

(2016) 01 MAD CK 0195

In the Madras High Court

Case No : Crl. R.C. (MD) No. 613 of 2015 and M.P. (MD) No. 1 of 2015

Natarajan

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 08-01-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 294(b), Section 299, Section 307, Section 319, Section 319(1), Section 34
Penal Code, 1860 (IPC) — Section 294(b), Section 307, Section 34

Citation : (2016) 166 AIC 523 : (2016) 2 MLJ Criminal 1

Hon'ble Judges : M. Venugopal, J.

Bench : Single Bench

Advocate : K. Prabhu, for the Appellant; P. Kandasamy, Govt. Advocate, for the Respondent

Final Decision : Allowed

Judgement

M. Venugopal, J.—1. The Revision Petitioner/A-4 has preferred in the instant Criminal Revision Petition as against the order dated 24.06.2015 in Cr.M.P. No. 78 of 2015 in S.C. No. 123 of 2011 passed by the Learned Assistant Sessions Judge, Sankarankovil, Tirunelveli District.

2. The Learned Assistant Sessions Judge, Sankarankovil, Tirunelveli, while passing the impugned order in Cr.M.P. No. 78 of 2015 (filed by the first respondent/appellant/petitioner under Section 319 of Cr.P.C.) had observed the following:

"The petition is allowed. This Court is inclined to issue summon against the 4th accused Natarajan for the offence under Sections 294(b), 307 r/w 34 I.P.C."

3. Though Court notice served on the respondents 2 and 4, there is no appearance either in person or through Learned counsel on their behalf in this Criminal Revision Petition. In respect of R-3, he died on 23.06.2015 vide death certificate dated 23.09.2015.

4. The Learned counsel for the Revision Petitioner/A-4 submits that in the present case, the satisfaction of the trial court is not reflected in the impugned order in Cr.M.P. No. 78 of 2015 in S.C. No. 123 of 2011, dated 24.06.2015 and further more, the impugned order is a non-speaking one. Therefore, the impugned order dated 24.06.2015 in Cr.M.P. No. 78 of 2015 in S.C. No. 123 of 2011 on the file of the trial court is liable to be set aside in the eye of Law.

5. The Learned counsel for the Revision Petitioner/A-4 urges before this Court that the petitioner's name was mentioned earlier in the first information report. But at a later point of time, his name was deleted from the charge-sheet. At this stage, it is represented on behalf of the revision petitioner that while taking cognizance, the trial court had perused the records and thereafter only it took cognizance of the case against the third accused. Further, based on Cr.M.P. No. 78 of 2015, filed by the first respondent/Police (under Section 319 of Cr.P.C.), the trial court has allowed the application and ordered the issuance of summons to the 4th accused, Natarajan (revision petitioner) for the offence under Sections 294(b), 307 r/w Section 34 of I.P.C.

6. The Learned counsel for the Revision Petitioner refers to paragraph No. 3 of Cr.M.P. No. 78 of 2015 in S.C. No. 123 of 2011 (filed by the respondent/Police) to the effect that the witness Nos. 1 & 2, examined before the trial court had tended evidences before the trial court to the effect that the 4th accused Natarajan (Revision Petitioner) was at the place of occurrence and he only instigated for the commission of offence and because of the available prima facie evidence to include the Revision Petitioner/4th accused, the petition filed under Section 319 of Cr.P.C. to include the Revision Petitioner as an accused must be allowed.

7. Admittedly, no counter was filed by R-1 to R-3 to Cr.M.P. No. 78 of 2015 filed by the first respondent/Police.

8. At this stage, it is represented on behalf of the Revision Petitioner/A-4 that the Revision Petitioner/A-4 was not issued with any notice prior to the court allows the Cr.M.P. No. 78 of 2015 in S.C. No. 123 of 2011 nor he was provided with the opportunity of being heard.

9. The Learned Counsel for the petitioner refers to the judgment dated 10.01.2014 of the Honourable Supreme Court (vide CDJ Law Journal , CDJ 2014 SC 035 in CrI.A. No. 1750 of 2008 with Criminal Appeal No. 1751 of 2008 with Special Leave Petition (CRL.) No. 9184 of 2008 etc.,) between Hardeep Singh & Others V. State of Punjab & Others, whereby at paragraph No. 75, it is observed as follows:

"75. Though the facts so received by the magistrate or the court may not be evidence, yet it is some material that makes things clear and unfolds concealed or deliberately suppressed material that may facilitate the trial. In the context of Section 319 Cr.P.C. it is an information of complicity. Such material therefore, can be used even though not an evidence in stricto sensu, but an information on

record collected by the court during inquiry itself, as a prima facie satisfaction for exercising the powers as presently involved."

Also, in the aforesaid decision, at paragraph 82, it is observed as under:

"82. We have given our thoughtful consideration to the diverse views expressed in the aforementioned cases. Once examination-in-chief is conducted, the statement becomes part of the record. It is evidence as per law and in the true sense, for at best, it may be rebuttable. An evidence being rebutted or controverted becomes a matter of consideration, relevance and belief, which is the stage of judgment by the court. Yet it is evidence and it is material on the basis whereof the court can come to a prima facie opinion as to complicity of some other person who may be connected with the offence."

That apart in the aforesaid decision at paragraph Nos. 84 to 90, it is observed as follows:

"84. Further, in our opinion, there does not seem to be any logic behind waiting till the cross-examination of the witness is over. It is to be kept in mind that at the time of exercise of power under Section 319 Cr.P.C., the person sought to be arraigned as an accused, is in no way participating in the trial. Even if the cross-examination is to be taken into consideration, the person sought to be arraigned as an accused cannot cross examine the witness(s) prior to passing of an order under Section 319 Cr.P.C., as such a procedure is not contemplated by the Cr.P.C. Secondly, invariably the State would not oppose or object to naming of more persons as an accused as it would only help the prosecution in completing the chain of evidence, unless the witness(s) is obliterating the role of persons already facing trial. More so, Section 299 Cr.P.C. enables the court to record evidence in absence of the accused in the circumstances mentioned therein.

85. Thus, in view of the above, we hold that power under Section 319 Cr.P.C. can be exercised at the stage of completion of examination in chief and court does not need to wait till the said evidence is tested on cross-examination for it is the satisfaction of the court which can be gathered from the reasons recorded by the court, in respect of complicity of some other person(s), not facing the trial in the offence.

Q. (iv) What is the degree of satisfaction required for invoking the power under Section 319 Cr.P.C.?

86. Section 319(1) Cr.P.C. empowers the court to proceed against other persons who appear to be guilty of offence, though not an accused before the court.

The word "appear" means "clear to the comprehension", or a phrase near to, if not synonymous with "proved". It imparts a lesser degree of probability than proof.

87. In *Pyare Lal Bhargava v. The State of Rajasthan*, , AIR 1963 SC 1094, a four-Judge Bench of this Court was concerned with the meaning of the word

"appear". The court held that the appropriate meaning of the word "appears" is "seems". It imports a lesser degree of probability than proof. In *Ram Singh & Ors. v. Ram Niwas & Anr.*, , (2009) 14 SCC 25, a two-Judge Bench of this Court was again required to examine the importance of the word "appear" as appearing in the Section. The Court held that for the fulfillment of the condition that it appears to the court that a person had committed an offence, the court must satisfy itself about the existence of an exceptional circumstance enabling it to exercise an extraordinary jurisdiction. What is, therefore, necessary for the court is to arrive at a satisfaction that the evidence adduced on behalf of the prosecution, if unrebutted, may lead to conviction of the persons sought to be added as an accused in the case.

88. At the time of taking cognizance, the court has to see whether a prima facie case is made out to proceed against the accused. Under Section 319 Cr.P.C., though the test of prima facie case is the same, the degree of satisfaction that is required is much stricter. A two- Judge Bench of this Court in *Vikas v. State of Rajasthan*, , 2013 (11) SCALE 23, held that on the objective satisfaction of the court a person may be "arrested" or "summoned", as the circumstances of the case may require, if it appears from the evidence that any such person not being the accused has committed an offence for which such person could be tried together with the already arraigned accused persons.

89. In *Rajendra Singh (Supra)*, the Court observed:

"Be it noted, the court need not be satisfied that he has committed an offence. It need only appear to it that he has committed an offence. In other words, from the evidence it need only appear to it that someone else has committed an offence, to exercise jurisdiction under Section 319 of the Code. Even then, it has a discretion not to proceed, since the expression used is "may" and not "shall". The legislature apparently wanted to leave that discretion to the trial court so as to enable it to exercise its jurisdiction under this section. The expression "appears" indicates an application of mind by the court to the evidence that has come before it and then taking a decision to proceed under Section 319 of the Code or not."

90. In *Mohd. Shafi (Supra)*, this Court held that it is evident that before a court exercises its discretionary jurisdiction in terms of Section 319 Cr.P.C., it must arrive at a satisfaction that there exists a possibility that the accused so summoned in all likelihood would be convicted."

Besides that, the Learned counsel for the Revision Petitioner relies on the decision of the Honourable Supreme Court *Mohit @ Sonu and Another V. State of Uttar Pradesh and Another* reported in , (2013) 7 SCC at page No. 789 at special page 808 at paragraph No. 36.1, it is observed as follows:

"36.1. In *Sayeed Bhagat V. State of Bihar*, (, 1999 Cri LJ 4040 (Pat)), a Bench of Patna High Court noticed the facts of the case where an application was filed in a criminal case under Section 319 Cr.P.C. to summon the remaining accused

persons who were named by the witnesses. The Magistrate refused the said prayer mainly for want of sufficient evidence. The said order was challenged in revision by the complainant. The Revisional Court set aside the order of the Magistrate without hearing the petitioners against whom prayer was made for issuance of summons. When the matter came up before the High Court, the Bench held as under: (Cri LJ p. 4041, para 8)

"8. In the instant case also though the jurisdiction of the court to summon a person under Section 319 Cr.P.C. cannot be questioned, the Revisional Court, in my view should have heard the petitioners before passing the impugned order because the same has prejudiced them."

10. It is to be pointed out that the power exercisable under Section 319 of Cr.P.C. is an extraordinary one conferred upon a Court of Law to do real justice. In fact, it ought to be pressed into service with caution and only if compelling reasons exist for proceeding against a person against him, action was not taken as per decision of the Honourable Supreme Court *Krishnappa v. State of Karnataka* reported in , AIR 2004 SC at page 4298. In short, the power of summoning under Section 319 of Cr.P.C. is not to be employed in a routine and mechanical manner. Per contra, the said power is to be invoked only when on consideration of all the materials available on record, the Court feels the necessity of impleading some persons as accused, as per the decision of the Honourable Supreme Court in *Rajinder Singh V. State of Uttar Pradesh* reported in , 2007 Cri LJ p.4281 (4287) (SC).

11. It is to be remembered that the power under Section 319 of Cr.P.C. is a discretionary one to be used with great care, caution and circumspection and that too based on the existence of compelling reasons, before the Court of Law exercising its judicial discretion in terms of Section 319 of Cr.P.C., which ought to arrive at a satisfaction with there exists a possibility that the accused so summoned is in all likelihood would be convicted. Also, a Court of Law can exercise power under Section 319 Cr.P.C. even at the fag end of trial as per decision *Bholu Ram V. State of Punjab* reported in , (2008) 3 SCC (Cri) P 710.

12. To put it precisely, there must be a legal evidence on record indicating the involvement of any individual other than an accused before the Court in the commission of an offence. In fact, the summoning order under Section 319 Cr.P.C. should be a reasoned and speaking order as per decision *Kishori V. State* reported in 1998 CriLJ 1363 (Del-DB).

13. As far as the present case is concerned, although the first Respondent/Police had filed Cr.M.P. No. 78 of 2015 in S.C. No. 123 of 2011 on the file of the trial court under Section 319 of Cr.P.C. praying for issuance of summons to the Revision Petitioner and to include him as A-4 in the case, this Court, on going through the impugned order passed by the trial court, is of the considered view that the order of the trial court dated 24.06.2015 in Cr.M.P. No. 78 of 2015 in S.C. No. 123 of 2011 is not a speaking and reasoned one and in short, the same

is cryptic. Further, there is no outline of process of reasoning as to why and how the Revision Petitioner/A-4 was ordered to be issued with summons in respect of the offence under Section 294(b), 307 r/w 34 of Cr.P.C. Of course, the power under Section 319 of Cr.P.C. to be examined by a Court of Law is not controlled by the result of investigation, in the considered opinion of this Court.

14. To put it succinctly, a Court of Law must draw a prima facie opinion and it should subjectively be satisfied as to the reasons that exists for issuance of summons to the Revision Petitioner/A-4 as one of the accused in the case in S.C. No. 123 of 2011. At this stage, it cannot be gain said that where there is material on record and a prima facie case is made out, an individual can be summoned under Section 319 of Cr.P.C. to face trial. At that point of time, only prima facie evidence, which emerges from the statement of prosecution witness is only to be considered, in the considered opinion of this Court.

15. In the upshot of detailed qualitative discussions, as mentioned supra and also this Court taking note of the said pivotal fact that the impugned order dated 24.06.2015 in Cr.M.P. No. 78 of 2015 in S.C. No. 123 of 2011, passed by the trial court to the effect that "the petition is allowed", on going through the impugned order, this Court is of the considered view that the said order is a non-speaking cryptic one and further the said order is devoid of qualitative and quantitative reasoning. As such, this Court holds that the impugned order dated 24.06.2015 in Cr.M.P. No. 78 of 2015 in S.C. No. 123 of 2011 passed by the trial Court suffers from legal infirmities in the eye of law. Accordingly, to prevent an aberration of justice, this Court interferes with the said order and sets aside the same. Consequently, the Criminal Revision Petition succeeds.

16. In the result, the Criminal Revision Petition is allowed. The order dated 24.06.2015 in Cr.M.P. No. 78 of 2015 in S.C. No. 123 of 2011, passed by the Learned Assistant Sessions Judge, Sankarankovil, Tirunelveli District is set aside by this Court for the reasons assigned in this Revision. The trial court is directed to pass fresh speaking orders on merits in Cr.M.P. No. 78 of 2015 in S.C. No. 123 of 2011 in accordance with Law. Consequently, connected miscellaneous petition is closed.