

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Miscellaneous No.39170 of 2015

Arising Out of PS.Case No. -214 Year- 2013 Thana -HUSAINGANJ District- SIWAN

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1. Hasan Imam Khan @ Hasne Imam Khan Son of Abdul Sakur Khan alias Sakur Khan.

2. Makbool Khan, Son of Manjar Imam Khan

3. Masum Khan, Son of Manjar Imam Khan

4. Asghar Imam Khan Son of Late Sakur Khan

All resident of Village- Semari, Police Station-M.H. Nagar, District- Siwan.

.... Petitioners

Versus

The State of Bihar

.... Opposite Party

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Appearance :

For the Petitioner/s : Mr. Shailendra Kumar Singh, Advocate

For the O. P. No. 2 : Mr. B. P. Pandey, Sr. Adv.

Dr. Amrendra Kumar, Advocate

Mr. Ramadhar Shekhar, Advocate

For the State : Mr. Jharkhandi Upadhyay, APP

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 15-10-2015

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

2. By way of present application, under Section 482 of the Code of Criminal Procedure (for short 'Cr.P.C.'), the petitioners challenge the order dated 30.7.2015, passed in Sessions Trial No. 54 of 2014, arising out Hussainganj P. S. Case No. 214 of 2013 by

the learned Additional Sessions Judge, II, Siwan, whereby the application filed on behalf of the petitioners under sub-section (3) of Section 233 Cr.P.C. for summoning call detail report with mobile location of cellular phone bearing SIM no. 9661028621 of 30th September, 2013, has been rejected.

3. The factual background, in short, giving rise to the present application is as under:-

(a) The petitioners are facing trial in Sessions Trial No. 54 of 2014, arising out of Hussainganj P. S. Case No. 214 of 2013, dated 30.9.2013, before the learned Additional Sessions Judge, II, Siwan for the offences punishable under Sections 302 and 307/34 of the Indian Penal Code (for short 'IPC') and Section 27 of the Arms Act.

(b) The prosecution case, in brief, is that one Md. Irsad Ali gave a written information to the Officer-in-charge of Hussainganj Police Station that on 30.09.2013, at about 9 a.m., he and his nephew Chhote Saheb on his motorcycle and elder brother Rizwan Khan and another villager Nanhe Khan left their house and were going to Siwan and as soon as they reached at Bararam more on main road (Siwan-Siswan path)



five persons of his village on two motorcycles, namely, Hasane Shyam Khan, Asagar Imam Khan, Maqbool Khan, Masum Khan and Sarafaraj @ Guddu and three-four unknown persons stopped them and on the order of Hasan Imam, Harafaraj @ Guddu and Maqbool started indiscriminate firing causing injury to his brother Rijwan Khan, who fell down from the motorcycle and died on the spot. Asgar Imam, Masum Khan and others also fired at them, but they did not receive any injury and were saved and fled away leaving their motorcycle. On *hulla*, all accused persons fled away towards Gopalpur. Both the motorcycles were having no number plate. The cause of the occurrence is old ongoing land dispute and murder case for which they were pressuring to compromise.

(c) On the basis of aforesaid written complaint, first information report (for short 'FIR') of Hussainganj P. S. No. 214 of 2013 was registered under Sections 302 and 307/34 IPC and 27 of the Arms Act.

(d) On completion of investigation, the Investigating Officer submitted charge-sheet against the petitioners and one another who is still absconding. Learned

Jurisdictional Magistrate took cognizance of the offence and after supply of police papers under Section 207 Cr.P.C. committed the case to the Court of Sessions for trial.

(e) On receipt of the record, the learned Sessions Judge transferred the case to the Court of learned Additional Sessions Judge, II, Siwan. At the stage of framing of charge, the petitioners denied the charges. Accordingly, the trial commenced.

(f) In course of trial, in all, five witnesses were examined on behalf of the prosecution.

(g) After completion of the evidence of the prosecution witnesses, the petitioners were examined under Section 313 Cr.P.C.. Thereafter, the petitioners were called upon to enter on their defence under Section 233 Cr.P.C. On 27.7.2015, a petition under Section 311 Cr.P.C., was filed on behalf of the defence for summoning the call details with tower location of cellular phone bearing SIM no. 9661028621. However, the said application was dismissed as withdrawn on 29.7.2015. Thereafter, an application under sub-section (3) of Section 233 C.P.C., was filed

on 30.7.2015 for summoning the call detail report of 30.9.2013 and tower location of cellular phone bearing SIM no. 9661028621, which was rejected vide impugned order dated 30.07.2015.

4. Mr. Shailendra Kumar Singh, learned counsel for the petitioners submitted that the trial Court has not taken into consideration the import of sub-section (3) of Section 233 Cr.P.C. He submits that a perusal of sub-section (3) of Section 233 Cr.P.C. would reveal that it is mandatory for the trial Court to issue process for production of documents and refusal can be only on three grounds, i.e., if the application is made for the purpose of vexation or delay or for defeating the ends of justice. He further submits that such a ground has to be recorded in writing. He submits that the trial Judge has not assigned any reason for rejecting the application filed on behalf of the petitioners. He further contended that the whole purpose of sub-section (3) of Section 233 Cr.P.C. is that before the defence is entered upon and prosecution has deliberately withheld any material witness or any document then it can ask the Court for intervention as the prosecutor must bring on record all that is relevant for a just determination of trial and not what is relevant for furthering the cause of the informant alone. In this regard, he has placed reliance on a decision of this Court rendered

in the matter of **Suresh Pal & Anr. vs. State of Bihar & Anr.**
[2007 (1) PLJR 650].

5. *Per contra*, Mr. Bibhuti Pandey, learned Senior Counsel appearing on behalf of the informant opposes the application vehemently. He submits that the impugned order is absolutely correct. He further submits that it would be apparent that the attempt of the petitioners against whom there is clinching evidence, is only to protract and delay the proceedings somehow. He has further contended that the facts of the case in **Suresh Pal & Anr.** (supra) relied upon by the learned counsel for the petitioners, were quite different and hence the ratio laid down by this Court in the aforesaid judgment would not be applicable to the facts of the present case. He also submits that while passing the impugned order the trial Judge has assigned cogent reasons to reject the application filed under sub-section 3 of Section 233 Cr.P.C. He contends that the call detail report or the tower location of the cellular phone in which SIM in question was inserted has no relevance to the fate of the present case. These are not the documents in possession of the prosecution, which the prosecution is trying to withhold.

6. I have considered the arguments advanced by learned counsel for the parties and perused the record.

7. Section 233 Cr.P.C. reads as under:-

“233. Entering upon defence -

(1) Where the accused is not acquitted under section 232, he shall be called upon to enter on his defence and adduce any evidence he may have in support thereof.

(2) If the accused puts in any written statement, the Judge shall file it with the record.

(3) If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice.”

8. It would be evident from perusal of Section 233 Cr.P.C. that if the accused is not acquitted under Section 232 Cr.P.C., then the trial Court calls upon him to enter on his defence. This is an essential part of criminal trial. The provisions are apparently engrafted in the statute to ensure that accused is given an adequate opportunity to defend himself effectively and is not denied right of fair trial.

9. Sub-section (3) of Section 233 Cr.P.C. would make it evident that the accused may apply for issue of process to compel attendance of witnesses or production of documents or things and the trial Judge, unless he considers the application to be vexatious



or made for the purpose of delay or defeating the ends of justice shall issue such process. In view of the above proposition of law, even if I presume that the petitioners had a right to apply for issue of process to compel production of call detail reports of cellular phone bearing SIM no. 9661028621, the question would be whether or not summoning of call detail reports and tower location of the cellular phone, in question, would be essential for the just decision of the case.

10. It would be apparent from the record that in the FIR there is no mention that the informant transmitted the Officer-in-charge of Hussainganj Police Station through telephone call, rather a written report was submitted by the informant of the case, who claims to be an eye witness of the occurrence, when the police visited the place of occurrence. Even from the deposition of the Investigating Officer of the case, it would not appear that the police proceeded to the place of occurrence on receipt of any information on receipt of telephone call made by the informant of the case. Under such circumstance, I do not think that any useful purpose would be served by summoning the call detail report with location of cellular phone bearing SIM no. 9661028621.

11. In **Suresh Pal & Anr.** (supra), the petitioners were accused of an offence under Section 302/34 of the Indian Penal



Code and Section 25 of the Arms Act for allegedly murdering the deceased. They were put on trial. The prosecution closed its case which was, *inter alia*, based on the allegations as made out in the FIR. At the stage of entering defence, in terms of sub-section (3) of Section 233 Cr.P.C., an application was made on behalf of the defence requesting the trial Judge for summoning two documents which were police station diary entry no. 215 of 2001 of the case, in question, and wireless message sent from the police station in respect of the said station diary entry. A plea was taken on behalf of the petitioners that the station diary entry and the wireless message were available to the prosecution but the prosecutor by not bringing on record the police documents acted in a partisan manner and therefore it was in the interest of justice in terms of sub-section (3) of Section 233 Cr.P.C. to summon the two documents and exhibit them during trial. The trial Judge rejected the application of the petitioners. Being aggrieved, the petitioners filed revision application before this Court. This Court in exercise of its revisional jurisdiction, set aside the said order and held as under:-

“5. Having considered the matter, the submissions of Mr. Jaiswal do not appear to be in consonance with established principles of criminal jurisprudence. If the prosecution has with it evidence which would throw light upon the true facts then it is for the prosecutor to bring those facts on record. The



prosecutor is the first Judge of the truth of the case.
He cannot withhold documents only with a view to
advance the case of the informant. He has to advance
the cause of justice in bringing an accused to trial.
The prosecutor would be failing in his duty if the
aforesaid documents, the existence of which is not
denied, is not brought on record. It would lead to
miscarriage of justice. Now coming to the question
of defence trying to establish its innocence, this is
contrary to the well established criminal
jurisprudence in such matters where the onus is on
the prosecution to prove the guilt and not on the
defence to establish its innocence. The defence is
only to create doubt in the story set up by the
prosecution. If what Mr. Jaiswal Submits on behalf
of the State is to be accepted then the prosecution
need not do anything beyond proving the first
information report and resting leaving it to the
defence to establish its innocence. To my mind, this
is putting the cart before the horse.

6. The whole purpose of Section 233(3) of Criminal Procedure Code, to my mind, is that before defence is entered upon if prosecution has deliberately withheld any material witness or any document then it can ask the Court for intervention as the prosecutor must bring on record all that is relevant for a just determination and not what is relevant for furthering the cause of the informant alone. This distinction has to be kept in mind by all concerned that is the prosecutor and the trial Judge. The trial Judge cannot prejudge the issue without even summoning the said documents. In the present case, in my opinion, the

trial Judge was duty bound to summon the said documents and then bring on record. This is not the stage to decide about the probative value or the admissibility of the said document. That matter is to be considered after the document is brought on record as evidence.”

(underlining mine for emphasis)

12. In my view, the facts of the case of **Suresh Pal & Anr.** (supra) are quite different from the facts of the present case. In that case, the Court has clearly held that if the prosecution has with it evidence which would throw light upon true facts then it is for the prosecutor to bring those facts on record. He cannot withhold documents only with a view to advance the case of the informant.

13. In the present case, the Investigating Officer has clearly deposed that he has held no investigation on the point of location of the cellular phone bearing SIM no. 9661028621, as it was not found necessary. It is not the case of the petitioners that the prosecution has collected the call detail report and tower location of the mobile carrying SIM in question and it is deliberately suppressing those documents with a view to advance the case of the informant. In that view of the matter, in my opinion, the ratio laid down by this Court in **Suresh Pal & Anr.** (supra) would be of no help to the petitioners.



14. The next point urged by the learned counsel for the petitioner is that the trial Court has not assigned any reason for rejecting the application filed on behalf of the petitioners. Apparently, the argument is fallacious. The trial Judge has clearly held in the impugned order that earlier, a similar application with identical prayer was filed on behalf of the petitioners under Section 311 Cr.P.C., which was dismissed as withdrawn and thereafter, the subsequent application has been filed just in order to protract the completion of the trial. The trial Court has also held that if the prayer of the petitioners is allowed, the same would be amount to reopening the case for further investigation, which would not be in the interest of justice. It has held that such an effort would be futile and simply cause delay in conclusion of the trial. Thus, I find that sufficient reasons have been assigned by the trial court while passing the impugned order, which are cogent and convincing.

15. I am of the opinion that exercise of power conferred under sub-section (3) of Section 233 Cr.P.C. must not be done in routine manner. There must be an extra-ordinary circumstance to persuade the Court to invoke the jurisdiction under sub-section (3) of Section 233 Cr.P.C.. In my view, it is not a fit case where the resort to summon the call detail or location of cellular phone, in question, must be permitted at the stage of Section 233 Cr.P.C. The

trial Court has rightly held that the application has been filed to protract and delay the trial somehow and defeat the ends of justice.

16. In view of the discussions made hereinabove, I am not persuaded to agree that the inherent powers conferred under Section 482 Cr.P.C. upon this Court needs be invoked to interfere with the order passed by the trial Judge. Accordingly, the application is rejected. The order dated 24.09.2015, whereby this Court had stayed the further proceedings of the trials stands vacated.

17. I make it clear that I have not expressed any opinion on the merits of the trial. The observations made in this order are only for the purpose of disposal of the application filed on behalf of the petitioners under sub-section (3) of Section 233 Cr.P.C..

(Ashwani Kumar Singh, J.)

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