
(2015) 06 MAD CK 0435

In the Madras High Court

Case No : Criminal R.C. No. 297 of 2015 in M.P. No. 1 of 2015

M. Saminathan and Others

APPELLANT

Vs

State of Tamil Nadu and Others

RESPONDENT

Date of Decision : 18-06-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 319, 319(1)

Citation : (2015) 06 MAD CK 0435

Hon'ble Judges : B. Rajendran, J

Bench : Single Bench

Advocate : V. Lakshmi Narayanan for N. Elayaraja, for the Appellant; V. Arul, Govt. Advocate, Advocates for the Respondent

Final Decision : Allowed

Judgement

B. Rajendran, J—The Criminal Revision has been filed by the petitioner aggrieved by the order dated 03.03.2015 passed by the learned Additional District Sessions Judge, Ariyalur by which the Court below allowed the application filed under Section 319 Cr.P.C. and included the petitioners herein as accused in S.C. No. 73 of 2014 pending on its file.

2. The respondent police registered a case in Crime No. 306 of 2013 against the sole accused K. Karthik based on the complaint given by one Mr. Thirumurugan alleging that the accused, whose father is the owner of the neighbouring land of the defacto complainant, believing that a pipe in his land has been broken by his father, had a wordy quarrel with him about 3 days prior to the incident. Subsequently, on 30.12.2013 when the complainant's father visited his field, the accused met him on the way and beat him with slippers and wooden log. Hence, the complainant along with his father went and questioned him but the accused again bet his father and on his way back to home his father fell unconscious and died. Thus, the complainant's father Ayyothi was caused to death by the accused Karthik. Immediately, a complaint was given by the complainant Thirumurugan and the next day, i.e. 31.12.2013, 161 Statement was also given by the

complainant, in a clear state of mind. Therefore, based on the complaint given by PW1/defacto complainant, a case was registered against the sole accused. After investigation, charge sheet was also filed and it was taken on file as S.C. No. 73 of 2014. During the course of trial, the defacto complainant examined himself as PW1 and during cross examination the defacto complainant deposed that the revision petitioners were also involved in the murder. At this stage, the prosecution has filed a petition under Section 319 of Cr.P.C. to implead the petitioners herein also as accused. The Court below, by the impugned order, allowed the petition filed by the prosecution against which the present Criminal Revision has been filed.

3. The learned counsel appearing for the petitioners would contend that the trial Court has not at all taken into consideration the relevant factors before passing the impugned order. The impugned order is a non-speaking order and there is no discussion as to why the petitioners are sought to be impleaded as accused in the case or what is the material available to implicate them. The learned counsel for the petitioners also contended that the name of the petitioners has not been mentioned in the complaint, FIR, 161 Statement or in the charge sheet. It was further submitted that even in the charge sheet there is neither any mention about the petitioners nor any unknown assailants. Subsequently, after the 2nd petitioner joined police service, he has been included into the case to wreck vengeance on him. Only during the cross examination, the complainant/PW-1 has mentioned about the involvement of the revision petitioners, for the first time. The orders of the Lower Court is liable to be set aside since the same has been passed only on the subsequent testimony of PW-1 and not based on any evidence collected during the trial. In view of the fact that the proposed parties are related to the first accused and that their names have not been mentioned in the 161 statement of PW-1, the Lower Court should not have taken into consideration the depositions of PW-1 during cross examination, about the involvement of the revision petitioners in the case. But, the trial court had simply allowed the petition without assigning any reasons for allowing the petition. In this connection, the learned counsel for the petitioner relied on the judgment of the Hon'ble Supreme Court in (Sarabjit Singh and another v. State of Punjab and another) and also the decision reported in Hardeep Singh Vs. State of Punjab and Others, AIR 2008 SC 7585 : (2009) CLT 247 : (2008) 12 JT 7 : (2009) 16 SCC 785 for the proposition that the Court has to see whether there is prima facie case against the person sought to be summoned or against whom process is sought to be issued. Thus, the power under Section 319 of Cr.P.C. is an extraordinary power which is required to be exercised sparingly and if compelling reasons exist for taking cognizance against persons against whom action has not been taken, the power under Section 319 of Cr.P.C. can be exercised.

4. Mr. V. Arul, learned Government Advocate also vehemently contended that the Hon'ble Supreme Court in a similar case, in respect of allowing a petition filed under Section 319, has stated that when a person whose name has not been included in the FIR, who is not included in the charge sheet and even a person

who has been discharged since there was no evidence, later if an evidence is found for involvement in the crime definitely such person can be included in the case, at any stage. In this case, the other witnesses has not been examined and even during the cross examination of PW-1 itself, since there is a clear mention of the participation of the other two accused, the C.C. is ordered.

5. Heard both sides and perused the materials available on record. By consent of the counsel for both sides, the main Criminal Revision case itself is taken up for final hearing, as the trial is pending before the Lower Court.

6. The learned counsel for the petitioner relied on two decisions of the Honourable Supreme Court, as mentioned supra. In the first decision reported in *Sarabjit Singh and Another Vs. State of Punjab and Another*, AIR 2009 SC 2792 : (2009) CLT 1327 : (2009) CriLJ 3978 : (2009) 8 JT 73 : (2009) 8 SCALE 175 : (2009) 16 SCC 46 : (2009) 8 SCR 762 : (2009) AIRSCW 4236 it has been held as follows:

"21. An order under Section 319 of the Code, therefore, should not be passed only because the first information or one of the witnesses seeks to implicate other person(s). Sufficient and cogent reasons are required to be assigned by the court so as to satisfy the ingredients of the provisions. Mere ipse dixit would not serve the purpose. Such an evidence must be convincing one at least for the purpose of exercise of the extraordinary jurisdiction. For the aforementioned purpose, the courts are required to apply stringent test; one of the tests being whether evidence on record is such which would reasonably lead to conviction of the person sought to be summoned."

7. The order of the Lower Court is passed, based on the evidence of PW-1, who has categorically stated that,

He has also deposed that,

The Lower Court has also stated that the evidence has been given in the court and the requisition also has been given to Court by PW-1. Though the evidence given by PW-1 is to be proved at the time of trial, once an occurrence comes to the knowledge of the court, the court has to consider and order notice and therefore the Court has directed them to be included. But, in this case, in the FIR it is clearly stated by the defacto complainant that,

Even in the 161 statement given by PW-1, on the next day, he had stated the very same lines, as follows :

8. It is pertinent to point out that the complainant is a Graduate. The accused is an Engineer. The second petitioner, now sought to be impleaded is a Police Officer and the other petitioner is stated to be the brother of an Advocate who appeared in this case. Therefore, all the persons involved in this case are closely related to the first accused. While so, the defacto complainant would have stated about their presence atleast and therefore there is a discrepancy. Further, as stated by the Hon"ble Supreme Court in the case of *Hardeep Singh Vs. State of*

Punjab and Others, AIR 2008 SC 7585 : (2009) CLT 247 : (2008) 12 JT 7 : (2009) 16 SCC 785 , as extracted hereunder.

"70. The learned counsel for the, accused, however, referring to Mohd. Shafi submitted that in the said decision, this Court held that the jurisdiction under Section 319 of the Code can be exercised by the court only if the court is satisfied that in all likelihood such person would be convicted. stated:

71. The Court in Mohd. Shafi, (SCC p. 547, para 12)

"12. From the decisions of this Court, as noticed above, it is evident that before a court exercises its discretionary jurisdiction in terms of Section 319 of the Code of Criminal Procedure, it must arrive at the satisfaction that there exists a possibility that the accused so summoned is in all likelihood would be convicted. Such satisfaction can be arrived at inter alia upon completion of the cross-examination of the said witness. For the said purpose, the court concerned may also like to consider other evidence." (emphasis supplied)) (See also Kailash v. State of Rajasthan with respect, the above observations do not appear to be in consonance with the statutory provisions or previous decisions of this Court. We have reproduced Section 319 of the Code in the earlier part of the judgment. A bare reading of sub-section (1) leaves no room of doubt what it requires. It states that for addition of the accused, it must appear to the court from the evidence that any person not being the accused has committed any offence for which such person should be tried along with the other accused.

72. In Joginder Singh a three-Judge Bench of this Court stated: (SCC p. 349, para 6)

"6. A plain reading of Section 319(1), which occurs in Chapter XXIV dealing with general provisions as to inquiries and trials, clearly shows that it applies to all the courts including a Sessions Court and as such a Sessions Court will have the power to add any person, not being the accused before it, but against whom there appears during trial sufficient evidence indicating his involvement in the offence, as an accused and direct him to be tried along with the other accused, ..."

73. In Michael Machado this Court held that the court must have reasonable satisfaction from the evidence led that the other person has committed an offence.

74. In Krishnappa it was observed that such power should be exercised if there are compelling reasons and in Mohd. Shafi this Court has held that such power can be exercised only if the court is satisfied that the accused so summoned is in all likelihood would be convicted. The test formulated in Mohd. Shafi substantially curtails discretionary power of the court conferred by the Code under sub-section (1) of Section 319. Even on this point, therefore, the matter requires fresh consideration."

Further it is submitted by learned counsel for the petitioner that he filed Crl. O.P.

No. 19976 of 2014 seeking for a direction to the first respondent herein to include the names of the revision petitioners herein and also for transfer of the case. But the said Petition was dismissed on 31.07.2014 stating that the investigation is complete and charge sheet has been filed.

9. The question that was referred to larger bench was whether power under Section 319 can be exercised only if the court is satisfied that the accused, if tried, is likely to be convicted. If there is likelihood that the accused, if tried, will be convicted, the court comes to the conclusion that there are evidences to implicate the person based on the cogent evidence available on record. But this aspect has to be necessarily considered by the court in detail. Unfortunately, the court below has not considered this at all. In fact, from the reading of the order itself, it is very clear that the order impugned is a non-speaking order. In any way, the order is a non-speaking order without any reason by which the petitioner is deprived of knowing the basis on which he was implicated as an accused or what is the materials available to subject him to trial in the calendar case. In the absence of the above, the impugned order cannot be sustained. Therefore, in the light of the judgment of the Hon"ble Supreme Court referred to above, the court below has to assign reasons as to what is the material available on record warranting it to implead the petitioner as an accused.

10. Here is a case, where the defacto complainant, at the stage of cross examination only had casually pointed out that the revision petitioners are also involved in the case. But at the earlier point of time, during complaint or while recording 161 statement has not made any mention about the involvement of the revision petitioners.

11. In the result, the Criminal Revision Case is allowed. The order dated 03.03.2015 passed in Cr. M.P. No. 96 of 2014 in S.C. No. 73 of 2014 by the Additional District Sessions Judge, Ariyalur is set aside. The court below is directed to proceed with the trial without being influenced by any of the observations made in this revision and to independently arrive at a conclusion, as this case has been dealt only with regard to the fact whether the revision petitioners can be included as accused at this stage. Consequently, connected MP No. 1 of 2015 is closed.