

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Revision No.340 of 2015

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1. Alok Kumar Singh Son of Kishori Singh
2. Arun kumar Singh son of Kishori Singh Both residents of Village-
Bhavdiha, P.s: Tariyani, District: Sheohar

.... Petitioner/s

Versus

1. The State of Bihar

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Ashhar Mustafa, Adv cate
& Mr. Murad Ashraf, Advocate

For the Respondent/s : Mr. R. B. Roy, Raman,(App)

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CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI
SHARAN SINGH
ORAL JUDGMENT AND ORDER

6 28-03-2017 Heard learned Counsel for the parties.

2. Section 319 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the **Code**), confers upon a Court a power to proceed against a person, not being an accused, where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that he has committed any offence for which he can be tried together with the accused.

3. What should be the criteria for the trial Court for summoning a person under Section 319 of the Code has always been contentious issue, despite various categorical pronouncements by the Courts including the Supreme Court.

4. In *celebrated* decision of the Supreme Court in case of **Michael Machado and Anr. Vs. Central Bureau of**



Investigation and Anr., reported in **(2000) 3 SCC 262**, the Court construing the words “the Court may proceed against such person” in Section 319 of the Code held that the power is discretionary and should be exercised only to achieve criminal justice . The Supreme Court sounded a note of caution that the Court should not turn against another person whenever it comes across any evidence connecting that other person also with the offence. A judicial exercise is called for, keeping a conspectus of the case including the stage at which the trial has proceeded already and the quantum of evidence collected till then, and also the amount of time which the Court had spent for collecting evidence, the Supreme Court held.

5. The legal controversy on scope and application of Section 319 of the Code has been set at rest to a great extent by a Constitution Bench decision in case of ***Hardeep Singh V. State of Punjab*** reported in **(2014) 3 SCC 92**.

6. In the present case impugned is an order, dated 12.12.2014, passed by learned First Additional Sessions Judge, Sheohar in Sessions Trial No. 405 of 2010, whereby the petitioners have been summoned under Section 319 of the Code to face trial, which arises out of Tariyani P. S. Case No. 139 of 2006.

7. In order to appreciate the points raised in the



present application, it will be useful to briefly take note of the case of the prosecution as narrated in the First Information Report and subsequent developments, till exercise of power by the Court below summoning the petitioners under Section 319 of the Code by the order, which is impugned in the present criminal revision application filed under Section 397 read with Section 401 of the Code.

8. *Fardbeyan* of the Informant recorded by the Sub-Inspector of Police, is the basis for registration of the First Information Report, according to which the informant and his family members were sleeping in the night at their "*Dalan*", when he awoke on hearing firings. The informant saw, with the aid of torch light focused by the persons, who had entered into the *Dalan* armed with guns, as Niraj Kumar Singh, Manish Kumar, Rabindra Singh and other 5-6 persons whom he could not identify by their names. Accused Manish Kumar instigated to kill father of the informant upon which the accused Niraj Kumar shot at the informant's father leading to his instantaneous death. It is further alleged that by the side of the informant his son Suraj was sleeping, who was killed by accused Manoj Kumar by shooting at him with gun. They are said to have thereafter proceeded to kill one Ramadhar Singh, who was sleeping in the adjacent *Baithka*. They went there, shot at him and fled away. The reason



behind occurrence has been assigned as dispute leading to enmity arising out of Panchayat Elections.

9. Evidently, the petitioners were not named in the First Information Report. The petitioners belong to the same village. The informant did not name them, rather, said in his *fardbeyan* that he could not identify other persons by name. First Information Report was registered against the said three persons. Nearly two months after lodging of the First Information Report, the informant filed a protest petition on 02.11.2006. That was for the first time when names of these petitioners emerged as persons present at the place of occurrence. It was stated in the said protest petition that since these petitioners were standing at some distance, the informant could not identify them but their family members did identify them, who were also standing carrying guns, which fact was told to the informant after sometime by the family members. It is significant to note that there is no overt act attributed against these petitioners in protest-cum-complaint petition and if that allegation in protest petition is to be taken, these petitioners were said to be standing away from the place of occurrence, armed with gun. It also transpires from the said protest-cum-complaint petition that a criminal case was pending between the petitioners and the informant with the institution of Tariyani P. S. Case No. 54 of



2005 registered for the offence punishable under Section 307 of the Indian Penal Code. Evidently, thus, the petitioners and the informant are on inimical terms.

10. The police submitted charge-sheet against only three persons named in the First Informant Report finding no material against these persons. Subsequently, accepting the plea of *alibi*, the police decided not to send up other two accused persons, namely, Manish Kumar and Niraj Kumar for trial, opining it to be a case of false accusation, by report dated 02.02.2007.

11. The learned Sub Divisional Judicial Magistrate, however, differing with the police report on the basis of materials collected in course of investigation, summoned the three accused persons, namely, Niraj Kumar Singh, Rabindra Kumar and Manish Kumar Singh after taking cognizance, for trial. Noticeably, the learned Sub Divisional Judicial Magistrate, in his wisdom did not opt to summon these petitioners, though from the order, dated 07.06.2007, it appears that he differed with the police report and summoned such persons, who were not sent up for trial after having perused the First Information Report, the charge-sheet, the final report, the case diary, the supplementary case diary and entire materials on record.

12. It is the plea of the petitioners that till the



stage of summoning the accused persons by order, dated 07.06.2007, there was no material available on record collected in course of investigation, which could necessitate their summoning by the Court taking cognizance.

13. The case was thereafter, committed and after transfer the charges were framed on 18.05.2011 against the said three persons on 18.05.2011. At the trial, three persons, namely, Chandan Kumar Singh, Ranjana Kumari and Anil Kumar Singh (the informant) as P. Ws 1,2 and 3 respectively, were examined, whereafter application to summon the petitioners under Section 319 of the Code was filed by the informant, which have been allowed by an order, which is impugned in the present application.

14. Mr. Ashhar Mustafa, learned counsel appearing on behalf of the petitioners has submitted that previous enmity between the petitioners and the informant's family is not in dispute. According to him, despite the petitioners being co-villagers and the informant claiming to be the eye-witness of the occurrence, the petitioners were not named in the First Information Report. He has submitted that according to the case of the prosecution, occurrence had taken place at 1.30 A.M. on 05.09.2006 and *fardbeyan* of the informant was recorded at 6.30 A.M. If the statement of the informant in his protest petition is to be considered, in which



he has said that family members of the informant had identified other persons present with the accused persons, the same ought to have been reflected in his *fardbeyan*, recorded five hours after the time of the occurrence.

15. He has submitted that the evidence of the prosecution witnesses at the trial were not sufficient for the Court below to have formed an opinion that the petitioners, who were not accused, had committed the offence. He has also contended that P. W. 1 for the first time took the name of these petitioners about whose presence he was informed by his wife and others. His statement recorded under Section 161 of the Code does not attribute anything against these petitioners. Similarly, P. W.3 in his evidence at the trial named the petitioners without attributing any specific role/accusation or overt act. In his statement recorded under Section 161 of the Code, he had not named them as persons present at the place of occurrence though he is said to have stated that complicity of the petitioners in conspiring the occurrence could not be ruled out. P. W. 3 is also said to have improved her version in her evidence at the trial from the statement recorded under Section 161 of the Code and named these petitioners also to be present at the place of occurrence.

16. He has contended that in the absence of any



specific accusation against these petitioners, the exercise of discretion by the Court below in summoning the petitioners is erroneous and against well established norms propounded in several decisions.

17. He has placed reliance on Supreme Court's decisions in case of **Michael Machado and Anr. Vs. Central Bureau of Investigation** (supra), **Krishnappa Vs. State of Karnataka**, reported in (**2004**) **7 SCC 792**, **Kailash Vs. State of Rajasthan and Anr**, reported in (**2008**) **14 SCC 51**, **Hardeep Singh Vs. State of Punjab** (supra).

18. There should not be any doubt over the well accepted principles of law that power under Section 319 of the Code, which is discretionary in nature can be exercised only where strong and cogent evidence has occurred against the person from the evidence led before the trial Court. It cannot be exercised in casual and cavalier manner. In case of **Hardeep Singh Vs. State of Punjab** (supra), the Supreme Court observed that exercise of power under Section 319 of the Code requires much stronger evidence than mere probability of his complicity. The Supreme Court held in that case that 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 sort of satisfaction to an extent that



the evidence, if goes unrebutted, would lead to conviction.

19. In the background of Supreme Court's decisions relied on by the learned counsel appearing on behalf of the petitioners it has to be seen as to whether it can be said that the evidence adduced at the trial, if one unrebutted, would lead to conviction of the petitioners. While doing so, the conduct of the witnesses in past cannot altogether overlooked.

20. As has been noticed and which has not been disputed that the informant in his evidence at the trial did not attribute any overt act or specific accusation against the petitioners. He apparently improved his case by saying that that his wife and others had told him that these petitioners were also involved in commission of the offence. Curiously enough, P. W.2 in her evidence deposed that when she came out of the house after hearing the sound of firing, she had met five persons whom she had seen and these petitioners were identifying the persons to be killed by the miscreants.

21. The evidence of prosecution witnesses have been brought on record by way of supplementary affidavit, which I have carefully gone through. In my view, on the basis of such evidence it was not possible to form reasonable satisfaction that the petitioners had committed the offence and for the said offence, they could as well be tried along



with already arraigned accused.

22. Learned Counsel for the petitioners has rightly relied on the pertinent observations made by the Supreme Court in case of **MCD Vs. Ram Kishor Rastogi, 1983 Cri. L.J. 159** that power under Section 319 should be exercised only when compelling reasons exist for taking cognizance against other person against whom action has not been taken. Reference may be made in this context to Supreme Court's decision in case of **Kailash Vs. State of Rajasthan** (supra), wherein, noticing apparent improvement introduced by the witnesses at the trial, taking into account the accusation in the First Information Report and the statement of witnesses recorded under Section 161 of the Code, the High Court had dismissed the application under Section 319 of the Code. When the matter went to Supreme Court, the Supreme Court held that power under Section 319 of the Code would be used only after legal evidence comes on record from which it appears that the concerned person has committed an offence. The Supreme Court laid great emphases stating that the words "it appears" are not to be read lightly.

23. I am in agreement with the submission advanced on behalf of the petitioners that the witnesses apparently improved their version only at the stage of trial to



a great extent from what they had said in the *fardbeyan* and in their statements recorded under Section 161 of the Code. Added to this, the informant did not name these petitioners, though he claimed to be an eye-witness and seen the occurrence as the persons committing the crime. Enmity between two families introduces another strong reason to perceive the evidence of such witnesses with suspicion. Mere presence of the petitioners at the spot as alleged by the witnesses itself could not establish that they had taken part in the assault.

24. Upon having perused the evidence of the prosecution witnesses and having compared the same with the First Information Report, I have no hesitation in coming to a conclusion that there did not exist an exceptional circumstance, which could have compelled the Court below to exercise extraordinary jurisdiction under Section 319 of the Code. In case of ***Hardeep Singh Vs. State of Punjab*** (supra), the Supreme Court has elaborately dealt with as to what would be the degree of satisfaction required for invoking power under Section 319 of the Code and had laid down in paragraphs 105 and 106 as follows:-

"105. 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 person from the evidence led before the Court that such power should be exercised and not in a casual and cavalier manner.

106. 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 CrPC 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."

25. Considering the facts and circumstances in its entirety as noted above, and applying the principles for application of Section 319 of the Code enunciated by the Supreme Court in various decisions as discussed above, I am of the view that it is a fit case which requires interference with the impugned order, dated 12.12.2014, passed by



learned First Additional Sessions Judge, Sheohar in Sessions Trial No. 405 of 2010. The said order is, accordingly, set aside.

26. Before I part with this judgment, I must take note of the fact that the impugned order has been passed on an application filed on behalf of the informant. Section 301 of the Code authorizes Public Prosecutor or Assistant Public Prosecutor in charge of a case to appear and plead before any court. Sub-section (2) of the said Section contemplates that if in any such case any private person instructs a pleader to prosecute any person in any court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so instructed shall act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor, and may, with the permission of the Court, submit written arguments after the evidence is closed in the case. Though I do not mean to say that filing of a petition is required for the Court to exercise its power under Section 319 of the Code, in my opinion, if any move to prosecute a person in a police case is made by a private person, the Courts are required to proceed keeping in mind the spirit of Section 301 of the Code. An impartial prosecution is of as equal importance for criminal justice system as of the Court's search/find out the real truth.



27. This application is, accordingly, allowed with the observation as above.

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(Chakradhari Sharan Singh, J)

