

Neutral Citation No. - 2023:AHC:205413

Court No. - 50

Reserved On: 04.07.2023

Delivered On: 28.10.2023

Case :- CRIMINAL REVISION No. - 1734 of 2023

Revisionist :- Suresh Gihar And 6 Others

Opposite Party :- State of U.P. and Another

Counsel for Revisionist :- Ayank Mishra

Counsel for Opposite Party :- G.A.,Radhey Shyam Yadav

Hon'ble Ram Manohar Narayan Mishra,J.

1. By means of instant revision, the revisionist have assailed impugned summoning order dated 28.02.2023 passed by Court of Special Judge S.C./ S.T. Act, Second Additional District and Sessions Judge, Farrukhabad in S.T. No. 77/2022 (State Vs. Anil Yadav and others) arising out of Case Crime No. 427 of 2021, under Section 302/34 I.P.C. , P.S. Maudarwaja, District- Farrukhabad. By the impugned order, learned trial court has summoned the revisionists under Section 319 Cr.P.C. to face trial for said offences together with the accused, who were already facing trial in the case.

2. Heard learned senior counsel Sri G.S. Chaturvedi appearing for the revisionist, who is assisted by Sri Ayank Mishra, Advocate, learned counsel for respondent No. 2, Sri Radhe Shyam Yadav as well as learned A.G.A. for the State and perused the record.

3. The factual matrix of the case are that the informant Smt. Sharda Devi, wife of Subhash Gihar lodged an F.I.R. at P.S. concerned on 28.09.2021 at 03:10 hours with averment that her son Shiva has left home at 03:00 P.M. on 27.09.2021 to visit Dildar resident of Dhaiya to take the money lent to him. As Dildar was not available at the home, Shiva while returning back to home telephoned his friends Raja at octroi post and asked him to come, thereupon Raja and Anoop rushed to him riding their scooty, but the accused Ajay, Sushil, Anil Yadav, Suresh Gihar, Pradeep, Shani, Anuj and Sonu opened fire by their respective country made pistol on Shiva in presence of eye-witnesses Raja and Anoop. Shiva died on the spot due to fire arm injuries. This incident took place at around 04:00 P.M. The police registered the case under Sections 147, 148, 149, 302, 120-B I.P.C. and Section 3(2)(5) of SC/ST Act against named accused persons. In post-mortem report of the deceased Shiva, 7 ante mortem injuries were found on his person. In the opinion of doctor, the cause of death was shock haemorrhage as a result of ante mortem fire arm injuries. The Investigating Officer examined eye-witnesses Raja and Anoop as well as the informant and other witnesses. During investigation, the deceased was found to have belonged to Scheduled Caste on the basis of caste certificate. The Investigating Officer submitted chargesheet only against accused Anil Yadav, Sheelu Yadav, Praveen @ Nanhe Yadav and dropped the name of other named accused persons during investigation. Thus, in nutshell only one named accused Anil Yadav in F.I.R. along with two accused Sheelu Yadav and Praveen @ Nanhe Yadav, whose name surfaced during investigation were chargesheeted. In other words, out of 8 named accused persons 7 were exonerated during investigation by the Investigating Officer as their complicity in the offence was not found on commencement of trial and the statement of P.W.1 Sharda Devi, the informant, P.W. 2 Raja and P.W. 3 Anoop Kumar, the eye-witnesses. After evidence of these three witnesses, an application under Section 319 Cr.P.C. was filed by the informant Sharda Devi wife of Subash Gihar to

summon 7 named accused persons in F.I.R. as accused, under Section 319 Cr.P.C. to face trial together with accused already facing trial in the case. She also stated that the complicity of these 7 accused persons, whose name has been dropped by Investigating Officer during investigation is established on the basis of the sworn testimony of eye-witnesses Raja and Anoop Kumar during trial. Their name was wrongly dropped during investigation ignoring the statement of eye-witnesses recorded under Section 161 Cr.P.C. The said witnesses have testified against them during their evidence before the Court. In the course of trial of accused Anil Yadav, Sheelu Yadav and Praveen @ Nanhe, P.W. 2 Raja has stated in his examination-in-chief that on exhortation of accused Suresh Girhar, all these 7 accused persons had opened indiscriminate fire on Shiva which resulted in his death. Similar statement has been made by eye-witness Anoop Kumar also as P.W. 3 before the Court. Thus, the three witnesses examined during trial of chargesheeted accused persons, a cogent evidence has been adduced with regard to complicity of these seven left over named accused persons and they are liable to be summoned to face trial.

4. Learned trial court has placed reliance on evidence of eye-witness P.W. 1 Sharda Devi, P.W.2 Raja and P.W. 3 Anoop Kumar and allowed the application of the informant under Section 319 Cr.P.C. citing judgments of Hon'ble Apex Court in **Hardeep Singh Vs. State of Punjab (2014) 3 SCC 92** and some other cases. Learned trial court has summoned the revisionist by impugned order dated 28.02.2023 to face trial under Section 319 Cr.P.C.

5. Learned Senior Counsel appearing for the revisionists submitted that the learned court below has passed impugned order in mechanical manner without application of judicial mind. Learned court below has failed to consider the fact that Investigating Officer after embarking into investigation thoroughly, exonerated the revisionists from the offence and filed chargesheet against one named and two unnamed accused persons,

whose name surfaced during investigation. The learned court below has failed to discuss the evidence collected by I.O. by summoning the revisionist and passed impugned order in illegal manner. The impugned order passed by learned court below is not sustainable in the eyes of law and same was passed without considering the facts and circumstances of the case. The impugned order suffers from vice of factual and legal error. The Investigating Officer recorded the statement under Section 161 Cr.P.C. of the complainant, who has not claimed herself to be an eye-witness of the occurrence and supplementary statement of the complainant has been recorded, after lapse of three months. The Investigating Officer dropped the name of the revisionists after taking a detailed investigation. The revisionists were never present on the spot, nor committed any offence as alleged in F.I.R. It is relevant to mention that revisionist No. 7 is an old person aged around 77 years and is not even able to walk and has been roped as an accused in the F.I.R. who has also been summoned by the court below by impugned order. The deceased was himself a man of criminal antecedents along with other family members and 4 F.I.R. were lodged against him which includes two cases under Section 307 I.P.C. and one case under Section 195 I.P.C. The complainant's brother-in-law, Ratan Gihar had lodged an F.I.R. vide Crime No. 428 of 2021 just after 10 minutes of lodging of present F.I.R. at 03:27 hours under Sections 147, 148, 149, 452, 506, 307 and Section 3(2)(5) of SC/ST Act against the named accused persons in present F.I.R. along with three other persons only to give colour and strength to prosecution version of present case, however final closure report has been submitted by police in this second F.I.R. Thus, two cases were slapped against the revisionists within gap of 15 minutes at same police station. Hon'ble Apex Court in its above cited judgment held that the court cannot act as a mere post office on application moved under Section 319 Cr.P.C. by the complainant and it is duty of the court below to appreciate or discard the evidence which has been collected by the Investigating Officer

before summoning the proposed accused persons in the court to face trial. Witnesses have concealed their mobile number deliberately during their evidence for summoning of an accused under Section 319 Cr.P.C., the evidence envisaged under Section 319 must be prima facie credit worthy and it should not be a ritualistic exercise. The C.D.R. of accused persons was collected by Investigating Officer. P.W. 2 Raja is cousin (*Mausera Bhai*) of the deceased and is highly interested witness and commotion occurred at the site of the incident and the said eye witnesses had seen nothing as they reached at the spot after the incident and have presented a concocted story.

6. *Per contra*, learned A.G.A. appearing for the State-respondents submitted that there is no legal or factual error in impugned order passed by learned court below. The accused persons have been named in F.I.R., their complicity has been established in the evidence of witnesses, P.W. 2 and P.W.3, Raja and Anoop. There is no occasion to disbelieve the eye-witnesses account of these witnesses which establishes strong prima facie case against present revisionists to summon them to face trial in exercise of powers of the court below under Section 319 Cr.P.C. The deceased suffered as many as 7 fire arm injuries as per his post-mortem report and all the injuries are wounds of entry which itself reveals that at least seven persons have been involved in causing of his death, whereas the Investigating Officer has wrongly chargesheeted only three persons, out of whom two are not named in F.I.R. The eye-witnesses Raja and Anoop as well as P.W. 1 Sharda Devi, the informant, has stated nothing against the accused Sheelu and Parveen @ Nanhe Yadav in their evidence even that they are chargesheeted by police on the basis of evidence of unconcerned persons, who are introduced as witnesses during investigation to deflect the line of investigation against named accused persons. The revision is devoid of merit and it should be dismissed.

7. Learned counsel for the revisionist placed reliance on judgment of **Juhru and others Vs. Karim and another 2023 SCC Online SC 171**,

wherein Hon'ble Apex Court held that in the absence of any authentic evidence to bring newly added accused persons under Section 319 Cr.P.C., in close proximity of reported crime, it would be unjustified to call upon appellants to face trial as additional accused in the case. Power of summoning under Section 319 Cr.P.C. is not to be exercised routinely. It is also held that existence of more than a prima facie case is sine qua non for summoning an additional accused.

8. Learned counsel also placed reliance on **Vikas Rathi Vs. State of U.P. and Anothers 2023 Supreme (SC) 195** in which reliance was placed on paragraphs 105 and 106 of **Hardeep Singh Vs. State of Punjab and Sagar Vs. State of State of U.P. and Anr. (2022) (6) SCC 389**. I have gone through the judicial authority of Hon'ble Apex Court and these cases in the light of factual scenario of this case.

9. From the perusal of record, it appears that the F.I.R. in present case was lodged by P.W.1 Smt. Sharda Devi, the mother of the deceased Shiva in the intervening night of 27/28.09.2021 at 03:09 hours whereas incident took place on 27.09.2021 at 03:00 hours. 8 persons were named in F.I.R., out of whom only Anil Yadav has been chargesheeted along with two other accused persons, whose names surfaced during investigation. The Investigating Officer dropped name of seven named accused persons, the present revisionists, with finding that there was enmity and litigation between the informant and named accused Ajay Kumar, Sushil Kumar and Suresh Gihar @ Baccha and for that reason the informant implicated named accused Anil Yadav and accused Sheelu Yadav, Parveen @ Nanhe together with Ajay Kumar, Sushil Kumar, Suresh @ Bachha, Pradeep and Sunny in F.I.R. But on basis of extensive investigation, the naming of seven accused persons, the present revisionists was not found to have been substantiated. Their presence was not found on the basis of C.D.R. of their cellphone. Their naming was found false. The informant has named the eight accused persons in her F.I.R. as well as in her statement under Section 161 Cr.P.C. before police, who are responsible for causing

gruesome murder of her son Shiva. The informant in her supplementary statement under Section 161 Cr.P.C. stated that police arrested named accused Anil Yadav, his son Sheelu Yadav and Praveen @ Nanhe Yadav and they were sent to jail in this offence. There was old enmity between her family and accused Ajay Kumar, Sushil Kumar, Suresh @ Bachha, Pradeep and Sunny.

10. Another F.I.R. was lodged by brother-in-law of present informant, Sharda Devi, on same day just after lodging of present F.I.R. against as many as 11 persons under Sections 147, 148, 149, 452, 506, 307 I.P.C. and Section 3(2)(5) of SC/ST P.A. Act after lodging of present F.I.R. at same police station with allegation that the named accused persons, who committed murder of her son along with some other persons forcefully entered into her house at 04:30 P.M. at 27.09.2021 and opened fire arm on ladies of her family with intention to kill in which Tanu and Rashmi got injured, however, complicity of accused persons in subsequent F.I.R. was not found to be established during investigation.

11. None of the witnesses of fact, who were examined during trial have testified with regard to complicity of accused Sheelu and Praveen @ Nanhe sons of named and chargesheeted accused Anil Yadav. P.W. 3 has specifically stated that Sheelu and Praveen @ Nanhe were not involved in murder of his brother Shiva. P.W. 2 has stated that first fire arm was shot at Shiva by accused Ajay, second fire was shot by Sushil then Sonu, Sunny and Pradeep and Anuj. Shiva died on the spot and Anil Yadav fired a shot by keeping his pistol on his temple. This witness has also not stated with regard to complicity of Sheelu and Praveen @ Nanhe.

12. The Hon'ble Apex Court in case of **Hardeep Singh vs. State of Punjab reported in (2014) 3 SCC 92 has laid down that:**

“105. Power under Section 319 CrPC is a discretionary and an extraordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be

exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.”

13. Considering rival submissions of the parties, the evidence of eye-witnesses including the informant recorded during trial and the fact that accused-revisionist are named in F.I.R. and their complicity in the offence has also surfaced during statement of the named eye witnesses recorded under Section 161 Cr.P.C. as well as in sworn testimony before the court, number of ante-mortem fire arm injuries on different parts of the deceased, it appears that investigation was not carried out in proper manner while deleting the name of the revisionists from investigation only on the basis that their presence was not found on the spot at the time of incident on perusal of C.D.R. of their mobile phones, location of their mobile phones and their C.D.R. The court below has recorded its satisfaction with regard to prima facie case to summon the revisionist in proper manner.

14. I find no illegality or irregularity or perversity in the impugned order of learned court below which is based on proper appreciation of the evidence on record by which a prima facie case as envisaged by **Hon’ble Apex Court in Hardeep Singh Vs. State of Punjab (2014) 3 SCC 92** has been made out for summoning of revisionists for aforesaid charges. The revision is devoid of merits and deserves to be dismissed.

15. The revision stands **dismissed** with above observations and impugned order dated 28.02.2023 passed by the court below is affirmed.

Order Date: 28.10.2023

Nitika Sri.