

(1994) 08 OHC CK 0009

In the Orissa High Court

Case No : Criminal Revision No. 17 of 1991

Md. Muzaffar Hussain Khan and Another

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 11-08-1994

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 164, 319, 398

Citation : (1994) 78 CLT 1065 : (1995) 1 OLR 242

Hon'ble Judges : A. Pasayat, J

Bench : Single Bench

Advocate : S.S. Swain, for the Appellant; Addl. Standing Counsel and H.S. Misra, (for opp. party Nos. 3, 6, 9 and 10), for the Respondent

Judgement

A. Pasayat, J.—This is an application questioning correctness of order dated 9-10-1990 passed by the learned Additional Sessions Judge, Balangir, holding that the petition dated 6-9-1989 filed by petitioner No. 1 styled as one u/s 319, Code of Criminal Procedure, 1973 (in short, the "Code") to frame charge against some persons, whose name did not appear in charge-sheet was without merit. The said persons are arrayed as opp. party Nos. 2 to 11 in this application. In the application it was stated that in addition to three persons who had been arraigned as accused, role of some others clearly established them to be equally responsible as would be evident from statements of many who were examined by the police during investigation. The learned Additional Sessions Judge rejected the motion holding that the stage for exercising powers u/s 319 of the Code had not come. He, however, observed that if during trial circumstances come to fore to warrant proceeding against others, the same shall be done at the appropriate stage. Nevertheless he referred to statements of persons recorded by the Investigating Officer to conclude that prima facie there was no material to proceed against any other person.

2. Mr Swain, learned counsel appearing for the petitioners submits that though the petition was labelled u/s 319 of the Code, in fact the prayer was to frame

charge against opp. party Nos. 2 to 11 in terms of Section 228 of the Code. Allegations are also levelled against the prosecuting lawyer to the effect that for reasons best known to him, there was opposition to the motion made by the petitioner No. 1. It is his case that in the greater interest of justice, the learned Additional Sessions Judge should not have looked at the label but should have gone into the substance of the petition.

3. Mr. H. S. Misra, learned counsel appearing for some of the opposite parties, submits that the materials on record clearly show the fallacy in the stand of petitioner No. 1 about any role having been played by opp. party Nos. 2 to 11 in the alleged incident. He further raises an objection as to the maintainability of the application at the behest of petitioner No. 2, who was not a co-petitioner with petitioner No. 1, in the application filed on 6-9-1989.

4. Section 319 of the Code aims at bringing into trial all those who are responsible for a crime. During trial if it appears from the evidence that any person not being accused has committed any offence for which he or she can be tried together with the accused, The Court may proceed against such person for the offence which he appears to have committed, Section 319 sets out powers of a Court to proceed against any person not shown or mentioned as accused, if it appears from evidence that such person has committed an offence for which he could be tried together with the main accused against whom an enquiry or trial is being held. It authorises the Court to issue a warrant or summons against such person if he is not attending the Court; and, if he is so attending, to detain such person for the purpose of inquiring into or trial of the offence which he appears to have committed. The proceedings against such person shad be commenced do novo and witnesses are to be re-heard. For exercising power u/s 319, it is sufficient if only prima facie case is made out. The power may be used sue motu or on an application by the prosecution or the accused. Power u/s 319 is really an extraordinary power which is conferred on the Court to do total justice. It should be used with caution and only if compelling reasons exist 1or proceeding against a person against whom action has not been taken. Court is not required to evaluate or appraise evidence as it would amount to pre-judging the issue. "Evidence" as used in Section 319 means evidence recorded during course of inquiry or trial. Statements recorded by police, and interrogation by investigator does not constitute evidence. For the purpose of Section 319, neither statements u/s 161 of the Code recorded by investigator nor those recorded u/s 164 can be treated as evidence.

5. In *Municipal Corporation of Delhi v. Ram Krishan Rohtagi and Ors.* AIR 1983 SC 67, it was pointed out by the apex Court that Section 319 gives ample powers to any Court to take cognizance and add any person not being an accused before it and try him along with other accused. if prosecution can at any stage produce evidence which satisfies the Court that the other accused or those who have not been arraigned as accused against whom proceedings have been quashed have also committed the offence, Court can take cognizance and try them along with

other accused. But being really of an extraordinary nature, snaring use is to be made; and that too for compelling reasons. It is designed to meet specific and limited situation of a Court discovering in the midst of trial or inquiry that some additional accused should also be tried together with persons already before it. The scope of the section is wide enough to include cases instituted on private complaint. Persons who have been discharged u/s 245 of the Code of all or some of the charges are accused and hence cannot be proceeded against u/s 319. Once a person is found to have been accused in the case he goes out of the reach of Section 319 as the crucial words in the said section are "any person not being the accused". Whether he can be dealt with under any other provisions of the Code is a different question in case of an accused who has been discharged under the relevant provisions of the Code, the nature of finality of such order and the resultant protection of the persons discharged subject to revision u/s 398 cannot be lost sight of. Provisions of Section 319 have to be read in consonance with the provisions of Section 398. (See *Sohan Lal and Ors. v. State of Rajasthan* AIR 1990 SC 2168).

6. In the case at hand, the stage of evidence has not come. As rightly pointed out by the learned Additional Sessions Judge if contingency arises for proceeding against any person certainly the Court would take appropriate steps at that time. I make it clear that the observations made by the learned Additional Sessions Judge that there was no prima facie case as against opp party Nos. 2 to 11 shall not weigh while considering desirability of applying Section 319 of the Code. Whether at any stage evidence warrants addition of a party has to be considered by the Court on appreciation of evidence. At an appropriate stage, if circumstances so warrant, it is open to the Court to decide whether some persons other than those who have been tried should be brought to trial.

The application is accordingly disposed of.