

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.18445 of 2015

Arising Out of PS.Case No. -268 Year- 2007 Thana -SIWAN MUFFASIL District- SIWAN

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1. Dhruv Lal Prasad Son of : Late Sheetal Prasad , Resident of Village: Pach Pakariya, P.S. G.B. Nagar, District : District : Siwan .
 2. Brij Kishore Manjhi, Son of Dhanraj Manjhi.
 3. Binda Prasad Son of Bhadaï Prasad Both Resident of Village: Alapur, P.S. Manjhagarh, District: Gopalganj.

.... Petitioner/s

Versus

State of Bihar & Anr

.... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. Vindhkeshari Kumar, Sr. Advocate
Mr. Ajay Kumar Pandey
For the State : Mr. (Dr.) Mayanand Jha, APP
For Opp. Party No. 2 :- Mr. S. M. Nematullah &
Mr. Anisur Rahman

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 07-05-2015

The present application under section 482 of the Code of Criminal Procedure (for short Code) has been filed for quashing the order dated 10.02.2015 passed by the learned 3rd Additional Sessions Judge, Siwan in Sessions Trial No. 393-A of 2008 arising out of Siwan Mufassil P.S. Case No. 268/2007 whereby the application filed on behalf of the prosecution for summoning the petitioners in exercise of powers conferred under section 319 of the Code has been allowed.

2. The prosecution case, as alleged by the informant, is that on 01.11.2007, while the informant and her family members were at their residence, at about 8.00 a.m., 6-7 persons including the



petitioners came on 4-5 motor cycles. Out of them, she could identify Dhrup Lal Mukhiya @ Dhrublal Prasad, Brij Kishore Manjhi and Binda Prasad (petitioner nos. 1 to 3) and one Ram Das Tiwari. Thereafter, petitioner no. 1 Dhrup Lal Prasad persuaded her to allow her son to accompany them on the pretext of visiting her son-in-law, resident of village Jhunapur who had fallen ill. On the insistence of the accused persons, the son of the informant went along with them. When the son of the informant did not return for two days, the daughter of the informant, namely, Neeraj Kumari went to the house of petitioner no. 1 but he was not found present in his house. It has further been alleged that in the meantime a rumour spread in the village that the son of the informant has been killed. When the informant heard such rumour, she told her husband to go to the Sasural of her daughter and enquire about the whereabouts of her son. On 5.11.2007, in the morning, a telephonic call was received by the informant and it was told to her that it has been learnt that her son has been murdered and his dead body has been buried. The informant claimed that she has reason to believe that the accused persons in conspiracy with each other killed her son.

3. On the basis of the fardbeyan of the informant, Siwan Mufassil P.S. Case No. 268 of 2007 was registered for the offence punishable under sections 364 and 302 read with section 34 of

the Indian Penal Code as well as Section 27 of the Arms Act against the aforementioned four persons including the petitioners and three unknown.

4. After registering the first information report (for short F.I.R.), the police took up investigation and on conclusion of investigation, a report under section 173(2) of the Code was filed before the learned Chief Judicial Magistrate, Siwan. In course of investigation, the complicity of the petitioners in the alleged commission of murder was not found true and thus, they were not sent up for trial. However, the police submitted charge-sheet against Ram Das Tiwary, an accused named in the F.I.R.

5. The report submitted by the police was accepted by the learned Chief Judicial Magistrate, Siwan. In due course of time, the case of Ram Das Tiwary was committed to the court of Session for trial. The trial court framed charges against Ram Das Tiwary under sections 364 and 302 of the Indian Penal Code. During trial of Ram Das Tiwary, 11 witnesses were examined on behalf of the prosecution out of whom P.Ws. 1 to 6 were declared hostile. P.W. 7 is a hearsay witness who came to know about the occurrence from the informant whereas P.W. 9 is the doctor who had conducted post mortem examination on the dead body of the deceased and P.W. 10 is the police officer who had conducted investigation of the case. The

other two witnesses, namely, P.W. 8 Bhagmani Devi and P.W. 11 Neeraj Kumari have supported the allegations made in the F.I.R. in their deposition during trial.

6. After examination of P.Ws. 8 and 11, the prosecution had filed an application on 10.09.2012 before the trial court with a prayer to summon the petitioners in exercise of powers conferred under section 319 of the Code. The trial court acceded to the prayer of the prosecution vide order dated 09.10.2012 and summoned the petitioners to face trial.

7. The aforementioned order dated 09.10.2012 was challenged by the petitioners before this Court in Criminal Misc. No. 1155 of 2013 by filing an application under section 482 of the Code. After hearing the parties, vide order dated 05.08.2013, a Bench of this Court set aside the aforementioned order dated 09.10.2012 and remanded the matter to the trial court for passing a reasoned order after taking into consideration the evidence on record within one month from the date of receipt of the order.

8. It would appear from the record that before the trial court could pass any order after remand of the case of the petitioners, the trial of co-accused Ram Das Tiwary concluded and he was convicted by the learned Ad-hoc Additional Sessions Judge V, vide judgment dated 11.10.2012 for the offence under section 364 of

the Indian Penal Code. The trial court, however, held that the prosecution has failed to prove the charge under section 302 of the Indian Penal Code against him and, accordingly, he was acquitted of the charge under section 302 of the Indian Penal Code.

9. The judgment of the trial court was challenged by the convict Ram Das Tiwary before this Court in appeal vide Criminal Appeal (SJ) no. 933 of 2012 which was decided by a Bench of this Court vide judgment dated 05.08.2014. The aforementioned appeal has been allowed and judgment of conviction and order of sentence passed by the trial court has been set aside.

10. It would be relevant to mention here that the trial court had relied on the evidence of P.Ws. 8 and 11 for holding Ram Das Tiwary guilty for the charge under section 364 of the Indian Penal Code. However, this Court in appeal has held that merely on the basis of the evidence of P.Ws. 8 and 11, accused Ram Das Tiwary could not have been convicted. It has been held in appeal that there is nothing on record to show that there was any enmity or dispute between the deceased and the persons with whom he went on 01.11.2007. In absence of any other corroborative material, this Court has come to the conclusion that there was no justification for the trial court to convict accused Ram Das Tiwary.

11. It has been contended that after remand of the



matter from this Court, the application filed on behalf of the prosecution dated 10.09.2012 for summoning the petitioners as additional accused was again taken up for hearing by the court below in 2015. The learned Additional Sessions Judge III, Siwan vide his order dated 10.02.2015 allowed the aforementioned application dated 10.09.2012 filed by the prosecution and summoned the petitioners to face trial.

12. It has been submitted that the learned court below has taken into consideration the same evidence i.e. the deposition of P.Ws. 8 and 11 for arriving at a conclusion about the involvement of the petitioners in commission of the offence. It has been contended that the court below has completely erred in passing the impugned order as the power exercisable under section 319 of the Code is extraordinary power conferred on the Court to do real justice and it should be used with caution and only if the compelling reason exists for proceeding against a person against whom action has not been taken. He has further submitted that in view of the subsequent developments of the case, it was apparent that there was no possibility of the petitioner being convicted as on the basis of the same evidence on which the petitioners have been summoned to face trial, accused Ram Das Tiwary has already been acquitted in appeal by this Court. The evidence of P.Ws. 8 and 11 would simply show that the deceased

had gone together with the petitioners and four others on 01.11.2007 and his dead body was recovered after five days i.e. on 06.11.2007. There is no other evidence to show that the persons with whom the deceased had gone had any role in the commission of his murder.

13. On the other hand, learned counsel for the State has submitted that the acquittal of a co-accused in appeal would be of no consequence in the present case as the trial court has got powers to summon an accused under section 319 of the Code at any stage of the trial. Moreover, in the present case the summoning order has been passed after the matter was remanded by this Court for deciding the matter afresh vide order dated 05.08.2013 passed in Criminal Misc. No. 1155 of 2013. He has submitted that the fate of the petitioners would be determined by the evidence led in a separate trial as the trial of accused Ram Das Tiwary had already concluded. According to him, at this stage, it cannot be presumed that the prosecution would not be able to bring sufficient evidence to prove the charges. He has submitted that the evidence led in the trial discloses offence committed by the petitioners and, hence, there is no infirmity in the order.

14. Learned counsel for Opposite Party No. 2 has contested the matter. He has submitted that there is sufficient evidence on record on the basis of which the trial court has come to

the conclusion that the petitioners had complicity in commission of the offence and, hence, the order passed under section 319 of the Code cannot be faulted with.

15. I have heard the parties and with their assistance, examined the record. I have also examined the record of Criminal Appeal No. 933 of 2012.

16. It is true that the provision of Section 319 of the Code empowers the court to proceed against any person not shown or mentioned as accused if it appears from the evidence that such person has committed an offence for which he could be tried together with the main accused against whom an enquiry or trial is being held. The object of Section 319 of the Code is to ensure that no one who appears to be guilty escapes trial in relation to that guilt.

17. The degree of satisfaction required for invoking the powers under section 319 of the Code has been elaborately dealt with by a Constitution Bench of the Apex Court in Hardeep Singh Vs. State of Punjab, reported in 2014(2) PLJR, 482 (SC). The Constitution Bench after taking into consideration the earlier decisions of the Apex Court in the cases of Pyare Lal Bhargava Vs. The State of Rajasthan, AIR 1963 SC, 1094, Ram Singh & Ors. Vs. Ram Niwas & another (2009) 14 SCC 25, Vikas Vs. State of Rajasthan, 2013(11) SCALE 23, Md. Shafi Vs. Md. Rafiq & Another,



AIR 2007 SC 1899, Sarabjit Singh and another Vs. State of Punjab & another, AIR 2009 SC 2792, Brindaban Das & Ors. Vs. State of West Bengal AIR 2009 SC 1248, Michael Machado & Another Vs. Central Bureau of Investigation and others, AIR 2000 SC, 1127, Palanisamy Gounder & another Vs. State represented by Inspector of Police, (2005) 12 SCC 327, observed that the power under section 319 of the Code is a discretionary and extraordinary power. It is to be exercised sparingly and only in those cases where the circumstances so warrant. It is not to be exercised because the Magistrate or the Sessions judge is of the opinion that some other persons may also be found 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.

18. The Apex Court has further observed that it requires much stronger evidence than mere probability of complicity. The test that is to be applied is one which is more than a 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 absence of such satisfaction, the Court should refrain from exercising power under section 319 of the Code.

19. Regard being had to the facts and circumstances



of the case as also the law laid down by the Constitution Bench of the Apex Court in the matter of Hardeep Singh (Supra), I am of the view that the impugned order dated 10.02.2015 passed by the trial court summoning the petitioners under section 319 of the Code cannot be sustained. The deposition of P.Ws. 7, 8 and 11 only indicates that the deceased had gone together with the petitioners and four others on 01.11.2007. There is no other evidence on record to show that the deceased was either abducted, kidnapped or murdered by the petitioners. The dead body of the deceased was found at a distant place after five days on 06.11.2007. The quality of the evidence led by the prosecution was not found sufficient to prove charge under section 302 of the Indian Penal Code against accused Ram Das Tiwary by the trial court.

20. I further find that this Court had earlier set aside the order dated 9th October, 2012 passed by the trial court whereby the petitioners were summoned to face trial vide order dated 05.08.2013 with a direction to the court below to pass a fresh reasoned order within one month from the date of receipt of the order. The court below could not pass any order for a quite long time after remand of the matter. In the meantime, the main accused Ram Das Tiwary, in whose trial the petitioners were summoned vide order dated 09.10.2012, was convicted on 18.10.2012 and his appeal against the

judgment of conviction was allowed by this Court vide judgment dated 05.08.2014.

21. More than six months after the judgment of this Court in the aforementioned Criminal Appeal (S.J.) No. 933 of 2012, the learned 3rd Additional Sessions Judge, Siwan passed the impugned order whereby relying upon the evidence of P.Ws. 7,8 and 11 the petitioners have been summoned to face trial.

22. In my view, since the evidence of aforesaid P.Ws. 7, 8 and 11 were duly scrutinized by this Court in appeal and this Court found it insufficient to uphold conviction of accused Ram Das Tiwary, there was no compelling reason before the trial court for taking cognizance against the petitioners.

23. In Palanisamy Gounder & another (Supra), the Apex Court has deprecated the practice of invoking the power under section 319 of the Code just to conduct a fishing inquiry, as in that case, the trial court had exercised that power just to find out the real truth, though there was no valid ground to proceed against the persons summoned by the court. In the present case also, it is apparent from the impugned order that the court below has summoned the petitioners merely on suspicion of their complicity in the offence. It has not recorded its satisfaction to the effect that there exists a possibility that the petitioners in all likelihood would be convicted, if the evidence

adduced on behalf of the prosecution remains un-rebutted.

24. For the reasons stated here-in-above, the impugned order dated 10.02.2015 passed by the learned 3rd Additional Sessions Judge, Siwan in Sessions Trial No. 393-A of 2008 is set aside. The application stands allowed.

(Ashwani Kumar Singh, J)

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