
(2005) 04 JH CK 0014

In the Jharkhand High Court

Case No : Criminal Miscellaneous No. 10675 of 1998 (R)

Ladhu Lakra

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 28-04-2005

Acts Referred:

Arms Act, 1959 — Section 27
Criminal Procedure Code, 1973 (CrPC) — Section 319
Evidence Act, 1872 — Section 3
Penal Code, 1860 (IPC) — Section 148, 149, 302, 307, 323

Citation : (2006) 1 JCR 410

Hon'ble Judges : Hari Shankar Prasad, J

Bench : Single Bench

Advocate : P.P.N. Roy and S.N. Sinha, in Cri. app. No. 851 of 2000 R, for the Appellant; APP, for the Respondent

Final Decision : Allowed

Judgement

Hari Shankar Prasad, J.—Both the applications (Cr. Misc. No. 10675 of 1998 and Cr. Misc. No. 851 of 2000) have arisen out of the same case and are being disposed of by common order.

2. Cr. Misc. No. 10675 of 1998(R) has been filed for quashing the order dated 21.11.1998 passed in Sessions Trial No. 240 of 1995 whereby and where under the learned VIIIth Additional Judicial Commissioner, Ranchi passed order for framing the charge and also framed charge against the petitioner and other accused persons under Sections 302/149/148/307, IPC and 27 of the Arms Act, whereas Cr. Misc. No. 851 of 2000(R) has been filed for quashing the orders dated 5.1.2000 and 2.7.1997 passed in Sessions Trial No. 240 of 1995 whereby and where the petitioner was summoned u/s 319, Cr PC to face trial and by order dated 5.1.2000 prayer to revoke the order dated 2.7.1997 was dismissed and prayer for anticipatory bail moved on behalf of the petitioner was directed to be filed before the learned Judicial Commissioner, Ranchi.

3. Facts leading to filing of Cr. Misc. No. 10675 of 1998(R) are that O.P.No. 2 informant lodged a written report with the Bariatu Police Station stating inter alia therein that he along with his friend namely Anil Kumar Deo was going towards hospital from hostel No. 2 and as soon as he and his friend had reached on the pitch road, he saw some persons running towards them. Anil Kumar Deo from his emergency light and focus towards those persons, the informant saw Ladhu Lakra, this petitioner, Rajesh Toppo, Arun Kumar Singh, all students of final year and Mukesh Kumar, Student of 3rd year. Barnawas Hembram, student of 3rd year and Raushan, student of final year and they tried to surround the informant and his friend Anil Kumar Deo, on which both of them tried to run away but in the meantime, Rajesh Toppo shot fire at him but could not cause any injury. Thereafter, Barnawas Hembram and Raushan assaulted the informant on his chest due to which, he fell down at that place, but any how he managed to run away. Thereafter, all of them surrounded Anil Kumar Deo caused injuries by explosive and fire-arms and knives. On seeing this occurrence, the informant fled towards girls hostel to save his life and he hid himself at the place in the dark. The police came at the place after hearing sound of explosion of bomb, thereafter the informant and others came out and saw his friend Anil Kumar Deo lying in drain in pool of blood and he was dead. Thereafter, the informant made report to the office-in-charge, Bariatu Police Station for taking necessary action. On the basis of that report, Bariatu P.S. Case No. 62 of 1994 was registered and police after investigation submitted final form in this case against this petitioner and some other persons and police had submitted charge sheet against two persons namely, Barnawas Hembram and Raushan Khalkho under Sections 302/307/323/34 of the Indian Penal Code. The learned Chief Judicial Magistrate accepted the final form against this petitioner but took cognizance against those persons against whom charge-sheet had been submitted. The learned Chief Judicial Magistrate after taking cognizance committed the case to the Court of Sessions for trial. When the case was pending for trial after commitment, a petition was filed on behalf of the prosecution u/s 319, Cr PC to summon this petitioner as well as other accused persons to face trial in this case and the Court vide order dated 2.7.1997 allowed the petition filed by the prosecution and issued summon against the petitioner and other accused persons for appearance and to face trial.

4. Mukesh Kumar, petitioner of Cr. Misc. No. 851 of 2000 (R) has challenged the order dated 2.7.1997 before the Court vide Cr. Misc. No. 5072 of 1997 (R) but this Court vide order dated 20.8.1997 dismissed the petition filed by the petitioners of both the cases. On 10.11.1998 hearing on charge was fixed but hearing on charge was made on 21.11.1998 and prayer for discharge was rejected and charges were framed under Sections 302/149/148/307 of the Indian Penal Code and Section 27 of the Arms Act against the accused persons including this petitioner.

5. The only contention of the learned Counsel for the petitioners of both the cases are that when charge-sheet was not submitted against the petitioners and

final form was submitted and final form was accepted by the learned Chief Judicial Magistrate and thereafter commitment of the case was made to the Court of Sessions where the Sessions case No. 240 of 1995 was pending for trial and during the pendency of the aforesaid sessions case, a petition was filed u/s 319, Cr PC by the prosecution and the learned Court below without entering into evidence and without any materials on record, came to a finding that there is sufficient material to summon the petitioners and summoned them. It was also pointed out that the learned Sessions Judge committed illegality and irregularity in view of the fact that not a single witness has been examined by them and simply on a petition of the Public Prosecutor, passed order u/s 319, Cr PC summoning the petitioners as accused, was not justified, whereas learned Sessions Judge should have entered into evidence available on the record and also evidence of some witnesses should have been recorded and if some evidence would have come against these petitioners, the learned Sessions Judge should have then summoned them, but before any evidence as per Section 3 of the Indian Evidence Act came on record, merely on the basis of case diary he has summoned petitioners and on the basis of the same case diary, the learned Chief Judicial Magistrate did not take cognizance against these petitioners and took cognizance against those persons against whom charge-sheet was submitted and did not commit these petitioners to face trial in the Court of Sessions. It is further pointed out that it is well settled principle of law and this principle has been set at rest by various judgment of the Apex Court that power u/s 319, Cr PC should be exercised only when trial starts and evidence comes against the persons other than those who are not facing trial, then only they can be summoned. But here in the instant case, without having any evidence in course of trial, the learned Sessions Judge has invoked provisions of Section 319, Cr PC without any basis and that order is fit to be quashed.

6. It was also pointed out that no doubt, the petitioners had come to this Court in Cr. Misc. No. 5072 of 1997(R) and that was dismissed without any liberty to the petitioners to come again and to raise points before the learned Court below, but that dismissal will not operate as a bar for coming to this Court again because law is flexible one and it changes from time to time. By recent judgment of the Apex Court, position on this point has been made clear that unless and until evidence comes against the persons who were not facing trial or against whom final form has been submitted, the person concerned cannot be summoned u/s 319, Cr PC and if some evidence in course of trial comes against such persons, only then Court can exercise its power u/s 319, Cr PC and summon them.

7. It was further submitted that dismissal of earlier petition on same facts will not operate as bar to subsequent petition. In this connection, reliance was placed upon Kashi Ram Dhandania Vs. Union of India (UOI), wherein it has been held that dismissal of earlier petition on same facts for quashing proceeding cannot operate as a bar to the subsequent petition and in this connection my attention was drawn to Para 4 which is quoted herein below :

4. Mr. M.P. Pandey, appearing on behalf of the Customs Department has raised a preliminary objection that the petitioner had earlier moved this Court for quashing Criminal Miscellaneous 4160 of 1975 which was dismissed on 7.11.1975, and, therefore, another application on the same fact and with the same prayer is not maintainable. Reliance in this connection has been placed on the case of U.J.S. Chopra Vs. State of Bombay, . Learned Counsel on behalf of the petitioner has placed reliance on Superintendent and Remembrancer of Legal Affairs, West Bengal Vs. Mohan Singh and Others, , where their Lordship's has held that the fact that a similar application for quashing the proceedings on the former occasion was rejected by the High Court is no bar to the quashing of the proceedings at the later stage, and such quashing will not amount to revision or review of the earlier order passed by the High Court. In that case a petition for quashing was filed, which was dismissed, and again another application was filed after two years and no progress was made and the High Court quashed the proceedings, and against that the State of West Bengal moved the Supreme Court, and the application was dismissed, in spite of the fact that the same Court had rejected the application of these petitioners two years earlier. In my opinion, this decision completely supports the contention raised on behalf of the petitioner. Therefore, the preliminary objection raised on behalf of the Customs Department is overruled.

Reliance was also placed upon Superintendent and Remembrancer of Legal Affairs, West Bengal Vs. Mohan Singh and Others, .

8. It was further pointed out that the petitioners have been summoned u/s 319, Cr PC without any evidence having being recorded in any inquiry or trial and such summoning is without jurisdiction. In this connection, reliance has been placed upon 2000 ECC 1095 , and my attention were drawn to Para 11 and 13 which is quoted herein-below :

11. In the present case as will appear from the order taking cognizance of the learned Chief Judicial Magistrate dated 1.10.1991, no cognizance was taken against the present petitioner since as per the charge-sheet he was not sent up for trial. If the informant had any grievance against this order of the learned Chief Judicial Magistrate it was open to him to move the Sessions Judge in revision in exercise of the power u/s 398 of the Code. It appears that this was not done and after necessary commitment the case was listed for hearing before the Additional Sessions Judge. Under this circumstances, the present petitioner could not be summoned u/s 319 of the Code and could not be put on trial since he had already figured as an accused in this case and cognizance of the offence against him was not taken. This has been so held in the case of Sohan Lal, (supra) whose paragraph No. 33 has been reproduced in extenso to show that once a person has been found to have been accused in this case he goes out of the reach of Section 319 of the Code. In the case in which the accused is discharged under the relevant provisions of the Code he gets the protection of law and this order of discharge, of course, can only be made subject to Section

398 of the Code. In any view of the matter, he cannot be summoned u/s 319 of the Code. This, to my mind, settles the matters so far as summoning of the present petitioner u/s 319 of the Code is concerned, inasmuch as at the earlier stage he had figured as an accused in the case.

13. In the present case as will appear from the impugned order the learned Sessions Judge had not recorded the evidence of any prosecution witness and has based the impugned order only on the statements of the witnesses recorded in the case diary as also the contents of the FIR. From the aforesaid decisions, it would become clear that the learned Judge was in the wrong for having based his decision on the aforesaid without recording any evidence in the case. Thus, on this score also the impugned order cannot be sustained.

Reliance was also placed upon *Sohan Lal and others Vs. State of Rajasthan*, . Reliance was also placed upon *Ranjit Singh Vs. State of Punjab*, , wherein it has been held that power of Court of Session to array a new person or persons as accused u/s 319, Cr PC cannot be invoked prior to evidence.

8-A. On the other hand, learned APP for the State submitted that since the petitioners had earlier come vide Cr. Misc. No. 5072 of 1997 (R) and that petition was dismissed, hence in the present facts and circumstances of the case, subsequent petition on the same facts will not lie as the petitioners were not given liberty to renew their prayer and, therefore, the petition should be dismissed.

9. After having considered legal position on the basis of case laws cited on behalf of the petitioners and on going through the facts brought on record, it is abundantly clear that the learned Sessions Judge exercised power u/s 319, Cr PC without there having been any evidence in course of inquiry or trial of the witnesses and has invoked its provisions prior to evidence and, therefore, both the applications are fit to be allowed.

10. In the result, both the applications are allowed and order dated 21.11.1998 passed in Sessions Trial No. 240 of 1995 of Cr. Misc. No. 10675 of 1998(R) and order dated 5.1.2000 and 2.7.1997 passed in Sessions Trial No. 240 of 1995 of Cr. Misc. No. 851 of 2000(R), is hereby quashed.