Cr. P. C came to be filed as against the applicants. According to the respondent No. 2, the investigation was motivated and was done with the intention to shield the real accused and that the four Adivasis were falsely implicated, whereas, the real accused (applicants) were not prosecuted. It appears that thereafter, the respondent No. 2 (original complainant) filed a revision application in the Sessions Court against the said order discharging the applicants under Section 169 Cr.P.C. The learned Sessions Judge set-aside the order of discharge and directed the Magistrate to refer the matter for investigation by exercising his powers under Section 156(3) Cr.P.C. It appears that thereafter, these orders were challenged right up to the Apex Court. In the meantime, the trial proceeded as against the four co-accused (not the applicants). According to the respondent No. 2, though he was an eyewitness to the said incident of assault, he was not cited as a witness. The prosecution had examined four witnesses, when the respondent No. 2 (original complainant) moved an application before the learned Sessions Judge stating therein, that he be examined as an eye-witness in the said case, pursuant to which, the respondent No. 2 (original complainant) was examined. The respondent No. 2, in his examination-in-chief, has given in detail how the incident took place and how the applicants were responsible for murdering his brother Yadav Mhatre. According to the respondent No. 2, the arrested accused were innocent and were falsely implicated by the police. On the very day i.e. on 22nd June, 2009, after the said examination-in-chief of the respondent No. 2, the Public Prosecutor preferred an application invoking the powers of the learned Sessions Judge under Section 319 Cr.P.C, to either arrest or summon the applicants. Admittedly, the said application was not decided by the learned Sessions Judge on the said date or immediately thereafter. It appears that on 25th June, 2009, the accused who was arrested and charge-sheeted in the said case, pleaded that he be acquitted from the said case. Accordingly, the learned Sessions Judge vide order dated 29th June, 2009 was pleased to acquit the accused. The learned Sessions Judge while acquitting the original accused vide judgment and order dated 29th June, 2009, was also pleased to pass the following order below Exhibit 53 i.e. the application preferred by the prosecution to issue summons to the applicants, in view of the examination-in-chief of the respondent No. 2:

"Heard. Application is considered in the final judgment and application is rejected."

6. Being aggrieved by the said order rejecting the application being Exhibit 53, the respondent No. 2 (original complainant) preferred a revision application in this Court. This Court (Coram : S. C. Dharmadhikari, J.) vide order dated 2nd April, 2013 heard the respondent No. 2 (original complainant) and the applicants at length. It is pertinent to note, that the respondent No. 2 had not pressed any reliefs against the acquitted accused, as according to him, right from the beginning i.e. from the time of lodging of the FIR, he had disclosed that it was the applicants who were responsible for the death of his brother Yadav Mhatre and that the wrong accused were charge-sheeted, when in fact they were innocent. This Court (Coram : S. C. Dharmadhikari, J.) observed in paras 22 and 23 as under :

"22. It appears that the learned Sessions Judge then disposed of the Sessions Case on the very date, namely, 22nd June, 2009. Virtually in one paragraph, the entire Sessions Case has been disposed of. The learned Sessions Judge despite observing that the Prosecutor had made an application under Section 319 of the Code of Criminal procedure, 1973 to delete the names of the Accused already impleaded and to summon the other persons named in that application as Accused and put them for trial, that application was not posed for hearing. However, the learned Sessions Judge states that prior thereto a report under Section 169 of the Code of Criminal Procedure, 1973 was filed by the prosecution. In such circumstances no useful purpose will be served by summoning the persons now named by the Prosecutor as Accused. He left the matter to be decided by the proper procedure and by the aggrieved Complainant/Applicant before me. Thereafter, in a one page order recording the reasons, the learned Judge acquitted all the Accused. It is very clear from his order that those who have been acquitted from the criminal case were indeed not being named as an Accused before the Investigating Machinery at all. They were involved in the case and implicated falsely was the consistent stand of the Applicant. The real culprits were being shielded although they are named by the prosecution. The criminal case, therefore, could not have been disposed of perfunctorily and hastily and without application of mind, when the allegations are as serious as of causing murder. These are not routine and ordinary criminal cases involving petty offences. The aspect of delay, though material, is not always fatal. The administration of justice can never become a casualty. Even after delay, if real culprits are brought before the Court, thereafter the Courts cannot become a silent spectator and dispose of criminal cases casually and light heartedly. The judgment rendered in this Court, therefore, falls short of the required standards. It has resulted in serious miscarriage of justice. In the Sessions Case where the materials placed before the Court show that the real Accused were not apprehended, arrested and put up for trial, then, the learned Judge should have been cautious and careful in evaluating the material. Even if he was not inclined to convict those who are arraigned as Accused, still he was obliged to consider

the seriousness of the matter. The learned Judge failed to take cognizance and note of the request of the Applicant and the prosecution, that the real culprits are now traced and they named as Accused in the case. They be put up for trial. Without deciding that application in accordance with law and straightway delivering a Judgment of acquittal has, thus, resulted in miscarriage of justice. This is complete mockery of criminal justice delivery system.

23. I would be failing in my duty as a higher Court if I do not interfere with such an acquittal. In revisional powers and equally in exercise of this Court's inherent power, such acquittals can be set aside. No doubt, powers under Section 397, 401 and 482 of the Code of Criminal Procedure, 1973 have to be exercised sparingly and in exceptional circumstances. However, when there is a glaring defect of procedure, manifest error on the point of law and a flagrant miscarriage of justice, then, there is a obligation to step in. If the Sessions Judge has failed to perform his function in duly and properly considering the Prosecution's Application under Section 319 of the Code of Criminal Procedure, 1973, he has overlooked the Applicant's consistent and unretracted testimony and has shut out other vital evidence in a Trial of a murder case, then, I must set right the error and perversity or else there will be failure of justice. I cannot, therefore, accede to Mr. Mundargi's submissions that my jurisdiction is extremely limited and hence I cannot set aside the acquittal."

(emphasis supplied)

7. In view of the aforesaid, the judgment and order dated 29th June, 2009 passed in Sessions Case No. 31 of 2007, came to be quashed and set-aside. Accordingly, the Sessions Case was restored to the file of the competent Judge in the District and Sessions Court, Thane at Vasai. Even the application preferred by the prosecution on 27th June, 2009 invoking the powers of the learned Judge under Section 319 of the Cr.P.C. was also restored to file. This Court directed the learned Judge to whom the criminal case was assigned to take up the application, being Exhibit 53 and after considering the reply of the accused/named persons therein (applicants), pass appropriate orders on the application in accordance with law. Direction was also given to dispose of the said case as expeditiously as possible and within a period of six months from the receipt of the order. It was also clarified that the acquitted accused shall not be arraigned as an accused, as his acquittal was not disputed.

8. The said judgment and order dated 2nd April, 2013 was challenged by the applicants in the Apex Court by way of an SLP. The Apex Court vide order dated 6th January, 2015 passed the following order :

"After arguing the matter at some length, learned counsel for the petitioner seeks leave to withdraw this petition. The special leave petition is dismissed as withdrawn."

9. Accordingly, the learned Sessions Judge, Vasai heard the parties i.e. the prosecution and the applicants, on the application being Exhibit 53 and passed a

detailed order. The operative part of the said reads thus :

"ORDER

1. Application at Exh.53 is allowed.

2. The prosecution is hereby directed to arraign Kisan Govind Patil, Mahadev Govind Patil, Baban Bhiwa Gharat, Kanti Bhaskar Dhumal, Baban Kashinath Patil, Atmaram Mahadeo Jadhav and Kishan Harishchandra Patil as accused in this case. The prosecution is also directed to supply copies of charge sheet to all these added accused."

10. The applicants are aggrieved by the said order dated 2nd August, 2016. The first submission raised by Mr. Marwadi, learned Counsel for the applicants is, that the basic requirement of Section 319 Cr. P.C has not been complied with. He submitted that there are no accused who are now facing trial and that the only accused has also been acquitted and therefore, in the absence of "any other accused", the applicant's cannot be tried. He relied on the judgment of the Apex Court in the case of Hardeep Singh v. State of Punjab and Ors. (supra) and in the case of Michael Machado and Anr. v. Central Bureau of Investigation and Anr., (2000) 3 SCC 262 : (AIR 2000 SC 1127).

11. The said submission of Mr. Marwadi is completely misplaced. It would be apposite to refer to the judgment of the Apex Court in the case of Shashikant Singh v. Tarkeshwar Singh and Anr. (supra), wherein, it was observed that the mandate under Section 319 (1) that newly added accused could be tried together with other accused is directory. It was observed in paras 12 and 13 of the said judgment as under :

"12. The mandate of the law of fresh trial is mandatory whereas the mandate that newly added accused could be tried together the accused directory.

13. On facts, the court could not have intended while concluding the trial against Chandra, Shekhar Singh, to nullify its earlier order directing issue of warrants against respondent No. 1. The construction to be placed on a provision like this has to commend to justice and reason. It has to be reasonable construction to promote the ends of justice. The words "could be" tried together with the accused in Section 319(1) cannot be said to be capable of only one construction. If it was so, approach to be adopted would be different since the intention of the Parliament is to be respected despite the consequences of interpretation. There is, however, a scope for two possible construction. That being the position, a reasonable and common sense approach deserves to be adopted and preferred rather than a construction that would lead to absurd results of respondent No. 1 escaping the trial despite passing of an order against him on Court's satisfaction under Section 319(1) and despite the fact that the proceedings against him have to commence afresh. In this view, the fact that trial against Chandra Shekhar Singh had already concluded is of no consequence insofar as respondent No. 1 is concerned."

12. The question that fell for determination in the case of Shashikant Singh v. Tarkeshwar Singh and Anr. (supra) was specific; "can a person summoned pursuant to an order passed by a court in exercise of power conferred by Section 319 of the Code of Criminal Procedure, 1973 (the Code) be tried for the offence for which he is summoned after the conclusion of the trial wherein such an order of summoning was passed ?" The Apex Court in the said case was required to interpret the words "could be tried together with the accused" in Section 319 Cr. P.C. The Apex Court held that the words "could be tried together with the accused" in Section 319(1) appear to be only directory. "Could be" cannot be held to be "must be". It was further observed that "the provision cannot be interpreted to mean that since the trial in respect of a person who was before the court has concluded with the result that the newly added person cannot be tried together with the accused who was before the Court when order under Section 319(1) was passed, the order would become ineffective and inoperative, nullifying the opinion earlier formed by the Court on the basis of evidence before it that the newly added person appears to have committed the offence resulting in an order for his being brought before the Court". In fact, reliance placed by the learned Counsel for the applicants in the case of Michael Machado and Anr. v. Central Bureau of Investigation and Anr. (supra) has also been dealt with by the Apex Court in the said case of Shashikant Singh v. Tarkeshwar Singh and Anr. (supra), wherein it was observed that the question raised in Shashikant Singh's case was not raised in the case of Michael Machado's case.

13. In the present case, admittedly, the application praying for invoking Section 319 against the applicants was preferred by the prosecution on 22nd June, 2009, after the respondent No. 2 (original complainant) was examined. Admittedly, on the said date the co-accused was facing a prosecution. Merely because the co-accused was acquitted subsequently, is of no consequence. The applicants cannot on the interpretation and construction as urged by them, escape the trial. Thus, there is no merit in the said submission.

14. The second submission of the learned Counsel is that an inquiry ought to be conducted, in light of the Constitution Bench judgment in Hardeep Singh v. State of Punjab and Ors. (supra). He relied on para 109 of the said judgment, which reads thus :

"109. Thus, it is evident that power under Section 319 Cr.P.C. can be exercised against a person not subjected to investigation, or a person placed in the Column 2 of the Charge-Sheet and against whom cognizance had not been taken, or a person who has been discharged. However, concerning a person who has been discharged, no proceedings can be commenced against him directly under Section 319 Cr.P.C. without taking recourse to provisions of Section 300(5) read with Section 398 Cr.P.C."

15. Learned P.P. has rightly submitted that the question of inquiry would arise where an accused has been discharged by a Court of competent jurisdiction. Admittedly, in the present case, the applicants were discharged under Section

169 Cr. P. C. It is pertinent to note, that right from the inception, i.e. from the time the FIR was lodged, the respondent No. 2 has specifically named the applicants. The respondent No. 2 is an eye-witness. Even in his evidence i.e. examination-in-chief, he has named the applicants as the perpetrators of the crime. According to Section 300(5) Cr. P. C., a person discharged under Section 258 Cr. P.C shall not be tried again for the same offence, except with the consent of the Court, by which, he was discharged or any other Court to which the first mentioned Court is subordinate. Section 398 Cr.P.C. provides that the High Court or the Sessions Judge, may direct the Chief Judicial Magistrate by himself or by any of the Magistrate subordinate to him to make an inquiry into the case against any person, who has already been discharged. In the present case, admittedly, the applicants have been discharged under Section 169 Cr. P. C and not by a Court of competent jurisdiction and therefore, the question of inquiry does not arise.

16. As far as the third and the last submission is concerned, with regard to the procedure to be adopted by the learned Sessions Judge, needless to state, that sub-section 4 of Section 319(4) is mandatory and that the learned Sessions Judge will have to comply with the same. It has been observed in the case of Shashikant Singh v. Tarkeshwar Singh and Anr. (supra) and Hardeep Singh v. State of Punjab and Ors. (supra) that subsection (4) of Section 319 is mandatory and that it stipulates a denovo trial in respect of newly added accused, and as such, there will have to be a denovo trial against the applicants.

17. Considering the aforesaid, I do not find any infirmity in the impugned order, passed by the learned Sessions Judge. The learned Sessions Judge has rightly directed the prosecution to supply copies of the charge-sheet to all the accused after arraigning them as accused. No infirmity can be found in the same.

18. It is indeed unfortunate that the said case is pending for more than 30 years. It appears that in fact some of the accused have in the interregnum also expired. Despite the directions in Criminal Revision Application passed by this Court vide order dated 2nd April, 2013 directing the Sessions Judge to dispose of the application and the case within six months of the receipt of the said order, the impugned order was passed only in August, 2016.

19. It would indeed be a travesty of justice, if the trial is delayed any longer. Considering that the incident is of 1987, the trial is expedited. Learned Sessions Judge to decide the case as expeditiously as possible and in any event, within nine months from the date of receipt of this order.

20. Application is disposed of accordingly.

21. Registry to communicate this order to the learned Sessions Judge, Vasai, by fax.

22. All concerned to act on the authenticated copy of this order.