

(2013) 03 MP CK 0109

In the Madhya Pradesh High Court

Case No : Criminal Revision No. 1291 of 2012

Sunny Gaur

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

Date of Decision : 11-03-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 319

Citation : (2013) CriLJ 2289 : (2013) ILR (MP) 1199

Hon'ble Judges : N.K. Gupta, J

Bench : Single Bench

Advocate : Surendra Singh and Prakash Upadhyay, for the Appellant; Mohd. Nasir, S. K. Kashyap, Public Prosecutor, for the Respondent

Judgement

N.K. Gupta, J.—These two revisions are connected with the common order dated 3.7.2012 passed by the learned Sessions Judge, Rewa in S.T. No. 135/2008 and therefore, decided by a common order. The applicant Sunny Gaur (hereinafter he will be referred to as "Applicant/accused") of criminal revision No. 1291/2012 has challenged the impugned order dated 3.7.2012 passed by the learned Sessions Judge, Rewa in S.T. No. 135/2008, whereby he was included in the list of accused persons u/s 319 of the Cr.P.C., whereas the criminal revision No. 2457/2012 has been preferred by the applicant Vinod Kumar Mishra (hereinafter he will be referred to as "Applicant/applicant"), in which he has challenged the impugned order to add the remaining persons to be accused in the case, by an application u/s 319 of the Cr.P.C. filed before the trial Court.

2. The facts of the case, in short, relating to the present revisions, are that, on 2.9.2008, at about 7 a.m. in the morning, some unemployed villagers of their association gathered before Vindhya Gate of JP cement factory, Naubasta, District Rewa. They demonstrated to get their demands fulfilled. They demanded that the applicant/accused Sunny Gaur should come to the gate to receive their memorandum but, the applicant/accused did not accept their demand. Thereafter, to maintain the law and order, the authorities decided that the

demonstrators be arrested and sent to the jail in various buses. One bus was also parked near the Vindhya Gate. Thereafter, the demonstrators started using their sticks and pelted stones upon the officers of the administration of the factory as well as the district administration and police including the guards of the factory. They damaged the buses, some motorcycles and they tried to destroy the Vindhya Gate. Some firing was done and one Raghvendra Singh Behra succumbed to the injuries due to firing, whereas 42 other persons were alleged to be injured in that firing. An FIR was lodged by Rajbahadur Singh, brother of the deceased, by way of a Dehati Nalshi and case was registered but, in investigation no one supported the case of the complainant that the firing was done by the applicant/accused Sunny Gaur and therefore, the case was registered against two security guards namely Sanjay Kumar Singh and Raghunandan Singh. In investigation, the police found that those two security guards were responsible for firing and therefore, a charge-sheet was filed against two security guards. The trial Court has examined as many as 27 witnesses, prior to the filing of the application u/s 319 of the Cr.P.C., whereas the complainant Rajbahadur Singh (P.W. 4) did not support his own FIR, Ex. P/4. Some witnesses like Rajbahadur Singh (P.W. 20), Rajababu (P.W. 21) and Chandrashekhar Singh (P.W. 24) have stated that the firing was done by the applicant/accused Sunny Gaur initially and thereafter, the fire was done by Rajnesh Gaur, K.P. Sharma, Ajay Singh Rana, Shivshankar Choubey, Ramesh Gupta and others and so many persons of the crowd sustained injuries. On the basis of the evidence given by said witnesses, the applicant/applicant has filed an application u/s 319 of the Cr.P.C. to add the applicant/accused and other persons like Shivshankar Choubey, Rajnesh Gaur. K.R. Sharma etc. to be accused in the case. The learned Sessions Judge vide the impugned order, partly allowed that application and name of the applicant/accused Sunny Gaur was added and remaining application filed by the applicant/accused was dismissed.

3. I have heard the learned counsel for the parties at length. They have raised so many points in the matter and therefore, their contentions will be considered point wise at present.

4. The learned Senior Advocate for the applicant has submitted that provisions u/s 319 of the Cr.P.C. can be applied to those, who can be tried simultaneously. At present, the case of the present accused persons is totally different from the case of the applicant/accused and therefore, they cannot be tried in the same case. Consequently, the application u/s 319 of the Cr.P.C. could not be accepted. In his support, he has placed his reliance on various judgments and orders passed by Hon"ble the Apex Court in cases of Harjinder Singh Vs. State of Punjab and Others, , Shiv Kumar Vs. Hukam Chand and Another, , Balbir Vs. State of Haryana and Another, .

5. It is true that the application was filed u/s 319 of the Cr.P.C. but, acceptance of that application would result in a joint trial of the present accused persons along with the proposed accused persons, whereas, their cases are diagonally

opposite. Initially, it was mentioned in the FIR that the security guards were armed with guns but, it was alleged that the applicant/accused Sunny Gaur took a gun from the guard and fired from that gun, causing death of Raghvendra Singh. Thereafter, remaining office bearers of the factory, took the guns from various security guards and fired from those guns, by which 42 persons were injured. However, in investigation, the present accused security guards were found to have fired. If the applicant/accused and other office bearers of the factory are joined as accused persons in the present case then, that case is entirely different from the case of the present accused persons. Rather it can be said that the case of the security guards (the present accused) is diagonally opposite to the case of the applicant/accused. If it is presumed that firing was done by the applicant/accused Sunny Gaur and his associates then, case of the prosecution against the present accused persons shall go away and trial would not proceed against them because two contradictory cases cannot be tried simultaneously and if trial is proceeded against the present accused persons then, opposite factual story cannot be established in the same case. Hon"ble the Apex Court in case of Balbir Singh Vs. State, has directed that :-

Thus, where there is commonality of purpose or design, where there is continuity of action, then all those persons involved can be accused of the same or different offences "committed in the course of the same transaction, "But if in one case the accused is alleged to have killed a person without any junction with the accused in the other case, then it cannot be treated as the same offence or even different offences "committed in the course of the same transaction". If such two diametrically opposite versions are put to joint trial the confusion which it can cause in the trial would be incalculable. It would then be a mess and then there would be no scope for a fair trial.

Therefore, in the light of law laid by Hon"ble the Apex Court in case of Balbir Singh Vs. State, , the present accused persons cannot be tried simultaneously with the proposed accused persons in the present case in a common trial. If provisions of section 319(1) of the Cr.P.C. are perused, which are as under:-

(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.

Then, it would be clear that the persons can be added with the help of those provisions. They could be tried together with the present accused. In the present case, if it was stated by the witnesses that the guards were firing upon the crowd and thereafter, the applicant/accused Sunny Gaur and his companions also took the guns of guards and they also fired then, they could be tried in a common case but. at present, the prosecution's case is that only the security guards had fired from guns, causing the entire incident, whereas the applicant/accused has contended in this application u/s 319 of the Cr.P.C., on the basis of the

statements of various witnesses that the security guards did not fire but, fire was done by the applicant/accused Sunny Gaur and his companions and therefore, in the light of judgment passed by Hon''ble the Apex Court in case of Balbir Singh Vs. State, , the present accused persons cannot be tried simultaneously with the proposed accused persons and therefore, the proposed accused persons cannot be added as accused u/s 319 of the Cr.P.C.

6. The learned counsel for the applicant/accused has stated that looking to the entire story of the case, no proposed accused can be added in absence of the evidence produced before the Court, which should be convincing for the purpose of the exercise of the extraordinary jurisdiction of the Court u/s 319 of the Cr.P.C. In support of the submissions, law laid by Hon''ble the Apex Court in case of Sarabjit Singh and Another Vs. State of Punjab and Another, is referred. On the other hand, the learned counsel for the State and the learned counsel for the applicant/accused have referred the various judgments passed by Hon''ble the Apex Court in cases of Suman Vs. State of Rajasthan and Another, , Brindaban Das and Others Vs. State of West Bengal, and Ram Pal Singh and Others Vs. State of U.P. and Another, and some orders of single Bench of this Court in cases of Ramlakhan and Another Vs. State of M.P., . Sumitra Vs. State of M.P., and Jagjeevan Tiwari Vs. State of M.P. and Others, are referred. In all the aforesaid judgments. it is directed that what would be the consideration of the evidence at the time of considering the application u/s 319 of the Cr.P.C. Out of such cases, in law laid by Hon''ble the Apex Court in case of Sabarjeet Singh. (AIR 2007 SC 2792) (supra) a clear direction is given by Hon''ble the Apex Court, a judgment of Hon''ble the Apex Court in case of Y. Saraba Reddy Vs. Puthur Rami Reddy and Another, is referred :-

... 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....

Also, by quoting that para, Hon''ble the Apex Court in case of Sabarjeet Singh. (AIR 2007 SC 2792) (supra) in para 17. it is directed as under:-

An order u/s 319 of the Code, therefore, should not be passed only because the first informant or one of the witnesses seeks to implicate other person(s). Sufficient and cogent reasons are required to be assigned by the court so as to satisfy the ingredients of the provisions. Mere ipse dixit would not serve the purpose. Such an evidence must be convincing one at least for the purpose of exercise of the extraordinary jurisdiction.

For the aforementioned purpose, the courts are required to apply stringent tests; one of the tests being whether evidence on record is such which would reasonably lead to conviction of the person sought to be summoned.

7. In the light of aforesaid judgments passed by Hon''ble the Apex Court, if

evidence of the present case is considered then, the FIR, which was lodged by the witness Rajbahadur Singh (P.W. 4) was discarded by himself and therefore, FIR, which was lodged after so many hours of the incident, is highly doubtful. The application of the applicant/accused was dependent upon the evidence given by Rajbhan Singh (P.W. 20). Rajababu (P.W. 21) and Chandrashekhar Singh (P.W. 24). whereas, all other independent eyewitnesses have turned hostile. Shri U.C. Tiwari, SHO (P.W. 22) and Tahsildar Shivani Pandey (P.W. 26) did not state that fire was done either by the applicant/accused Sunny Gaur or his companions. There is a lot of contradictions in the statements of witnesses Rajbhan Singh, Rajababu and Chandrashekhar Singh. The witness Rajbhan Singh has accepted that he did not state to the police that it was the applicant/accused Sunny Gaur, who fired from the gun and killed the deceased Raghvendra. His contradiction with his case diary statement, Ex. D/2 was recorded and therefore, his testimony cannot be believed. It is an after thought statement given by the witness Rajababu Singh. Chandrashekhar Singh has stated that initially the applicant/accused Sunny Gaur fired from the gun and thereafter, his companions also started firing from the gun, whereas Rajababu did not say that the companions of the applicant/accused fired from the guns, which indicates that Chandrashekhar Singh is telling a falsehood about the companions of the applicant/accused Sunny Gaur and hence, the learned Sessions Judge did not believe the witness Chandrashekhar Singh in respect of the companions of the applicant/accused Sunny Gaur while considering the application u/s 319 of the Cr.P.C.

8. The witness Rajababu did not state to the police that the proposed accused Rajnish Gaur was present at the time of the incident. He has stated that he was not at all examined by the police and he was not amongst the demonstrators but. he was going through the passage, where the crowd was gathered. If a crowd is gathered on the Vindhya Gate and a pedestrian is while passing through the passage cannot see that who fired from the gun because in between the proposed accused and this witness, a crowd of many persons was present and therefore, he cannot pinpoint one person from the crowd. Therefore, the statement of the witness Rajababu appears to be not believable. Chandrashekhar Singh has accepted that the applicant/accused Sunny Gaur took a gun from a security guard and killed the victim Raghvendra. who fell on Earth but. such description is not written in his case diary statement, Ex. D/4. Similarly, he has stated that the companions of the applicant/accused Sunny Gaur had also fired from various guns but, no such statement was given by him to the police and a contradiction was recorded with his case diary statement, Ex. D/4. The learned Sessions Judge has rightly disbelieved this witness relating to the companions of the applicant/accused Sunny Gaur. Looking to his contradiction with the case diary statement, his testimony cannot be accepted against the applicant/accused Sunny Gaur.

9. Under such circumstances, if the statements of SHO, U.C. Tiwari (P.W. 22) and Tahsildar Shivani Pandey (P.W. 26) are considered then, no doubt is created

against the applicant/accused Sunny Gaur that he assaulted the deceased Raghvendra by firing from a gun. If the applicant/accused Sunny Gaur would have come on the gate then, a memorandum could be given to him by the crowd and there was no possibility of any incident. Under such circumstances, where the FIR of the case is discarded because the complainant himself did not support the FIR and only 2-3 witnesses are telling against the applicant/accused Sunny Gaur and his companions, also the learned Sessions Judge did not rely upon these witnesses for the companions of the applicant/accused Sunny Gaur, therefore, in absence of their such previous statements or due to evidence of majority witnesses, the evidence given by these three witnesses would not be accepted finally and therefore, with help of the evidence given by these three witnesses, neither the applicant/accused Sunny Gaur, nor his companions can be convicted for the offence punishable u/s 302 or 307 of IPC. Hence, it is apparent that there is no cognate evidence against the applicant/accused Sunny Gaur, so that this extraordinary power be used to implicate him in the case as an accused. On the contrary, if he is added then, the prosecution's case against the present accused persons shall be damaged. The learned Sessions Judge did not rely upon the witnesses for the companions of the applicant/accused Sunny Gaur then, such witnesses should not be relied against the applicant/accused Sunny Gaur also. Hence, in the absence of any cognate evidence, neither the applicant/accused Sunny Gaur nor his companions could be made accused in the present case.

10. Also, as discussed above, a common trial cannot be done against the present accused persons and the applicant/accused Sunny Gaur and his companions and therefore, they cannot be joined as an accused in the present case. The learned Sessions Judge has committed an error of law in passing the order against the applicant/accused Sunny Gaur to join him as an accused in the case.

11. So far as the joining of remaining proposed accused is concerned, as discussed above, there is no cognate evidence against them that they participated in the crime and therefore, the learned Sessions Judge has rightly rejected the application u/s 319 of the Cr.P.C. against those proposed accused persons and therefore, the revision filed by the applicant/applicant Vinod Kumar Mishra cannot be accepted. Also, it is pertinent to note that the applicant/applicant Vinod Kumar Mishra sought a relief against the proposed accused persons, by way of a revision but, he did not include those persons to be party in the present revision and therefore, in absence of those proposed accused persons, no relief can be granted to the applicant against the persons, who were not made party in the present revision.

12. On the basis of the aforesaid discussion, the revision filed by the applicant Vinod Kumar Mishra cannot be accepted. Hence, it is hereby dismissed. On the other hand, the revision filed by the applicant/accused Sunny Gaur is acceptable and therefore, it is hereby accepted. The impugned order passed by the learned Sessions Judge, Rewa relating to implication of the applicant/accused Sunny

Gaur to be accused in the present case u/s 319 of the Cr.P.C. is hereby set aside. A copy of the order be sent to the trial Court, so that he may continue with the trial against the present accused persons. However, by perusal of the impugned order, it appears that the learned Sessions Judge has disclosed his mind in detail prematurely and therefore, a prejudice would be caused to the State if trial will proceed before the Sessions Judge. Rewa, therefore, the learned Sessions Judge, Rewa is advised that the trial may be transferred to any other Additional Sessions Judge, Rewa.