

(2010) 09 MP CK 0053

In the Madhya Pradesh High Court

Case No : Criminal Rev. No"s. 829 and 835 of 2010

Shankar Yadav

APPELLANT

Vs

Basantibai and Another
 Deepak and Another Vs State
of M.P.

RESPONDENT

Date of Decision : 13-09-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 162(1), 173(2), 319, 319(4)
Evidence Act, 1872 — Section 103
Penal Code, 1860 (IPC) — Section 148, 149, 302

Citation : (2010) ILR (MP) 89

Hon'ble Judges : P.K Jaiswal, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

P.K. Jaiswal, J.—Criminal Revision No. 835/10 u/s 397 r/w Section 401 Code of Criminal Procedure, 1973 (in short "Cr.P.C.") has been filed by applicant-accused Shankar Yadav challenging the order dated 19.7.10 passed by XIIth Additional Sessions Judge, Indore in Sessions Trial No. 1308/2009 (Crime No. 745/09, registered at Police Station Chandan Nagar, Indore), whereby the trial Court has allowed the application filed by the non-applicant No. 1 u/s 319 of Cr.P.C. and directed to arraign as accused in the said case.

2. Criminal Revision No. 829/10 has been filed by accused Deepak and Raju. In both the revision applicants are aggrieved by the order dated 19.07.2010 and common question is involved therein and, therefore, they are being disposed of by this common order.

3. Facts briefly stated are that on 27.8.2009 at about 13.00 Hrs. the non-applicant No. 1 was going alongwith his son Vikas @ Gultu and when they reached at Rishi Palace his son was assaulted by Mahendra Solanki, Raju Solanki, Pappu Sabjiwala, Nilesh, Lalu and present applicants namely Shankar Yadav, Deepak and Raju Yadav. A Marg report was made at 13.30 Hrs on 27.8.2009 i.e.

within half hour of the murder of Gultu. On the basis of Marg FIR was registered vide Crime No. 745/09 on 27.8.2009. Named FIR has been lodged against the present applicants and other co-accused persons. During investigation a complainant was lodged to the Sr. Superintendent of Police, Indore that Shankar Yadav has been falsely implicated in the alleged offence, whereas accused Shankar Yadav was not present on scene of occurrence, he was attending the funeral of Dharmendra Singh Gaud, elder brother of Education Minister, Late Laxaman Singh Gaud. Another accused Deepak Yadav was hospitalized in Arvindo Medical Hospital Indore when the alleged offence took place. Raju Yadav was also not present on the scene of occurrence. During investigation, 161 statements of Kishore Singh Solanki, Health Officer, Indore Municipal Corporation, Dr. Uttam Yadav, Health Officer, Indore Municipal Corporation, Devkrishna Sankhla, Councilor and Member of Indore Municipal Corporation, Amar Singh Panwar, Office Asstt. MPSEB, Rajmohalla Zone, Smt. Malini Gaud, MLA, Yogendrasingh Rathore, Revenue Inspector, Collectorate, Indore, Ravindra Singh Gaud, Govt. Pleader and Public Prosecutor were recorded. In their police statements, they deposed that the Shankar Yadav was not present on the scene of occurrence on 27.8.2009. Kishore Singh Solanki in police statement has deposed that on 27.8.2009 at 1.45 pm he came at Bhandari Mill Square and he was with Shankar Yadav from 1.45 pm to 2.45 pm. Prior to 1.45 pm, he has no knowledge about him. Dr. Uttam Yadav in his 161 statement has deposed that Shankar Yadav was alongwith him from 1.45 pm to 2.45 pm. Devkrishna Sankhla in his 161 statement has deposed that Shankar Yadav was attending funeral of Dharmendra Singh Gaud alongwith him and he was there from 11.30 am to 1.00 pm and thereafter they again met at 2.00 pm and he was with him till 15.00 Hrs. final report, filed u/s 173(2) of Cr.P.C. name of Shankar Yadav, Deepak and Raju Yadav were not included alongwith other co-accused persons. The case was sent for trial by the committal Court before the Sessions Judge as per order dated 17.12.2009. In the Sessions Court case was registered on 24.12.2009.

4. On 13.1.2010 an application u/s 319 Cr.P.C. was filed by the non-applicant No. 1 Smt. Basantibai (first informant). On 2.2.10 the said application was dismissed as not pressed. Thereafter Court statement of first informant (eye-witness) Basantibai (PW/1) and eyewitness Devendra Singh (PW/2) were recorded on 6.4.10 where they specifically stated about the presence of Shankar Yadav, Deepak Yadav and Raju Yadav and the role played by them in the incident.

5. On 7.4.10 statements of Uday Singh (PW/3) and Lokesh Brahmane (PW/4) were recorded. On 8.4.10 statements of Dr. Bharat Prakash Bajpai (PW/5), Lalu @ Anis (PW/6) and Puttilal Verma (PW/7) were recorded. On 29.4.2010 statement of Raju Lunia (PW/8) was recorded, on 12.7.2010 statement of Umesh Rathore was recorded and on 14.7.2010 statement of Babulal Panwar was recorded. After recording the court statements of PW/1, PW/2, PW/3 and PW/4 again an application u/s 319 of Cr.P.C. was filed by non-applicant No. 1. On 8.4.10 AGP sought time to file the reply to the said application and the case was

fixed for 29.4.10. On 29.4.10 again time was granted to AGP to file the reply, but no reply was filed by AGP and thereafter prayer was made that the application be decided on the basis of material available on record. Learned trial Court postpone the hearing of the application and fixed the case for 12.7.2010 and observed that after recording the statement of other witnesses application u/s 319 of the Cr.P.C. will be decided on merit. The non-applicant No. 1 was aggrieved by non-consideration of the application and filed an application before this Court u/s 482 of Cr.P.C. for direction to the trial Court to decide the application expeditiously. This Court vide order dated 25.6.10 directed the trial Court to decide the application within the period of 4 weeks from the date of receipt of certified copy of the order and disposed of the said petition. In pursuance to the directions given by this Court, the trial Court fixed the case for reply of AGP on 13.7.10 and after hearing the arguments on 14.7.10 allowed the application by passing the impugned order dated 19.7.10 and directed to arraign the applicants in the case as accused.

6. Shri R.P. Agrawal, learned Sr. Counsel challenging the impugned order on the ground that once first application was dismissed as not pressed, the second application filed by the non-applicant No. 1 complainant is not maintainable in view of the law laid down by the Apex Court in the case of Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others, . He further submits that the trial Court without considering the reply of prosecution has allowed the application and taken cognizance against the present applicants u/s 148, 302 r/w Section 149 of IPC. It is further submitted that 7 prosecution witnesses in their 161 statement very specifically stated that at the time of alleged incident, the applicant Shankar Yadav was with them attending the funeral of Dharmendra Singh Gaud and thereafter he was present along with some of the officials of Indore Municipal Corporation for the purposes of inspection of the route to be used for "Ganesh Visarjan" in Indore. The statement of above part of material of evidence has not been considered by the trial Court while deciding the application u/s 319 of Cr.P.C. The present applicants have been falsely implicated in the alleged offence due to previous enmity with the complainant party. It is further submitted that the learned trial Court without granting adequate opportunity to the applicants allowed the application contrary to the legal proposition laid down by the Apex Court. They would contend that power of a Court u/s 319 of Cr.P.C. being exceptional in nature and should be used only if compelling reasons exists for taking cognizance against the other person against whom action has not been taken. Further, the power being an extraordinary one, it has to be exercised sparingly. In support of above arguments, they drew my attention to the various decisions of Apex Courts, which are as under:

- (i) Arun Dube Vs. The State of M.P.,
- (ii) Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others,
- (iii) Sarabjit Singh and Another Vs. State of Punjab and Another,

(iv) Krishnappa v. State of Karnataka (2004) 7 SCC 262

(v) Michael Machado and Another Vs. Central Bureau of Investigation and Another,

(vi) Sidhartha Vashisht @ Manu Sharma Vs. State (NCT of Delhi),

7. On the other hand, Shri Mitul Saxena, learned Counsel for the Objector drew my attention to FIR, 161 statement of Smt. Basantibai, Devendra Singh @ Vikki and their Court statement and submitted that specific overt-acts have been attributed to the applicants and other co-accused persons in the FIR as well as in their police statement, testimony and Court statements as well as testimony of eye witness Umesh Rathore. In respect of applicant Shankar Yadav, it is submitted that he was armed with Pistol and caused gun shot injury at chest of deceased Gultu. As per statement of Dr. Bharat Prakash injury No. 12 is gun shot injury and bullet has been recovered from the body of deceased Gultu. Injuries No. 5, 6, 7 and 8 are attributed to Deepak Yadav and injury No. 11 is attributed to Raju Yadav. It is submitted that named FIR has been lodged against the present applicants and specific overt-acts are attributed to them, which have also been medically corroborated. As per case Court statement of eye-witnesses (PW/1 and PW/2) the applicants were present on the spot and caused injuries to the deceased. He would contend that looking to the material available on record, it cannot be said that the present applicants have been falsely implicated in the alleged offence and no legal evidence in support of plea of alibi is available and at this stage plea of alibi cannot be considered. Learned trial Court after appreciating the evidence on record exercise its extraordinary power and recorded compelling reasons for impleading the applicants as accused in the case and prays for dismissal of criminal revision. In support of his arguments he drew my attention to the decisions of Apex Court in the case Rajendra Singh Vs. State of U.P. and Another, , Lok Ram Vs. Nihal Singh and Another, 2 Y. Saraba Reddy Vs. Puthur Rami Reddy and Another, and Ram Pal Singh and Others Vs. State of U.P. and Another,

8. Learned Counsel for the applicant has strongly relied on the decision of Apex Court in Sarguja Transport Service (supra). He has submitted that in that decision Apex Court has laid down that if a writ petition filed in a High Court is withdrawn without permission to file a fresh writ petition, a second writ petition for the same relief is barred. Learned Senior Counsel for the applicant submitted that earlier application was dismissed as not pressed on 02.02.2010, but there is no mention in the said order that the objector is given liberty or permission to file a fresh application u/s 319 of Cr.P.C. Accordingly, he submitted that the decision of Sarguja Transport Service (supra) squarely applies to the present case. He submitted that although the decision was based on public policy but was also application to proceedings u/s 319 of Cr.P.C. As per Section 319 of Cr.P.C. the basic requirement for invoking the provisions is that it should appear to the Court from the evidence collected during trial or in the inquiry that some other person, who is not arraigned as an accused in that case has committed an

offence for which that person could be tried together with the accused already arraigned. It is not enough that the Court entertained some doubt, from the evidence, about the involvement of another person as accused. The application u/s 319 of Cr.P.C. can be filed at any stage of proceeding and the power u/s 319 of Cr.P.C. can be exercised by the Court suo motu or on an application by someone including accused already before it. If it is satisfied that any person other than accused has committed an offence he is to be tried together with the accused.

9. Here in the present case the first application was dismissed as not pressed on 2.2.10 and thereafter the statements of PW/1, PW/2 and PW/3 were recorded. After recording the statements of eye-witnesses, second application was filed for impleadment of present applicants, therefore, at this stage, it cannot be said that the second application would be barred on the ground of public policy. The ratio of any decision must be understood in the background of the facts of that case. Hence, *Sarguja Transport Service (supra)* is clearly distinguishable and will not be applicable in the present facts and circumstances of the case. Thus the said objection of the applicants is devoid of merit and on that count it cannot be said that the learned trial Court committed any error in entertaining the application by passing the impugned order dated 19.7.10.

10. After perusing the aforesaid judgments, I find that the judgment passed in the case of *Michael Machado (supra)*, is the basic judgment in the field. As regards other judgments are concerned, they have relied on the judgment passed in the case of *Michael Machado (supra)*. The Hon'ble Apex court in the case of *Michael Machado (supra)*, has considered the scope of Section 319, Cr.P.C. 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 entire inquiry, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under Sub-clause (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.

11. The Hon"ble Apex Court in its judgment has laid down that the basic requirements for invoking Section 319, Cr.P.C. is that it should appear to the Court from the evidence collected during trial or in the inquiry that some other person, who is not arraigned as an accused in that case, has committed an offence for which that person could be tried together with the accused already arraigned. It is not enough that the Court entertained some doubt, from the evidence, about the involvement of another person in the offence. In other words, the Court must have reasonable satisfaction from the evidence already collected regarding two aspects. First is that the other person has committed an offence. Second is that for such offence that other person could as well as be tried along with the already arraigned accused. The Hon"ble Apex Court has further held that it is discretion and power conferred upon the Court, which should be exercised only to achieve justice. It is not that the Court should turn against any other persons whenever it comes across evidence connecting that other person also with the offence. A judicial exercise is called for, keeping a conspectus of the case, including the stage at which the trial has proceeded already and the quantum of evidence collected till then, and also the amount of time which the Court had spent for collecting such evidence. It must be remembered that there is no compelling duty on the Court to proceed against other persons. The Court should also satisfy from the evidence that the other accused against whom proceedings have been quashed or those who have not been arrayed as accused, have also committed an offence in order to enable the Court to take cognizance against them and try them along with the other accused. The Court while deciding whether to invoke the power u/s 319, Cr.P.C. of the Code, must address itself about the other constraints imposed by the first limb of Sub-section (4), that proceedings in respect of newly added persons shall be commenced afresh and the witnesses re-examined. The whole proceedings must be recommended from the beginning of the trial, summon the witnesses once again and examine them and cross-examine them in order to reach the stage where it had reached earlier. If the witnesses already examined are quite large in number of Court must seriously consider whether the objects sought to be achieved by such exercise. Court should examine whether said exercise is worth to achieve the ends of justice or whether said exercise would be waste of the whole labour already undertaken. Unless the Court is hopeful that there is a reasonable prospect of the case as against the newly brought accused ending in being convicted of the offence concerned. If there are no prospects of conviction, then Court should not allow such application and reopen the entire case.

12. On a careful reading of Section 319 of the Code, it becomes clear that the Trial Court has undoubted jurisdiction to add any person not being the accused before it to face the trial along with other accused persons, if the Court is satisfied at any stage of the proceeding on the evidence adduced that the persons who have not been arrayed as accused should face the trial. It is further evident that such person even though had initially been named in the FIR as an

accused, but not charge-sheeted, can also be added to face the trial. The Trial Court can take such a step to add such persons as accused only on the basis of evidence adduced before it and not on the basis of materials available in the charge-sheet or the case diary, because such materials contained in the charge-sheet or the case diary do not constitute evidence. Of course, as evident from the Apex Court decision reported in Sohan Lal and others Vs. State of Rajasthan, the position of an accused who has been discharged stands on a different footing.

13. Power u/s 319 of the Code is discretionary and such discretion must be exercised judicially having regard to the facts and circumstances of the case. Undisputedly, it is an extraordinary power which is conferred on the Court and should be used very sparingly and only if compelling reasons exist for taking action against a person against whom action had not been taken earlier. The word "evidence" in Section 319 contemplates that evidence of witnesses given in Court Under Sub-section (4)(1)(b) of the aforesaid provision, it is specifically made clear that it will be presumed that newly added person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced. That would show that by virtue of Sub-section (4)(1)(b) a legal fiction is created that cognizance would be presumed to have been taken so far as newly added accused is concerned.

14. Learned Sr. counsel for the applicants drew my attention to the police statements of certain witnesses, who have been examined by the Investigating Officer during the course of investigation were annexed which included the statement of Kishore Singh, Dr. Uttam Yadav and Devkrishan Sankhla, who have stated that applicant Shankar Yadav was with them and he was attending the funeral of Dharmendra Singh Gaud and thereafter attended the function of Municipal Corporation. No doubt, it might have been probable defence which Court could not consider at the time of proceedings of u/s 319 of Cr.P.C. A statement u/s 161 is not substantive piece of evidence. In view of proviso to Sub-section (1) of Section 162 of Cr.P.C., the statement can be used only for limited purpose of contradicting the maker thereof in the manner laid down the said proviso. The aforesaid evidence is wholly inadmissible evidence in holding that Shankar Yadav could not have been present at the scene of commission of offence. That apart, the plea taken by the applicant Shankar Yadav in this revision was that of alibi. Section 103 of the Evidence Act says that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is proved by any other law than the proof of that fact lie on any particular person. The burden of establishing the plea of alibi said by the applicants lay squarely upon them. This could be done by leading evidence in the trial. In such a case prosecution could have got an opportunity to cross examine those witnesses and demonstrate that their testimony was not correct. Thus, therefore, there was absolutely no legal evidence in support of plea of alibi of Shankar Yadav, Raju Yadav and Deepak Yadav.

15. Shri Mitul Saxena, learned Counsel for the non-applicant No. 1, has, on the

other hand, submitted that name of Shankar Yadav, Raju Yadav and Deepak Yadav were mentioned in the FIR and specific role were attributed to them. The respondent No. 1 Smt. Basantibai (P.W.1) had corroborated the version given in the FIR and had not only mentioned about the presence of Shankar Yadav, Raju Yadav and Deepak Yadav at the scene of commission of crime, but had assigned specific role to them. Smt. Basantibai (PW/1) was first informant and main eye witness of the case. Learned Counsel thus submitted that ingredient of Section 319 of Cr.P.C. were fully satisfied and the learned Additional Sessions Judge has rightly exercised the power and had summoned the accused.

16. Having considered the submissions made by learned Counsel for the parties, I am of the opinion that the statement of witnesses u/s 161 of Cr.P.C. being wholly inadmissible in evidence could not at all be taken into consideration. As mentioned above, burden to prove the plea of alibi lay upon accused, which they can do by producing the evidence in trial and not by some statements purported to have been recorded u/s 161 of Cr.P.C.

17. Thus, the application made in terms of Section 319 of Cr.P.C. cannot be rejected on the ground that the plea of alibi raised by the applicants was investigated by Dy. Superintendent of Police or other officials of respondent No. 2 under the instructions of Sr. Superintendent of Police and on his satisfying about substance in the plea of accused about their non-involvement, directed the omission of their names. Though their names were deleted from the array of accused, their names were found in the FIR and the statement of witnesses.

18. On careful reading of Section 319 of Cr.P.C. as well as decision of Apex Court in the case of Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others, , it becomes clear that trial court has undoubted jurisdiction to add any person not being accused before it to face the trial alongwith other co-accused persons, if the Court is satisfied at any stage of proceeding on the evidence adduced that persons who have not been arrayed as accused should face trial. It is further evident that such persons, even though had initially been named in the FIR as accused, but not charge sheeted, can also be added to face trial. The trial Court can take such step to add such persons as accused only on the basis of evidence adduced before it and not on the basis of materials available in the charge sheet or case diary, because such materials contained in the charge sheet or case diary do not constitute evidence.

19. Ingredients of Section 319 of Cr.P.C. are unambiguous and indicate that where in the course of inquiry into, or trial or, 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 he has committed. All that is required by the Court for invoking its powers u/s 319 of Cr.P.C. is to be satisfied that from the evidence adduced before it, a person against whom no charge had been framed, but whose complicity appears to be clear, should be tried together with the accused. It is also clear that the discretion is left to the Court to take a

decision on the matter.

20. In the instant case, although, the applicants were named in the FIR, they were not named as accused in the charge sheet during the trial. However, PW/1 and PW/2 in their statement have named the applicants as persons, who were involved in the incident causing death of Gultu. The trial Court after considering the evidence of PW/1 and PW/2, though it necessary for the applicants to be summoned.

21. For the above reasons, I am also of the view that the trial Court has not committed any error in directing the applicants to be summoned to stand in trial Court alongwith other co-accused persons in view of the evidence of PW/1 and PW/2 during trial itself.

22. I, therefore, dismiss the criminal revision and upheld the directions given by the trial Court on 19.7.10 by summoning the applicants u/s 319 of Cr.P.C.

23. In the result, both the criminal revisions have no merit and are hereby dismissed. The trial Court shall take steps for proceedings against the applicants in terms of Section 319 of Cr.P.C. I make it clear that by dismissing these revisions, I have not expressed any opinion on merits of the case.