

(2000) 03 PAT CK 0146
In the Patna High Court
Case No : Revision No. 498 of 1994

Sambhu Singh

APPELLANT

Vs

The State of Bihar and Braj Kishore Sah

RESPONDENT

Date of Decision : 13-03-2000

Acts Referred:

Arms Act, 1959 — Section 27
Criminal Procedure Code, 1973 (CrPC) — Section 190, 193, 319, 319(1), 397
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2000) 2 PLJR 784

Hon'ble Judges : I.P. Singh, J

Bench : Single Bench

Advocate : Anant Bijay Singh and Rakesh Kumar Singh, for the Appellant;
Harendra Narain Sinha, Radha Prasad and , Assistant Public Prosecutor for State,
for the Respondent

Final Decision : Allowed

Judgement

I.P. Singh, J.—This is an application under Sections 397 and 401 of the Code of Criminal Procedure, 1973 (in short the "Code"). It is directed against the order dated 2.6.1994 passed by the second Additional Sessions Judge, Saran at Chapra in S.T. No. 486/92 by which the learned Additional Sessions Judge ordered for the issue of summons to the Petitioner to face his trial in the said sessions case in exercise of the powers u/s 319 of the Code of Criminal Procedure.

2. From the prosecution case it appears that the informant (opposite party No. 2) gave his Fardbeyan to police on 29.6.1991 alleging therein that while his father was sitting on Chauki at his house all on a sudden, Sambhu Singh (the present Petitioner) alongwith others came there. There was a exchange of hot words between the present Petitioner and the father of opposite party No. 2. The present Petitioner went back and returned with other accused persons of this case and fired his pistol hitting at the neck of the father of the informant as a result of which he died.

3. On the basis of the Fardbeyan of opposite party No. 2 the police registered the F.I.R. and after completing the investigation submitted charge sheet u/s 302/34 of the Indian Penal Code and also u/s 27 of the Arms Act against three persons, namely, Ram Janam Singh, Ram Ekbal Singh and Ganesh Singh. However, the police did not submit the charge sheet against the present Petitioner and did not send him up for trial. This charge sheet was placed before the learned Chief Judicial Magistrate, Chapra who by his order dated 24.10.1991 took cognizance of the offence against the persons named in column No. 4 of the charge sheet. However, after perusing the charge sheet he discharged the present Petitioner named in column No. 2 of the charge sheet since he found that the charge sheet was not submitted against him and he was not sent up for trial. After the cognizance and necessary commitment proceedings the case was transferred to the Court of 2nd Additional. Sessions Judge, Saran at Chapra where it was registered as Sessions Trial No. 486/92 / 61/93.

4. The further case of the Petitioner is that before the Additional Sessions Judge who was holding the trial, the Additional Public Prosecutor filed a petition on 17.7.1993 u/s 319 of the Code praying to summon the present Petitioner to stand his trial with other accused persons. Subsequently this Petitioner was not pressed and in its place another petition dated 17.5.1994 was filed with similar prayer. The learned trial Judge (2nd Additional Sessions Judge, Saran at Chapra) by the impugned order summoned the present Petitioner under the purported exercise of the power u/s 319 of the Code after perusing the case diary and the F.I.R., although till the date of the passing of this order no evidence at all of any prosecution witness was recorded before the learned trial Court.

5. It has been submitted that the Petitioner was a named accused in the F.I.R. and after investigation the police did not submit the charge sheet against him. Under the circumstances he could not have been put on trial by the impugned order in exercise of the powers u/s 319 of the Code as has been held in the case of Sohan Lal and Ors. v. State of Rajasthan 1991 (1) PLJR 41 (SC) in which it was clearly held that the powers u/s 319 of the Code could only be exercised if a person did not figure at any stage as an accused in the case and that only after evidence was adduced before the trial Court showing complicity of that person in the alleged offence. In, the present case the Petitioner was named as an accused in the F.I.R. but the police did not sent him up for trial at the time of submitting the charge sheet. The learned Chief Judicial Magistrate while taking cognizance of the offence discharged the Petitioner by his order dated 24.10.1991. Under the circumstances it was not open to the learned Additional Sessions Judge to summon the Petitioner under the provisions of Section 319 of the Code without recording any evidence. Once a person is found to have figured as an accused in the case at any stage he goes out of the reach of Section 319 of the Code. On these grounds amongst others it has been proved that the impugned order be quashed.

6. Opposite party No. 2 has filed a show cause in the matter contending that the

petition filed by the Petitioner is bad in law and wrong on facts. The learned Additional Sessions Judge has rightly summoned the Petitioner who was the main assailant resulting in the death of the deceased to face his trial in accordance with the provisions of Section 319 of the Code. The Fardbeyan of this opposite party was recorded without any loss of time according to which it was this Petitioner who had fired at the neck of his father resulting in his death. Even from the case diary it would appear that the witnesses whose statements were recorded by the police have fully supported this allegation against the present Petitioner. Section 319 of the Code empowers the Court to proceed against any other person appearing to be guilty of the offence at any stage of the trial by exercising the power u/s 319 of the Code. The Court has only to see whether a prima facie case has been made out against the person who was being summoned; even if he was discharged by the Magistrate taking cognizance of the offence since it is not violative of Section 193 of the Code. On these grounds, amongst others, it has been prayed that this show cause be accepted and the criminal revision filed by the present Petitioner be dismissed.

7. A written note of argument has been filed on behalf of the Petitioner. In this written note, to which I will refer to subsequently; the Petitioner has taken two grounds, namely, (1) that in order to attract the provisions of Section 319 of the Code it has to be seen that the person sought to be summoned in the case did not figure at any stage as an accused in the case and (2) no such person can be summoned u/s 319 of the Code unless the trial Court has recorded some evidence in the case. The learned Counsel appearing on behalf of the opposite party has, however, challenged these points raised in this written note of argument.

8. I have heard the parties in detail. I will firstly refer to the undisputed facts of this case. From Annexure-1 which is the F.I.R. it would appear that the present Petitioner figured as accused No. 1 and he is said to have opened fire at the neck of the deceased resulting in his death. After completing the investigations the police submitted the charge sheet (Annexure-2) from which it would appear that the present Petitioner was not sent up for trial. Only three persons named in its column No. 4 were sent up for trial excluding the present Petitioner whose name figured in the column No. 2 of the charge sheet. Annexure-3 is the order dated 24.10.1991 passed by the learned Chief Judicial Magistrate by which he took cognizance of the offence only against three persons named in column No. 4 of the charge sheet and not against the present Petitioner who was shown in its column No. 2 as not sent up for trial and was discharged by this order. From the impugned order it would appear that the learned Additional Sessions Judge without recording any evidence in course of the trial ordered for issuing summons against the present Petitioner on the basis of the perusal of the F.I.R. and the case diary. These are some of the facts about which there is hardly any dispute.

9. In the present revision application a reference has made to the case of Sohan

Lal and others Vs. State of Rajasthan, . In this decision the Hon"ble Supreme Court has taken into consideration the ratio of the decisions in the case of Joginder Singh and Another Vs. State of Punjab and Another, , Chandra Deo Singh Vs. Prokash Chandra Bose and Another, , Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others, and Dr. S.S. Khanna Vs. Chief Secretary, Patna and Another, . After referring to the aforesaid cases and their ratio of decisions the Hon"ble Supreme Court in paragraph No. 33 of its judgment in the case of Sohan Lal (supra) has observed as follows:

33. The above views have to yield to what is laid down by this Court in the decisions above referred to. The provisions of Section 319 had to be read in consonance with the provisions of Section 398 of the Code. Once a person is found to have been the accused in the case he goes out of the reach of Section 319. Whether he can be dealt with under any other provisions of the Code is a different question. In the case of accused who has been discharged under the relevant provisions of the Code, the nature of finality to such order and the resultant protection of the person discharged subject to revision u/s 398 of the Code may not be lost sight of. This should be so because the complainant's desire for vengeance has to be tempered with though it may be, as Sir James Stephen says.- "The Criminal Law stands to the passing of revenge in much the same relation as marriage to the sexual appetite....

10. I had occasion to consider the ratio of the decision of the case of Sohan Lal (supra) in my judgment in the case of Uma Shankar Sahay v. State of Bihar and Anr. 1988 Cri. LJ 2807. After carefully analysing the provisions of law and also the ratio of the decision in the case of Sohan Lal (supra) I had held accordingly as mentioned paragraph 38 of the decision of Sohan Lal (supra) which I have reproduced above. From the aforesaid it would become perfectly clear that once a person has figured as an accused in a criminal case at any stage he goes out of the reach of Section 319 of the Code. In the present case it has seriously been contended before me that the allegation against the present Petitioner are very serious and it was he who had opened fire on the deceased resulting in his death. Under the circumstance he was the main accused in the case and the police has committed a grave error in not submitting the charge sheet against him. It has further been pointed out before me that the learned Chief Judicial Magistrate at the time of taking cognizance of the offence should not have confined himself only to the charge sheet submitted by the police since the law fully authorised him to differ with the charge sheet and to take cognizance of the offence even against such person who was not sent up for trial. No doubt the law on this point is well settled as has been held in the case of Raghubans Dubey Vs. State of Bihar, . In this case the Hon"ble Supreme Court has held that once cognizance has been taken by the Magistrate, he takes cognizance of the offence and not the offenders; once he takes cognizance of an offence it is his duty to find out who the offenders really are and once he comes to the conclusion that apart from the persons sent up by the police some other persons are involved, it is his duty to proceed against those persons. The summoning of the additional

accused is part of the proceeding initiated by his taking cognizance of an offence. The Special Bench of this Court in the case of Kuli Singh and Ors. v. The State of Bihar and Ors. AIR 1978 Pat 298 (SB) also clearly held that on receiving a report u/s 190 a Magistrate has full jurisdiction to differ with the conclusion of the police and to direct the accused not named in the police report or not sent up for trial be also put on trial. There are other decisions on this point by the Hon''ble Supreme Court but I did not consider it necessary to refer to them in view of authoritative pronouncement of the Apex Court in the case of Raghubans Dubey (supra).

11. In the present case as will appear from the order taking cognizance of the learned Chief Judicial Magistrate dated 1.10.1991 no cognizance was taken against the present Petitioner since as per the charge sheet he was not sent up for trial. If the informant had any grievance against this order of the learned Chief Judicial Magistrate it was open to him to move the Sessions Judge in revision in exercise of the power u/s 398 of the Code. It appears that this was not done and after necessary commitment the case was listed for hearing before the Additional Sessions Judge. Under this circumstances the present Petitioner could not be summoned u/s 319 of the Code and could not be put on trial since he had already figured as an accused in this case and cognizance of the offence against him was not taken. This has been so held in the case of Sohan Lal (supra) whose paragraph No. 33 has been reproduced in extenso to show that once a person has been found to have been accused in this case he goes out of the reach of Section 319 of the Code. In the case in which the accused is discharged under the relevant provisions of the Code he gets the protection of law and this order of discharge, of course, can only be made subject to Section 398 of the Code. In any view of the matter he can not be summoned u/s 319 of the Code. This to my mind settles the matter so far as summoning of the present Petitioner u/s 319 of the Code is concerned inasmuch as at the earlier stage he had figured as an accused in the case.

12. I will next proceed to discuss the contention raised on behalf of the Petitioner that the impugned order could not have been passed without recording any evidence by the trial Court. In this connection a reference may be made to Section 319 of the Code itself whose Sub-section (1) runs as follows:

319(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.

A bare reading of this Sub-section will clearly show that before the order u/s 319 of the Code can be passed some evidence during the enquiry or trial has to be adduced before the trial Court without which no such order summoning any person u/s 319 of the Code can be passed. In this connection a reference may be made to the case of Ranjit Singh Vs. State of Punjab, . In this case it was held

that the session Court can not summon any person u/s 319 of the Code prior to evidence collection stage. Before any person can be summoned u/s 319 of the Code there must be some evidence adduced before the Sessions Court. Thus, the law on this point has been very clearly laid down by the Hon''ble Supreme Court in this decision in which a reference has also been made to another case from Patna, namely, Raj Kishore Prasad Vs. State of Bihar and another, in which it has been held that the Court of session can exercise the jurisdiction u/s 319 of the Code only on the basis of the evidence recorded by it.

13. In the present case as will appear from the impugned order the learned Additional Sessions Judge had not recorded the evidence of any prosecution witness and has based the impugned order only on the statements of the witnesses recorded in the case diary as also the contents of the F.I.R. From the aforesaid decisions it would become clear that the learned Magistrate was in the wrong for having based his decision on the aforesaid without recording any evidence in the case. Thus, on this score also the impugned order can not be sustained.

14. From the discussions made above it becomes perfectly clear to me that the impugned order summoning the present Petitioner u/s 319 of the Code can not be sustained in the eyes of law and has to be quashed.

15. In the result this revision application is allowed and the impugned order dated 2.6.1994 passed by the 2nd Addl. Sessions Judge, Saran at Chapra in S.T. No. 486/92 is hereby quashed.