

Court No. - 77

Case :- CRIMINAL REVISION No. - 3707 of 2023

Revisionist :- Mahan Mudgal

Opposite Party :- State Of U.P. And 7 Others

Counsel for Revisionist :- Saurabh Dwivedi

Counsel for Opposite Party :- Ajay Kumar
Pandey,G.A.,Hitesh Pachori

Hon'ble Rajeev Misra,J.

1. Heard Mr. Saurabh Dwivedi, the learned counsel for revisionist, the learned A.G.A. for State-opposite party-1, Mr. Mayank Singh, Advocate, holding brief of Mr. R.D. Singh, the learned counsel representing opposite parties 2 and 3, Mr. Hitesh Pachori, the learned counsel representing opposite parties 4 and 7 and Mr. Satish Trivedi, the learned senior counsel assisted by Mr. Ajay Kumar Pandey, the learned counsel representing opposite parties 5, 6 and 8.

2. Perused the record.

3. This criminal revision has been filed challenging the order dated 27.06.2023 passed by Additional Sessions Judge, Court No. 1, Agra in Sessions Trial No. 235 of 2022 (State Versus Shivanshu Mudgal & others) , arising out of Case Crime No.478 of 2021, under Sections 302, 307, 506, 34 I.P.C., Police Station Shahganj, District Agra, whereby, application dated 20.05.2023, under Section 319 Cr.P.C. (Paper No. 70-Ba) filed by the prosecution/first informant for summoning the prospective accused i.e. opposite parties 2 to 8 herein (named in the FIR but not charge-sheeted) to face trial in aforementioned Sessions Trial has been rejected.

4. Record shows that in respect of an incident, which is alleged to have occurred on 02.11.2021, a delayed first information report dated 03.11.2021 was lodged by first informant, namely, Mahan Mudgal and was registered as Case Crime No.0478 of 2021, under Sections 147, 148, 149, 302, 307, 506 I.P.C., Police Station Shahganj, District Agra. In the aforesaid F.I.R. 11 persons, namely, Shivanshu Mudgal, Tarkeshwar Mudgal, Prashant Pachori, Syed alias Shanu, Rahul Pachori, Vikas Pachori, Rekha, Mukesh Sharma, Sumit Paliwal, Anil and Rajeev have been nominated as named accused.

5. The gravamen of the allegations made in the first information

report is to the effect that on the fateful day i.e. on 02.11.2021, at around 6.30 P.M., the named accused with a common object came to the place where father of first informant, namely, Ram Bhadur Mudgal was sitting on a chair at the haystack shop. As per the prosecution story as unfolded in the first information report, named accused Prashant Pachori and Shanu @ Sayed caught hold of the hands of Ram Bahadur Mudgal, thereafter Tarkeshwar Pachori and Shivank Mudgal fired gunshots at Ram Bahadur Mudgal on account of which he fell on the ground. Subsequent to above, when Mahan Mudgal (first informant) and Bharat Mudgal (brother of the first informant) attempted to catch hold the accused then other three named accused, namely, Mukesh Sharma, Sumit Paliwal and Anil are alleged to have exhorted on account of which gunshots were fired upon Bharat Mudgal and the first informant but they escaped.

6. After aforementioned first information report was lodged, Investigating Officer proceeded with statutory investigation of concerned case crime number in terms of Chapter XII CrPC. He first visited the place of occurrence, recovered the dead body of deceased, got the inquest of body of deceased conducted followed by post-mortem of the body of deceased. As per the opinion of Autopsy Surgeon, who conducted autopsy of the body of deceased, the cause of death of deceased is shock and hemorrhage as a result of ante-mortem injuries. The autopsy surgeon found following ante-mortem injuries on the body of deceased :-

"Ante-mortem Injuries :

- 1. Firearm wound of entry 1x1 cm +nt on Lt. side neck middle part.**
- 2. Firearm wound of exit 1.5 x 1 cm Rt. side neck margins lower part emitted.**
- 3. Firearm wound of entry 1 x 1 cm +nt Lt. side neck calkle region with blackening tattooing.**
- 4. Metallic bullet size 1 x 0.4 cm recovered from Rt. side back of scapular region.**
- 5. Metallic bullet sealed & Handover to C.P. consult"**

7. Investigating Officer thereafter prepared the site plan and examined the first informant and other witnesses under Section 161 CrPC. On the basis of above and other material collected by him during course of investigation as well as the mitigating circumstances that emerged during course of investigation came

to the conclusion that complicity of only five of the named accused, namely, Shivank Mudgal, Tarkeshwar Mudgal, Prashant Pachori, Syed @ Shanu and Vikash Chaudhary is established in the crime in question. He, accordingly, submitted the police report in terms of Section 173 (2) CrPC, whereby aforementioned named accused were charge-sheeted under Sections 302, 307, 506, 34 IPC, whereas other named accused, namely, Rahul Pachori, Rekha, Mukesh Sharma, Sumit Paliwal, Anil and Rajeev were exculpated.

8. Upon submission of aforementioned police report, cognizance was taken on the same by the concerned Magistrate in exercise of jurisdiction under Section 190 (1)(b) CrPC. However, as offence complained of is exclusively triable by the court of Sessions therefore, concerned Magistrate in accordance with Section 209 CrPC committed the case to the court of Sessions. Resultantly, Sessions Trial No.235 of 2022 (State Versus Shivanshu & others) came to be registered and is now said to be pending in the court of Additional Sessions Judge, Court No.1, Agra.

9. The concerned Sessions Judge in accordance with the mandate of Section 211 CrPC framed charges against charge-sheeted accused and thus proceeded with the trial. Charge-sheeted accused denied the charges so framed and pleaded innocence. Resultantly, the trial procedure commenced.

10. Prosecution in discharge of its burden to bring home the charges so framed against charge-sheeted accused adduced PW-1 Madan Mudgal (first informant/son of the deceased) and PW-2 Bharat Mudgal (eye-witness and brother of the deceased) up to this stage. After the statement-in-chief as well as examination-in-chief of aforementioned witnesses was recorded, prosecution/first informant filed an application dated 20.05.2023 under Section 319 CrPC duly supported by an affidavit, which came to be registered as Paper No.70-B, alleging therein that since as per the depositions of aforementioned prosecution witnesses, complicity of prospective accused (named but not charge-sheeted) is also established in the crime in question, therefore, they be also summoned to face trial in aforementioned Sessions Trial.

11. Perusal of aforementioned application will go to show that the same was filed on following grounds:-

(a) The murder of Ram Bahadur Mudgal was committed on 02.11.2021 by the named accused Shivanshu Mudgal, Tarkeshwar Mudgal, Prashant Pachori, Sayed Zafar Rizvi alias Shanu, Rahul Pachori, Vikas Pachori, Rekha W/o Tarkeshwar,

Mukesh Sharma, Sumit Paliwal, Anil Kumar and Rajeev Sharma @ Raju with a common intention.

(b). Mahan Mudgal, Bharat Mudgal and Bholu are the eye witnesses of the occurrence. In their statements under Section 161 Cr.P.C., they have named all the named accused.

(c). The Investigating Officer in order to extend undue favour to the named accused has on an extraneous consideration exculpated Rahul Pachori, Rekha, Mukesha Sharma, Sumil Paliwal, Anil Kumar and Rajeev @ Raju from the crime in question.

(d). The names of the exculpated accused have emerged in the statements of the two prosecution witnesses, who have deposed before Court below as PW-1 and PW-2.

(e). As the names of exculpated accused have emerged in the FIR, the statements of witnesses examined under Section 161 Cr.P.C. as well as the depositions of witnesses examined up to this stage, therefore, sufficient evidence exists on record against the prospective accused.

(f). All the accused are guilty of committing the murder of deceased.

12. It appears that no written objection to the said application under Section 319 Cr.P.C. was filed by the charge-sheeted accused. However, oral objections to the same were raised by the counsel representing charge sheeted accused before Court below. As per the objections raised, it was pleaded on behalf of the charge sheeted accused that vide CD Parcha No.-17, the location of accused Sumit Paliwal is found to be in Loha Mandi meaning thereby, he was not present at the place of occurrence. The other prospective accused were also not present at the place of occurrence. Evidence to this effect has been collected by the Investigating Officer. It is the case of the prosecution that shots were fired from different weapons but as per the post mortem report, all the gun shots sustained by the deceased were fired from a single weapon. No blood was collected by the Investigating Officer from the spot. No blood stains were found in the Ecco Car. No signs are present at the alleged place of occurrence. The empty was found inside the haystack shop, whereas, the occurrence is alleged to have occurred outside the haystack shop. There is no evidence to show that exhortation was extended through the mobile phone of Rajeev Sharma. Since complicity of accused Tarkeshwar has been alleged and he has also been charge sheeted, therefore, deliberately, his wife Rekha has also been implicated in the crime in question. The

prospective accused have been named in the FIR and thereafter, sought to be summoned by means of application under Section 319 Cr.P.C. so that no adult member is in the house to pursue the trial on behalf of accused. Rahul Pachori and Vikas Pachori are the brothers of Prashant Pachori, whereas Rekha is the wife of Tarkeshwar. Rajeev Sharma @ Raju is the cousin brother of Shivanshu Mudgal (son of Mausii) whereas, Mukesh Sharma and Sumil Paliwal are advocates on behalf of the accused. All the senior lawyers of Agra District Court have been engaged by the prosecution so that no competent advocate is available to the accused.

13. The court below thereafter evaluated and examined the allegations made in the application under Section 319 CrPC in the light of material on record particularly, the depositions of PW-1 and PW-2. In doing so, Court below framed the following questions, which fell for consideration;-

(a) whether on the basis of the depositions of PW-1 and PW-2 is it judicious to summon the prospective accused?

(b) whether the depositions of PW-1 and PW-2 shall prevail over the material or the electronic evidence collected by the Investigating Officer during course of investigation?

(c) except for the oral evidence, whether something more strong and cogent evidence is required to summon the prospective accused?

14. In the light of above, the Court below examined the papers accompanying the police report and on basis thereof, returned categorical and cogent findings namely (a) civil dispute regarding land is pending between the first informant and Shivanshu Mudgal, (b) as per the material on record, the location of the prospective accused was not found on the spot, (c) as per the electronic evidence, the location of the prospective accused were not found near the place of occurrence either, (d) prospective accused Sumit Paliwal, his wife Hemlata, Mukesh Sharma and Rahul are found to be present at Police Station-Loha Mandi as per the CCTV footage of aforementioned Police Station from 18:40 to 18:49 hours, (e) as per the CDR report of deceased, no phone call was made from the mobile phone of Rajeev Sharma @ Raju on the mobile of deceased and (f) prospective accused Rekha was not present at the time and place of occurrence as per the statements of witnesses inasmuch as, she has doing business and was distributing milk and (g) as per the CDR report of the mobile phone of Rajeev Sharma, his location was not found near the place of occurrence.

15. The court below, on the basis of above, came to the conclusion that no prima facie case is made out to summon the prospective accused to face trial in aforementioned Sessions Trial at this stage. However, court below vide order dated 27.06.2023 instead of rejecting the application under Section 319 Cr.P.C. at this stage out-rightly, rejected the aforementioned application under Section 319 CrPC filed by the prosecution/first informant/revisionist.

16. Perusal of the order impugned dated 27.06.2023 passed by court below will go to show that court below in support of the conclusion drawn by it, as noted above, has recorded a finding that it would not be judicious to summon the prospective accused on the basis of statement-in-chief/examination-in-chief of PW-1 and PW-2 only inasmuch as, neither the electronic evidence, which has been collected by Investigation Officer, has been placed before Court nor the same has been proved by the prosecution up to this stage.

17. Thus feeling aggrieved by the above order dated 27.06.2023, the first informant/revisionist has now approached this Court by means of present criminal revision.

18. Present criminal revision came up for admission on 08.11.2023 and this Court passed the following order :

"Issue notice to opposite party Nos. 2 to 8 returnable at an early date.

List this case as fresh on 11.12.2023."

19. In compliance of above order dated 08.11.2023, notices were issued to opposite parties 2 to 8 who have put in appearance. However, it is apposite to mention here that no counter affidavit has been filed by the prospective accused i.e. opposite parties 2 to 8 herein, in opposition to present criminal revision. A counter affidavit has been filed by State but no rejoinder affidavit to the same has been filed by revisionist.

20. Mr. Saurabh Dwivedi, the learned counsel for revisionist, contends that the order impugned in present criminal revision is manifestly illegal and therefore liable to be set aside by this Court. In continuation of aforesaid submission, he submits that court below has rejected the application under Section 319 CrPC filed by the prosecution primarily on the ground that simply on the basis of statements of PW-1 and PW-2 the prospective accused cannot be summoned. Court below has further concluded that the electronic evidence collected by Investigating Officer during course of investigation qua the

innocence of the prospective accused has not been produced before the court nor the same has been got proved by the prosecution. In the submission of learned counsel for revisionist the reasonings so assigned by the court below are not only illegal but also misconceived. He, therefore, contends that the order impugned is not only illegal but also perverse. According to the learned counsel for revisionist, a five Judges' Bench of Supreme Court in **Hardeep Singh Vs. State of Punjab and Others, (2014) 3 SCC 92**, has held that an application under Section 319 CrPC can be decided by the court on the basis of the statement-in-chief of one prosecution witness only and the court need not wait for the entire prosecution evidence to be recorded before deciding the application under Section 319 CrPC. Apart from above, admittedly the examination-in-chief of PW-1 and PW-2 had already taken place. He, therefore, contends that depositions of PW-1 and PW-2 shall fall in the realm of legal evidence. However, in clear ignorance of the mandate of law laid down by the five Judges' Bench as noted above, the court below in clear violation of the principles laid down for exercise of jurisdiction under Section 319 CrPC has rejected the application filed by the prosecution/revisionist under Section 319 CrPC. As such, the order impugned cannot be sustained and is, therefore, liable to be set aside by this Court.

21. According to Mr. Saurabh Dwivedi, the learned counsel for revisionist, it is not only the complicity of the prospective accused which has emerged in the crime in question but strong and cogent evidence has also emerged against them. Admittedly, the first information report was lodged against named accused under Section 149 IPC i.e. formation of an unlawful assembly with a common object. He, therefore, contends that the primary question that was required to be answered by court below is whether as per the depositions of the prosecution witnesses examined upto this stage i.e. PW-1 and PW-2, the presence of the prospective accused at the time and place of occurrence is established or not. Once the presence of the prospective accused at the time and place of occurrence stands established as per the depositions of PW-1 and PW-2, then the issue as to whether any active or passive role was played by the prospective accused in the crime in question becomes redundant. The said submission derives its sustenance from the judgement of the Supreme Court in **Sandeep Kumar Vs. State of Haryana, 2023 SCC OnLine SC 888**. He, therefore, contends that since the very presence of the prospective accused at the time of place of occurrence is established as per the depositions of aforementioned prosecution witnesses examined upto this stage, therefore,

nothing more was required to infer the complicity of the prospective accused in the crime in question. On the above premise, he contends that the ratio that can be culled out from the judgments of the Supreme Court in **Brijendra Singh and Others Vs. State of Rajasthan (2017) 7 SCC 706** as well as in **S. Mohammed Ispahani Vs. Yogendra Chandak and others (2017) 16 SCC, 226** i.e.

(a) a prospective accused can be summoned under Section 319 Cr.P.C. upon consideration of the statement-in-chief of one prosecution witness. As such, Court concerned need not wait for the entire prosecution evidence to be recorded.

(b) the plethora of evidence collected by the Investigating Officer during course of investigation is required to be looked into by a Court dealing with an application under Section 319 Cr.P.C. as it is relevant material.

(c) Court while dealing with an application under Section 319 Cr.P.C. must examine the statement of the witness recorded under Section 161 Cr.P.C. and thereafter, draw a parallel to find out whether something new has emerged in the deposition of such a witness.

(d) a prospective accused cannot be summoned simply on the basis of his mere complicity in the crime in question

(e) Court can summon a prospective accused in exercise of jurisdiction under Section 319 Cr.P.C. only if, an inference of guilt of the prospective accused can be gathered from the material on record.

(f) jurisdiction under Section 319 Cr.P.C. is an extra-ordinary discretionary jurisdiction and should be exercised sparingly.

(g) Court should exercise it's jurisdiction under Section 319 Cr.P.C. diligently and not in a casual and cavalier fashion.

(h) a prospective accused can be summoned only when some strong and cogent evidence has emerged against him and not merely on the basis of his complicity in the crime in question.

are not attracted in the present case. Since the judgement of the Supreme Court in **Sandeep Kumar (supra)** carves out an exception to the principles laid down in aforementioned judgements of the Supreme Court and the said exception stands satisfied in the present case as per the depositions of PW-1 and PW-2, therefore, the order impugned cannot be sustained and is, therefore, liable to be set aside by this Court.

22. Per contra, the learned A.G.A. for State-opposite party 1 and the learned senior counsel/learned counsels representing prospective accused i.e. opposite parties 2 to 8 herein have vehemently opposed the present criminal revision. They submit that the order impugned in present criminal revision is perfectly just and legal and therefore, not liable to be interfered with by this Court. Detailed and lengthy arguments have been raised by them in opposition to this criminal revision. Mr. Satish Trivedi, the learned Senior Counsel assisted by Mr. Ajay Kumar Pandey, the learned counsel representing opposite parties 5, 6 and 8 has taken the Court to the depositions of PW-1 and PW-2 and on basis thereof, he submits that as per the admitted case of PW-1 and PW-2, the prospective accused/opposite parties 5, 6 and 8 namely Mukesh Sharma, Sumil Paliwal and Rajeew Sharma are not part of that unlawful assembly, which is alleged to have committed the crime in question. As per the depositions of PW-1 and PW-2, the prospective accused/opposite parties 5, 6 and 8 are said to be standing away from the place of occurrence and only the role of exhortation has been assigned to them. However, as per the electronic evidence collected by the Investigating Officer, during course of investigation, their presence was not found even near the place of occurrence at the time of occurrence. On the above conspectus, it is thus urged by the learned Senior Counsel that no prima-facie case can be said to be made out to summon the prospective accused/opposite parties 5, 6 and 8. Mr. Hitesh Pachori, the learned counsel representing accused-opposite parties 4 and 7 submits that during course of investigation, Investigating Officer has examined certain witnesses under Section 161 Cr.P.C. also. Some of the witnesses so examined have clearly stated that Smt. Rekha W/o of Tarkeshwar Mudgal was present at her dairy and distributing milk and she has dairy business. Apart from above, her mobile location also did not indicate her presence at the time and place of occurrence. Furthermore, though the FIR was lodged under Section 149 IPC also but no charge sheet has been submitted by the Investigating Officer under Section 149 IPC. As such, it cannot be said that a cast-iron case for summoning the prospective accused/opposite parties 4 and 7 is made out. Mr. Mayank Singh, Advocate, holding brief of Mr. R.D. Singh, the learned counsel representing opposite parties 2 and 3 submits that as per the electronic evidence collected by the Investigating Officer, the very presence of prospective accused/opposite parties 2 and 3 is not established even near the place of occurrence. As such, opposite parties 2 and 3 have been falsely implicated in the crime in question on account of rivalry. He, therefore, submits that no good ground is made out to summon the prospective accused/opposite parties 2 and 3 in the crime in question.

23. Having heard, Mr. Saurabh Dwivedi, the learned counsel for revisionist, the learned A.G.A. for State-opposite party-1, Mr. Mayank Singh, Advocate, holding brief of Mr. R.D. Singh, the learned counsel representing opposite parties 2 and 3, Mr. Hitesh Pachori, the learned counsel representing opposite parties 4 and 7, Mr. Satish Trivedi, the learned senior counsel assisted by Mr. Ajay Kumar Pandey, the learned counsel representing opposite parties 5, 6 and 8 and upon perusal of record, this Court finds that the issue involved herein i.e. the summoning of the prospective accused is a complex one, in view of the mitigating circumstances that have emerged in favour of the prospective accused as per the material collected by the Investigating Officer during course of investigation, on the one hand and the depositions of two prosecution witnesses, who have deposed before Court below up to this stage on the other hand. In short, the Court is faced with a conundrum as two equal weighing circumstances have emerged.

24. It is on account of above that Court below while deciding the application under Section 319 Cr.P.C. filed by the prosecution framed the three questions as have been noted in paragraph 13 of this order. It is in line with above that Court below examined the plethora of evidence collected by the Investigating Officer during course of investigation, which exercise is in consonance with one of the principles laid down by Apex Court in **Brijendra Singh (Supra)** i.e. the plethora of evidence collected by the Investigating Officer during course of investigation is a relevant material, which is also required to be looked into apart from the deposition of the prosecution witness examined up to that stage by Court while considering an application under Section 319 Cr.P.C.

25. On the basis of above exercise undertaken by Court below i.e. evaluation of the material collected by the Investigating Officer at the stage of investigation that Court below has observed in paragraph 19 of the impugned order that the application under Section 319 Cr.P.C. is not maintainable at this stage. The reasons for the same have been further recorded in the penultimate part of paragraph 20 of the impugned order.

26. Admittedly, the electronic evidence relied upon by the prosecution regarding the innocence of other named but not charge sheeted accused has neither been placed before Court below nor the same has been proved in evidence. However, as same is part of the papers accompanying the police report, therefore, Court below was fully justified in referring to the same. It is not the case of revisionist that the said material is not part of the case diary nor the learned counsel for revisionist has assailed the same at the time of arguments. As such, Court

below has rightly referred to the same and therefore, no illegality to the said exercise can be attached.

27. However, in spite of having recorded aforesaid finding duly supported by reasons, the Court below inadvertently without dismissing the application under Section 319 Cr.P.C. at this stage straightaway dismissed the application. It is here that the Court below has gone wrong.

28. In view of above, this Court finds that the merits of the application under Section 319 Cr.P.C. filed by the prosecution/first informant or the opposition raised to the same by the learned Senior Counsel/learned counsel for the prospective accused is not required to be dealt with, threadbare inasmuch as, the question whether on account of the electronic evidence collected by the Investigating Officer, during course of investigation, which prima-facie proves the innocence of the prospective accused, still, simply on the basis of depositions of PW-1 and PW-2, the prospective accused could be summoned, cannot be answered judiciously but only angularly.

29. Even though, this Court is not unmindful of the distinction drawn by the Apex Court in the case of **Sandeep Kumar (Supra)** but is also equally reminded of the caution given by the Apex Court in **S. Mohammad Ishpahani (Supra)**, wherein Court has observed that jurisdiction under Section 319 Cr.P.C. is an extraordinary discretionary jurisdiction and should be exercised sparingly, Courts should exercise their jurisdiction diligently and not in casual and cavalier fashion and only when some strong and cogent evidence has emerged against the prospective accused, which is more than their mere complicity in the crime in question that they be summoned, this Court finds that Court below rightly observed in the order impugned that the application under Section 319 Cr.P.C. filed by the prosecution is not maintainable at this stage.

30. In view of the discussion made above, no fault can be attached to the aforesaid observations made by Court below. But as already noted above, the Court below instead of dismissing the application under Section 319 Cr.P.C. at this stage, out-rightly dismissed the same, which is prima-facie unjustifiable.

31. Consequently, the inescapable conclusion is that the present criminal revision must succeed. The same is, therefore, liable to be allowed.

32. It is, accordingly, **allowed**.

33. The impugned order dated 27.06.2023 passed by Additional Sessions Judge, Court No. 1, Agra in Sessions Trial No. 235 of 2022 (State Versus Shivanshu Mudgal & others) , arising out of Case Crime No.478 of 2021, under Sections 302, 307, 506, 34 I.P.C., Police Station Shahganj, District Agra is hereby set aside.

34. The matter shall stand remanded to Court below to decide the application under Section 319 Cr.P.C. filed by the prosecution/first informant afresh but only after the electronic evidence collected by the Investigating Officer during course of investigation has been placed before Court below and proved in evidence. Consequently, the hearing of the application under Section 319 Cr.P.C. shall stand deferred till aforementioned exercise is not undertaken by Court below. The burden to place and prove the electronic evidence collected by the Investigating Officer shall be upon the prosecution itself at is is the prosecution, which is pleading the existence of certain facts. This direction is issued to avoid unnecessary delay in the progress of the trial.

35. Considering the facts and circumstances of the case, the cost is made easy.

Order Date :- 27.5.2024.

Imtiyaz