

(2012) 09 AHC CK 0263
In the Allahabad High Court
Case No : Criminal Revision No. 2527 of 2012

Mayank Chaturvedi and Another

APPELLANT

Vs

State of U.P. and Another

RESPONDENT

Date of Decision : 28-09-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 169, 313, 319, 319(1), 319(4)
Penal Code, 1860 (IPC) — Section 201, 302

Citation : (2013) ACR 181 : (2013) 1 ADJ 54

Hon'ble Judges : Manoj Misra, J

Bench : Single Bench

Advocate : Amit Kumar Srivastava and Anil Kumar Srivastava, for the Appellant;
G.S. Srivastav and A.G.A., for the Respondent

Final Decision : Allowed

Judgement

Manoj Misra, J.—I have heard learned counsel for the revisionists; Sri Ganesh Shanker Srivastava for the opposite party No. 2; and the learned A.G.A. for the State. As the relevant material has already been brought on record, with the consent of the counsel for the parties, this revision is being finally disposed of without calling for the record of the Court below. Instant revision application has been filed against the order dated 28.7.2012 passed by the Additional Sessions Judge, Auraiya in Session Trial No. 153 of 2003, whereby, in exercise of power u/s 319 Cr.P.C., the revisionists have been summoned to face trial alongwith other accused persons, under Sections 302 and 201 I.P.C.

2. The facts, as they emerge from the record, are that on 7.9.2001, an information was received at police station Ayana District Auraiya from one Gulshan, the Chowkidar of village Dhanaupur, that he found a dead body in a Well situated on the field of Bare Singh. The dead body was recovered and sent for post mortem examination. Post mortem report, which is Annexure 3 to the affidavit, reveals that it was carried out on 8.9.2001 at about 10:50 a.m. Ante mortem injuries were found on the body of the deceased and, as per the opinion

of the doctor, the death was caused due to shock and haemorrhage as a result of ante mortem injuries. On 10.9.2001, it appears, that the dead body was identified by Ram Mohan Tiwari (the brother of the deceased) and Brijesh Kumar Dubey (the Behnoi of the deceased) to be that of Ram Naresh son of Kailash Narayan. Upon identification of the dead body, statement was given to the police by Brijesh Kumar Dubey that on 4.9.2001 at about 7 p.m., the deceased had left from the house of Brijesh Kumar Dubey with Ram Sewak Kanchi (charge-sheeted), Betan Singh (charge-sheeted), Ram Naresh Gujar (revisionist No. 2) and Mayank Chaturvedi (revisionist No. 1) for striking deal of a rifle, but thereafter he did not return. The matter was investigated and a charge-sheet was laid against Ram Sewak Kanchi and Betan Singh whereas no charge-sheet was filed against the revisionists. Upon committal, Session Trial No. 153 of 2003 proceeded against Ram Sewak Kanchi and Betan Singh. During the course of trial, Brijesh Kumar Dubey (the Behnoi of the deceased) was examined as P.W. 2. P.W. 2 stated that 10-, 15 days before the incident, his brother in law Ram Naresh had acquired a 315 bore rifle. 2-3 days thereafter Ram Sewak Kanchi, Betan Singh, Ram Naresh Gujar and Mayank Chaturvedi had come to his house and had talks with his brother in law with respect to purchase of rifle. It was agreed that they would purchase the rifle for Rs. 70,000/- but left saying that they would return in two to four days. Ultimately, on 4.9.2001 at about 7 p.m., Ram Sewak Kanchi, Betan Singh, Ram Naresh Gujar and Mayank Chaturvedi had come to his house to meet his brother-in-law Ram Naresh (the deceased) in connection with purchase of the rifle. His brother in law left the home at about 7 p.m., on 4.9.2001, with all the four persons for obtaining full sale consideration of the rifle. Thereafter, when his brother-in-law did not return, he contacted the aforesaid persons, with whom he had left, and they reported to him that his brother-in-law was paid the money and had left for home that night itself. Thereafter effort was made to trace him out but to no avail. Ram Naresh had to attend a date at Etawah Kutchehy on 7.9.2001. But he did not attend the Court. On 9.9.2001 he got information that an unidentified body was recovered at village Dhanaupur, then he contacted Ram Mohan, the brother of Ram Naresh. Thereafter he went with Ram Mohan to the police station and the body was identified from the clothes and photograph of the deceased. It has been stated by him that from these circumstances he feels that Ram Sewak Kanchi, Betan Singh, Ram Naresh Gujar and Mayank Chaturvedi were the persons who killed Ram Naresh and threw away his body. On the basis of the testimony of P.W. 2, an application was filed for adding Mayank Chaturvedi and Ram Naresh Gujar as accused u/s 319 Cr.P.C. The Court considered the application and by its order dated 15.12.2004 rejected the application finding insufficient material for drawing proceedings against the said persons. Thereafter, the trial proceeded and several more witnesses were examined. Yet again an application was moved for exercising power, u/s 319 Cr.P.C., to add Mayank Chaturvedi and Ram Naresh Gujar as accused but the said application was dismissed as not pressed and, ultimately, after recording the statements of the witnesses as well as the statement of the accused u/s 313 Cr.P.C., the case was fixed for delivery of

judgment. On the date of delivery of judgment i.e. 28.7.2012, the Additional Sessions Judge, Auraiya instead of delivering the judgment, passed an order stating that when he sat to write the judgment he found that the evidence against Mayank Chaturvedi and Ram Naresh Gujar was sufficient for trying them together with the other accused inasmuch as the evidence on record do, prima facie, disclose their involvement in the crime for offences punishable u/s 302 read with Section 201 IPC.

3. Challenging the order passed by the Court below, the learned counsel for the revisionists submitted that the Court below has exercised its power u/s 319 Cr.P.C. without recording any satisfaction whether the evidence led before it, if left un rebutted, would reasonably lead to conviction of the persons sought to be added as accused. In support of his contention, the learned counsel for the revisionists placed reliance on several judgments i.e. Sarabjit Singh and Another Vs. State of Punjab and Another, ; Ram Singh and Others Vs. Ram Niwas and Another, ; Brindaban Das and Others Vs. State of West Bengal, ; Krishnappa Vs. State of Karnataka, . In addition to above, learned counsel for the revisionists also submitted that power u/s 319 Cr.P.C. ought not be exercised at the conclusion of the trial when several witnesses have already been examined. In support of this contention, reliance was placed on the judgment of Michael Machado and Another Vs. Central Bureau of Investigation and Another, , as also Krishnappa Vs. State of Karnataka, . It was further contended that since it was a case of circumstantial evidence and the entire evidence was already on record, the Court below, before exercising its power, was required to disclose its satisfaction that from the material brought on record, the chain of circumstances were complete which, in all likelihood, would have led to the conviction of the persons sought to be added as accused. It was further contended that the order of the Court below only disclosed that the evidence led against the persons, against whom the trial proceeded, was the same as against the persons proposed to be added as accused, therefore, they should be tried together. It was further contended that the satisfaction of the Court below with respect to only a prima facie case against the revisionists, was not sufficient to exercise the power u/s 319 CrPC particularly when the entire evidence was over and the Court had all the material before it to express its satisfaction with respect to possibility of conviction of the persons sought to be added as accused. It was also contended that since earlier the application for exercise of power u/s 319 CrPC was rejected by the Court below and the quality of evidence since its rejection had not improved, there was no justification to exercise the power, at this stage, when the case was ripe for judgment and that exercise of such power would amount to review, which is prohibited u/s 362 of the Code.

4. Per contra, learned AGA, as well as the counsel for the opposite party No. 2, submitted that since the evidence against the revisionists, as well as those who were charge-sheeted, was the same, therefore, if the Court below was, prima facie, satisfied with regard to the involvement of the revisionists in the crime, from the evidence led before it, the exercise of power, u/s 319 CrPC, cannot be

faulted. Relying on the case of Shashikant Singh Vs. Tarkeshwar Singh and Another, , it was contended that the words "could be tried together with the accused" have been interpreted to be only directory whereas de novo trial, as provided under sub-section (4) of Section 319 CrPC, is mandatory, therefore, exercise of power even at the last stage of the trial is permissible, if justified in law. Accordingly, it was contended that there is no bar to the exercise of power even if the case is ripe for judgment.

5. Having considered the rival submissions made by the learned counsel for the parties as also on perusal of the record, what is clear is that the instant case is a case of circumstantial evidence. In a case of circumstantial evidence, the entire conspectus of the case has to be considered before taking a decision whether the circumstances brought before the Court are such, which would reasonably lead to conviction of the accused. From a perusal of the order dated 28.7.2012, it appears that the Court recorded its satisfaction that the testimony led before it was sufficient for holding trial against the persons sought to be added as accused inasmuch as a prima facie case was made out against them with regard to the commission of the offences punishable under Sections 302 and 201 IPC. When the entire evidence was already there before the Court below, the prima facie satisfaction of the Court below was not enough for the purpose of exercising its power u/s 319 CrPC. The Court below, at this stage, should have taken a conspectus of the entire facts and circumstances and then ought to have recorded its satisfaction that the evidence that has come on record sufficiently establishes that the other person has committed an offence for which he should be tried together.

6. In a recent decision of the Apex Court in the case of Sarojben Ashwinkumar Shah etc. Vs. State of Gujarat and Another, , the Apex Court after taking note of several pronouncements laid guidelines for exercise of power u/s 319 Cr.P.C. These guidelines have been provided in paragraph 16 of its judgment, which reads as follows :

16. The legal position that can be culled out from the material provisions of Section 319 of the Code and the decided cases of this Court is this:

(i) The Court can exercise the power conferred on it u/s 319 of the Code suo motu or on an application by someone.

(ii) The power conferred u/s 319(1) applies to all Courts including the Sessions Court.

(iii) The phrase "any person not being the accused" occurring in Section 319 does not exclude from its operation an accused who has been released by the police u/s 169 of the Code and has been shown in Column 2 of the charge-sheet. In other words, the said expression covers any person who is not being tried already by the Court and would include person or persons who have been dropped by the police during investigation but against whom evidence showing their involvement in the offence comes before the Court.

(iv) The power to proceed against any person, not being the accused before the Court, must be exercised only where there appears during inquiry or trial sufficient evidence indicating his involvement in the offence as an accused and not otherwise. The word "evidence" in Section 319 contemplates the evidence of witnesses given in Court in the inquiry or trial. The Court cannot add persons as accused on the basis of materials available in the charge-sheet or the case diary but must be based on the evidence adduced before it. In other words, the Court must be satisfied that a case for addition of persons as accused, not being the accused before it, has been made out on the additional evidence let in before it.

(v) The power conferred upon the Court is although discretionary but is not to be exercised in a routine manner. In a sense, it is an extraordinary power which should be used very sparingly and only if evidence has come on record which sufficiently establishes that the other person has committed an offence. A mere doubt about involvement of the other person on the basis of the evidence let in before the Court is not enough. The Court must also be satisfied that circumstances justify and warrant that other person be tried with the already arraigned accused.

(vi) The Court while exercising its power u/s 319 of the Code must keep in view full conspectus of the case including the stage at which the trial has proceeded already and the quantum of evidence collected till then.

(vii) Regard must also be had by the Court to the constraints imposed in Section 319 (4) that proceedings in respect of newly-added persons shall be commenced afresh from the beginning of the trial.

(viii) The Court must, therefore, appropriately consider the above aspects and then exercise its judicial discretion.

7. In view of the law noticed above, it becomes clear that the power u/s 319 Cr.P.C. is a discretionary power which can be exercised suo motu or on an application by someone. Even though, the power is discretionary but it is not to be exercised in a routine manner. It is an extraordinary power which should be used sparingly and only if evidence has come on record which sufficiently establishes that the other person has committed an offence. A mere doubt about involvement of the other person on the basis of the evidence let in before the Court is not enough. The Court must also be satisfied that the circumstances justifies and warrant that the other person be tried with the already arraigned accused. While exercising this power, the Court must keep in view full conspectus of the case including the stage at which the trial has proceeded already and the quantum of evidence collected till then.

8. Coming to the facts of the present case, the entire evidence was before the Court below. Accordingly, the Court below was required to take a full conspectus of the case before taking decision to add the revisionists as accused. The case, at hand, is a case of circumstantial evidence. Whether the chain of circumstances brought on record would reasonably lead to conviction of the persons proposed

to be added as accused ought to have been examined by the Court below, before exercising its power u/s 319 Cr.P.C. In the instant case, the Court below did not examine the matter taking a full conspectus of the case, accordingly, I am of the view that the Court below requires to re-examine the matter. However, it is made clear that the contention of the learned counsel for the revisionist that the Court could not have exercised its power after having once rejected the application, u/s 319 CrPC., is unsustainable inasmuch as several other witnesses including the Doctor, who conducted the post mortem, were examined later, therefore, the entire canvas had changed, which may justify exercise of power, even suo motu. For the reasons aforesaid, the revision is liable to be allowed and is, accordingly, allowed. The order dated 28.7.2012 passed by the Additional Sessions Judge, Auraiya in S.T. No. 153 of 2003 is set aside. The Additional Sessions Judge, Auraiya shall reconsider exercise of power u/s 319 Cr.P.C., in the light of the observations made herein above.