
(1998) 07 AHC CK 0100
In the Allahabad High Court
Case No : Criminal Revision No. 245 of 1998

Maresh Chandra Misra and Others	Vs	APPELLANT
State of U.P. and Others		RESPONDENT

Date of Decision : 13-07-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 164, 193, 209, 319
Penal Code, 1860 (IPC) — Section 147, 148, 149, 182, 211

Citation : (1999) CriLJ 315

Hon'ble Judges : O.P. Jain, J

Bench : Single Bench

Advocate : A.B.L. Gaur, for the Appellant; S.C., Dileep Kumar and Rajiv Gupta, for the Respondent

Final Decision : Allowed

Judgement

O.P. Jain, J.—This revision is directed against order dated 2nd February, 1998 passed by Sessions Judge, Mainpuri by which process has been issued against the revisionists on the application filed by the prosecution u/s 319, Cr.P.C.

2. The facts of the case are somewhat unusual. According to F.I.R. (Annexure-1) lodged by complainant Ashok Kumar Dixit, opposite party No. 2, he had to go to ease himself at 1.00 a.m. in the night intervening 10th/11th April, 1992. He found that as usual truck No. U.P.-77/9264 belonging to his brother, Indresh Kumar Dixit, was parked nearby. His brother Indresh Kumar Dixit and the driver of the truck, Alok Kumar Dixit, were sleeping on the roof of the cabin of the truck. Suddenly driver Alok Kumar Dixit started the truck and switched on the head lights of the truck. As soon as he did so, six persons namely Mahesh Chandra, Ganesh Chandra, Ajay Kumar, Kamlesh Kumar, Yogesh Kumar and Jayant Kumar (revisionists) together with three unknown persons boarded the truck and the driver, Alok Kumar Dixit, took the truck towards Bewar. Complainant's brother Indresh was raising an alarm from the roof of the cabin of the truck. It is the further case of complainant Ashok Kumar Dixit, O.P. No. 2,

that he immediately went home and with the help of his brothers, Ratnesh and Pawanesh, followed the truck on a scooter. Near Kushmara town they saw the truck standing and saw the above mentioned persons causing injuries to Indresh by knives and jack-rod of the truck. Ashok Kumar Dixit and his brothers challenged the assailants who fled away and they found their brother, Indresh, lying dead.

3. On the basis of this report a case under Sections 147 148 149 and 302, I.P.C. was registered by the local police. After investigation the police filed a charge-sheet against Alok Kumar Dixit alias Uddo, driver of the truck, and one Satish alias Khunwa who was not named in the F.I.R.

4. Being dissatisfied with the result of the investigation, complainant Ashok Kumar Dixit requested the higher police authorities that the case may be investigated by C.B. C.I.D. and investigation was changed accordingly. C.B. C.I.D. took over the investigation and agreed with the conclusion arrived at by the regular police. C.B. C.I.D. filed a complaint under Sections 182-211, I.P.C. against Ashok Kumar Dixit, Pawanesh Kumar Dixit and Ratnesh Kumar Dixit on the ground that they falsely implicated the revisionists in the F.I.R. A copy of the complaint under Sections 182-211, I.P.C. is Annexure II to the affidavit filed in support of the revision petition.

5. During the course of the investigation, the police got recorded the statements of Smt. Nirmala Dixit who is widow of Indresh Dixit. The police also got recorded the statement of Sonu, son of the deceased. These statements were recorded by a Magistrate on oath u/s 164, Cr. P. C. Copies of the statements are Annexures III and IV to the affidavit. The substance of the statements given by Smt. Nirmala Devi and Sonu is that Indresh Kumar Dixit was employed in the Army from where he took voluntary retirement and purchased Truck No. U.P.-77/9264. On the date of the incident Ratnesh Kumar Dixit had gone with driver Alok Kumar Dixit and cleaner of the truck Khunwa (alias Satish) to bring Sonu from a nearby village. Indresh Kumar and Sonu were sleeping in the truck. Alok Kumar and Khunwa requested Smt. Nirmala Dixit to permit them to sleep in the house but she refused and therefore they were annoyed and went away. Smt. Nirmala went to the truck and asked her husband and son to sleep in the house. Her son accompanied her to the house but her husband insisted on sleeping in the truck. While she was coming to her house along with Sonu, driver Alok Kumar Dixit and cleaner Khunwa came near the truck and after starting it took it towards Bewar. She went to police Kushmara and sent a wireless message to Bewar. Another truck happened to come from the side of Bewar and on enquiry by the police the driver of that truck told the police that a truck is standing near Ishan river and a person in the truck is crying. Another truck happened to come from Bewar side and on enquiry the driver of that truck told the police and Smt. Nirmala that the truck is standing towards Bewar and a person is lying dead near the truck. The driver of that truck also told Smt. Nirmala and the police that he saw two persons running away towards village Kundi.

6. Smt. Nirmala in her statement (Annexure-III) u/s 164, Cr. P. C. further stated that her husband has been got murdered at the instigation of Alok Kumar Dixit, Pawanesh Kumar Dixit and Ratnesh Kumar Dixit and that the murder has been committed by the driver of the truck Alok Kumar Dixit and Cleaner Khunwa. She further stated that Ashok Kumar Dixit had accidentally killed her 12 years old daughter Beena by gun shot and had implicated some Thakurs of the village. Her husband Indresh Kumar Dixit told Ashok Kumar, Ratnesh Kumar and Pawanesh that he will divulge the true facts to the police and therefore Ashok Kumar Dixit, Ratnesh Kumar Dixit and Pawanesh Kumar Dixit, who are brothers of deceased Indresh Kumar Dixit, were inimical towards Indresh. Smt. Nirmala further stated that on the day of the incident Ratnesh, Pawanesh and Ashok Kumar objected to the truck being parked there but her husband asserted his right to do so and there was a quarrel between her husband on one hand and his three brothers on the other hand. Her husband was beaten by his three brothers and he threatened his three brothers that he will tell the police about the killing of his daughter Beena. Ashok Kumar, Pawanesh Kumar and Ratnesh became apprehensive and got her husband murdered by Alok Kumar Dixit and Khunwa and falsely implicated Mahesh, Jayant, Ganesh etc.

7. Accused Ashok Kumar Dixit and accused Satish alias Khunwa were committed to the Court of Session. On 2nd February, 1998 when the statement of Ashok Kumar Dixit was being recorded, the Public Prosecutor moved an application u/s 319, Cr. P. C. and prayed that six more persons named by Ashok Kumar Dixit may be summoned as accused u/s 319, Cr. P. C. Admittedly, by the time the application was filed and the impugned order dated 2nd February, 1998 was passed, the statement of Ashok Kumar Dixit was not completed and the impugned order issuing process against the six revisionists was passed on the basis of the examination-in-chief of the complainant Ashok Kumar Dixit.

8. While admitting the revision of 24th February, 1998 this Court fixed 6th April, 1998 for hearing. Parcha was filed on behalf of the opposite party No. 2 Ashok Kumar Dixit on 2-5-98 but no counter was filed. Arguments were heard on 25-5-98. Sri A.B.L. Gaur learned counsel for the revisionists, Sri Rajeev Gupta learned counsel for the opposite party No. 2 and A.G.A. for the State have been heard.

9. It is argued by the learned counsel for the revisionists that the present six revisionists were named in the F.I.R. but the police had submitted a final report so far as the revisionists are concerned. Therefore, it is argued, in view of Sohan Lal and others Vs. State of Rajasthan, the cognizance is bad in law. In my opinion this contention is not correct because in Sohan Lal's case (supra) the accused had been discharged by the Court. In the instant case the revisionists have not been charge-sheeted by the police but there is no order of discharge by any Court. Therefore, Sohan Lal's case (supra) is not applicable.

10. The next contention on behalf of the revisionists is that the order issuing process has been passed on the basis of examination-in-chief of Ashok Kumar

and therefore it cannot be said that there was any "evidence" before the Court within the meaning of Section 319, Cr. P. C. It is argued that the statement is not complete without cross-examination. In support of this contention learned counsel for the revisionists has cited *Brijpal Singh v. State of U.P.* 1996 ACC 34, in which a learned single Judge of this Court has held that the Court should wait till cross-examination of the witness is completed. The order passed by the Court below u/s 319, Cr. P. C. on the basis of examination-in-chief alone was quashed. Similar view has been taken by another single Bench of this Court in the case of *Surendra Sharma v. State of U.P.* XXIII1996 ACC 51. In *Bhagwan Singh v. State of U.P.* 1996 ACC 605 : 1996 All LJ 931 the same view has been reiterated. Therefore, the second contention on behalf of the revisionists is correct that an order u/s 319, Cr. P. C. summoning the accused cannot be passed on the basis of examination-in-chief alone.

11. That however does not conclude the matter because the learned counsel for the opposite party No. 2 has rightly pointed out that even if summoning of accused is not justified u/s 319, Cr. P. C., the same may be upheld u/s 193, Cr. P. C. Sri Rajeev Gupta, learned counsel for opposite party No. 2, has cited *Kishun Singh and Others Vs. State of Bihar*, which fully supports his contention. The observation made by the Apex Court in the last paragraph of *Kishun Singh's* case may usefully be reproduced as under at page 783 (of AIR SCW):

For the reasons stated above while we are in agreement with the submission of the learned counsel for the appellants that the stage for the exercise of power u/s 319 of the Code had not reached, inasmuch as, the trial had not commenced and evidence was not led, since the Court of Session had the power u/s 193 of the Code to summon the appellants as their involvement in the commission of the crime prima facie appeared from the record of the case, we see no reason to interfere with the impugned order as it is well-settled that once it is found that the power exists the exercise of power under a wrong provision will not render the order illegal or invalid. We, therefore, dismiss this appeal.

11A. The same view has been reiterated by the Apex Court in the case of *Nisar v. State of U.P.* 1995 SCC (Cri) 306 : AIR 1995 SCW 1493 in which the following observations made in the case of *Kishun Singh and Others Vs. State of Bihar*, have been quoted at page 783 (of AIR SCW):

Thus, on a plain reading of Section 193, as it presently stands, once the case is committed to the Court of Session by a Magistrate under the Code, the restriction placed on the power of the Court of Session to take cognizance of an offence as a Court of original jurisdiction gets lifted. On the Magistrate committing the case u/s 209 to the Court of Session the bar of Section 193 is lifted thereby investing the Court of Session complete and unfettered jurisdiction of the Court of original jurisdiction to take cognizance of the offence which would include the summoning of the person or persons whose complicity in the commission of the crime can prima facie be gathered from the material available on record.

12. The legal position which emerges is that if the order summoning the accused is passed by the Court purporting to do so u/s 319, Cr. P. C. and if it is found that the order cannot be sustained u/s 319, Cr. R C., the Court can still uphold the same u/s 193, Cr. P. C.

13. But there is a clear distinction between what can be done and what should be done. The question which arises in the instant case is whether it was a fit case in which the learned Sessions Judge should have proceeded against six persons, who are revisionists before this Court, on the basis of the un-cross examined statement of a person like opposite party No. 2, Ashok Kumar Dixit.

14. It was found by C.B. C.I.D. that opposite I party No. 2 had falsely implicated these six persons. This was also the conclusion of the regular police and the same was reiterated by C.B. C.I.D. to which the case was entrusted at the instance of opposite party No. 2 himself. Smt. Nirmala wife of the deceased and Sonu son of the deceased have given their statements on oath u/s 164, Cr. R C. that Ashok Kumar, Pawanesh and Ratnesh got the deceased murdered through Alok Kumar Dixit and Khunwa. Ashok Kumar, Pawanesh and Ratnesh are being prosecuted under Sections 182-211, IPC. It is stated in para 17 of the affidavit of Mahesh Chandra Mishra that Ashok Kumar Dixit and his brothers are involved in a number of criminal cases and are history-sheeters. According to the F.I.R. Ashok Kumar felt the urge to answer the call of nature in the dead of night at 1.00 a.m. which is very unusual. His alleged presence at the spot was most unnatural. After investigation by the regular police and C.B. C.I.D. it was found that Ashok Kumar Dixit was not an eye-witness but was the instigator of the crime and yet the Public Prosecutor examined him as his first witness. A perusal of the impugned order shows that the learned Session Judge has passed the order after pursuing the statement of the complainant, the F.I.R. and the statements of the witnesses u/s 161, Cr. P. C. It is significant to note that the order does not say that the Court took into consideration the statements of Nirmala and Sonu recorded u/s 164, Cr. P. C.

15. For the above reasons this Court comes to the conclusion that issuing of process against as many as six persons in a serious case of murder on the basis of uncross-examined statement of a person like Ashok Kumar Dixit was a gross abuse of the discretionary powers under Sections 319-193, Cr. P. C. It appears that some subordinate Courts are under the impression that the complainant simply has to utter a name and that will justify summoning such a person as an accused. This impression is wholly wrong. When some persons are named in the F.I.R. as accused and the investigation officer after investigating does not file a charge-sheet against some of them, he assumes responsibility for his action and the ipse-dixit of the complainant is not sufficient for issuing process against those persons who have been found by the investigating agency as not involved in the crime.

16. In view of the above discussion, this revision is allowed and the impugned order dated 2nd February, 1998 passed by Sessions Judge, Mainpuri in S.T. No.

330 of 1997 State v. Alok Kumar Dixit and Ors. under Sections 147 148 149 and 302, I.P.C. is hereby set aside. The interim order passed by this Court on 24-2-1998 and extended from time to time is vacated and it is ordered that the trial will proceed against Alok Kumar Dixit and Satish alias Khunwa. The trial has already been delayed and the learned Session Judge is directed to expedite the same.