
(2008) 04 AHC CK 0100
In the Allahabad High Court

Mohd. Jahid

APPELLANT

Vs

State of UP and Others

RESPONDENT

Date of Decision : 21-04-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 319, 482
Dowry Prohibition Act, 1961 — Section 3, 4
Evidence Act, 1872 — Section 103
Penal Code, 1860 (IPC) — Section 201, 302, 304B, 498A

Citation : (2008) 04 AHC CK 0100

Hon'ble Judges : Amar Saran, J

Bench : Single Bench

Judgement

Amar Saran, J.—Heard Sri Vinay Saran, learned Counsel for the applicant, learned Counsel for opposite party No. 2 Sri Javed Habib and learned AGA.

2. This criminal revision has been filed for quashing an order dated 15.6.2004 summoning the applicant Mohd. Jahid under sections in a case under Sections 498A IPC, 304B and 201 IPC and 3/4 of the D.P. Act in exercise of powers u/s 319 Cr.P.C. passed by the Addl. Sessions Judge, FTC 2, Bareilly, after recording the examination-in-chief of the informant-PW 1, Mohd. Shafi on 6.2.2004.

3. The allegations in this case were that the deceased Kesar Jahan had been murdered for dowry and her body had been buried. After exhuming the body it was learnt that the deceased had been throttled to death.

4. It was argued by the learned Counsel for the applicant that without cross-examination of the witness an order for summoning u/s 319 Cr.P.C. ought not to have been passed. For this proposition reliance was placed on the decision of Mohd. Shafi v. Mohd. Rafiq (LVIII) 2007 ACC 254. I have considered the proposition laid down in this case. After examining the various decisions of the Apex Court, viz. in the cases of Rakesh v. State of Haryana AIR 2001 SC 2001. Rajendra Singh v. State of UP (VII) 2007 SCC 378, in the decision of Parmal v. State of U.P. and Anr. Cr. Misc. Appln. No. 2355 of 2008 decided on 19.2.2008 I

have held as follows:

The case of Mohd. Shafi v. Mohd. Rafiq and Anr. LVIII 2007 ACC 254 also does not lay down any proposition that an accused can only be summoned after a witness has been cross-examined; rather the said case was one where the learned Sessions Judge had refused to accede to the prayer for summoning the appellant u/s 319 Cr.P.C. because in that case the Sessions Judge had noted that the witness had reached the spot on hearing a noise and on an examination of his statement u/s 161 Cr.P.C. he was reported to have stated that he reached the spot after the incident. Hence, the evidence did not appear acceptable to the Court and the Court had simply dismissed the prayer u/s 319 Cr.P.C. at that stage. The Apex Court rightly observed in the said case that the order summoning the accused should be the result of a judicial exercise of discretion and the Court had properly exercised its discretion in not summoning the accused at that stage as it thought that the matter could be better resolved after cross-examination of the witnesses and the Court further observed that no exception could be taken to the order of the Sessions Judge when the State was not aggrieved by the same.

5. In the present case, on the contrary, the learned Sessions Judge was fully satisfied that sufficient grounds existed for summoning the applicant on the basis of the examination-in-chief of the witness Ved Pal and that the learned Magistrate has not given proper reasons for not summoning him at the earlier stage when the learned Magistrate rejected the final report and summoned the other co-accused.

6. In the case of Rakesh v. State of Haryana AIR 2001 SC 252 the conspectus of case law on the point has been considered and it has been clarified that it is not mandatory to cross-examine the witness before summoning an accused in exercise of power u/s 319 Cr.P.C. In this connection paragraphs 13 and 14 of Rakesh's case may be read with advantage:

13. Hence, it is difficult to accept the contention of the learned Counsel for the appellants that the term "evidence" as used in Section 319, Criminal Procedure Code would mean evidence which is tested by cross-examination. The question of testing the evidence by cross-examination would arise only after addition of the accused. There is no question of cross-examining the witness prior to adding such person as accused. Section does not contemplate an additional stage of first summoning the person and giving him an opportunity of cross-examining the witness who has deposed against him and thereafter deciding whether such person is to be added as accused or not. Word "evidence" occurring in sub-section is used in comprehensive and broad sense which would also include the material collected by the Investigating Officer and the material or evidence which comes before the Court and from which the Court can prima facie conclude that person not arraigned before it is involved in the commission of the crime.

14. Lastly, learned Counsel further submitted that power u/s 319 is an

extraordinary power and should be used very sparingly and only for some compelling reasons for taking cognizance of other persons against whom action has not been taken. For this purpose, he referred to *Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others*, . In our view, there cannot be a dispute that power u/s 319 is to be sparingly used. But that would not mean that when a prosecutrix names three persons who were involved in the serious crime are not to be added as accused by exercise of such power.

7. In another recent decision of the Apex Court in *Rajendra Singh v. State of U.P.* (VII) 2007 SCC 378 where an appeal was preferred from an order of the Allahabad High Court, in a case u/s 302 IPC where in the examination in chief a similar role of instigation had been assigned to the accused, who had been summoned by the learned Sessions Judge in exercise of powers u/s 319 Cr.P.C. inspite of a final report being submitted by the police. The Apex Court criticized the High Court for setting aside the order on the basis of alibi material in the form of affidavits and statements of witnesses u/s 161 Cr.P.C. and emphasized that such evidence of alibi needs to be proved by the accused in accordance with Section 103 of the Evidence Act by leading defence evidence during trial and statements of witnesses to the police or affidavits could not be considered by the High Court for passing such an order in an application u/s 482 Cr.P.C. Even the fact that the co-accused had been acquitted in the meanwhile in *Rajendra Singh*'s case was not considered a proper reason for setting aside the order summoning the accused u/s 319 Cr.P.C."

8. Therefore, this proposition cannot be accepted that if there is legal evidence an accused cannot be summoned u/s 319 Cr.P.C. Moreover, Mr. A.N. Mulla, learned AGA, has rightly pointed out that u/s 319 Cr.P.C. the power to summon an accused u/s 319 Cr.P.C. can be exercised both in the course of an enquiry or during trial. Obviously, at the stage of an enquiry, no cross-examination takes place. Therefore, it would not be wrong to take the position that in every case unless cross-examination of the witness has taken place in court, an additional accused cannot be summoned u/s 319 Cr.P.C. What is to be seen is whether the evidence adduced in the court is reliable enough for summoning the accused in exercise of power u/s 319 Cr.P.C.

9. It was then contended by the learned Counsel for the applicant that the applicant was a chachia sasur (brother of father-in-law) and he lived separately and some documents were filed showing his separate residence in a different district. It was also argued that despite the fact that the applicant was named in the FIR, most of the witnesses mentioned that he was residing separately in statements u/s 161 Cr.P.C. the investigating officer chose not to charge-sheet him along with the other accused and, therefore, the evidence against him is extremely weak in character. Relying on the decision of the latest decision of the Apex Court in *Kunwar Sarvesh Kumar v. State of U.P.* CrI. Appeal No. 621 of 2008, arising out of SLP (CrI) No. 3005 of 2007 decided on 8.4.2008 learned Counsel for the applicant argued that unless there is substantial evidence against

a particular accused, it would be risky to summon him in the trial and in the said case in the statements u/s 161 Cr.P.C. there is no mention of the alleged accused leading an unruly mob. Therefore, it was held to be hazardous to take cognizance against the accused, when for the first time such a statement was made in the court. In Rajendra Singh's case as pointed out above, it has been held that it would be improper to consider statements u/s 161 Cr.P.C. or the defence evidence of alibi given in an affidavit for the purpose of setting aside an order summoning the accused u/s 319 Cr.P.C. There is no reason why the applicant who is said to be a distant relative would have been nominated repeatedly in this case in the FIR and again in the evidence if he had no role to play in offence.

10. In view of the aforesaid, there is no force in this revision, which is rejected. Interim order, if any, is vacated.

11. However, if the applicant appears before the court concerned within a month and prays for bail, his bail prayer may be considered and decided expeditiously.