

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.40769 of 2012

Arising Out of PS.Case No. -111 Year- 2008 Thana -Town District- DARBHANGA

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1. Dilip Sahni S/O Late Kishori Sahni R/O Mohalla - Mishra Tola, Bhikha Salami, P.S. Town, District - Darbhanga
 2. Ram Prasad Sahni S/O Late Kishori Sahni R/O Mohalla - Mishra Tola, Bhikha Salami, P.S. Town, District - Darbhanga
 3. Manoj Kumar @ Pappu Sahni S/O Late Kishori Sahni R/O Mohalla - Mishra Tola, Bhikha Salami, P.S. Town, District - Darbhanga
 4. Luchchi Devi W/O Late Kishori Sahni R/O Mohalla - Mishra Tola, Bhikha Salami, P.S. Town, District - Darbhanga
 5. Amar Sahni S/O Ram Prasad Sahni R/O Mohalla - Mishra Tola, Bhikha Salami, P.S. Town, District - Darbhanga

.... Petitioner/s

Versus

1. The State Of Bihar
2. Lakhan Mahto S/O Late Newalal Mahto R/O Mohalla - Mishra Tola, Bhikha Salami, P.S. Town, District - Darbhanga

.... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. Girish Chandra Jha, Adv.

For the Opposite Party/s : Mr. Ram Chandra Singh, APP

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 05-05-2015

Heard learned counsel for the petitioners and learned
counsel for the State.

In the present application filed under section 482 of the
Code of Criminal Procedure (in short 'the Code'), the petitioner has
prayed for quashing the order dated 23.08.2012 passed by the learned
Adhoc Additional Sessions Judge- IV, Darbhanga in Sessions Trial
No. 84 of 2009 arising out of Town P. S. Case No. 111 of 2008,
whereby the application filed under section 319 of the Code on behalf

of the prosecution for summoning the petitioners to face trial has been allowed.

The F.I.R. in question was registered against one Munna Mahto and ten others for the offences punishable under sections 147, 452, 307, 324, 326 and 302 read with 34 of the Indian Penal Code. After investigation, the Investigating Officer submitted charge sheet for the offences punishable under sections 147, 452, 307, 324, 326 and 302 read with 34 of the Indian Penal Code against Munna mahto, Pintu Mahto and Balo Devi and other accused persons including the petitioners were not sent up for trial.

In course of trial, altogether 11 witnesses were examined on behalf of the prosecution. At that stage, an application under section 319 of the Code was filed on 17.02.2012 on behalf of the prosecution for summoning the petitioners to face trial as several witnesses had supported the fact that the petitioners were also involved in the commission of the offence. The trial court has considered the evidence on record and by the impugned order dated 23.08.2012 allowed the application filed on behalf of the prosecution.

It has been contended that the impugned order dated 23.08.2012 is patently illegal as the learned trial court has taken into consideration the statement of the witnesses recorded under section 161(3) of the Code in course of investigation as one of the relevant

facts for summoning the petitioners under section 319 of the Code.

On the other hand, learned counsel for the State has vehemently opposed the prayer of the petitioner for quashing of the impugned order dated 23.08.2012. He has submitted that it would appear from the impugned order that out of the 11 witnesses examined in course of trial, P.W.1, P.W.8 and P.W.9 have categorically stated that the petitioners had also participated in the alleged commission of murder.

I have heard the respective counsel for the parties and, with their assistance, perused the record.

The provisions of section 319 of the Code empowers the court to proceed against any person not sent up or mentioned as accused if it appears from the evidence that such person has committed the offence for which he should be tried together with the main accused against whom an enquiry was held or trial is being held. It authorizes the court to issue warrant or summon against such person if he is not attending the court. The power exercisable under section 319 of the Code is an extra ordinary power conferred on the court to do real justice. It should be used with caution and only if compelling reason exists for proceeding against a person against whom action has not been taken. However, where evidence shows involvement of the person in commission of the crime, the court

should exercise its power under section 319 of the Code and summon him as additional accused.

Though the trial court has power under section 319 of the Code to proceed against any person not sent up for trial but while summoning the additional accused under section 319 of the Code, the police statement recorded under section 161 of the Code cannot be looked into. The expression “appears from the evidence” used under section 319 of the Code indicates application of mind by the court to the evidence that has come before it and then take a decision whether to proceed under section 319 of the Code or not. The police statement recorded under section 161 of the Code cannot be treated as evidence.

It would appear from the record that while passing the impugned order, the court below has considered the statement of the witnesses recorded in the case diary at paragraphs 7, 8 and 11. The relevant portion of the impugned order dated 23.08.2012 passed by the court below reads as under :-

“.... I have also gone through case diary. At para-7 deceased Lakshminiya Devi, para-8 victim Rinki kumari, para-11 witness Sitaram Mahto have named the accused persons with regard to their participation in the alleged incident. The other witnesses have also stated that deceased died due to burn injury.”

In view of what have been recorded hereinabove, it would appear that the finding of the trial court is based not only on

the evidence recorded in course of trial but also the statement recorded under section 161 of the Code by the police during investigation, which would make the order bad in the eyes of law.

In that view of the matter, the application is allowed. The impugned order dated 23.08.2012 passed by the learned Adhoc Additional Sessions Judge- IV, Darbhanga in Sessions Trial No. 84 of 2009 arising out of Town P. S. Case No. 111 of 2008 is set aside.

The trial court shall consider the aforementioned application dated 17.02.2012 filed on behalf of the prosecution afresh and pass appropriate order/orders in accordance with law after taking into consideration the evidence recorded in course of trial.

(Ashwani Kumar Singh, J)

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