

(2021) 04 J&K CK 0035

In the Jammu And Kashmir High Court

Case No : Miscellaneous Criminal Cases (CRMC) No. 110 Of 2019

Mehraj-Ud-Din Khan Alias Raja Khan

APPELLANT

Vs

State Of J&K And Another

RESPONDENT

Date of Decision : 19-04-2021

Acts Referred:

Code Of Criminal Procedure, 1989 — Section 561A
Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 302, 307
Arms Act, 1959 — Section 7, 25
Code Of Criminal Procedure, 1973 — Section 319, 351, 512

Citation : (2021) 04 J&K CK 0035

Hon'ble Judges : Sanjeev Kumar, J

Bench : Single Bench

Advocate : Gulzar Ahmad Bhat, Asifa Padroo

Final Decision : Dismissed

Judgement

1) Impugned in this petition filed by the petitioner under Section 561-A of the J&K Code of Criminal Procedure is an order dated 13th of November, 2015, passed by the Court of learned Additional Sessions Judge, Sopore ("the trial court", for short) in file No.84 titled State vs. Imtiyaz Ahmad Mir and others. In terms of the impugned order, protest petition filed by the respondent No.2 for constituting a Special Investigation Team (SIT) for further investigation of the case has been disposed of and a direction has been issued to add the petitioner herein as an accused in the pending challan.

2) Briefly stated, the facts leading to the filing of this petition are that on 20th of April, 2014, Police Station, Sopore, received an information from reliable sources that some unknown terrorists had barged into the house of one Khazir Mohammad Naikoo and indulged in indiscriminate firing killing one Nazir Ahmad on spot and injuring Shri Shabir Ahmad. On this information, an FIR bearing No.95/2014 under Section 302/307 RPC and 7/25 Arms Act was registered by the police and investigation in the matter set in motion. While the investigation

was going on, the injured Shabir Ahmad also succumbed to his injuries and died. The Investigating Officer recorded the statement of witnesses and on that basis took into custody some suspected persons for interrogation. The accused Imtiyaz Ahmad Mir, who was arrested in FIR No.113/2014, made a confessional statement to the extent that prior to the occurrence he along with accused Aijaz Ahmad had inspected and identified the house of Khazir Mohammad Naikoo, the father of deceased Nazir Ahmad, at the instance of one Shri Muzaffar Ahmad Naikoo. And that, he along with accused Aijaz Ahmad had made said Muzaffar Ahmad Naikoo aware about the situation. His further statement was that he along with Javaid Ahmad Mantoo, Sameer Ahmad Wani and Mehmood Bai proceeded towards the house of Khazir Mohammad Naikoo in a Maruti car along with Sajad Ahmad Malla and cordoned off his house. Three gunmen entered his house and started indiscriminate firing in which Nazir Ahmad Naikoo died on spot and Shabir Ahmad got seriously injured etc. etc.

3) On the basis of disclosure statement made by accused Imtiyaz Ahmad Mir, the vehicle used in the crime was seized. The accused Imtiyaz Ahmad Mir and Aijaz Ahmad were arrested in the FIR on 27th of July, 2014. The accused Sajad Ahmad Malla was also formally arrested in the FIR in question. Muzaffar Ahmad Naikoo and Sameer Ahmad Wani could not be traced and they were proceeded under Section 512 Cr. P. C. The other accused, namely, Mehmood Bai was already killed in an encounter on 22nd June, 2014.

4) The Investigating Officer after completing the requisite formalities presented the challan before the trial court for disposal under law. The trial court, on the basis of material collected during investigation, framed charges against accused Imtiyaz Ahmad Mir, Aijaz Ahmad and Sajjad Ahmad Malla, who pleaded not guilty and claimed to be tried. The prosecution commenced its evidence and examined witness PWs 1 to 5 and PW 8 out of 14 witnesses listed by the prosecution. The statement of Khazir Mohammad Naikoo, the de facto complainant, who figured at serial No.1 in the list of prosecution witnesses, was also recorded by the trial court.

5) While the prosecution witnesses in the case were being examined, Khazir Mohammad Naikoo, the father of deceased Nazir Ahmad Naikoo, filed a protest petition before the trial court seeking a direction to SSP, Baramulla, to constitute a SIT to investigate FIR No.95/2014 so that the actual perpetrators of double murder are brought to book. The protest petition was filed, primarily, on the allegation that one Ghulam Nabi Naikoo, who happens to be the brother of Khazir Mohammad Naikoo ("the protest petitioner" hereinafter), was the person who had actually hatched a conspiracy for committing the murder of entire family of the protest petitioner and with a view to fulfill that object, the respondents named in the protest petition had, in connivance with army officials, STF and local police, raided the house of protest petitioner on 20th of June, 2014. They made forcible entry into the house of protest petitioner and resorted to indiscriminate firing resulting into death of Nazir Ahmad Naikoo and Shabir

Ahmad Naikoo. The protest petitioner also claimed to have identified the petitioner herein whose mask had accidentally fallen. It was also urged that the police shielded the actual perpetrators of the crime and implicated some other persons who were not even remotely connected with the commission of offence. The effort was only to make the double murder case look like a militancy related case. The protest petitioner also claimed to have represented before DIG but with no avail because despite being instructed, the SHO concerned, for unlawful considerations, did not book the real culprits in the double murder case.

6) Having failed to persuade the police to conduct a fair investigation in the matter, the protest petitioner also approached this Court by way of a petition bearing OWP No.576/2015 which was disposed of by this Court vide order dated 15.05.2015 by relegating the protest petitioner to a remedy before trial court and by giving an opportunity to the protest petitioner to re-agitate the matter, if the grievances of the petitioner remained un-redressed. This is how the protest petitioner filed a protest petition before the trial court.

7) The protest petition came to be considered by the trial court and the trial court in the light of Statements of PW (1) Khazir Mohammad Naikoo, the protest petitioner, and PW (2) Mohammad Maqbool Naikoo, came to the conclusion that the complicity of the petitioner herein in the commission of crime registered vide FIR No.95/2014 was established and, therefore, there was hardly any point to direct further investigation in the case. The trial court invoked the powers conferred upon it under Section 351 of Cr. P. C and directed that the petitioner herein be arraigned as an accused in the case after putting him on show cause notice. This was done by the trial court vide its order dated 13th of November, 2015.

8) On being put on notice, the petitioner herein filed his objections to the protest petition and sought recalling of order dated 13th of November, 2015. The trial court, after providing an opportunity of being heard to the petitioner concluded that the petitioner herein had not been able to make out any case for recalling of order dated 13th of November, 2015. The trial court, vide its order dated 15th of October, 2018, formally arraigned the petitioner herein as an accused in the FIR and directed him to appear on the next date of hearing. Both these orders i.e. orders dated 13th of November, 2015 and 15th of October, 2018, are subject matter of challenge in this petition.

9) The impugned orders have been assailed by the petitioner, inter alia, on the following grounds:

(i) That the evidence on record was not sufficient on the basis of which the trial court could have made a prima facie opinion with regard to the complicity of the petitioner with the crime registered under FIR No.95/2014;

(ii) That the trial court erroneously pressed into service the provisions of Section 319 of the Central Code of Criminal Procedure whereas the case was governed by Section 351 of the State Code and under Section 351, it is only a person

attending a Criminal Court who can be detained by the trial court and arraigned as a accused in a pending challan;

(iii) That the petitioner was neither named in the FIR nor any evidence came against him during the course of investigation and, therefore, the statements of PW (1) and PW (2) were an afterthought and motivated. The petitioner was involved in the crime by the aforesaid witnesses because of a land dispute between his brother-in-law, namely, Ghulam Nabi Naikoo, and the protest petitioner.

10) Mr. Gulzar Ahmad, learned counsel appearing for the petitioner has reiterated the aforesaid grounds which he has taken in the petition and submits that the petitioner, who is innocent and is not, in any manner, connected with the crime be let off and the impugned orders set aside.

11) Per contra, Ms. Asifa Padroo, learned Additional Advocate General, has supported the impugned orders. She would argue that even under Section 351 of the State Code of Criminal Procedure, there is enough power vested in the trial court to summon any person and arraign him as an accused if there is sufficient evidence on record to establish his complicity in the crime pending trial.

12) Having heard learned counsel for parties and perused the record, it is necessary to first set out Section 351 of the State Code of Criminal Procedure which was then in force when the impugned orders were passed:

" 351. Detention of offenders attending Court.-

(I) Any person attending a criminal Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of inquiry into or trial of any offence of which such Court can take cognizance and which, from the evidence, may appear to have been committed, and may be proceeded against as though he had been arrested or summoned.

(2) When the detention takes place after a trial has been begun, the proceedings in respect of such person shall be commenced afresh, and the witnesses reheard."

13) From a reading of Section 351(supra), it transpires that the trial court is empowered to detain a person for the purposes of inquiry into or trial of any offence of which such Court can take cognizance and proceed against him as though he had been arrested or summoned provided such person is in attendance in the Court. Sub-section (2) further provides that the proceedings in respect of such person shall be commenced afresh and the witnesses reheard if the arraignment of such person has taken place after the trial has begun.

14) Plain reading of the Section 351 of Cr. P. C suggests that the jurisdiction of the trial court to arraign a person as an accused and proceed against him in the trial is limited only to a person attending the Court but putting a purposeful interpretation of Section 351 and the manner, in which the trial court has

proceeded in the instant case, does make it abundantly clear that if the trial court from the evidence before it is of the view that the complicity of such person in the crime under trial is established, it may summon such person and direct him to show cause as to why he be not impleaded as party/accused in the trial. It is only when such person is in attendance before the trial court and fails to show sufficient cause as to why he could not be arraigned as an accused in the challan pending trial, the trial court can pass an appropriate order directing such person to be arraigned as an accused. The proceedings in respect of such arraigned accused shall, however, be commenced afresh and the witnesses reheard.

15) It is true that Section 351 of the State Code of Criminal Procedure is not in pari materia with Section 319 of the Central Code, which is now applicable to the Union Territory of Jammu and Kashmir after the promulgation of Jammu and Kashmir Reorganization Act, 2019, yet the two meet the same contingencies. Section 319 of the Central Cr. P. C is an improvised version of Section 351 of the State Code. This has happened due to the amendments carried in the Central Code of Criminal Procedure.

16) Be that as it may, I am of the considered view that even under Section 351 of the State Code of Criminal Procedure, the trial court is empowered to summon a person to attend the Court and arraign him as an accused if the evidence led before it in an inquiry or trial is sufficient to connect him with the crime. The test is that the evidence should be sufficient enough to form an opinion with regard to the prima facie involvement of the person sought to be arraigned as an accused with the offences under inquiry or trial. From the statements of prosecution witnesses, PW (1) Khazir Mohammad Naikoo and PW (2) Mohammad Maqbool Naikoo, the involvement of petitioner in the gruesome crime of murder of two youths, namely, Nazir Ahmad Naikoo and Shabir Ahmad, is, prima facie, established. As a matter of fact, there is testimony of PW (4), namely, Mohammad Maqbool Bhat, also indicating the involvement of the petitioner in the crime.

17) The trial court has carefully considered the evidence led before it during trial and concluded that the involvement of the petitioner in the crime was, prima facie, established. It did not pass an order of arraignment of the petitioner as an accused straightway but before doing so, the trial court put the petitioner on show cause notice and gave him adequate opportunity to defend his position. The petitioner filed detailed objections to the protest petition to make out a case for recalling of show cause notice. The trial court, after threadbare discussion and taking into account all relevant considerations, came to the conclusion that the complicity of the petitioner with the crime was, prima facie, established and, therefore, it was in the interests of justice to arraign him as an accused in the case.

18) I do not find any illegality or infirmity in the impugned orders, which would impel me to exercise inherent jurisdiction vested by virtue of Section 561-A Cr. P.

C. The petition is found to be without any merit and the same is, accordingly, dismissed. Interim direction, if any, shall cease to be in operation.

19) Trial court record along with copy of this order be sent back to the trial court.