

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.1083 of 2007

1. Shyam Kumar @ Shyama Yadav
2. Ram Kumar @ Rama Yadav
Both sons of Sri Kaleshwar Yadav, resident village-Nandlalpur, P.S.-Mufsil,
District-Munger.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

with

Criminal Appeal (DB) No. 1134 of 2007

1. Hirday Yadav , son of Late Ramrup Yadav, resident of village-Lakrapatal,
P.S.-Dharhara, District-Munger.
2. Dasrath Yadav, son of Late Tarai Yadav, resident of village-Nandlalpur,
P.S.-Muffassil, District-Munger.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

Appearance:

(In CR. APP (DB) No. 1083 of 2007)

For the Appellant/s : Shri Kanhaiya Prasad Singh, Sr. Adv.

For the Respondent/s : Shri Dilip Kumar Sinha, APP

(In CR. APP (DB) No. 1134 of 2007)

For the Appellant/s : Shri Kanhaiya Prasad Singh, Sr. Adv.

For the Respondent/s : Mrs. Shashi Bala Verma, APP

CORAM: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA

and

HONOURABLE SHRI JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

(Per: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA)

Date: 12-03-2015

These two appeals arise out of judgment of conviction
and order of sentence dated 18.08.2007 passed by the learned
Presiding Officer of Fast Track Court No.II, Munger jointly in
Sessions Trials No.230 of 1999 and 230A of 1999 by which the two



appellants in each of the two appeals, totaling up to four, were held guilty of committing offence under Section 302/34 IPC as also Section 27 of the Arms Act. They were heard on sentence on the same day and were directed to suffer rigorous imprisonment for life under Section 302/34 as also rigorous imprisonment of three years for being held guilty under Section 27 of the Arms Act. The learned trial Judge directed the sentences to run concurrently.

2. As per the prosecution story which emanated from the fardbeyan of Pinki Devi, PW.5 the wife of the deceased Sanjeev Yadav @ Doman Yadav, the couple had treaded out of their house to attend the call of nature and when they had come to a particular place, five accused persons named in the FIR, which included the four appellants as also one Naresh Yadav, came there, surrounded him and one after the other fired shots at him.

3. There is no dispute in the fact that deceased Sanjeev Yadav @ Doman Yadav succumbed to his injuries which were found caused by fire arms by PW.6 Dr. Krishna Mohan Purvey. The investigation which was conducted by PW.7 S.I. Jai Bihari Singh found that appellants Shyam Kumar @ Shyama Yadav and Ram Kumar @ Rama Yadav had no complicity in the commission of the offence and, as such, they were not sent up. The police submitted chargesheet by sending up appellants Hirday Yadav and Dasrath

Yadav for their trial and, accordingly, the trial proceeded against them after framing of charges on the 06th of December, 1999 as it appears from the order passed by the learned trial Judge in Sessions Trial No.230 of 1999.

4. During the course of trial spanning over two years, witnesses from PWs 1 to 6 were examined from the 16th of January, 2000 up to 21st of November, 2000. It appears that the learned trial Judge passed an order on 09.04.2002 under Section 319 Cr.P.C. to summon the appellants Shyam Kumar @ Shyama Yadav and Ram Kumar @ Rama Yadav. They appeared and the charges were again framed against the two accused persons, namely, Shyam Kumar @ Shyama Yadav and Ram Kumar @ Rama Yadav by an order passed on 02.07.2004. However, what appears further is that a petition was filed by appellants Shyam Kumar @ Shyama Yadav and Ram Kumar @ Rama Yadav on 04.07.2002 requesting the trial Court to recall the witnesses, i.e., PWs.1 to 6 who had been examined in absence of them for cross-examination by them. Accordingly, an order was passed directing the production of PWs.1 to 6 for the purpose of being cross-examined by the two accused summoned under Section 319 Cr.P.C. Summons for the appearance of witnesses already examined and discharged prior to the order under Section 319 Cr.P.C. were issued as appears from the margin of order dated 04.07.2002.



5. The witnesses, we find from their deposition sheets were produced by the Public Prosecutor for their cross-examination and, accordingly, each and every witness right from PW.1 to PW.6 was cross-examined by two additional accused summoned under Section 319 Cr.P.C. and they were discharged. It were witnesses, like, PW.7 and 8, i.e., S.I. Jai Bihari Singh who had investigated the case and Neelam Devi respectively, who were examined after the framing of charges against all the accused persons afresh after the passing of the order under Section 319 Cr.P.C. and appearance of the additional accused before the trial Court consequent upon it.

6. While we were being addressed on merits of the appeal, it could struck me particularly that the trial in the light of the provisions Section 319(4)(a) Cr.P.C. should be re-heard as the proceedings in respect of the newly added person has to commence afresh. In my view, it is a case which merited being remanded as to holding a de novo trial.

7. For holding the above view, I place reliance upon the decision of the Supreme Court recorded in (2002) 5 SCC 738 ***Shashikant Singh v. Tarkeshwar Singh*** in which the scope and ambit of Section 319 and specially that of sub-section (4) it was directly considered by their Lordships. As regards the proceeding to start afresh against the newly added accused persons and direction of

the law to re-hear the witnesses. I am tempted to quote the relevant part of the judgment which runs as under:

"6. Clearly, the proceedings against the person summoned under sub-section (1) are required to be commenced afresh and the witnesses reheard. The entire proceedings have to recommence from the beginning of the trial. All the witnesses have to be examined afresh. Opportunity has to be granted to such a person to cross-examine those witnesses. There has to be a de novo trial.

The Supreme Court, thereafter, went on to lay down the further propositions in support of the above as follows:-

9. The intention of the provision here is that where in the course of any enquiry into, or trial of, an offence, it appears to the court from the evidence that any person not being the accused has committed any offence, the court may proceed against him for the offence which he appears to have committed. At that stage, the court would consider that such a person could be tried together with the accused who is already before the court facing the trial. The safeguard provided in respect of such person is that, the proceedings right from the beginning have mandatorily to be commenced afresh and the witnesses reheard. In short, there has to be a de novo trial against him. The provision of de novo trial is mandatory. It vitally affects the rights of a person so brought before the court. It would not be sufficient to only tender the witnesses for the cross-examination of such a person. They have to be examined afresh. Fresh examination-in-chief and not only their presentation for the purpose of the cross-examination of the newly added accused is the mandate of Section 319(4). The words "could be tried together with the accused" in Section 319(1), appear to be only directory. "Could be" cannot under these circumstances be held to be "must be". The provision cannot

be interpreted to mean that since the trial in respect of a person who was before the court has concluded with the result that the newly added person cannot be tried together with the accused who was before the court when order under Section 319(1) was passed, the order would become ineffective and inoperative, nullifying the opinion earlier formed by the court on the basis of the evidence before it that the newly added person appears to have committed the offence resulting in an order for his being brought before the court.

10. Where a statute does not consist merely of one enactment, but contains a number of different provisions regulating the manner in which something is to be done, it often happens that some of these provisions are to be treated as being directory only, while others are to be considered absolute and essential; that is to say, some of the provisions may be disregarded without rendering invalid the thing to be done, but others not. (*Craies on Statute Law*, 7th Edn., pp. 266-67.)

11. The mandate of the law of fresh trial is mandatory whereas the mandate that newly added accused could be tried together with the accused is directory."

8. A decision reported in 2013 Cr.L.J. 1547 in the case of Babubhai Bhimabhai Bokhiria v. State of Gujarat was also placed before us and it was submitted that as regards the hearing of the witnesses it was not the sine qua non that the trial of those accused who were already on trial prior to the passing of the order under Section 319 Cr.P.C. need be also remanded back for re-trial by reading the part of sub-section (4) to Section 319 Cr.P.C. which directed the 'witnesses to be re-heard'.



On a careful consideration of the judgments and other judgments, like Michael Machado and Anr. v. Central Bureau of Investigation & Anr. reported in (2000) 3 SCC 262 which were referred in the case of Babubhai Bhimabhai Bokhiria v. State of Gujarat what I find is that the situation which was discussed by their Lordships in Babubhai Bhimabhai Bokhiria v. State of Gujarat was something different from that which is obtained herein. In that case, as also in Michael Machado and Anr. v. Central Bureau of Investigation & Anr. (supra) the issue was that the trial of some of the accused persons had been winded up and the judgment had been delivered. Some other accused persons in the same case had been summoned on the basis of the evidence under Section 319 Cr.P.C. By the time the order under Section 319 Cr.P.C. had been passed or by the time newly added accused had appeared at the trial, the main accused, who had already been on trial, had been either acquitted or convicted on account of the trial coming to an end. A submission was raised in Babubhai Bhimabhai Bokhiria v. State of Gujarat (supra) as also in Michael Machado and Anr. v. Central Bureau of Investigation & Anr. (supra) that the accused persons have to be tried together as the proceedings has to be started afresh and the witnesses have to be re-heard against all the accused persons. The Supreme Court was answering this situation. They took note of the change in situation of



the trial on account of the trial of the original accused having been concluded while the accused summoned under Section 319 Cr.P.C. had appeared after that conclusion of the trial and it was directed that the provision was only directly as regards the trial of accused persons together or separately. So far as the other parts of Section are concerned, it was held that it was mandatory. I find from the judgment of *Shashikant Singh v. Tarkeshwar Singh* (supra) that this point was also considered in that judgment and the case of Michael Machado and Anr. v. Central Bureau of Investigation & Anr. (supra) was also taken note of by their Lordships in paragraph 13 of the judgment and the issue was thrashed as follows:-

"13. Reliance by learned counsel for Respondent 1 has been placed on *Municipal Corpn. of Delhi v. Ram Kishan Rohtagi*¹ in support of the contention that Respondent 1 could be tried only with Chandra Shekhar Singh and his trial having concluded, Respondent 1 cannot be now tried pursuant to order under Section 319(1) of the Code. This Court in the cited decision was not concerned with the issue which has fallen for consideration before us. The same is the position in respect of *Michael Machado v. Central Bureau of Investigation*². There this Court considered the scope of the provision as to the circumstances under which the court may proceed to make an order under Section 319 and not the question as to the effect of the conclusion of the trial after passing an order under Section 319(1). None of these decisions have any relevance for determining the point in issue.



9. In view of the interruption of Section 319(1)(4) Cr.P.C. what appears to me is that the trial has to be de novo as was directed by the Supreme Court in *Shashikant Singh v. Tarkeshwar Singh* (supra) because the trial in respect of two of the appellants, namely, Hirday Yadav and Dasrath Yadav had not been brought to a conclusion and further on account of the fact that the additional accused, like, appellants Shyam Kumar @ Shyama Yadav and Ram Kumar @ Rama Yadav had been summoned on the basis of the same evidence. It appears in the fitness of things and as per the provision of law as explained by the Supreme Court in the above noted decisions, the use of the evidence which was recorded in absence of Shyam Kumar @ Shyama Yadav and Ram Kumar @ Rama Yadav ought not to have been used against them for recording their conviction. In addition to that as was held by *Shashikant Singh* (supra) the entire trial was to be held de novo by recommending the proceedings of the trial in which all the witnesses were to be examined afresh.

10. In that view of the matter I hereby set aside the judgment of conviction passed by the learned court below and direct the re-trial of all the four appellants together on one trial by taking evidence of all the witnesses afresh.

11. The judgment of conviction and order of sentence are accordingly set aside by allowing the appeal and by ordering re-trial

of the accused persons.

12. While perusing the records, what I found was that the original accused, namely, Hirday Yadav and Dasrath Yadav had been tried in Sessions Trials No.230 of 1999, but the other two accused, namely, Shyam Kumar @ Shyama Yadav and Ram Kumar @ Rama Yadav were charged together in a separate case bearing Sessions Trial No.230A of 1999. I could not appreciate as to how the trial of the newly added accused, summoned under Section 319 Cr.P.C, could be initiated by numbering his trial separately from that which was numbered for the trial of Hirday Yadav and Dasrath Yadav. The summoning order under Section 319 Cr.P.C. was passed in Sessions Trial No.230 of 1999 and the newly summoned or newly added accused persons had appeared in that trial and as I have discussed with reference to the Supreme Court judgment, the trial of all the accused persons have to be held afresh by examining the witnesses which means that all the accused persons have to be tried together at one trial. The trial of newly added accused by summoning him under Section 319 Cr.P.C. separately was a gross violation of the provision of Section 319 and settled principles of law and indicate the ignorance of procedure in that behalf.

(Dharnidhar Jha, J.)



I have privilege to hear the dictation given by my learned Brother. With regard to status of appellants Shyam Kumar @ Shyama Yadav and Ram Kumar @ Rama Yadav, who were summoned under Section 319 Cr.P.C. and faced trial in pursuance thereof, without having any opportunity in terms of Section 319 (4) of the Cr.P.C. to have “de novo trial”, therefore, the trial commenced and concluded relating to them is found contrary to law and on account thereof, I concur with the view expressed by my learned Brother that the judgment of conviction and sentence recorded by the learned trial Court to the extent of Shyam Kumar @ Shyama Yadav and Ram Kumar @ Rama Yadav happens to be in utter violation of law and is fit to be set aside even though, prayer having on their behalf was to recall the witness for cross-examination only. Therefore, I do allow the Cr. Appeal (DB) No.1083 of 2007 filed on their behalf setting aside the judgment of conviction and sentence recorded against them by the trial Court and further remitting back to lower court with a direction to proceed afresh in terms of de novo trial. Appellants are on bail, hence the same is hereby cancelled with a privilege to the appellant to appear before the learned lower court with a prayer of bail which, the learned lower court will consider favourably, in accordance with law.

2. However, the finding recorded by the learned trial Court with regard to appellants Hirday Yadav and Dasrath Yadav are concerned, I have got some sort of reservations.

3. The evidence, in terms of Evidence Act, constitute examination-in-chief, cross-examination and re-examination, if any. The concept of criminal prosecution happens to be that there should be presence of accused during course of trial so that he be able to perceive the allegation put forward by the prosecution during course of trial along with, an opportunity to defend himself. And that happens to be reason behind that as per Section 273 Cr.P.C., all the evidences has to be recorded in presence of accused save and except, an exception so prescribed under Section 299 of the Cr.P.C.

4. Admittedly, as is evident from the record appellants Hirday Yadav and Dasrath Yadav, having been chargesheeted and forwarded to the Court of Sessions by an event of committment were present during course of framing of charge and all the witnesses were examined in their presence. So they have an opportunity to see the examination-in-chief, conducted cross-examination, were confronted with the incriminating material in compliance of Section 313 Cr.P.C. and on that very basis defended themselves and got the judgment of conviction and sentence.

5. During midst thereof, as is evident the proceedings



diverted to some extent on account of application of Section 319 Cr.P.C. whereunder appellant Shyam Kumar @ Shyama Yadav and Ram Kumar @ Rama Yadav were summoned after whose appearance, as is evident, on their own lackadaisical, the witnesses were recalled for cross-examination only and subsequent thereof, some more witnesses were examined conjointly. Therefore, now the only question survives for consideration that when these two appellants Hirday Yadav and Dasrath Yadav have their distinct identification than that of appellants Shyam Kumar @ Shyama Yadav and Ram Kumar @ Rama Yadav who later on joined trial on being summoned under Section 319 Cr.P.C.; really attract de-novo trial. The question being typical one, but goes to root to crumb.

6. Before proper answering the aforesaid problem, it is apparent from the record that these two accused, on account of having their presence since inception have had on opportunity to see examination-in-chief, done cross-examination of the witnesses, who accordingly been discharged. They had availed the opportunity and on account thereof, neither it could be said that their fundamental right in tune of Article 21 of the Constitution has been infringed nor their interest is found prejudiced.

7. At the present juncture, the need for “de novo trial” with regard to the accused summoned in terms of Section 319 Cr.P.C. is to

be seen in pragmatic way. Because of their appearance at subsequent stage, they are not expected to have police paper, the evidences found on record in happens to be collected during his absence, should not be taken as surprise coupled with to test their veracity by way cross-examination.

8. Now, the moot question rest, whether trial of accused so summoned in terms of Section 319 Cr.P.C. should be along with the accused facing trial since before and whether it happens to be mandatory or directory. In a way to answer, first of all Section 319(4) has to be seen.

“319. 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 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.”

From bare perusal of sub-section 4(a), (b), it is apparent that it does not lay down the mandate that de-novo trial of newly added accused should be along with accused, already present on record, rather it speaks with regard to conduction of de-novo trial of the accused, who subsequently been arrayed as an accused in terms of 319(1) Cr.P.C.

At the present stage one should not ignore the provision as prescribed under Section 223 Cr.P.C. when prescribes categories whereunder accused persons are liable to be prosecuted jointly, but on account of stage of the trial, the same is found in applicable.

9. In *Shashikant Singh v. Tarkeshwar Singh reported in AIR 2002 SC 2031* which my learned Brother has also referred, explicitly deals with the controversy. The fact of the aforesaid case depict while accused Chandrashekhar Singh was being prosecuted, on an application of prosecution, accused (respondent) were summoned. However, during course of intermediary period while the order was sub-judiced under revision, trial of main accused Chandrashekhar Singh concluded resulting in conviction. Before revisional Court, it was contended that as, accused, could not be tried along with accused already on record, therefore scope of Section 319 Cr.P.C. ceased to effect, which was accepted by the revisional court, and accordingly,



set aside the order. Informant, being aggrieved preferred SLP before the Hon'ble Apex Court, wherein the ambit and scope of Section 319 Cr.P.C. was discussed in detail under para 6,7,8,9,10 and held at paragraph 12 "the mandate of the law of fresh trial is mandatory whereas the mandate that newly added accused could be tried together the accused directory."

10. That it means to say it was not obligatory on the part of the Court to have a de novo trial of a newly added accused along with the accused having on the record. That means to say, having absence of mandate of law in obligatory form, will release the strict adherence of compliance and being so, compulsion to have de-novo trial of accused already on record with accused so summoned in terms of Section 319(1) Cr.P.C. is found stifled.

11. Furthermore, the Hon'ble Apex Court in Babubhai Bhimabhai Bokhiria v. State of Gujarat & Ors., reported in 2013 Cr.L.J, wherein petitioners, who were summoned under Section 319 Cr.P.C. have had challenged the same and while the matter was pending further proceeding before the trial Court was stayed. Another accused, Neja Prabhat Bhutiya, who was facing trial since before and was under custody for so many years prayed for vacating the order / grant of bail and the same was considered and after thorough discussion, consideration, the court was pleased to vacate the stay

directing the trial Court to proceed against the accused Neja Prabhat Bhutiya who was on trial since before and against whom, materials have already been collected during trial, taking into account stage as well as examination of the PWs and concluded under para-19 as follows:

"19. In the totality of the above circumstances, therefore, we are inclined to modify our order dated 17-12-2008 by which further proceedings before the trial court were brought to a halt. We make it clear that while the stay of the trial against Babubhai Bhimabhai Bokhiria the petitioner in SLP No. 9184 of 2008 shall continue qua the said petitioner, the trial court shall be free to proceed with the trial qua the other accused persons. Criminal Miscellaneous Petitions Nos. 20502 of 2008 and 24292 of 2011 are allowed in part, and to the above extent."

12. Now coming to the facts of the case, it is apparent that six witnesses were already been examined at the moment when appellants Shyam Kumar @ Shyama Yadav and Ram Kumar @ Rama Yadav were summoned in tune of Section 319 of the Cr.P.C. and after their appearance, only two witnesses were examined. Though, the learned lower court, taking into account prayer made on behalf of newly added accused (appellants of Cr. Appeal (DB) No.1083 of 2007) recalled the witnesses for cross-examination only, could not found sufficient to eradicate impurity, however, could not be found a good ground to have de novo trial of appellant Hriday Yadav and Dasrath Yadav, who have faced full fledged trial, apart

from the fact that having bifurcation of trial will not cause prejudice, nor the learned counsel for the appellants able to show.

Hence I do not find myself in toe with the view perceived by my learned Brother as a result thereof, I direct Cr. Appeal (DB) No.1134 of 2007 to be listed for hearing on merit.

(Aditya Kumar Trivedi, J.)

In view of the conflicting orders as regards the re-trial of four appellants of the two appeals, as also due to conflicting views on the scope and ambit of Section 319(4) Cr.P.C. as discussed herein, let the matter be placed before Hon’ble the Chief Justice for the needful.

(Dharnidhar Jha, J.)

(Aditya Kumar Trivedi, J.)

Brajesh Kr./Prakash

U		T	
---	--	---	--