

IN THE HIGH COURT OF DELHI, AT NEW DELHI

Crl.Rev.P.No.317/2005

Judgment delivered on 27th April, 2009

DR.F. KAMIL Petitioner
Through : Mr. G. Tushar Rao, Advocate

Versus

\$ State & OTHERS Respondent
^ Through : Mr. Sudershan Rajan and
Mr. Mohd. Qumar Ali

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

1.Whether reporters of local papers may be allowed to see
the Judgment ? **YES**

2.To be referred to the Reporter or not? **YES**

3.Whether the judgment should be reported in the Digest? **YES**

G.S. SISTANI, J.

- 1 The present revision petition has been filed against the order dated 12.04.2005 passed by the learned Additional Sessions Judge, Karkardooma Courts, Delhi in criminal revision no. 21/2004, FIR No. 438/96, under sections 147/148/149/323/427 and 109 r/w 114 of the Indian Penal Code, 1860 (hereinafter referred to as, "IPC"), Police Station, Preet Vihar, Delhi.
- 2 As per the petition, the brief facts of the case are as under.
- 3 On 13.12.1996, one Sh. Fasihuddin Kamil (petitioner herein) lodged a complaint at Police station Preet Vihar, Delhi, alleging that he resides at 10, Park End, Vikas Marg, Delhi alongwith the family members and is working as a Professor in Delhi University. On 13.12.1996, the complainant had gone to Park End Masjid for offering NAMAZ where pamphlets were being distributed against him and his brother and on the loud speaker public was being

instigated and incited against him by saying that mere offering Namaz will not do anything and that they should work for the religion with their life and money and devote themselves for the sake of the religion. It was also being said through the loud speaker that in the neighbourhood, there is a house and the residents of that house have filed a case against the Masjid and they want the Masjid to be demolished and take possession of the land.

- 4 As per the complaint, filed by Sh. Fasihuddin Kamil (petitioner herein), all the slogans were being raised by Basit Ali, Imam of the Masjid. These pamphlets were being distributed in the Masjid under the supervision of Shamim and Neaz Ahmed alongwith Badruddin, barber who has a shop near 47, Park End. Further, Imam was exhorting the persons who had come to offer Namaz to stay after Namaz and that he and his companions would talk to them about the Masjid. At about 2:00 pm the said persons who had gathered for Namaz came at his house, raised objectionable slogans and asked him to come out of the house but he did not. Thereafter, the rioters pelted stones on his shop and house, broke open the doors and windows and caused loss to them. All this was being done at the instance of Sh.Q.D. Qureshi, who was doing the illegal construction in the Masjid against whom a stay order had been taken from the Court. When the police came, the Imam along with 15 – 20 persons ran away after locking the door of the Masjid. Thereafter, a case was registered vide FIR No.438/96 on the complaint of Dr.Fasihuddin Kamil (petitioner). Post investigation by the police, persons namely Basit Ali, Anwar Ahmed, Ali Hasan,

Badruddin, Shamim Ahmed and Neaz Ahmed were challaned under Section 147, 148, 149, 323, 427, 109, 114 IPC and sent for trial, while the name of Sh.Q.D. Qureshi was placed in column no.2 of the chargesheet.

- 5 As per the petition, statements of Dr.Fasihuddin Kamil, PW-1 and his wife Smt. Afshan Qureshi were recorded in the court wherein they narrated the whole incident and specifically stated the role of Sh.Q.D. Qureshi. Subsequently, an application under section 319, Code of Criminal Procedure, 1973 (hereinafter referred to as, "Cr.P.C.") was made by the complainant (Dr.Fasihuddin Kamil) before the trial court, that Sh.Q.D. Qureshi (respondent no.2, herein) be summoned as an accused, and upon which the learned Metropolitan Magistrate passed an order on 12.12.2002 whereby Sh.Q.D. Qureshi was summoned as an accused as his name figured in the original complaint as well as the witnesses had deposed against him. Subsequently, Sh.Q.D. Qureshi filed an application in the court of learned Metropolitan Magistrate for recalling of the order summoning him and sought his discharge from the case as an accused. The learned Metropolitan Magistrate after hearing the arguments came to the conclusion that the witnesses had categorically deposed in the court that a huge mob was led by Sh.Q.D. Qureshi, who attacked his house badly with stones, damaged and looted their property including the boutique being run by his wife. Thus learned Metropolitan Magistrate dismissed the application holding that the order passed under section 319 Cr.P.C. was in consonance with law. Sh.Q.D. Qureshi filed a revision petition against the order of the learned

Metropolitan Magistrate in the court of Additional Sessions Judge, Delhi under sections 397/399 Cr.P.C and the learned Judge vide order dated 12.04.2005 allowed the revision petition and set aside the order of the learned Metropolitan Magistrate

- 6 Learned counsel for the petitioner submits that the impugned order dated 12.04.2005 passed by the learned Additional Sessions Judge is perverse and he has failed to apply his mind to the facts of the case and law. It is contended that the learned Additional Sessions Judge has wrongly considered the evidence and the plea of alibi of Q.D Qureshi, that he was working with MMTC and a certificate was produced from the General Manager, MMTC, to show that the respondent had attended office on the said date. It is contended that the plea of alibi can only be decided during the course of trial and only after a finding is returned in favour of respondent no.2 that he may derive any benefit of the said plea. It is the case of the petitioner that the plea of alibi could only have been appreciated at the time of trial. To buttress his argument counsel also relies upon in the case of **Y.S. Saraba Reddy Vs. Puthur Rami Reddy and Another**, reported at **(2007) 4 SCC 773**.
- 7 Learned counsel has further relied upon the case of **Rakesh And Another Vs. State of Haryana** reported at (2001) 6 SCC 248, to show that the Court does not even have to wait for an opportunity to cross-examination of the witnesses and once the statement has been made by the witness, even at this stage Section 319 of the Cr.P.C. would be available and maintainable. Counsel has laid stress on the fact that, at this stage, the Court is only concerned

with the evidence which comes before the Court on the basis of which the Court can *prima facie* conclude that the person arraigned before it is involved in the commission of crime. Learned counsel has also relied upon the case of **Lok Ram Vs. Nihal Singh and Another** reported at **(2006) 10 SCC 192**, in support of his argument that the Trial Court should exercise its jurisdiction under section 319, Cr.P.C. based on the evidence and on the basis of material available in the charge-sheet or the case diary. It is further submitted that the learned Additional Sessions Judge has exceeded his jurisdiction and no interference was called for as the order of the M.M. was neither capricious, nor arbitrary and learned Additional Sessions Judge had no power to appreciate the evidence in the revision.

- 8 Learned counsel has also raised an objection that the order dated 12.04.2005 was further not maintainable in view of the fact that the Supreme Court had over-ruled its earlier decision given in the case of **K.M. Mathew Vs. State of Kerala**, reported at 1992 (1) SCC 217 vide its decision in **Adalat Prasad Vs. Rooplal Jindal** reported at 2004 (113) DLT 356 (SC) Prasad.
- 9 In light of these judgments, learned counsel for the petitioner submits that the petitioner had even prior to the date of the incident made a complaint against respondent no.2 herein before the SHO, Preet Vihar, Delhi on 12.12.1996, copy of which has been filed on record. Counsel further submits that the petitioner also addressed a letter to the Commissioner of Police, which was received by the Commissioner of Police on 17.12.1996, wherein it has been categorically mentioned that at 2.00 p.m. the mob of

about 300/400 people led by respondent no.2 had attacked his house. Counsel submits that all these questions can only be decided after trial. Learned counsel for the petitioner submits that the learned Additional Sessions Judge has decided the case on merits and has exceeded his revisional jurisdiction while setting aside the impugned order.

- 10 Learned counsel for respondent no.2 has opposed this petition primarily on the ground that the order passed by the learned ASJ is neither perverse nor arbitrary. Learned counsel submits that in view of the fact that the plea of *alibi* raised by respondent no.2 is genuine and which is supported by a certificate issued by the General Manager, MMTC, no case is made out against respondent no.2. Counsel also submits that there is contradiction in the statement recorded in the Court by PW-1 and PW-2, who happens to be the wife of the petitioner. In her statement, nowhere it has been mentioned that the mob was being led by respondent no.2. In view of this, learned counsel submits that no case is made out against respondent no.2
- 11 I have heard learned counsel for the parties and gone through the record of this case.
- 12 It is settled position of law that a Court exercising revisional jurisdiction cannot examine the evidence in detail and may interfere only when there is any impropriety or material irregularity in the order passed by the lower court and further that a revisional court cannot sit as a court of appeal and reappraise the evidence in detail. In the case of ***Jagannath Choudhary v.***

Ramayan Singh reported at **(2002) 5 SCC 659**, the Apex Court while reiterating the established principles with regard to revisional jurisdiction, held:

“9. Incidentally the object of the revisional jurisdiction as envisaged under Section 401 was to confer upon superior criminal courts a kind of paternal or supervisory jurisdiction, in order to correct miscarriage of justice arising from misconception of law, irregularity of procedure, neglect of proper precautions of (sic or) apparent harshness of treatment which has resulted on the one hand in some injury to the due maintenance of law and order, or on the other hand in some undeserved hardship to individuals. (See in this context the decision of this Court in Janata Dal v. H.S. Chowdhary¹.) The main question which the High Court has to consider in an application in revision is whether substantial justice has been done. If however, the same has been an appeal, the applicant would be entitled to demand an adjudication upon all questions of fact or law which he wishes to raise, but in revision the only question is whether the Court should interfere in the interests of justice. Where the court concerned does not appear to have committed any illegality or material irregularity or impropriety in passing the impugned judgment and order, the revision cannot succeed. If the impugned order apparently is presentable, without any such infirmity which may render it completely perverse or unacceptable and when there is no failure of justice, interference cannot be had in exercise of revisional jurisdiction (emphasis supplied)

10. While it is true and now well settled in a long catena of cases that exercise of power under Section 401 cannot but be ascribed to be discretionary — this discretion, however, as is popularly informed has to be a judicious exercise of discretion and not an arbitrary one. Judicial discretion cannot but be a discretion which stands “informed by tradition, methodised by analogy and disciplined by system” — resultantly only in the event of a glaring defect in the procedural aspect or there being a manifest error on a point of law and thus a flagrant miscarriage of justice, exercise of revisional jurisdiction under this statute ought not to be called for. It is not to be lightly exercised but only in exceptional situations where the justice delivery system requires interference for correction of a manifest illegality or prevention of a gross miscarriage of justice. In Nosibolla², Logendranath Jha³ and Chinnaswamy Reddy⁴ as also in Thakur Das v. State of M.P.⁵ this Court with utmost clarity and in no uncertain terms recorded the same. It is not an appellate forum wherein scrutiny of evidence is

¹ (1992) 4 SCC 305 : 1993 SCC (Cri) 36.

² AIR 1951 SC 196 : 1951 SCR 284 : 52 Cri LJ 510.

³ AIR 1951 SC 316 : 1951 SCR 676 : 52 Cri LJ 1248.

⁴ AIR 1962 SC 1788 : (1963) 1 Cri LJ 8.

⁵ (1978) 1 SCC 27 : 1978 SCC (Cri) 21.

possible; neither the revisional jurisdiction is open for being exercised simply by reason of the factum of another view being otherwise possible. It is restrictive in its application though in the event of there being a failure of justice there can be said to be no limitation as regards the applicability of the revisional power.

- 13 In this case, based on the complaint of the petitioner, FIR No.438/96 was registered and six persons were challaned under Sections 147/148/149/323/427/109/114 of the IPC and sent for trial. The respondent was placed in Column no.2. Petitioner thereafter filed an application under section 319 of Cr.P.C., for summoning Sh.Q.D. Qureshi, before the learned Metropolitan Magistrate and which application was allowed vide order dated 12.12.02. The learned Metropolitan Magistrate observed:

“Arguments on the application under section 319 CrPC heard. QD Qureshi was named in the original complaint and thereafter QD Qureshi was kept in the column no. 2 and he was not summoned by the Court and subsequently PW1 was examined and in the examination he has deposed against QD Qureshi. After going through the statement of Dr. Fasimuddin Kamil prima facie case is made for summoning QD Qureshi for offence u/s 147, 148 427 r/w sec. 149 IPC. Accused QD Qureshi be summoned for 28/3/03.”

- 14 Thereafter an application was filed by Sh.Q.D. Qureshi before the learned Metropolitan Magistrate for recalling of the order summoning him, and which was dismissed by the learned Metropolitan Magistrate, who observed in the order dated 15.03.2004, thus:

“[i]t is crystal clear that PW1 Dr. Fasihuddin Kamil has categorically deposed in the court that a huge mob led by accused QD Qureshi, Hakim Anwar Ahmed, Niaz Ahmed Mohd., Viash Wasit Ali, Badruddin And Shamim has attacked his house badly with stones and damaged and looted their property comprising of the boutique being run by his wife. Since PW 1 has specifically levelled the allegation against the accused

QD Qureshi, the accused QD Qureshi has rightly been summoned to face trial with the accused.

.... Since the evidence has come on record against the accused QD Qureshi, the accused QD Qureshi is liable to be tried together with other accused. "

- 15 Section 319 of the Cr.P.C. vests power in a Court to call any person and array him as an accused if the person has not previously been summoned and in the considered opinion of the Court, there is *prima facie* evidence against the said person. In the case of **Lok Ram v. Nihal Singh** reported at **(2006) 10 SCC 192**, Section 319, Cr.P.C. was elaborately discussed and it was held:

"10. On a careful reading of Section 319 of the Code as well as the aforesaid two decisions, it becomes clear that the trial court has undoubted jurisdiction to add any person not being the accused before it to face the trial along with the other accused persons, if the court is satisfied at any stage of the proceeding on the evidence adduced that the persons who have not been arrayed as accused should face the trial. It is further evident that such person, even though had initially been named in the FIR as an accused, but not charge-sheeted, can also be added to face the trial. The trial court can take such a step to add such persons as accused only on the basis of evidence adduced before it and not on the basis of materials available in the charge-sheet or the case diary, because such materials contained in the charge-sheet or the case diary do not constitute evidence. Of course, as evident from the decision in *Sohan Lal v. State of Rajasthan*⁵, the position of an accused who has been discharged stands on a different footing.

11. Power under Section 319 of the Code can be exercised by the court suo motu or on an application by someone including the accused already before it. If it is satisfied that any person other than the accused has committed an offence he is to be tried together with the accused. The power is discretionary and such discretion must be exercised judicially having regard to the facts and circumstances of the case. 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 the evidence of witnesses given in court. Under sub-section (4)(b) of the aforesaid provision, it is specifically made clear that it will be presumed that newly added person had been an accused person when the court took cognizance of the offence upon which the inquiry or trial was commenced. That would show that by virtue of sub-section (4)(b) a legal fiction is created that cognizance would be presumed to have been taken so far as newly added accused is concerned.”

- 16 The Id. ASJ has observed in the order dated 12.04.2005 that no case was made out for summoning Sh.Q.D. Qureshi. The Id. ASJ observed:

“I find that the case of the complainant from the very beginning is that the petitioner was instrumental for the incident in question. However, the complainant, PW-1 in his evidence before the trial court has assigned specific role to the petitioner of leading a huge mob at the time of the incident. It was put to counsel for the complainant to point out if the aforesaid apparent contradiction in the evidence of the complainant has been explained by him or not. Counsel for the complainant could not point out or reconcile the totally different role assigned by the complainant to the petitioner in his evidence and in the cross-examination done by the State.....In fact, counsel for the Complainant relies upon photocopy of the complaint mark PW1/1, made by the Complainant to the Commissioner of Police on 16.12.96 to show that the role attributed to the petitioner by him of leading the mob on the day of the incident is reflected therein. However, in this complaint mark PW1/1, it is not stated that the Complainant had told so to the police and in the FIR it has been wrongly recorded that this incident was at the instance of the petitioner.

- 17 In my considered opinion, *firstly* the Id. ASJ committed an error in as much as he went on to reappraise the evidence in exercise of his revisional jurisdiction, which was beyond his jurisdiction. The Court was only to examine if there was any illegality or material irregularity or impropriety in the impugned order passed by the

learned Metropolitan Magistrate. However, the Id. ASJ failed to consider the matter on the basis of settled position of law in relation to the facts of this case. It would be pertinent to note that on the one hand, Id. ASJ states that the case of the complainant from the very beginning is that the petitioner was instrumental for the incident in question, thereafter he has set aside the order passed by the learned Metropolitan Magistrate. The attention of Id. ASJ was also drawn to the complaint dated 16.12.1996, filed by the petitioner before the commissioner of police and which was received by the Commissioner of Police on 17.12.1996, wherein the petitioner expressly stated that on 13.12.1996 at 2.00 p.m. a mob of about 300/400 people led by Sh.Q.D. Qureshi had attacked his house. However this argument of the complainant (petitioner herein) was rebuffed by the Id. Judge on totally non-cogent reasons. It is also worthwhile to note that the learned Metropolitan Magistrate succinctly stated the reasons for summoning Sh.Q.D. Qureshi in the order dated 12.12.02. It was observed by him that Sh.Q.D. Qureshi was named in the original complaint and thereafter Sh.Q.D. Qureshi was kept in the column no. 2 of the charge-sheet. Subsequently PW1 (petitioner herein) was examined and in the examination he has deposed against Sh.Q.D. Qureshi. And accordingly, Sh.Q.D. Qureshi was summoned. Further in the order dated 15.03.2004, it has been observed by the learned Metropolitan Magistrate that there are specific allegations that have come up against Sh.Q.D. Qureshi. There is no quarrel with the proposition that under section 319, Cr.P.C., merely because a prosecution witness mentions a person as an

accused or that the name of a person crops up for the first time in the prosecution evidence, it does not imply that the said person is involved in the commission of the offence directly or indirectly, and, thus he is to be summoned straightaway. In such circumstances the Court is duty bound to look into other material aspects of the case, and see if *prima facie*, a case is made out against the person mentioned or not, on the basis of the evidence that has come before it. However, the Court is not to consider if the evidence is sufficient to warrant conviction. No doubt the discretion to exercise this power under Section 319 of the Cr.P.C is extraordinary and is to be used sparingly, however, this does not withhold the Court from exercising its powers where ever it is necessary for it to do so. It has also to be borne in mind that the very purpose of section 319, Cr.P.C is to empower the Court to array a person as an accused before it, who has not been sent up by the investigating authorities for trial, and in the judicious opinion of the court there is evidence that makes out a *prima facie* case against the person so mentioned. Coming back to the facts of this case, it is not that allegation against Sh.Q.D. Qureshi surfaced for the first time during trial. In fact the name of Sh.Q.D. Qureshi was mentioned in the complaint as the person at whose instance the incident took place. Further the name of Sh.Q.D. Qureshi was mentioned in column No.2 of the charge-sheet. Thereafter based on the evidence against Sh.Q.D. Qureshi at the time of prosecution evidence before the learned Metropolitan Magistrate, Sh.Q.D. Qureshi was summoned. Thus, in my considered view, there is no infirmity in this order of the learned

Metropolitan Magistrate.

- 18 Furthermore, on the issue of *alibi*, the Id. Sessions Court has observed that the plea of *alibi* taken by Sh.Q.D. Qureshi has been duly verified during investigation and found to be correct and therefore Sh.Q.D. Qureshi was put in column no. 2. In the case of ***Y.S. Saraba Reddy Vs. Puthur Rami Reddy and Another***, reported at **(2007) 4 SCC 773**. The Apex Court observed:

“4. The trial court rejected the application made in terms of Section 319 of the Code primarily on the ground that the plea of alibi raised by the respondents was investigated by the Deputy Superintendent of Police under the instructions of the Superintendent of Police and on his satisfying about the substance in the plea of the accused about their non-involvement, directed the omission of their names. Though their names were deleted from the array of the accused their names were found in the FIR and statement of witnesses. Assailing the same, firstly the State filed Crl. RC No. 1476 of 2004 and thereafter the appellant (PW 1, the de facto complainant) filed Crl. RC No. 1551 of 2004 before the High Court. The High Court found no infirmity in the trial court’s order and additionally found that the charge-sheet was filed on 7-11-1997. Neither the Public Prosecutor nor the appellant took any steps immediately. Only on 7-7-2004 an application was filed. The High Court found that first of all the appellant and the Public Prosecutor should not have kept quiet for such a long period of about 7 years. The fact that they kept silent for such a long period, according to High Court, shows that the plea of alibi which was found to be true by the special investigating officer who enquired into that aspect was true. The High Court also accepted that there was force in the contention that on account of political factions the respondents were falsely implicated and on account of change of the Government, the Public Prosecutor had filed the petition. Since the Deputy Superintendent of Police had found the plea of alibi to be correct, the fact that the witnesses during trial stated otherwise was really of no consequence.

7. If the satisfaction of the investigating officer or supervising officer is to be treated as determinative, then the very purpose of Section 319 of the Code would be frustrated. Though it cannot always be the satisfaction of the investigating officer

which is to prevail, yet in the instant case the High Court has not found the evidence of PW 1 to be unworthy of acceptance. Whatever be the worth of his evidence for the purposes of Section 319 of the Code it was required to be analysed. The conclusion that the IO's satisfaction should be given primacy is unsustainable. The High Court was not justified in holding that there was belated approach."

- 19 In the facts of this case, the learned Metropolitan Magistrate had on the point of alibi, observed:

"The plea of alibi is not maintainable at this stage as the accused will be given ample opportunity to show his innocence during the trial and he can lead evidence in defence and his evidence will be appreciated in the right perspective at the appropriate stage."

- 20 Applying this principle laid down by the Apex Court in the case of **Y.S. Saraba Reddy** (*supra*), it was only after a detailed trial that, the veracity of the plea of *alibi* taken by Sh.Q.D. Qureshi could have been ascertained beyond doubt. In my considered opinion, the learned Metropolitan Magistrate correctly opined that at the stage of evidence, Sh.Q.D. Qureshi would be able to lead evidence with regard to his innocence.

- 21 For the reasons stated above, the present petition is allowed. Order dated 12.04.2005 passed by learned Additional Sessions Judge, Karkardooma Courts, Delhi in criminal revision no. 21/2004, FIR No. 438/96, under sections 147/148/149/323/427 and 109 r/w 114 of the IPC, Police Station, Preet Vihar, Delhi, is set aside.

G.S. SISTANI, J.

April 27, 2009
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