
(2011) 05 RAJ CK 0115

In the Rajasthan High Court

Case No : Criminal Revision Petition No. 288 of 2011

Suresh Kumar

APPELLANT

Vs

State of Rajasthan and Another

RESPONDENT

Date of Decision : 13-05-2011

Acts Referred:

Constitution of India, 1950 — Article 21

Criminal Procedure Code, 1973 (CrPC) — Section 161, 190, 227, 228, 319

Penal Code, 1860 (IPC) — Section 143, 148, 149, 308, 323

Citation : (2011) CriLJ 4756 : (2011) 4 RCR(Criminal) 556 : (2011) 4 RCR(Criminal) 556 : (2011) 4 RLW 3081

Hon'ble Judges : R.S. Chauhan, J

Bench : Single Bench

Final Decision : Allowed

Judgement

R.S. Chauhan, J.—Both these petitions arise out of the same impugned order, namely order dated 05.03.2011, passed by the Additional Session Judge (Fast Track) No. 2, Jhunjhunu, whereby the learned Judge had issued process u/s 319 Code of Criminal Procedure against the Petitioners. Thus, they are being decided together by this common judgment.

2. Being taken from S.B. Criminal Revision Petition No. 333/2011, the brief facts are that on 19.02.2009 the Parchabayan of Sheeshram, Respondent No. 2, was recorded by the police. In his Parchabayan, Sheeshram claimed that on 18.02.2009, while he was returning from the village Deda Ki Dhani, along with his nephew, he was assaulted by Rakesh Jat, Suresh Jat, Pradeep, Chidia and by two or four other persons, whose names he does not know. According to him, he was first assaulted by Pradeep and Rakesh and subsequently by others. According to him, these persons were armed with Lathies and Barchi. He further claimed that his nephew, Dilip, called up Dharmveer, who came there in his vehicle. He further alleged that he has suffered injuries on different parts of his body. Due to nervousness and anxiety, he cannot reveal as to who assaulted him at specific parts of his body. He further claimed that there was no animosity

between him and the assailants. On the basis of this Parchabayan, the police Station Bagad, District Jhunjhunu, registered a formal FIR, FIR No. 13/2009 for offences under Sections 143, 341, 323 and 427 IPC. After a thorough investigation, while the charge-sheet was filed against the other co-accused persons, the police did not file any charge-sheet against Suresh Kumar, the Petitioner in S.B. Cr. Revision Petition No. 288/2011, and against Sanjay @ Chidia, the Petitioner in S.B. Cr. Revision Petition No. 333/2011. However, during the course of trial, after recording the testimonies of the witnesses, Sheeshram moved an application u/s 319 Code of Criminal Procedure for issuing process against the Petitioners. Vide order dated 05.03.2011, the learned Judge issued process against the Petitioners and took cognizance for offences under Sections 148, 341, 325, 325/149, 326, 326/149, 308 and 308/149 IPC. He further directed that the Petitioners should be summoned through non-bailable warrants of arrest. Hence, these petitions before this Court.

3. Mr. Ghanshyam Singh Sisodia, the learned Counsel for the Petitioner in S.B. Criminal Revision Petition No. 288/2011, has raised the following contentions before this Court: firstly, the power u/s 319 Code of Criminal Procedure is a vast power, which should be exercised sparingly and not routinely. The said power cannot be exercised mechanically solely on the ground that prima facie a case is made out against the alleged offender. Secondly, the power u/s 319 Code of Criminal Procedure stands on a different footing than the power u/s 190 Code of Criminal Procedure or the power under Sections 227 and 228 Code of Criminal Procedure. Since Section 319 Code of Criminal Procedure uses the words "appears from the evidence", before the process can be issued under the said provision, the learned Judge is legally bound to sift through the evidence to see if a conviction can be recorded against the person. It is only when there is a very strong probability of conviction, that the power should be invoked. Thirdly, personal liberty is the heart and soul of the citizenry and of the Constitution of India. Therefore, before personal liberty can be cribbed, cabined and confined, a great care has to be taken by the learned trial court. After all, criminal jurisprudence is not divorced from the constitutional philosophy. Fourthly, there are no chances of a conviction as far as the Petitioner in his case is concerned. For, the witnesses have blandly claimed that the Petitioner had assaulted the injured with fists and kicks on his torso. However, the medical evidence does not corroborate this fact. In fact, according to the medical evidence, no injuries were suffered by the injured on his torso. Therefore, there is a contradiction between the ocular evidence and the medical one. Lastly, in case the power u/s 319 Code of Criminal Procedure has to be invoked, at the first instance summons should have been issued rather than non-bailable warrants. In order to buttress these contentions, the learned Counsel has relied upon the cases of Krishnappa Vs. State of Karnataka, ; Ram Singh and Others Vs. Ram Niwas and Another, ; Sarabjit Singh and Another Vs. State of Punjab and Another, ; Lal Suraj @ Suraj Singh and Another Vs. State of Jharkhand, ; Brindaban Das and Others Vs. State of West Bengal, ; Ram Kumar and Ors. v. State of Rajasthan and Anr. 2007 (1)

Cri.L.R. (Raj.) 871 ; and Inder Mohan Goswami and Another Vs. State of Uttaranchal and Others, .

4. On the other hand, Mr. Dileep Singh Jadaun, the learned Counsel for the Petitioner in S.B. Criminal Revision Petition No. 333/2011, has strenuously contended that the power u/s 319 Code of Criminal Procedure can be exercised only when fresh evidence has been brought before the court. However, in the present case, no fresh evidence was brought before the court. What was stated by the witnesses in their statements recorded u/s 161 Code of Criminal Procedure, was merely elaborated upon in their deposition before the court. Therefore, the power u/s 319 Code of Criminal Procedure should not have been invoked by the learned Judge. Secondly, there is a confusion with regard to the name of the Petitioner. According to some, he is called Sanjay @ Chidia, but according to Sheeshram, the offender was Chidia @ Sushil. Thus, the identity of the Petitioner is unclear. Therefore, there is a great possibility that an innocent person may be convicted upon an uncertain and untrustworthy evidence. Mr. Jadaun has further echoed the arguments of Mr. Sisodia, therefore, they need not be repeated.

5. Mr. K.K. Singh, the learned Counsel for Respondent No. 2, and Mrs. Alka Bhatnagar, the learned Public Prosecutor, have strenuously countered by pleading that the very purpose of Section 319 Code of Criminal Procedure is to bring to book those persons who have been left out by the investigating agency, but against whom there is evidence pointing to their involvement in the offence alleged by the prosecution. Secondly, even if a prima facie case were to exist, the learned trial court would be justified in invoking its power u/s 319 Code of Criminal Procedure and in issuing process. Thus, they have supported the impugned order.

6. Heard the learned Counsel for the parties and perused the impugned order as well as the case law cited at the Bar.

7. Undoubtedly, the Constitution of India is the grundnorm - the paramount law of the country. From the constitutional Himalayan ranges, other laws flow like diverse rivers. Therefore, criminal law also derives its source and sustenance from the Constitution. The heart of the Constitution finds its echoes in the heart beats of the criminal law. Certainly, Article 21 is the heart of the Constitution. Deprived of Article 21, the Constitution would stand emasculated of its vigor and powers. Liberty, personal or otherwise, burns brightly in the soul of man. For liberty, revolution are waged, battles are fought, empires rise and fall.

8. The burden to protect and promote the liberty of a citizen is upon the judiciary. It is a sacred duty cast upon the courts. Therefore, while discharging the judicial function, the Judges have to be alive not only to the sacred duty cast upon them, but they also have to be sensitive to the Constitutional mandate. In the case of Pepsi Foods Ltd. and Another Vs. Special Judicial Magistrate and Others, , the Hon''ble Supreme Court had opined that facing a criminal trial is not

an easy task. For, the criminal trial exposes a person to social ridicule and ostracism, taxes his time, money and energy, and breaks his spirit as a human being. Thus, before a person is sucked into the whirlpool of criminal trial, care should be taken by the Judges. In catena of cases, from Union of India (UOI) Vs. Prafulla Kumar Samal and Another, to Dilawar Balu Kurane Vs. State of Maharashtra, , the Apex Court has opined that the Judges should neither act as a mouthpiece of the prosecution, nor as a post office for the prosecution. In fact, both the Constitution and the Code of Criminal Procedure expect the Judge to play a pro-active role during the court proceeding. The Judge is neither a mute witness, nor a piece of ornamentation, merely presiding over a criminal proceeding. In fact, he is like an umpire who has to intervene at significant point in order to control and supervise both the prosecution and the defence.

9. Section 319 Code of Criminal Procedure 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 inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under Sub-section (1), then-

(a) the proceedings in respect of such person shall be commenced afresh, and the 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.

10. The interpretation of the said provision has taxed the judicial imagination. In the case of State of Rajasthan Vs. Prakash Chand and Others, , the Hon''ble Supreme Court had clearly observed that "the power u/s 319 Code of Criminal Procedure is really an extraordinary power which is 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."

11. In the case of Kailash Vs. State of Rajasthan and Another, , the Hon''ble Supreme Court has held as under:

A glance at the provisions (of Section 319 Code of Criminal Procedure) would suggest that during the trial it has to appear from the evidence that a person not being an accused has committed any offence for which such person could be tried together with the accused who are also being tried. The key words in this section are "it appears from the evidence" ... "any person" ... "has committed any offence". It is not, therefore, that merely because some witnesses have mentioned the name of such person or that there is some material against that person, the discretion u/s 319 Code of Criminal Procedure would be used by the court. This is apart from the fact that such person against whom such discretion is used, should be a person who could be tried together with the accused against whom the trial is already going on. This Court has, time and again, declared that the discretion u/s 319 Code of Criminal Procedure has to be exercised very sparingly and with caution and only when the court concerned is satisfied that some offence has been committed by such person. This power has to be essentially exercised only on the basis of the evidence. It could, therefore, be used only after the legal evidence comes on record and from that evidence it appears that the person concerned has committed an offence. The words "it appears" are not to be read lightly. In that the court would have to be circumspect while exercising this power and would have to apply the caution which the language of the section demands.

(emphasis in the original).

12. In the case of Lal Suraj alias Suraj Singh (Supra), the Hon'ble Supreme Court has opined that "the principle of strong suspicion may be a criterion at the stage of framing of charge as all the materials brought during investigation were required to be taken into consideration, but, for the purpose of summoning a person, who did not figure as accused, a different legal principle is required to be applied. A Court framing a charge would have before it all the materials on record which were required to be proved by the prosecution. In a case where, however, the court exercises its jurisdiction u/s 319 Code of Criminal Procedure, the power has to be exercised on the basis of the fresh evidence brought before the court. There lies a fine but clear distinction."

13. In the case of Mohd. Shafi v. Mohd. Rafiq and Anr. (2007) 14 SCC 544, the Apex has opined that "before, thus, a trial court seeks to take recourse to the said provision, the requisite ingredients therefore must be fulfilled. Commission of an offence by a person not facing trial, must, therefore, appear to the court concerned. It cannot be ipse dixit on the part of the court. Discretion in this behalf must be judicially exercised. It is incumbent that the court must arrive at its satisfaction in this behalf."

14. In the case of Krishnappa (Supra), the Hon'ble Supreme Court had clearly held that "the power to summon an accused is an extraordinary power conferred on the court. It is discretionary and should be used very sparingly. There should be certain compelling reasons for taking cognizance against those persons who were never charge-sheeted by the investigating agency. The said power cannot

be used mechanically merely on the ground that some evidence had come on record implicating the person sought to be added as an accused.

15. Similar view has also been expressed in the case of Sarabjit Singh and Anr. (Supra) and in the case of Brindaban Das and Ors. (Supra). In the case of Brindaban Das and Ors. (Supra), the Hon"ble Supreme Court has firmly opined as under:

In matters relating to invocation of powers u/s 319, the court is not merely required to take note of the fact that the name of a person who has not been named as an accused in the FIR has surfaced during the trial, but the court is also required to consider whether such evidence would be sufficient to convict the person being summoned. Since issuance of summons u/s 319 Code of Criminal Procedure entails a de novo trial and a large number of witnesses may have been examined and their re-examination could prejudice the prosecution and delay the trial, the trial court has to exercise such discretion with great care and perspicacity.

Although a somewhat discordant note was struck in Rajendra Singh case the views expressed in the majority of decisions of this Court on the point subscribe to the view that the power u/s 319 Code of Criminal Procedure is to be invoked, not as a matter of course, but in circumstances where the invocation of such power is imperative to meet the ends of justice.

16. The Apex Court went on to observe as under:

The fulcrum on which the invocation of Section 319 Code of Criminal Procedure rests is whether the summoning of persons other than the named accused would make such a difference to the prosecution as would enable it not only to prove its case but to also secure the conviction of the persons summoned.

17. While exercising the power u/s 319 Code of Criminal Procedure, the principles annunciated above, by the Apex Court, have to be kept in mind. Applying these principles to the factual matrix of the present case, the impugned order is unsustainable. As far as Suresh Kumar is concerned, the witnesses have vaguely claimed that the Petitioners had assaulted the injured with fists and kicks on his stomach. However, according to the injury report, the injured has not suffered a single injury, not even pain, or a swelling on the stomach. Hence, the testimonies of these witnesses are not corroborated by the injury report. It is, indeed, a settled principle of criminal jurisprudence that "while Man may lie, circumstances do not." Since the medical evidence does not support the ocular evidence, a great possibility does exist that the Petitioner is being roped in falsely by the witnesses. Moreover, as there are chances of a false implication, at the end of the trial, there is a great possibility that the benefit of doubt invariably would have to be given to the Petitioners. Thus, the possibility of conviction is slim.

18. In the case of Ram Kumar (Supra), this Court was faced with a similar

situation where during the course of trial the witnesses had claimed that some of the alleged offenders had hit the injured with fists and kicks. However, the testimonies of the witnesses, in that case, were not supported by the medical evidence. Therefore, this Court held that the power u/s 319 Code of Criminal Procedure had been invoked illegally against them. The present case is squarely covered by the judgment of Ram Kumar (Supra).

19. Hence, this Court has no hesitation in quashing and setting aside the order dated 05.03.2011 qua Suresh Kumar, the Petitioner in S.B. Cr. Revision Petition No. 288/2011.

20. Mr. Jadaun is certainly justified in claiming that there is a confusion about the identity of Sanjay @ Chidia.

According to some, he is Sanjay @ Chidia, yet according to the injured, Sheeshram, Chidia is otherwise known as Sushil. Thus, it is unclear as to who is the actual culprit ? In such circumstances, it would be imprudent to place the Petitioner, Sanjay @ Chidia, on trial. Moreover, no fresh evidence has been brought in by the prosecution against Sanjay @ Chidia. The confusion which existed during the course of investigation continues to exist even during the course of trial. After a thorough investigation, the investigating agency had decided not to charge-sheet Sanjay @ Chidia. Thus, no cogent reason has been assigned for issuing the process against Sanjay @ Chidia. Merely because few of the witnesses have named him, the learned trial court should not ipse dixit issue the process against the Petitioner. In fact, it should have sifted the evidence to at least ascertain the identity of the person before putting the Petitioner in the dock.

21. Before parting with this case, this Court would like to make the following observations:

22. It has come to the notice of this Court that invariably while invoking the power u/s 319 Cr.P.C., the learned courts below are issuing non-bailable warrants of arrest against the alleged offender(s) at the first instance. The issue, whether non-bailable warrants of arrest should be issued at the first instance while invoking the power u/s 319 Code of Criminal Procedure or not, is no longer res integra. The said issue has already been settled by the Apex Court in the case of Inder Mohan Goswami (Supra). It will be beneficial to quote from the said judgment. The Hon'ble Supreme Court has observed as under:

Personal liberty and the interest of the State

Civilized countries have recognized that liberty is the most precious of all the human rights. The American Declaration of Independence 1776, French Declaration of the Rights of Man and the Citizen 1789, Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights 1966 all speak with one voice - liberty is the natural and inalienable right of every human being. Similarly, Article 21 of our Constitution proclaims that no one shall be deprived of his liberty except in accordance with the procedure prescribed by law.

48. The issuance of non-bailable warrants involves interference with personal liberty. Arrest and imprisonment means deprivation of the most precious right of an individual. Therefore, the courts have to be extremely careful before issuing non-bailable warrants.

49. Just as liberty is precious for an individual so is the interest of the society in maintaining law and order. Both are extremely important for the survival of a civilized society. Sometimes in the larger interest of the Public and the State it becomes absolutely imperative to curtail freedom of an individual for a certain period, only then the non-bailable warrants should be issued.

When non-bailable warrants should be issued Non-bailable warrant should be issued to bring a person to court when summons or bailable warrants would be unlikely to have the desired result. This could be when:

- * it is reasonable to believe that the person will not voluntarily appear in court; or
- * the police authorities are unable to find the person to serve him with a summons;

or

- * it is considered that the person could harm someone if not placed into custody immediately.

50. As far as possible, if the court is of the opinion that a summons will suffice in getting the appearance of the accused in the court, the summons or the bailable warrants should be preferred. The warrants either bailable or non-bailable should never be issued without proper scrutiny of facts and complete application of mind, due to the extremely serious consequences and ramifications which ensue on issuance of warrants. The court must very carefully examine whether the Criminal Complaint or FIR has not been filed with an oblique motive.

51. In complaint cases, at the first instance, the court should direct serving of the summons along with the copy of the complaint. If the accused seem to be avoiding the summons, the court, in the second instance should issue bailable-warrant. In the third instance, when the court is fully satisfied that the accused is avoiding the court's proceeding intentionally, the process of issuance of the non-bailable warrant should be resorted to. Personal liberty is paramount, therefore, we caution courts at the first and second instance to refrain from issuing non-bailable warrants.

52. The power being discretionary must be exercised judiciously with extreme care and caution. The court should properly balance both personal liberty and societal interest before issuing warrants. There cannot be any straight-jacket formula for issuance of warrants but as a general rule, unless an accused is charged with the commission of an offence of a heinous crime and it is feared that he is likely to tamper or destroy the evidence or is likely to evade the process of law, issuance of non-bailable warrants should be avoided.

53. The Court should try to maintain proper balance between individual liberty and the interest of the public and the State while issuing non-bailable warrant.

23. Keeping these guidelines in mind, unless there are very strong reasons for issuing non-bailable warrants of arrest, initially the alleged offender should be called through summons; in case he fails to appear before the court, then he should be called through bailable warrants of arrest; in case he, still, refuses to appear and to abide by the direction of the court, only then non-bailable warrants of arrest should be issued against him. In case, non-bailable warrants of arrest are being issued, the learned trial court should indicate its reasons for disturbing the personal liberty of the alleged offender. After all, personal liberty has to be protected and promoted and cannot be cribbed, cabined and confined in a mechanical manner.

24. A copy of this order should be sent by the Deputy Registrar (Judicial) to all the District Judges, who are requested to circulate the copy of this judgment to their Subordinate Judicial Officers.

25. For the reasons stated above, both the petitions are allowed and the order dated 05.03.2011 is, hereby, quashed and set aside.