

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: January 25, 2011
Judgment delivered on: February 25, 2011

+ **CRL.M.C. NO.2592/2009 & CRL.M.A. NO.8674/2009**

ASHOK MALHOTRA

....PETITIONER

Through: Mr. Rakesh Mishra, Advocate

Versus

STATE

.....RESPONDENT

Through: Ms. Fizani Husain, APP

CORAM:

HON'BLE MR. JUSTICE AJIT BHARIHOKE

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ?
3. Whether the judgment should be reported in Digest ?

AJIT BHARIHOKE, J.

1. Ashok Malhotra, the petitioner herein has filed this petition under Section 482 Cr.P.C. seeking quashing of the order of learned Metropolitan Magistrate dated 04.05.2007 in case FIR No.459/94 under Section 284/304A/337 IPC P.S. Mangol Puri whereby the learned Magistrate has summoned the petitioner under Section 319 Cr.P.C. to appear and undergo trial for the aforesaid offences with the other accused persons who were charge sheeted.

2. Briefly stated, relevant facts for the disposal of this petition are that accused Yogesh Malhotra was challaned in the above referred case and sent for trial for the offences under Section 284, 304A and 337 IPC on the allegations that he was the Manager of M/s. Interport Industry located in Industrial area, Phase-II, Mangol Puri, the factory belonging to accused Sunil Tandon. On 04.06.1994 at about 8:00 pm, accused Sunil Tandon and Yogesh Malhotra forced their employees complainant Ishwar Singh, Sukhbir , Rajesh and Rakesh to clean the choked MCD sewer located outside the factory premises. When they removed the manhole cover for the purpose, the sewer emitted some poisonous gases. On this, complainant Ishwar Singh and others told the Manager Yogesh Malhotra that it was not safe to clean the sewer because of poisonous gases. Yogesh Malhotra ignored their request and pressurised them to enter the sewer for cleaning. Because of the pressure exerted by the Manager Yogesh Malhotra, Rajesh entered the sewer. When Rakesh was asked to enter the sewer, he initially declined, but the Manager Yogesh Malhotra forced him to enter the sewer and on entering the sewer, Rakesh became unconscious and fell into the sewer. Sukhbir Kumar and Rajesh tried to get him out of the sewer, but in the process they also fell into the sewer. Rajesh and Sukhbir somehow managed to come out of the sewer, but Rakesh could not come out. He was taken out from the sewer by one Prahlad in unconscious condition. In the meanwhile, someone from the public had informed PCR. PCR van came and took Rakesh and Sukhbir Kumar

to the hospital where Rakesh was declared dead because of inhaling poisonous gas.

3. The charge sheet was initially filed against Yogesh Malhotra, Manager of the factory. The trial court, however, on consideration of the charge sheet found incriminating evidence against owner of the factory Sunil Tandon, so he was also summoned and both of them were served with notice under Section 251 Cr.P.C. for the offence under Section 304A/34 IPC. They pleaded not guilty and claimed trial.

4. The notice was served on those two accused persons on 28.04.1995. Thereafter, the trial court proceeded to record evidence. Prosecution evidence was concluded on 04.06.2004. On 06.10.2004, at the stage of recording of statement of accused persons under Section 313 Cr.P.C., prosecution moved two applications, one under Section 311 Cr.P.C. to lead additional evidence and other under Section 319 Cr.P.C. for summoning the petitioner Ashok Malhotra as an accused to undergo trial along with the other two accused persons.

5. Basic allegation in application under Section 319 Cr.P.C. was that the complainant Ishwar Singh, who was examined as PW5 on 20.03.1996 had named the petitioner Ashok Malhotra as one of the culprits who purportedly compelled him to clean the sewer, failing which he threatened to remove him from service. The relevant portion of the testimony of PW5 Ishwar Singh is, inter alia, reproduced thus:

“.....Ashok Malhotra the Manager of the factory called me and compelled me to cleanse the sewer and he also told me that in case of non compliance of order I will be removed from the service.....”

“.....Accused Sunil Tandon and Yogesh Malhotra were present in the court and Ashok Malhotra the another Manager are responsible for this incident. Ashok Malhotra and Yogesh Malhotra had removed me from service earlier because I had refused to cleanse this sewer...”

6. In view of the aforesaid statement given by the complainant Ishwar Singh, learned M.M. took the view that, prima facie, there was complicity of Ashok Malhotra in the offence and, therefore, it was in the interest of justice to summon him to undergo trial for the offence under Section 304A IPC read with Section 34 IPC along with the other two accused persons on trial. Thus, he allowed the application under Section 319 Cr.P.C.

7. Feeling aggrieved, petitioner Ashok Malhotra has filed instant petition seeking quashing of the impugned order.

8. Learned counsel for the petitioner has submitted that impugned order is untenable for the reason that it is unfair to summon and force the petitioner to undergo trial in respect of incident pertaining to the year 1994 after a lapse of almost 13 years. Learned counsel further submitted that the trial court has failed to appreciate that the name of the petitioner surfaced for the first time in the testimony of the complainant Ishwar Singh recorded on 20.03.1996. Otherwise, there is no mention of his complicity in the offence or the role played by him

either in the FIR or in the statements of the eye witnesses recorded under Section 161 Cr.P.C. Thus, he has urged for quashing of the order dated 04.05.2007 allowing the application under Section 319 Cr.P.C.

9. On the contrary, learned APP has argued in support of the impugned order. She has drawn my attention to the testimony of complainant Ishwar Singh noted above and contended that from the aforesaid evidence, the complicity of the petitioner Ashok Malhotra in the offence is established. She contended that aforesaid version rather tends to show that it was Ashok Malhotra who had forced the complainant, the deceased and others to enter the sewer. Therefore, learned trial Judge was right in invoking his power under Section 319 Cr.P.C. to summon the petitioner for undergoing trial for the offence under Section 304A IPC along with the other accused persons.

10. I have considered the rival contentions and perused the record. In order to appreciate the rival contentions, it would be useful to have a look on Section 319 of the Code of Criminal Procedure, which is reproduced thus:

“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 trader arrest or upon a summon, 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 subsection (1) then-

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

11. On reading of this Section, it is clear that Section 319 Cr.P.C. empowers the court to proceed against any person not shown or mentioned as accused in the charge sheet, if it appears from the evidence adduced in the court that such person has committed an offence for which he could be tried together with the main accused against whom the inquiry or trial is being held. The power exercisable under Section 319 Cr.P.C. is an extraordinary power conferred on the court to do real and substantial justice. This power, however, should be used with caution and only if compelling reasons exist for proceeding against a person against whom the action has not been taken.

12. On reading of Section 319(4)(a), it is clear that invoking of Section 319 (1) Cr.P.C. against any person who was not put to trial necessarily means re-examination of all the witnesses, which obviously would result in delay in trial of the accused persons already put on trial. Therefore, also, the trial Judge should exercise power under Section 319 Cr.P.C. with due care and caution for the reason that

incorrect summoning of a person under Section 319 Cr.P.C. can result in violation of the right to speedy trial of the accused person already on trial.

13. In the instant case, perusal of the record shows that out of the three eye witnesses cited and examined by the prosecution, two are hostile witnesses and they have not stated anything against the petitioner Ashok Malhotra. Only PW5 Ishwar Singh (complainant) in his testimony has stated about the above-noted role played by Ashok Malhotra, petitioner. His aforesaid version, obviously, is an exaggeration for the reason that in his complaint Ex.PW5/A, which is the basis for the registration of the case, PW5 Ishwar Singh has not stated anything about the role played by the petitioner Ashok Malhotra. Rather, name of Ashok Malhotra does not find mention in the complaint Ex.PW5/A or in any of the statements recorded under Section 161 Cr.P.C. Thus, in all probabilities, even if Ashok Malhotra is put to trial, the version of the complainant is not likely to be believed, being an improvement upon his earlier statement made way back on 04.06.1994.

14. Further, since filing of this petition, another development has taken place, i.e., the complainant Ishwar Singh has expired on 04.04.2008, which fact is verified by Satish Yadav, SHO Mangol Puri in his affidavit dated 12.05.2010. Thus, in the event of petitioner Ashok Malhotra being put to trial, the version of the complainant cannot be

used in evidence against the petitioner Ashok Malhotra as he would not get the opportunity to cross-examine him. Thus, under the circumstances, I find that no useful purpose shall be served by putting Ashok Malhotra to unnecessary trial, which in all probabilities cannot result in conviction. On the other hand, if he is put on trial along with the others, it would be counter-productive as he would get an opportunity to examine the witnesses afresh and that would unnecessarily delay the conclusion of trial, which is already delayed by almost 17 years.

15. In view of the discussion above, I am of the view that the impugned order dated 04.05.2007 of learned Metropolitan Magistrate summoning the petitioner Ashok Malhotra under Section 319 Cr.P.C. is not tenable in law. It is therefore, set aside.

16. Petition as well as the application stand disposed of accordingly.

(AJIT BHARIHOKE)
JUDGE

FEBRUARY 25, 2011
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