
(2007) 11 AHC CK 0121
In the Allahabad High Court

Mustakim Keelwala

APPELLANT

Vs

State of U.P. and Sri Ashiq

RESPONDENT

Date of Decision : 29-11-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 319, 482
Penal Code, 1860 (IPC) — Section 147, 302

Citation : (2007) 11 AHC CK 0121

Hon'ble Judges : Shiv Charan, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Shiv Charan, J.—The present application has been moved u/s 482 Cr.P.C. for quashing the order dated 24.10.2007 passed by Addl. Sessions Judge Court No. 4 Etawah in S.T. No. 158/05 u/s 147,302 IPC.

A perusal of the documents shows that FIR was lodged by Mohd Asif on 20.5.2007 at about 9.45 pm against Mustkim applicant and four other accused persons registered at Crime No. 71 of 2005 u/s 147,302 IPC P.S. Ekdil, District Etawah. The matter was investigated by the police and charge sheet was submitted against the accused persons except the applicant Mustkim. Afterwards the statement of Mohd. Asif P.W.1 was recorded and on the basis of the statement of examination in chief of this witness, application was moved for summoning the applicant Mustakim for the offence u/s 147 and 302 IPC u/s 319 Cr.P.C. and learned Sessions Judge being satisfied from the evidence of Mohd. Asif summoned the applicant to face trial for the offence and this order passed u/s 319 Cr.P.C. is challenged by this application.

2. It has been argued by learned Counsel for the applicant that learned Sessions Judge committed gross illegality in passing the order of summoning on the basis of the evidence recorded by the IO in the case diary and also on the basis of the statement of the examination in chief of Mohd. Asif P.W.1. That learned Sessions Judge was not justified in considering the evidence recorded by the IO in the

case diary for the purpose of passing the order u/s 319 Cr.P.C. Learned Sessions Judge also committed illegality in passing the order of summoning only on the basis of the statement of examination in chief of Mohd. Asif That in view of the judgement of Hon"ble Apex Court this was the most unjustified act and order is illegal hence the order is liable to be set aside.

3. Learned AGA opposed the argument of learned -counsel for the applicant and argued that for passing the order u/s 319 Cr.P.C. the satisfaction of trial court is of prime importance and in the present case learned Sessions Judge after being satisfied from the statement of Mohd. Asif passed the order of summoning and there is no illegality in the order.

4. I have considered all the facts and circumstances of the case. In view of Section 319 Cr.P.C". learned Sessions Judge is fully competent to pass the order of summoning if the court is satisfied in course of any enquiry and trial for an offence that any person not being the accused had committed any offence for which such persons should be tried together with the accused and such person can be summoned on the basis of the evidence. I agree with this argument of learned Counsel for the applicant that the evidence recorded by the IO in the case diary cannot be a basis for passing the order u/s 319 Cr.P.C". Although it is a fact that in the impugned order learned Sessions Judge considered the evidence recorded by the IO in the case diary during investigation. But learned Sessions Judge also considered the evidence of P.W.1 recorded in the court. If this part of the order in which the trial court placed reliance on the evidence recorded by the IO in the case diary for the purpose of passing the order u/s 319 Cr.P.C. is to be ignored then whether there is sufficient material before Sessions Judge to pass the order of summoning under this provision is to be considered. Because learned Sessions Judge has passed the order u/s 319 Cr.P.C. after recording the statement of Mohd. Asif P.W.1 and Sessions Judge has also relied upon the statement of P.W.1 for the purpose of summoning the applicant. The legal matter involved in the present case is as to whether the learned Sessions Judge is satisfied in placing reliance on the statement of examination in chief of P.W.1. And whether it is the requirement of the law that the entire statement of a witness including cross examination should be recorded prior to passing the order u/s 319 Cr.P.C. and in that circumstance the statement of such witness should be considered. In this context the learned Counsel for the applicant cited judgement of Hon"ble Apex Court reported in Mohd. Shafi Vs. Mohd. Rafiq and Another, The Hon"ble Apex Court held as follows:

"12. The Trial Judge, as noticed by us, in terms of Section 319 of the Code of Criminal Procedure was required to arrive at his satisfaction if he thought that the matter should receive his due consideration only after the cross-examination of the witnesses is over, no exception thereto could be taken far less at the instance of a witness and when the State was not aggrieved by the same.

5. In view of this judgement of Hon"ble Apex Court it is the satisfaction of the Court concerned to pass the order u/s 319 Cr.P.C. and if the court is not satisfied

for passing the order u/s 319 Cr.P.C. for summoning the accused then the Court can require that this application shall be considered after recording the evidence of witness. But Hon"ble Apex Court has not laid down that the order u/s 319 Cr.P.C. Shall be passed only after recording the entire statement of the witness including cross-examination also. It is evident from the facts of the case before Hon"ble Apex Court that learned Sessions Judge deferred the disposal of the application u/s 319 Cr.P.C. till the cross-examination of the witnesses was recorded and in this context the Hon"ble Apex Court held that it is satisfaction of the court concerned for passing the order u/s 319 Cr.P.C. and if the court considered that the matter is required received due consideration only after cross examination of the witness is over then it cannot be said that the court acted illegally. But if the position is that the learned Sessions Judge after being satisfied from the examination in chief of the witness for summoning the accused u/s 319 Cr.P.C. then it cannot be said that the learned Sessions Judge acted illegally in passing order without recording the cross-examination. The main thing is the satisfaction of the court concerned and in the present case the learned Sessions Judge was satisfied with the examination in chief of the witness and hence the order was passed for summoning of the accused applicant to face trial.

6. Learned Counsel for the applicant placed reliance on para 13 of the above judgement of Apex Court. It has been held in this para:

13. From the decisions of this Court, as noticed above, it is evident that before a court exercises its discretionary jurisdiction in terms of Section 319 of the Code of Criminal Procedure, it must arrive at the satisfaction that there exists a possibility that the accused so summoned in all likelihood would be convicted. Such satisfaction can be arrived at inter alia upon completion of the cross-examination of the said witness. For the said purpose, the court concerned may also like to consider other evidence. We are, therefore, of the view that the High Court has committed an error in passing the impugned judgement.

And on the basis of this part of the judgement of Apex Court the applicant's counsel argued that while passing the order u/s 319 Cr.P.C. the trial court must be satisfied that there exists a possibility that the accused so summoned in all likelihood will be convicted and such satisfaction can be arrived at inter alia of completion of the cross-examination of the said witness. Learned Counsel for the applicant stated that learned Sessions Judge has not stated in the order that on the basis of the statement of P.W.1 conviction can be based of the applicant and moreover for placing reliance on the statement of the witness for the purpose of conviction the entire statement including cross-examination must be recorded. Learned Counsel also argued that in this connection Section 33 of the Evidence Act is also material. And if the person subsequently failed to appear in the Court due to any reason for cross-examination than no conviction is possible hence in all circumstances for summoning the applicant u/s 319 Cr.P.C. The entire statement including cross-examination of the witness is to be recorded and the

finding must be recorded. But in para 12 of the judgement Hon''ble Apex Court held that it is the satisfaction of the court concern for passing the order of summoning and if the court required that the order will be passed only after recording cross-examination also then it cannot be said that the Sessions Judge acted illegally. Because ultimately the satisfaction of the court is essential. But it has also been held that the cross-examination must be recorded of such a witness. In the present case the trial court was satisfied on the basis of examination in chief of the witness to pass the order of summoning. Learned Counsel for the applicant also cited Y. Saraba Reddy Vs. Puthur Rami Reddy and Another, But in this judgement the Hon''ble Apex Court held that while passing an order u/s 319 Cr.P.C. the evidence recorded by the 10 in case diary shall not be taken into consideration. In the present case the trial court besides placing reliance on the statement of Mohd. Asif recorded in the court also placed reliance on the statement recorded by the 10 but I have stated above that this portion of the order is not to be looked into and it is to be seen whether ignoring this evidence the learned Sessions Judge was justified in passing the order of summoning on the statement of Mohd. Asif. Hence learned Sessions Judge was justified in placing reliance on the statement of Mohd. Asif. Learned Counsel for the applicant also cited 2006(1) SCC 568 Palanisamy Gounder and Anr. v. State represented by Inspector of Police. In this case also the Hon''ble Apex Court held that the court must be satisfied that there is reasonable prospect of case against such accused in his conviction and in the present case there is the statement of Mohd. Asif who is an eyewitness. Hence the solitary statement of one witness is sufficient to base conviction.

7. On the basis of the above, I am of the opinion the trial court based the order of summoning u/s 319 Cr.P.C. after being satisfied from the statement of Mohd. Asif P.W.1 after examination in chief and it all depends upon the satisfaction of the trial court in order to pass the order of summoning on the basis of the statement of this witness. Hence there is no illegality and irregularity in the order. The application u/s 482 Cr.P.C. deserves to be dismissed.

8. The application u/s 482 Cr.P.C. is dismissed accordingly.