
(2015) 08 AHC CK 0071
In the Allahabad High Court
Case No : Criminal Revision No. 2545 of 2015

Virendra Singh and Others

APPELLANT

Vs

State of Uttar Pradesh and Others

RESPONDENT

Date of Decision : 26-08-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 319, 362
Evidence Act, 1872 — Section 32
Penal Code, 1860 (IPC) — Section 307, 34, 504

Citation : (2015) 08 AHC CK 0071

Hon'ble Judges : Manoj Misra, J

Bench : Single Bench

Advocate : Vinay Saran and Saumitra Dwivedi, for the Appellant

Final Decision : Dismissed

Judgement

Manoj Misra, J—Heard Sri Vinay Saran for the revisionists; learned A.G.A. for the State; and perused the record.

2. The instant revision has been filed against the order dated 12.06.2015 passed by the Special Judge (Dacoity Affected Areas), Mainpuri in S.T. No. 98 of 2007, arising out of Case Crime No. 168 of 2004, P.S. Dannahar, District Mainpuri, whereby the application, under Section 319 Cr.P.C., has been allowed and the revisionists have been summoned as additional accused to face trial along with other accused under Sections 307/34 and 504 IPC.

3. A perusal of the record would go to show that the first information report was lodged nominating four persons namely, Dinesh, Ram Naresh and the revisionists. The police investigated the case and sent only two accused, namely, Ram Naresh and Dinesh for trial. The trial proceeded. After recording the statement of PW-1, who was one of the persons injured in the incident, an application was moved to summon the revisionists as additional accused, which was rejected by order dated 18.07.2007 on the ground that there appeared to be some inconsistency in the statement of P.W. 1 made during trial with that

recorded under section 161 Cr.P.C. as also on the ground that several persons who were stated to have witnessed the incident had given their affidavits to the investigating officer exonerating the accused. It is important to note that at the time when the said application was rejected, PW-1 had not been cross examined and the other prosecution witnesses were yet to be examined.

4. Thereafter statements of PW-2, another person injured, and PW-3, the doctor, who examined the persons injured, were recorded. Again application was moved to add the revisionists as accused, which was rejected by order dated 31.01.2009.

5. A perusal of the order dated 31.01.2009 would go to show that the trial court rejected the application, under Section 319 Cr.P.C., primarily on the ground that according to the informant's case there were other persons who had witnessed the incident, namely, Ram Sewak, Kamlesh and Mahaveer, who, in their statement recorded under Section 161 Cr.P.C., did not support the prosecution case. The court also cursorily observed that so far as the statement of the other injured witness is concerned he being not an independent witness and towing the same line as that of PW-1, on whose statement the first application to add accused was rejected, therefore the second application was also liable to be rejected. While rejecting the application it was observed that if other witnesses are examined then it would be open to the prosecution to move a fresh application for adding the accused.

6. Against order dated 31.01.2009 the informant filed revision before this Court, which was dismissed by order dated 24.04.2009. The operative portion of the order dated 24.04.2009 reads as follows:-

"The revision is dismissed. However, it shall be open to the revisionist to move another application after the close of the whole evidence."

7. It appears that after recording of the entire prosecution evidence, which consisted of the two injured witnesses, a doctor and two police witnesses of investigation, another application was moved by the prosecution for adding the revisionists as accused in exercise of power under Section 319 Cr.P.C.

8. By the impugned order, the court below, after considering the evidence led before it during the course of trial, came to the conclusion that there was sufficient evidence to try the revisionists along with other accused, accordingly, exercising its power under Section 319 Cr.P.C., added the revisionists as accused.

9. Sri Vinay Saran, who has appeared on behalf of the revisionists, submitted that once the application under Section 319 Cr.P.C. was rejected by the trial court after recording the statement of the two injured witnesses and the doctor, it was not open to the trial court to re-visit the issue of adding accused as such exercise would be barred by the provisions of Section 362 Cr.P.C. In support of his submission, he has placed reliance on decisions of the Apex Court in the case of Hindustan Construction Co. Ltd. and Another Vs. Gopal Krishna Sengupta and

Others, AIR 2003 SC 3536 : (2003) 3 SCALE 730 : (2003) 11 SCC 210 : (2003) AIRSCW 2160 : (2003) 3 Supreme 626 and Simrikhia Vs. Dolley Mukherjee and Chhabi Mukherjee and Another, (1990) 3 JT 79 : (1990) 2 SCC 437(1) : (1990) 2 SCC 437 so as to contend that once an application is rejected by the court, a fresh order on the same set of facts cannot be passed as that would amount to review of the earlier order, which is specifically barred by Section 362 Cr.P.C.

10. Per contra, the learned AGA has submitted that the earlier rejection was based not on consideration of the evidence led during the course of trial but on material collected during investigation and since it was left open to the court to take a fresh decision after leading of the whole evidence, therefore, fresh application was not barred. He further submitted that the impugned order suffers from no legal infirmity as the two injured witnesses, whose injuries have been proved by the doctor, have disclosed the participation of the revisionists in the crime and since the complicity of the revisionists had been disclosed from the very beginning and has been affirmed by the evidence led during the course of trial, a strong case was made out to summon the revisionists as additional accused.

11. I have given thoughtful consideration to the submission of the learned counsel for the parties as also to the authorities that have been cited. So far as the rejection of the first application was concerned, it hardly poses any issue with regards to the maintainability of the second because at that time the prosecution evidence was not fully recorded. In fact, at that time, only the statement in chief of P.W. 1 was recorded. Therefore, rejection of the first application could not have barred subsequent application after leading of further evidence. The question that however remains to be decided is, as to what would be the consequence of rejection of the second application which was affirmed by this Court in revision.

12. Before dealing with the said question it would be useful to discuss the nature of the order dated 31.01.2009 by which the second application under Section 319 Cr.P.C. was rejected. A perusal of the said order would reveal that it was passed not on the consideration of the evidence led before the court during the course of the trial but on consideration of the material collected during the course of investigation such as statements of certain persons either made on affidavit or recorded under Section 161 Cr.P.C.

13. At this stage, it is necessary to observe that the power under Section 319 Cr.P.C. is to be exercised on the basis of the evidence that is led before the court during the course of trial and not on material collected during investigation unless it partakes the character of evidence. A statement recorded under section 161 Cr.P.C. is not substantive piece of evidence though it can be used to corroborate or contradict a witness when he is examined in court. There are, however, exceptions to above, particularly, where the statement is of such a nature that it may by itself become admissible under section 32 or other provisions of the Evidence Act. Therefore, ordinarily statement of a person made on an affidavit or even recorded under section 161 Cr.P.C. would not be

admissible evidence unless the said person is produced in court and confronted with the same.

14. In the instant case while rejecting the first two applications, under section 319 Cr.P.C., the court below did not examine the weight of the evidence led during the course of trial but thought it appropriate to take a fresh call on the issue after recording of statement of independent witnesses who had allegedly witnessed the incident. Therefore, there was no proper adjudication with regards to the sufficiency of evidence led during the course of trial to warrant addition of revisionists as accused.

15. Even otherwise, it would be useful to observe that this Court had left it open to the revisionists to move another application after the close of evidence. This necessarily implies that this Court had not put an end to the issue. What this Court did was to leave it open for the trial court to take a re-look at the matter after the close of evidence. As a matter of fact after dismissal of the revision by this Court two more witnesses, though witnesses of investigation, were examined. The court below, thereafter, took a re-look at the matter, examined the evidence led before it and, upon finding that two persons who were injured in the incident had disclosed the active participation of the revisionists in the crime along with other accused, summoned the revisionists accordingly.

16. A constitutional bench of the Apex Court in the case Hardeep Singh Vs. State of Punjab and Others etc. etc., AIR 2014 SC 1400 : (2014) CriLJ 1118 : (2014) 1 JT 412 : (2014) 1 SCALE 241 : (2014) 3 SCC 92 observed that the power under Section 319 Cr.P.C. has been provided to ensure that real culprit does not escape trial. It was observed that it is the duty of the Court to do justice by punishing the real culprit.

17. In the instant case, this Court finds that the evidence led against two persons, who have been sent for trial, and the two revisionists, who are before this Court, is similar, inasmuch as, the two witnesses of fact have deposed that those two accused and the revisionists had together actively participated in the crime. Under the circumstances and in view the law laid down in Hardeep Singh's case (supra) that the degree of satisfaction required for the court to add an accused in exercise of its power under section 319 Cr.P.C. is not that the evidence, if goes un rebutted, would lead to conviction, it would be travesty of justice if only two persons are tried whereas the other two persons, who have been named from the initial stage and against whom two injured witnesses have deposed, disclosing their participation in the crime, are left scot-free.

18. In view of the discussion made above, I do not find any good reason to accept the submission of the learned counsel for the revisionists that the order passed by the court below is in the teeth of the provisions of Section 362 Cr.P.C. I, therefore, find no legal infirmity in the impugned order.

19. At this stage, the learned counsel for the revisionists submitted that some observation may be made with regards to consideration of the bail prayer of the

applicants, particularly, because the applicant No. 1 (Virendra Singh) is an old person aged about 75 years.

20. Considering the facts and circumstances of the case, without expressing any opinion on the merits of the case, it is hereby provided that if the revisionists appear before the court concerned and apply for bail, within three weeks from today, their prayer for bail shall be considered expeditiously, in accordance with law.

21. Subject to above, the revision lacks merit and is dismissed.