

(1996) 12 PAT CK 0043

In the Patna High Court

Case No : Criminal Miscellaneous No. 1131 of 1988

Surendra Prasad Sharma @ Surendra Sharma and Others

APPELLANT

Vs

The State of Bihar and Another

RESPONDENT

Date of Decision : 20-12-1996

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 193, 319, 319(1), 398, 482
Penal Code, 1860 (IPC) — Section 201, 302, 34, 364

Citation : (1997) 1 PLJR 300

Hon'ble Judges : P.K. Sarin, J

Bench : Single Bench

Advocate : Y.C. Verma, U.K. Prasad No. 1, Sanjeev Kumar, Sangeet Deokuliar, in Cr. Misc. Nos. 1131 of 1988 and 2174 of 1989, Tara Kant Jha and Dharendra Kumar Jha, in Cr. Misc. No. 7348 of 1989 and Pankaj Kumar Sinha, in Cr. Misc. No. 4242 of 1990, for the Appellant; Shiva Shankar Prasad Singh, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Sarin, J.—As common law point arises in all these Cr. Misc. Cases No. 1131 of 1988, 2174 of 1989, 7343 of 1989 & 4242 of 1990, hence it has been heard together and are being disposed of by this common judgment.

2. The common question of law arises for consideration is whether the Petitioners could have been summoned u/s 319 of the Code of Criminal Procedure (hereinafter referred to as the Code) for facing trial.

3. Before dealing with the question of law it would be proper to mention the facts of each case in brief.

4. In Cr. Misc. No. 1131 of 1988 Petitioners were named as accused in Hathuri P.S. Case No. 0015 of 1987 lodged by one Ram Sanjeen Sharma Police, after investigation, submitted charge sheet; copy of which is Annexure-1 of the petition. The Petitioners were sent up for trial by the Police. The charge sheet

was submitted only against eleven other co-accused against whom Police found the case to be made out.

5. The learned Magistrate took cognizance only against eleven persons and did not take cognizance against the present Petitioners. The case was committed to the court of sessions. The learned 4th Additional Sessions Judge, whom, the case was made over for trial, on a petition filed on behalf of prosecution for summoning the Petitioners u/s 319 of the Code, ordered for summoning the Petitioners as accused to face the trial by the impugned order dated 4.1.1988. The impugned order has been challenged on the ground that the powers u/s 319 of the Code could not have been exercised before recording of any evidence. It has been alleged that the learned Sessions Judge could not have summoned the Petitioners on the same materials contained in Police papers on which the learned Magistrate had not taken cognizance against the present Petitioners and the Police also had not sent up the Petitioners for trial in the said charge sheet.

6. Cr. Misc. No. 2174 of 1989 has been filed by six Petitioners for quashing the order dated 19.1.1988 passed by 3rd Additional Sessions Judge, Motihari, summoning the Petitioners u/s 319 of the Code as accused to face trial in Sessions Trial No. 1 of 1984.

7. The said Sessions Trial arose out of Turkolia P.S. Case No. 3 of 1980 which was registered on a first information report lodged by one Lal Chaudhary u/s 302/34 of the Indian Penal Code. The Petitioners were not named in the first information report as accused. However, They were implicated during investigation but the Police, after investigation, found the case against the Petitioners to be true and submitted charge sheet against them. Police submitted charge sheet only against four other accused persons and, accordingly, the Chief Judicial Magistrate, Motihari, took cognizance against those four accused persons on 8.7.1981 and discharged the present Petitioners who were not sent up for trial by the Police. The case was committed to the court of sessions. It appears that on the application of the prosecution filed u/s 319 of the Code the learned trial court ordered summoning of the Petitioners as accused to face trial on the basis of materials collected during investigation. The Petitioners challenged the impugned summoning order on the ground that in the absence of any fresh material the learned trial court could not have summoned them on the same materials collected during investigation on which the Police had not sent them up for trial and the learned Magistrate, agreeing with the charge sheet, had discharged them.

8. Criminal Miscellaneous No. 7348 of 1989 has been filed by eight Petitioners for quashing the order dated 28.6.1989 passed in Sessions Trial No. 108 of 1986 by Sessions Judge, Sitamarhi, by which the Petitioners had been summoned" to face the trial as accused. The said sessions trial arises out of Piprahi P.S. Case No. 42 of 1984 registered on the basis of Fardbayan of one Phulai Mahton on 21.7.1984, u/s 364, 302, 201/34 of the Indian Penal Code. Copy of the first information report is at Annexure-1 of the petition. Police, after investigation, submitted

charge sheet against three other persons as accused for the offences under Sections 364, 302 and 201 of the Indian Penal Code and the Petitioners who were named as accused in the first information report, were shown in column No. 2 of the charge sheet under the heading not sent up for trial. Copy of the charge sheet is at Annexure-2 of the petition. The learned Chief Judicial Magistrate took cognizance by order dated 9.11.1984 against three other co-accused and discharged the Petitioners, who were not sent up for trial by the Police. The order of the learned Chief Judicial Magistrate has been annexed as Annexure-3. It has been alleged that the order taking cognizance was challenged before this Court in Cr. Misc. No. 694 of 1985 by the three other accused persons (against whom cognizance had been taken) but this court dismissed the said Criminal Miscellaneous application by order dated 30.1.1985 with the observation that the point agitated in the Criminal Miscellaneous application can later be appreciated at the time of framing of charge. The copy of the order of this court in the said Criminal Miscellaneous is Annexure-4 of the petition. It has been further alleged that the informant of the case challenged the order of the learned Chief Judicial Magistrate dated 9.11.1984, in so far as it related to the discharge of the Petitioners by filing Cr. Rev. No. 317 of 1984 before the Sessions Judge, Sitamarhi. The learned Sessions Judge, Sitamarhi, by order dated 22.2.1986 (copy at Annexure-5 of the petition) set aside that portion of the order by which the learned Chief Judicial Magistrate had discharged the Petitioners. The learned Sessions Judge further directed the Chief Judicial Magistrate to afford an opportunity of hearing to the informant on his protest petition. Thereafter, the learned Chief Judicial Magistrate, Sitamarhi, heard the informant on his protest petition and rejected the protest petition by his order dated 5.6.1986 (Copy at Annexure-6 of the petition). However, it was observed by the Chief Judicial Magistrate that the informant may agitate the matter u/s 319(1) of the Code. Being dissatisfied with the said order of the revisional court, the informant filed a Criminal Revision application No. 778 of 1986 before this court but, ultimately, the said criminal revision application was allowed to be withdrawn by this court with the observation that the informant can agitate the matter u/s 319(1) of the Code. The copy of the order of this Court dated 27.7.1986 is Annexure-7 of the application. The case was committed to the court of sessions in the month of August, 1986 and on 21.5.1987 the informant-opposite party no 2, filed an application for summoning the Petitioners to face the trial. The copy of the application of the informant is at Annexure-8 of the application. The learned Sessions Judge, by the impugned order, ordered for summoning the Petitioners to face trial as accused. The Petitioners challenged the said order on the ground that the learned Sessions Judge could not have summoned the Petitioners without recording any evidence in the case. The other ground taken is that the Petitioners having been discharged could not come "within the mischief of any person not being the accused" as incorporated in Section 319(1) of the Code. It is further stated that the learned Sessions Judge could not have summoned the Petitioners on the same materials collected during investigation on which the Police had not sent the Petitioners up for trial.

9. The Petitioners of Cr. Misc. No. 4242 of 1990 has prayed for quashing the order dated 16.4.1990 passed by 6th Additional Sessions Judge, Purnia, in Sessions Trial No. 249 of 1987 by which the Petitioner has been summoned by the 6th Additional Sessions Judge to face the trial as an accused. It appears that the said sessions trial arose out of the Jokihat (Mahalgaon) P.S. Case No. 22 of 1986 which was registered on the first information report lodged by one Rajendra Biswas, opposite party No. 2 of the case, on 9.2.1986. The Petitioner was not named in the first information report and the Police, after investigation, had not submitted charge sheet against the Petitioner. The case was committed to the court, of sessions and the learned 6th Additional Sessions Judge, Purnia, who was seized of the Sessions Trial No. 249 of 1987 allowed the application of Additional Public Prosecutor for summoning the Petitioner as an accused in the case. The learned Additional Sessions Judge, accordingly, summoned the Petitioner to face trial along with the accused against whom charge sheet has been submitted. The learned Additional Sessions Judge has not mentioned that he was summoning the Petitioner u/s 319 of the Code. It has been averred by the Petitioner in the petition that the learned Additional Sessions Judge, has, without any additional evidence before him, illegally made the Petitioner accused in the case and summoned him and the said order amounts to abuse of process of court.

10. It has been contended by the learned Counsel for the Petitioners that the learned Sessions Judge could not have summoned any person as an accused u/s 319 of the Code without recording any evidence. The contention is that the learned Sessions Judge could not have summoned the Petitioners as accused to face trial on the basis of same material of the case diary on which the Police had not sent them up for trial and the learned Chief Judicial Magistrate had agreed with the Police report and had discharged the Petitioners. Reliance has been placed on behalf of the Petitioners on a decision of the Apex court in the case of Sohan Lal and others Vs. State of Rajasthan, wherein it has been held that the provisions of Section 319 of the Code have to be read in consonance with the provisions of Section 398 of the Code and once a person is found to have been accused in the case he goes out of the reach of Section 319. It has been further observed that whether he can be dealt with under any other provisions of the Code is a different question. On the facts of the said case it has been observed that in the case of the accused, who has been discharged under the relevant provisions of the Code, the nature of finality to such order and resultant protection of the persons discharged subject to revision u/s 398 may not be lost sight of, and once a person was an accused in the case he would be out of reach of Section 319 of the Code. The facts of the said case will show that it was the case triable by Magistrate and the learned Magistrate after taking cognizance and after hearing the arguments had discharged the two Appellants of the said case of all the charges levelled against them. In the context of the said factual position it was held that the accused who has been discharged from the charges after taking of cognizance cannot be summoned u/s 319 of the Code which

contemplates summoning of a person who was not an accused in the case. In the cases under consideration the facts are different than the facts of the said case. No Petitioner has been discharged after taking cognizance. The Police has shown the names of Petitioners in column No. 2 of the charge sheet mentioning that they are not sent up for trial as the case was not found true against them. The learned Magistrate while taking cognizance against the other persons by the same order appears to have mentioned that the Petitioners (who were not sent up for trial by the Police) are discharged. The contention of the learned Counsel for the Petitioners that mentioning by learned Magistrate about discharge shows that the learned Magistrate has considered the case of accused so discharged and then had passed the order. This contention does not appear to have any force. There will be difference between the discharge after taking cognizance on the ground that no charge is made out against that person and the discharge at the stage taking cognizance itself on the ground that such a person has not been sent up for trial by the Police. A Division-Bench of this Court in the case of *Bishwanath Tato and Others Vs. The State of Bihar* has held that if a person is not sent up by the Police to face the trial then the order not issuing summons against that person does not amount to discharge in the eyes of law. The principle as laid down in the said case applies to the facts of the present case. The Petitioners were not sent up by the Police to face the trial and the process were not issued against them by the learned Magistrate. Therefore, the Petitioners cannot be said to have been discharged after application of mind after issuance of process against them, in this view, the contention of the learned Counsel for the Petitioners that the learned Sessions Judge had no power to take cognizance against the present Petitioners and issue processes against them, cannot be accepted. The Petitioners do not get any assistance from the decision of the Apex Court in the case of *Sohan Lal and Ors. v. State of Rajasthan* (supra) and the case of *Hukamaram and Ors. v. State of Rajasthan*, (supra). No doubt an order u/s 319(1) of the Code can be passed only after recording some evidence and if by such evidence complicity of any other person also appears to be made out he may be summoned to face trial as an accused. Needless to point out that the materials in the case diary is not substantive evidence in the trial or enquiry. Section 319(1) of the Code contemplates evidence in course of any enquiry or trial of an offence which is indicative that the evidence has to come in the course of trial or enquiry. In this view, strictly speaking the trial court could not have summoned any of the Petitioners to face trial as an accused by virtue of exercise of power u/s 319(1) of the Code. However, mentioning of any wrong section would not invalidate any order if it can be found that the order is sustainable under any other provisions of law.

11. The Sessions Judge, on receiving the case by committal, takes cognizance of the offence by virtue of the provisions of Section 193 of the Code and court taking cognizance has full jurisdiction to look into the police papers and other materials on the record to find out as to who are the accused persons who are to be summoned to face trial and if he summons such persons also on the basis of

materials found in police papers and other materials on the record who were not sent up by the Police for trial and who were not shown as accused in the committal order.

As regards the power of the Sessions Judge to take cognizance against present Petitioners and order for issuance of summons against them in exercise of powers u/s 193 of the Code the legal position stands settled by a Full Bench decision of this Court in the case of *Sk. Lutfur Raman v. State* 1985 PLJR 540 (FB) wherein it has been held:

Therefore, what the law u/s 193 seeks to visualise and provide for now is that the whole of the incident constituting the offence is to be taken cognisance of by the court of session on commitment and not that every individual offender must be so committed or that in case it is not so done then the Court of Session would be powerless to proceed against persons regarding whom it may be fully convinced at the very threshold of the trial that they are *prima facie* guilty of the crime as well.

12. It has been further observed that once the case has been committed the bar of Section 193 is removed or, to put it in other words, the condition therefore stands satisfied vesting the court of Session with the fullest jurisdiction to summon any individual accused of the crime. It was held in the said case that the Court has power apart from 319 of the Code to summon any person to face trial by virtue of its power to take cognizance on the basis of materials already on record on which cognizance has to be taken. The view of the said Full Bench decision was taken note of by the Apex Court in the case of *Kishun Singh v. State of Bihar* 1993 (2) PLJR 2 (S.C.) and the Apex Court expressed its agreement with the distinction brought in the said Full Bench case between the old Section 193 and the provisions as it now stands. In *Kishun Singh's* case (*supra*) the Supreme Court refused to quash the impugned order against the accused persons summoned by the Sessions Court by observing that since the Court of Sessions had the power u/s 193 of the Code to summon the Appellants as their involvement in the commission of the crime *prima-facie* appear on the record of the case. It was further observed that it is well settled that once it is found that the power exists the exercise of power under a wrong provision will not render the order illegal or invalid.

In view of the decision of the Full Bench of this Court in the case of *Sk. Lutfur Rahman* (*supra*) and the decision of the Apex Court in the case of *Kishun Singh v. State of Bihar* (*supra*) the impugned orders passed by trial court for summoning the respective Petitioners to face trial as an accused before recording any evidence does not appear to be illegal or without Jurisdiction so as to warrant quashing of the same.

13. The learned Counsel for the Petitioners of Cr. Misc. No. 7348 of 1989 has contended that the informant of the case had agitated the matter in higher court against the order of the Chief Judicial Magistrate by which he had discharged the

Petitioners of the case as the Police had not sent them up for trial but his application was rejected upto the stage of this Court with the observation that the matter may be agitated by him u/s 319(1) of the Code as such the trial court could not have summoned the Petitioners of the case before reaching the stage of 319(1) of the Code and that stage contemplates recording of some evidence during trial. The rejection of the application of the informant and the observation of this Court that the informant may agitate the matter u/s 319(1) of the Code would only bar further agitation by the informant of the same matter before the stage of 319(1) of the Code. The order of this Court passed earlier does not bar the powers of the Sessions Judge to summon any person as accused by virtue of the powers conferred by Section 193 of the Code when cognizance is taken by him. Therefore, the impugned order cannot be invalidated on the ground that the informant was unsuccessful earlier when he had agitated the matter of discharge by the Chief Judicial Magistrate at the time of taking cognizance of the case. In my opinion, the power of the sessions court conferred by Section 193 of the Code is not affected by the unsuccessful attempt of the informant against the order of discharge by Magistrate.

14. Considering the entire facts and circumstances of the case, no illegality or infirmity is found in the impugned orders. Wrong mentioning of Section 319(1) of the Code would not affect the validity of the orders as the orders are sustainable by virtue of the powers conferred on the sessions court u/s 193 of the Code. The impugned orders cannot be said to be abuse of the process of court so as to warrant any interference by this Court in exercise of powers u/s 482 of the Code.

15. The applications in all the four cases (Cr. Misc. Nos. 1131 of 1988, 2174 of 1989, 7348 of 1989 & 4242 of 1990) are dismissed accordingly. The stay orders are vacated.