

Reserved On : 2.12.2024

Delivered On: 13.2.2025

Court No. - 80

Case :- CRIMINAL REVISION No. - 3888 of 2024

Revisionist :- Saleem Khan

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

Counsel for Revisionist :- Narendra Nath Tripathi

Counsel for Opposite Party :- Ashok Kumar Yadav,G.A.

Hon'ble Ram Manohar Narayan Mishra,J.

1. By means of instant criminal revision, revisionist has challenged the impugned order dated 3.6.2024 passed by the learned Additional District and Sessions Judge Court No. 3, Deoria in S.T. No. 06 of 2019 (State vs. Nadeem & others) arising out of Case No. 760 of 2018, under sections 323, 504, 506, 307 I.P.C., P.S. Kotwali Sadar, District Deoria whereby learned court below has allowed the application 39 Kha filed by the complainant and injured Mohd. Tahir under section 319 Cr.P.C. and summoned the revisionist and Saleem and Javed Ahmad as accused to face trial for charges under sections 323, 504, 506, 307 I.P.C.

2. Heard learned counsel for the revisionist, learned counsel for the opposite party no. 2, learned AGA for the State and perused the record.

3. The factual matrix of the case culled out from FIR and material on record are that the informant Mohd. Tahir lodged an FIR at P.S. Deoria on 21.8.2018 at 5:01 hours vide Case Crime No. 760 of 2018 with the averment that he is resident of mohalla Garulpar behind Vijay Takij P.S. Kotwali District Deoria and on 21.8.2018 at around 3:20 hours in the morning he had to go outside the house along with his younger brother Wasim. As soon as he opened the door accused Nadeem khan came into

Verandah of the house and fired many round of shots by pistol of Javed Ahmad.

4. One fire arm shot hit him on his left arm and another shot scattered hither and thither coincidentally, accused Ahmad Khan also fired shot at him with intention to kill. Imtiyaj khan @ Mantu assaulted him by stick on his back and thigh. Saleem khan reached there by a red Scorpio and exhorted other accused to kill the informant while abusing him. Javed had given a pistol to Nadeem and he was also abusing and challenging him. He got hospitalized and is under treatment. His mother Jahirunnisha, his wife Tarnnus and witness Wakar Ahmad were also present on the spot. Accused persons fled away from the spot by abusing the informant and witnesses. The FIR was lodged under section 147, 148, 149, 323, 504, 506, 307 I.P.C. and the police investigated the case.

5. The injury report of injured Mohd. Tahir was prepared on 21.8.2018 at the district hospital Deoria at 4 A.M. by Dr. Nagendra Kumar wherein it is stated that the injured was brought by Bashim Raja, his brother. Injured has sustained two injuries which reads as under:-

- i. Circular L.W. size 2 cm x 1 cm on the left upper arm 15 cm above to left elbow joint bleeding present. Referred to surgeon.
- ii. Circular L.W. size 0.5 x 0.3 cm on the left upper arm 14 cm above to left elbow joint bleeding. Referred to surgeon.

In the opinion of doctor, all above injuries were caused by gun shot.

6. In FIR as many as five persons were named as accused. The investigating officer submitted his charge sheet against Nadeem Khan and Imtiyaj Khan @ Mantu in first phase and supplementary charge sheet was filed against Amjad Khan after his arrest in the case in aforesaid panel sections. Complicity of accused Saleem khan and Javed Khan was not found in the offence during investigation and the investigating officer submitted a closer report against them.

7. Learned Magistrate took cognizance of the offence and committed the case to court of sessions for trial during trial of co-accused persons. Evidence of P.W. 1 injured Tahir and P.W. 2 eye witness Wasim has been recorded by trial court. After evidence of P.W. 1 and P.W. 2, the informant filed an application under section 319 Cr.P.C. with the prayer to summon accused Saleem Khan and Javed Khan also to face trial for the said offence together with the charge sheeted accused persons on the ground that from evidence of P.W 1 and P.W. 2, complicity of these two persons in offence is also established.

8. Learned trial court summoned Saleem Khan and Javed in exercise of power under Section 319 Cr.P.C. to face trial for charge under sections 307, 332, 504, 506 I.P.C. Feeling aggrieved by the impugned order, newly added Saleem khan has filed present criminal revision before this Court.

9. Learned counsel for the revisionist submitted that complicity of revisionist was not found during investigation and investigating officer had submitted a closer report in respect of revisionist and co-accused Javed. The informant has not challenged or assailed the closure report before learned Court below. He only moved an application under section 319 Cr.P.C. after six years of the incident which is out come of after thought.

10. The revisionist has been implicated only due to fact that he is brother of co-accused charge sheeted accused persons. The revisionist is 60% physically disabled person and cannot walk properly without support of other persons. He has filed his disability certificate issued by Chief Medical Officer bearing date 20.5.1978 in which it is mentioned that he is suffering from Polio and is 60% physically disabled. He has also filed a photocopy of said certificate as annexure no. 7 to the affidavit which shows he has difficulty in movement. He next submitted that evidence appearing on record against revisionist is not sufficient regarding his conviction if the same remain unrebutted.

11. He next submitted that learned trial court has failed to record his satisfaction required for summoning a person as additional accused in exercise of powers under section 319 Cr.P.C. Learned trial court has not considered at all the grounds taken by investigating officer while exonerating the revisionist from the investigation. He lastly submitted that only role assigned to the revisionist in the offence is that of exhortation which is weak piece of evidence and this is a matter of common experience that people often attribute role of exhortation to the persons who are not involved in the offence only to settle score against them and make them accused with the assailants.

12. Per contra, learned counsel for the respondent no. 2 placing reliance on counter affidavit filed on his behalf and submitted that the revisionist is named in the FIR as accused which was promptly lodged at the instance of the injured himself within two hours of the incident which contradicts the possibility of concoction of false implication. The revisionist is a person of criminal antecedent and he has been assigned a criminal history of ten cases during period of 2001 to 2019. He shared common intention to attempt to kill the injured together with the charge sheeted accused persons. He had animus to kill the injured as witnesses have stated in their evidence that the accused persons were involved in imparting wrong treatment to people of locality without having any medical qualification.

13. P.W. 1 had made a complaint on 8.6.2018 to CMO Deoria and subsequently before District Magistrate Deoria filed an inquiry into unauthorised medical activities of accused persons wherein an enquiry was conducted and Saleem Khan and Imtiyaz Khan were arrested but Amjad Khan and Nadeem Khan escaped after closing their clinic. He was attacked by accused persons in retaliation on the said complaint on the date of incident.

14. He next submitted that accused Saleem Khan find no difficulty in movement. He rides scooter and drives car. He also gives dental treatment to patients, his disability certificate is manipulated. Learned court below

took activity part of the accused in the offence. There is no illegality, irregularity or perversity in the impugned order passed by the learned court below.

15. According to prosecution version, the incident occurred on 21.8.2018 at 3:30 A.M. in the Verandah of the house of the informant where he was wounded by fire arm shot caused by Nadeem Khan. He was also assaulted by Imtiyaz Khan at his back and thigh. Accused Javed had given his pistol to injured by which Nadeem fired a shot at the informant. Amzad Khan also fired a shot at the injured but he did not hurt him. The injured was accompanied by his younger brother Wasim.

16. P.W. 1 Mohd. Tahir and P.W. 2 Wasim were examined as eye witness. He has reiterated his statement under section 161 Cr.P.C. and supported FIR version. He stated that on exhortation of Saleem and Javed, Nadeem opened a shot at his brother with intention to kill him. The Fire arm shot hit his brother in his left hand. His brother ran towards inside the house but he got stuck in channel/gate. Nadeem had opened fire and Amzad had also shot a fire at his brother. The people of neighbourhood assembled by hearing the noise.

17. Injured was reached to district hospital Deoria from where he was referred to medical college Gorakhpur. His brother got the written statement described by the witnesses (P.W. 2) and he produced the same at police station by which FIR was lodged. His brother Tahir was scheduled to move Lucknow at the date and time of incident and this fact was only known to his family members. He is employed in some private job out of Deoria. He apprehends danger from accused persons since the date of incident, he is not aware that whether any fire arm was recovered on pointing out of the accused persons. The incident was seen by him, his mother and Bhabhi Tarannus wife of Tahir. Accused persons reached in front of his house by a Duster vehicle. They were flashing fire arm and displayed music system in their car.

18. The police reached at the place of incident within short time. His brother was hospitalised in Gorakhpur for a day. His brother remained at district hospital Deoria from 4:00 AM to 7:30 AM. There was commotion on the spot due this incident. His brother Tahir works as a property dealer in Lucknow. His brother suffered one fire arm shot and three other shots did not hit him or any other person. His brother fell down in verandah after being hit by the fire arm shot but he was unconscious. P.W. 1 Tahir has stated that he had made a complaint through CMO at District Magistrate against accused persons regarding their unauthorised medical practice. There were five accused persons who appeared on spot, Javed Ahamad handed over a pistol to Nadeem by which Nadeem fire a shot at him which hit him on his shoulder. He works in construction activities.

19. Accused persons had abused and threatened him at his residence in June, 2018 regarding which he had filed a report at police station. The named accused Saleem Khan is disabled person. Javed Ahmad does not belong to family of other accused persons. The investigating officer found naming of Saleem Khan and Javed wrong. No bullet or ballet were recovered from his person by doctor in his knowledge. No fire arm or weapon was recovered at the instance of accused persons. P.W. 2 also stated that accused Saleem is physically disabled persons from leg.

20. Learned court below had summoned the revisionist and co-accused Javed with the observation that informant Tahir and his brother Wasim have implicated named accused Javed and Saleem in their statement under section 161 Cr.P.C. as well as their sworn testimony before the court and have stated in their evidence that accused Saleem and Javed were person on the spot and were involved in the offence, therefore, there is a prima facie case against them which is more than that required for framing of charge.

21. Hon'ble Supreme Court has elaborately dealt with the ambit and scope of exercise of power under section 319 Cr.P.C. in Constitution

Bench Judgement ***Hardeep Singh vs. State of Punjab AIR 2014 SC 1400.***

Hon'ble Court observed in paragraph no. 11 and 12 as under:-

“11. Section 319 Cr.P.C. as it exists today, is quoted hereunder:

“319 Cr.P.C. -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 under arrest or upon a summons, 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 sub-section (1), then-

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

12. Section 319 Cr.P.C. springs out of the doctrine judex damnatur cum nocens absoluitur (Judge is condemned when guilty is acquitted) and this doctrine must be used as a beacon light while explaining the ambit and the spirit underlying the enactment of Section 319 Cr.P.C.

It is the duty of the Court to do justice by punishing the real culprit. Where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial. The question remains under what circumstances and at what stage should the court exercise its power as contemplated in Section 319Cr.P.C.?

The submissions that were raised before us covered a very wide canvas and the learned counsel have taken us through various provisions of Cr.P.C. and the judgments that have been relied on for the said

purpose. The controversy centers around the stage at which such powers can be invoked by the court and the material on the basis whereof such powers can be exercised."

22. The Hon'ble Court further observed that the court can exercise power under section 319 Cr.P.C. only after the trial proceeds and commences with the recorded of the offence and also in exceptional circumstances.

23. Hon'ble court examined meaning of word 'evidence' used in section 319 Cr.P.C. at length and concluded that it is, therefore, clear that the word 'evidence' under section 319 Cr.P.C. means only such evidence as is made before the court, in relation to statements, and as produced before the court, in relation to documents. It is only such evidence that can be taken into account by the Magistrate or the Court to decide whether power under Section 319 Cr.P.C. is to be exercised and not on the basis of material collected during investigation.

24. Hon'ble court laid down ambit and scope of exercise of powers under section 319 Cr.P.C. in paragraph no. 98 and 99 which may be reproduced as under:-

"98. Power under Section 319 Cr.P.C. 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.

99. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court not necessarily tested on the anvil of Cross-Examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes un rebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Cr.P.C. In Section 319 Cr.P.C. the purpose of providing if 'it appears from the evidence that any person not being the accused has committed any offence' is clear from the words "for which such person could be tried

together with the accused." The words used are not 'for which such person could be convicted'. There is, therefore, no scope for the Court acting under Section 319 Cr.P.C. to form any opinion as to the guilt of the accused.

Q.(v) In what situations can the power under this section be exercised: Not named in FIR; Named in the FIR but not charge-sheeted or has been discharged?"

25. In the present case, this is admitted fact by the injured and his eye witnesses in their evidence before the court that the revisionist is a disabled person. There is no occasion to disbelieve his medical disability certificate issued by the Chief Medical Officer at this stage. The role attributed to him in the offence is that he came on the spot by a red scooty and exhorted the accused persons. This fact has also surfaced in evidence of P.W. 2 that apart from Nadeem and Imtiyaz, three accused persons were unarmed and according to prosecution version, the revisionist was also unarmed.

26. We go through the sequence of events as narrated in the FIR which is lodged at the instance of injured itself and the statement of the P.W. 1 and P.W. 2 recorded under section 161 Cr.P.C., it leads to an inference that Nadeem Khan suddenly fired a shot at the informant with intention to kill him and fired many rounds by pistol aiming the injured out of which one shot hit him on his right arm. Amjad had also fired a shot at him which did not hit him. Imtiyaz Khan assaulted him by a stick on his back and thigh and Saleem Khan reached there by scooty and exhorted the accused to kill the injured.

27. The P.W. 2 has stated that the injured received only one fire arm injury. Perusal of sworn testimony of the witnesses , it cannot be held that all the accused persons came together. P.W. 2 has stated that three accused persons reached by a four wheeler and two accused Saleem and Javed followed them. In this fact, situation and according to FIR version, Nadeem opened fire at the informant. It does not sound natural that subsequent to the arrival of assailants, the revisionist would come by

scooty and gave exhortation to the accused person to kill the injured. The injury suffered by informant does not appear as out come of the exhortation allegedly given by the revisionist.

28. In as much as, the actual words used by the revisionist in alleged exhortation have neither been mentioned in FIR nor in statement of the witnesses during their statement under section 161 Cr.P.C. or sworn testimony before the Court.

29. This court in ***Ashish Batra vs. State of U.P. in Criminal Appeal No. 1964 of 2003*** observed in judgement dated 13.4.2016 while placing reliance judgement of Hon'ble Apex court in *Jainul Haque vs. State of Bihar, 1974 (3) SCC 543* that *the evidence of exhortation is, in the very nature of things, as weak piece of evidence. There is quite often a tendency to implicate some person in addition to the actual assailant, by attributing to that person an exhortation to the assailant to assault the victim. Unless the evidence in this respect be clear, cogent and reliable, no conviction for abetment can be recorded against the person alleged to have exhorted the actual assailant.*

30. There is no consistency in sequence of evidence with regard to role of the revisionist in the offence in FIR and statement of witnesses recorded during investigation and their sworn testimony before the court, therefore, summoning of the revisionist by the learned court below in exercise of powers under section 319 Cr.P.C. for his alleged role of exhortation cannot be sustained.

31. Revisionist has explained his criminal history in supplementary affidavit filed in support of affidavit which reveals that apart from present case, 8 cases were registered against him earlier out of which he has been enlarged on bail in six cases and in one case he was not charge sheeted and in another case summon has not been issued against him till date.

32. Giving a thoughtful consideration on submissions made by the learned counsel for the parties and matriculate examination on material on record

it cannot be held that the test of satisfaction as laid down by Hon'ble Apex Court in Hardeep Singh's Case (Supra) for exercise of powers under section 319 Cr.P.C., which is more than prima facie, case at the time of framing of charge but short of satisfaction to an extent that the evidence, if goes un rebutted, would lead to conviction, has been fulfilled in present case while summoning the revisionist in exercise of powers under section 319 Cr.P.C. consequently, the impugned order is liable to be set aside.

33. The impugned order passed by the learned court below is set aside to the extent of summoning of the revisionist Saleem in exercise of powers under section 319 Cr.P.C. for alleged offence is set aside.

34. The revision is allowed accordingly.

Order Date :- 13.2.2025

Sushma