
(2007) 06 AHC CK 0056
In the Allahabad High Court

Shiv Ganesh Gautam

APPELLANT

Vs

State of U.P. and Balram Yadav

RESPONDENT

Date of Decision : 15-06-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 151, 319, 82, 83
Penal Code, 1860 (IPC) — Section 120B, 302

Citation : (2007) 06 AHC CK 0056

Hon'ble Judges : Vinod Prasad, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Vinod Prasad, J.—Both the above criminal miscellaneous applications have been filed by Shiv Ganesh Gautam and because the order passed in the former criminal miscellaneous application no. 6911 of 2007 will have bearing on the latter criminal miscellaneous application No. 12322 of 2007 and hence both the above applications are being disposed of by this common order.

2. Shiv Ganesh Gautam presently posted as Sub-Inspector of Police, district Chandauli has prayed for quashing of the order dated 14.2.2007 passed by Additional Sessions Judge, Fast Track Court, No. 1, Azamgarh in Sessions Trial No. 219 of 2005, State v. Bhagwan for offences under Sections 302/120B I.P.C through Criminal Miscellaneous Application No. 6911 of 2007. By the aforesaid order the trial court has summoned the applicant u/s 319 Cr. P.C. to stand trial along with other accused persons, who were already being tried by it. In the aforesaid criminal miscellaneous application a counter affidavit was called for on 3.4.2007, which has been filed by Dadhibal Tiwari, Station Officer, Atarauliya through learned A.G.A. to which a rejoinder affidavit has also been filed by the applicant.

3. During the pendency of the former Criminal Misc. Application 6911 of 2007 non-bailable warrant, proclamation u/s 82 Cr. P.C. and attachment has been issued against the applicant consequently he filed subsequent Criminal

Miscellaneous Application No. 12322 of 2007 with the prayer that the order of proclamation and attachment under Sections 82 and 83 Cr. P.C. dated 17.5.2007 passed in the aforesaid Session's trial be also quashed.

4. The factual matrix, which has generated the present two applications are that on 2.7.2004 at 10.30 a.m. informant Balram Yadav was returning back to his house accompanied by his uncle Chhabilal, elder brother Baj'rangi and his younger brother after ploughing his field by his tractor and when he reached near the field of Balli Singh, accused persons including two sets of siblings Bhagwan Singh, Chandradev Singh both sons of Awadh Bihari, Siyaram and Jairam both sons of Vansh Lochan and Hawaldar sons of Basdev armed with rifle, bomb and gun appeared at the spot and because of the harboured previous animosity started indiscriminate firing from their respective weapons and also hurled the bombs. Assailent Siyaram shot at Chhabilal on his face and chest and Bhagwan Singh shot at Vishwanath on his chest. Both the above persons died on the spot instantaneously. Informant and his brother were also fired at but they sheltered themselves behind the tractor and escaped unhurt. This incident was witnessed by the informant, his brother, and also by Shiv Sagar Yadav, Jai Sagar Yadav and other co villagers. Because of hurling of bomb and indiscriminate shooting a lot of commotion occurred at the spot. It was alleged that the incident was executed in conspiracy with the present applicant Shiv Ganesh Gautam. Informant lodged the F.I.R. of the said incident at police station Atarauliya, district Azamgarh on the same day at 7.20 p.m.

5. The police started the investigation and charge sheeted Chandrodey, Jairam Singh, Hawaldar Singh and Surya Nath Singh. Finding no case against the applicant the Investigating Officer did not charge sheet the applicant.

6. Charge sheeted accused were committed to the court of sessions for trial vide ST. No. 219 of 2005 State v. Bhagwan Singh and Ors. before Sessions Judge, Azamgarh who framed charges against them inter alia u/s 302 IPC on 29.1.2005.

7. In the trial informant Balram Singh was examined as PW 1 by the prosecution. In his examination-in-chief he stated that the present applicant Shiv Ganesh Gautam, S.O. Atarauliya, had hatched up the conspiracy regarding the incident. He was cross-examined at great length. In his cross-examination nothing was stated by him in respect of the present applicant. After the deposition of PW 1 informant Balram Singh was concluded prosecution moved an application on 16.10.2006 for summoning the applicant u/s 319 Cr. P.C. But their said application was rejected by the trial Judge by passing a detailed order on 11.12.2006. in the aforesaid order the trial Judge observed that from the statement of P.W. 1 the complicity of the applicant in the crime and that he had hatched up the conspiracy is not born out and there was no sufficient reason to summon him u/s 319 Cr. P.C. By observing thus the trial Judge rejected the prayer of the prosecution to summon the applicant u/s 319 Cr. P.C as an accused in the trial.

8. Subsequently, prosecution examined two other witnesses of fact Jai Sagar Yadav P.W. 2 and Bajrangi P.W. 3. After examination of these witnesses prosecution again filed an application u/s 319 Cr. P.C. for summoning of the applicant as accused on 6.2.2007. This time the trial Judge vide his impugned order dated 14.2.2007 summoned the applicant for offence u/s 120B I.P.C. and issued bailable warrant against him. Since the applicant did not appear before the trial Court, proclamation u/s 82 Cr. P.C. and attachment of property of the applicant under 83 Cr. P.C. has been issued against him. In the two present applications summoning order as well as the 82 and 83 Cr. P.C. proceedings mentioned above has been prayed to be quashed by the applicant.

9. I have heard Sri Viresh Mishra, learned senior counsel assisted by Mrs. Swati Agrawal, on behalf of the applicant in support of the two " above applications and the learned A.G.A. in opposition.

10. Learned Counsel for the applicant contended that it is a case of no evidence and the applicant has been wrongly summoned. He submitted that nobody should be summoned only to stand the trial. He further contended that it is easy to level allegations against the Investigating Officer and police personnel and make them accused in the case. He further submitted that during the investigation it has come to the light that the applicant has arrested the family members of the informant u/s 151 Cr. P.C. and therefore, he has been wrongly nominated by a bald statement. He concludingly, submitted that summoning order of the applicant dated 14.2.2007 be quashed. For the second petition he contended that if the summoning order is quashed the second criminal miscellaneous application becomes infructuous and in case the said former application challenging the summoning order is dismissed then some time be allowed to the applicant to appear before the trial court and seek bail and plead for discharge.

11. Learned A.G.A. contended that the impugned order of summoning is justified as it has been deposed by the witnesses in the court that the incident occurred because of the conspiracy hatched up by the present applicant who was the station officer of the concerned police station. He, therefore, contended that the present two applications are wholly misconceived and they should be dismissed.

12. I have cogitated over the submissions raised by the rival sides. It is not in dispute that after the examination of P.W. 1 Balram Singh, who is the informant of the case, an application u/s 319 Cr. P.C. was filed by the prosecution to summon the application. The said application was rejected by the trial Judge by holding that a single line statement that the incident occurred due to conspiracy hatched up by the applicant is not sufficient to summon him. By observing thus the trial Judge has rejected the prayer of the prosecution to summon the applicant as an accused to stand the trial for offences u/s 302/120B I.P.C. Subsequently, prosecution examined two other witnesses P.W. 2 and P.W. 3. Both the aforesaid witnesses have also stated that very line that the incident was executed because of the conspiracy hatched up by the applicant. It is on the

basis of these single line statement that the applicant has been summoned subsequently by the trial Judge. Thus it is clear that there was no change in evidence so far as the present applicant is concerned from the statement of first witness to the third witness. From the above facts it is not clear as to why the trial Judge has summoned the applicant on the basis of same evidence as according to his opinion, on the earlier occasion the said statement was insufficient to summon the applicant. If evidence of the informant that the conspiracy was hatched up by the applicant was insufficient to summon him as an accused, the repetition of that very line by the other two subsequent witness how can make the prosecution version against the applicant better. Repetition of statement is no ground to summon anybody as an accused in the case. It is the quality of evidence and the nature of allegation levelled in the deposition and the role assigned to a particular accused that is material to summon any body as accused and the evidence is to be looked into only from this point of view while exercising the extraordinary power u/s 319 Cr. P.C. It will be a travesty of justice to ask somebody to go to the arduous procedure of trial only to be acquitted. The present case is one of the such case where only a single line statement has been given by all the witnesses that the incident was executed in the conspiracy of the applicant that the applicant has been summoned. But for this allegation there is no other evidence on record to bring the complicity of the applicant in the crime. In my view, the said statement given by the witnesses is only an allegation and not an evidence. The prosecution has not led any evidence in the trial as to how the conspiracy was hatched up and who participated in the conspiracy and with whom the applicant conspired.

13. In fact even if the evidence of the three prosecution witnesses examined in the trial remain uncross-examined the applicant cannot even be charged with the offence of conspiracy coupled with murder. The statements of the witnesses is wholly insufficient to bring out the ingredients of conspiracy against the applicant. Even if the applicant would have not cross-examined the aforesaid witnesses and would have accepted the evidence as it is stated before the court he would not have been convicted at all. The evidence led by the three evidences is so deficient in its contents that even a prudent man cannot come to the conclusion that the applicant requires to be prosecuted along with the other accused persons for such a serious charge as that of a murder. Summoning of a person as accused is a serious matter as it jeopardises his liberty and entails serious consequences. It should not be resorted to as a matter of routine-There can not be any hard and fast rule in this respect but every case will vary from facts of facts and evidence led in the trial. There can not be rigid formula for it but flexibility of evidence led in the trial coupled with the role and nature of crime will be the guiding factors for exercising such wholesome power. In this respect Apex Court in the recent Judgment reported in 2007ACC 257 Shankar Diwal Wadu v. State of Maharashtra it has been observed by the Apex Court as follows:

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 is in all likelihood would be convicted.

14. Thus summoning of an accused u/s 319 Cr. P.C. should be made only when there is a possibility of his being convicted. In this respect in *Krishnappa Vs. State of Karnataka*, the Apex Court has held as follows:

6. It has been repeatedly held that the power to summon an accused is an extraordinary power conferred on the court and should be used very sparingly and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken.

15. It has further been held in the above decision of *Krishnappa (Supra)* by the Apex Court as follows:

9. In *Michael Machado and Another Vs. Central Bureau of Investigation and Another*, construing the words "the court may proceed against such person" in Section 319 Cr. P.C. this Court held that the power is discretionary and should be exercised only to achieve criminal justice and that the court should not turn against another person whenever it comes across evidence connecting that other person also with the offence. This Court further held that 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. The court, while examining an application u/s 319 Cr. P.C, has also to bear in mind that there is no compelling duty on the court to proceed against other persons. In nut shell, it means that for exercise of discretion u/s 319 Cr. P.C, all relevant factors, including the one noticed above, have to be kept in view and an order is not required to be made mechanically merely on the ground that some evidence had come on record implicating the person sought to be added as an accused.

16. Some other decisions of the Apex Court in this respect are *Kailash Dwivedi v. State of M.P. and Anr.* (2006) 1 SC C 764 and *Palanisamy Gounder and Anr. v. State* represented by Inspector Of Police (2006) 1 S.C.C. 568.

17. In view of the aforesaid law, it is crystal clear that summoning of a person as an accused u/s 319 Cr. P.C. should not be done as a matter of routine course. It should be done on the basis of cogent and reliable evidence which can be prima facie be considered to be sufficient for a likelihood conviction of the person to be summoned.

18. In view of above discussion the summoning order of the applicant u/s 319 Cr. P.C. by the trial Judge through the impugned order dated 14.2.2007 was not warranted, therefore, the said cannot be sustained in law and deserves to be quashed.

19. Concludingly, Criminal Miscellaneous Application No. 6911 of 2007, *Shiv Ganesh Gautam v. State of U.P. and Anr.* is allowed. The summoning order of the

applicant u/s 319 Cr. P.C. vide impugned order dated 14.2.2007 passed by Additional Sessions Judge, Fast Track Court no. 1, Azamgarh in Sessions Trial No. 219 of 2005, State v. Bhagwan and others is hereby quashed.

20. Since the summoning order of the applicant has been quashed the second Criminal Miscellaneous Application No. 12322 of 2007, Shiv Ganesh Gautam v. State of U.P. and Anr. challenging the order u/s 82 and 83 Cr. P.C. dated 17.5.2007 becomes infructuous and is dismissed as such because the proclamation and attachment against the applicant now cannot be executed.