
(2001) 01 BOM CK 0040

In the Bombay High Court

Case No : Criminal Revision Application No. 52 of 1998

Rukhminabai Vitthalrao Jogdand

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 23-01-2001

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 319
Penal Code, 1860 (IPC) — Section 313, 34, 498A

Citation : (2001) ALLMR(Cri) 955 : (2001) CriLJ 2109 : (2001) 3 MhLj 473

Hon'ble Judges : R.K. Batta, J

Bench : Single Bench

Advocate : P.V. Hardas, for the Appellant; Yongal, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

R.K. Batta, J.—On a complaint filed by Geeta Bharat Badar, charge sheet was filed against three accused, who are facing trial under Sections 498-A and 313, read with Section 34 of the Indian Penal Code. In the said trial, Examination in Chief and Cross-examination partly of the complainant Geeta Bharat Badar was recorded and on the basis of the same, a notice was issued to the present applicant u/s 319, Criminal Procedure Code. The present applicant filed reply raising preliminary objection that on the basis of incomplete examination of complainant Geeta Bharat Badar, action could not be taken u/s 319, Criminal Procedure Code. In support of this contention, reliance was placed on Gulam Mondal Vs. Nazam Hossain and Others, , and Sannarevanappa Bharamajappa Kalal @ Kuncharkar and others Vs. State of Karnataka, . It was also urged in the said reply that the incident had taken place about seven years ago and the Admission Register as well as records are required to be preserved only for periods of five years and three years respectively. Accordingly, the applicant submitted that the trial should be proceeded without joining her as co-accused. Learned Additional Sessions Judge, vide impugned Order, dated 24-3-1998, which is a subject-matter of Revision, rejected the contentions of the applicant.

2-3. Learned Advocate for the applicant urged before me that firstly even the deposition of Geeta Bharat Badar, though incomplete, does not show that the applicant had carried out the termination of pregnancy of the said complainant against her wish, and secondly, on the basis of incomplete cross-examination of Geeta Bharat Badar, action u/s 319, Criminal Procedure Code, could not be initiated.

4. Learned A.P.P. on the other hand, submitted that there is some evidence on record on account of which the Additional Sessions Judge was well within his jurisdiction to press into action Section 319, Criminal Procedure Code. In this respect, reliance has been placed on a Judgment of the Apex Court in Tek Narayan Prasad Yadav v. State of Bihar 1999 SCC (Cri) 356.

5. First of all, I would like to point out that from the evidence of Geeta Bharat Badar, though incomplete (since the cross-examination was not completed and had been deferred), it does not follow that the applicant had terminated the pregnancy against the will of the complainant. What the complainant had stated is that the accused carried her to Malegaon at the hospital of Dr. Jogdand. She had resisted for termination of pregnancy still accused threatened her with dire consequences. There is nothing in the evidence of complainant to suggest that the complainant had resisted termination of pregnancy in the presence of the doctor, or had informed the Doctor that she was not willing for termination of pregnancy, or that the accused had threatened the complainant with dire consequences in the presence of the doctor. In the absence of clear evidence that the pregnancy was terminated against the will of complainant, obviously Section 319, Criminal Procedure Code, could not be pressed into service.

6. I have already pointed out that witness Geeta Badar was examined in chief and cross examined partly when further cross-examination was deferred and notice u/s 319, Criminal Procedure Code, was issued on the basis of incomplete evidence of witness Geet Badar. Section 319, Cr.P.C. reads as under :--

319. Power to proceed against other persons appearing to be guilty of offence --

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial, of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub-section (1) then --

(a) the proceedings in respect of such person shall be commenced afresh, and witnesses re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced.

In order to take action u/s 319, Criminal Procedure Code, it postulates the existence of evidence. The expression "evidence", in the context with reference to statement of witness, would mean complete statement, that is to say, examination-in-chief and cross-examination. The statement, which does to satisfy this test, cannot be called "evidence". The Gujarat High Court in *R.J. Lakhia Vs. State of Gujarat*, , the Punjab High Court in *Amarjit Singh v. State of Punjab* 1983 Cri LJ 98 , the Calcutta High Court in *Gulam Mondal Vs. Nazam Hossain and Others*, , and the Karnataka High Court in *Sannarevanappa Bharamajappa Kalal @ Kuncharkar and others Vs. State of Karnataka*, have taken a view that expression "evidence", as found in Section 319, connotes not only Examination-in-Chief, but also cross-examination and on the basis of incomplete Examination-in-chief or incomplete cross-examination, Section 319 cannot be pressed into service. Learned A.P.P., has not been able to persuade me to take a different view of the matter. Even in the Judgment of the Apex Court, upon which reliance has been placed by learned A.P.P., it is stated that the trial Court had recorded some evidence. Though the details of the evidence recorded are not known, yet the expression used by the Apex Court is some evidence".

7. In view of above, I am of the opinion that the Additional Sessions Judge has acted hastily in the matter and exceed his jurisdiction in issuing a Show-cause Notice to the applicant u/s 319, Criminal Procedure Code. The action of the Additional Sessions Judge cannot be sustained on facts as also in law.

8. In the aforesaid circumstances, revision is allowed and the impugned order joining the applicant for the purpose of facing trial for an offence u/s 313, read with Section 34, Indian Penal Code, is set aside.