

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.980 of 2017

Arising Out of PS.Case No. -199 Year- 2008 Thana -BALIA District- BEGUSARAI

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1. Naresh Sah @ Ram Naresh Sah Son of Late Damodar Sah, Resident of
Village- Karhari, P.S.- Dandari, District- Begusarai.

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Ajay Kr. Thakur,
Mr. Nilesh Kumar, Advocates

For the Respondent/s : Mr. Binay Krishna, SPP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV ORDER

4 10-05-2017 Being aggrieved by and dissatisfied with the order dated 24.08.2016 passed by the Special Judge, SC/ST, Begusarai in Sessions Trial No. 44 of 2010 arising out of Balia PS Case No. 199 of 2008, whereby and whereunder, appellant, Naresh Sah @ Ram Naresh Sah has been summoned to face trial invoking the power envisaged under Section 319 CrPC, filed instant appeal under Section 14A(1) of the SC/ST (POA) Act.

2. The main crux of argument raised on behalf of appellant is that the Court should not have acted on a petition filed on behalf of informant as the informant is not at all competent enough to sail the proceeding save and except to the extent of liberty granted in terms of Section 301(2) of the CrPC. Therefore, the prayer made on behalf of informant would not be recognizable, consequent thereupon, the learned lower court would not have



taken cognizance thereof and so, summoning the appellant on that very score is found contrary to the spirit of law whereupon the order impugned is fit to be set aside.

3. Furthermore, to buttress such plea, put reliance in the case of *Dhariwal Industries Limited v. Kishore Wadhwani* as reported in *(2016) 10 SCC 378*.

4. Learned Special P.P. opposed the prayer and submitted that the order impugned happens to be just, legal and proper, on account thereof, does not require interference.

5. In order to properly appreciate the points raised on behalf of appellant, it looks better to incorporate Section 319 CrPC which reads as follows:-

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.

6. From the plaint reading of Section 319 CrPC, it is evident that it happens to be obligatory on the part of the court to perceive the evidence and gather therefrom, whether the persons who are not on the record as an accused, are also to be prosecuted on account of divulgence of allegation against him. Basic principle commanding the aforesaid eventuality is found on the principle of *judex damnature-cum-nocens avsolvitur*, that means to say '*judge is condemned when guilty is acquitted*' and while appreciating the ambit and scope of Section 319 of the CrPC, the aforesaid basic principle commands the whole event and further, the judge has to act in accordance thereof.

7. Section 319 CrPC enables the Court to summon those who are not on record as an accused on account of so many factors including being discharged at an earlier occasion, being not named and its intricacies attracted so many Constitution Bench under old CrPC and recently in the case of ***Dharam Pal v. State of Haryana*** as reported in (2014) 3 SCC 306 as well as ***Hardeep Singh v. State of Punjab*** as reported in (2014) 3 SCC 92. In ***Hardeep Singh's*** case, the case of ***Dharampal Singh*** has also



been taken note of.

8. In *Hardeep Singh's* case question no.5 was formulated relating to persons having not named in the FIR and it has been answered under para-117.6 which is as follows:-

“117.6 A person not named in the FIR or a person though named in the FIR but has not been chargesheeted or a person who has been discharged can be summoned under [Section 319](#) Cr.P.C. provided from the evidence it appears that such person can be tried along with the accused already facing trial. However, in so far as an accused who has been discharged is concerned the requirement of [Sections 300](#) and [398](#) Cr.P.C. has to be complied with before he can be summoned afresh.”

9. Now coming to the case of *Dhariwal Industries Limited v. Kishore Wadhwani* as reported in (2016) 10 SCC 378, as referred on behalf of appellant, it is evident that the aforesaid matter came up before the Apex Court on account of permitting the appellant/complainant/informant to participate at the stage of Section 239 CrPC, that means to say, at the stage of charge/discharge with a rigor in terms of Section 301(2) of the CrPC and on that very score, the matter has been thrashed and during course thereof, the relevant provision in terms of Section 301 as well as 302 of the CrPC has been taken note of and culled



down in para-17 which is as follows:-

17. We have already explained the distinction between Sections 301 and 302 CrPC. The role of the informant or the private party is limited during the prosecution of a case in a Court of Session. The counsel engaged by him is required to act under the directions of public prosecutor. As far as Section 302 CrPC is concerned, power is conferred on the Magistrate to grant permission to the complainant to conduct the prosecution independently.

10. Though the matter has been left open for the Magistrate to pass appropriate order in terms of Section 302 CrPC, in case, approached by the appellant.

11. In *Anant Prakash Sinha v. State of Haryana* reported in **(2016) 6 SCC 105**, similar nature of question challenging the identity of informant was raised during course of asking for amendment of charge in terms of Section 216 CrPC by the informant, the matter was dealt with from para-21 and at para-22, it has been held as follows:-

22. Being of this view, this Court upheld the order passed by the High Court. The said decision in *Shiv Kumar case* [(1999) 7 SCC 476] is, in our opinion, is distinguishable on facts. The instant case does not pertain to trial or any area by which a private lawyer takes control of the proceedings. As is evident, an application was filed by the informant to add a charge



under [Section 406](#) IPC as there were allegations against the husband about the criminal breach of trust as far as her stridhan is concerned. It was, in a way, bringing to the notice of the learned Magistrate about the defect in framing of the charge. The court could have done it suo motu. In such a situation, we do not find any fault on the part of learned Magistrate in entertaining the said application. It may be stated that the learned Magistrate has referred to the materials and recorded his prima facie satisfaction. There is no error in the said prima facie view. We also do not perceive any error in the revisional order by which it has set aside the charge framed against the mother-in-law. Accordingly, we affirm the order of the High Court in expressing its disinclination to interfere with the order passed in revision. We may clarify that the entire scrutiny is only for the purpose of framing of charge and nothing else. The learned Magistrate will proceed with the trial and decide the matter as per the evidence brought on record and shall not be influenced by any observations made as the same have to be restricted for the purpose of testing the legal defensibility of the impugned order.

12. In *Gulab Chand v. Pradeep Kumar Dehalwal* reported in (2014) 14 SCC 472 whereunder the learned trial court summoned respondent considering the prayer made by the prosecution in accordance with Section 319 CrPC who was not



named in the FIR which was set aside by the High Court and allowing the appeal, it has been held under para-7 and 8 which reads as follows:-

“7. With the assistance of the learned counsel for the appellant and respondent no.1, we have carefully perused the evidence of the mother of the deceased- P.W.5 and the father of the deceased-P.W.6. We have also seen the order passed by the Trial Court as well as by the High Court. The High Court, without properly examining the evidence on record and without properly appreciating the judgment passed by the Trial Court, ought not to have reversed the findings reached by the Trial Court. In our considered view, the Trial Court was justified in calling upon the respondent no.1 to face the trial for the death of the deceased.

8. In view of the above, we allow this appeal, set aside the order passed by the High Court in Criminal Revision No.704 of 2011 and restore the order passed by the Trial Court. Any observations made by us in the course of our order are only for the purpose of disposal of this appeal. This should not be taken as an expression of our opinion for involving of respondent no.1 for the death of the deceased. In view of the order passed by us, the interim order granted by this Court stands vacated.

13. Therefore, by the Constitution Bench, the Apex



Court has paved the way for summoning of those accused who though not named in the FIR but properly identified during course of evidence.

14. Whether on a petition filed on behalf of informant, an order concerning summoning of accused would be passed. In *Y. Saraba Reddy v. Puthur Rami Reddy* as reported in (2007) 4 SCC 773, it has been held as follows:-

“11. Power under Section 319 of the Code can be exercised by the Court suo motu or on an application by someone including accused already before it. If it is satisfied that any person other than accused has committed an offence he is to be tried together with the accused. The power is discretionary and such discretion must be exercised judicially having regard to the facts and circumstances of the case. Undisputedly, it is an extraordinary power which is conferred on the Court and should be used very sparingly and only if compelling reasons exist for taking action against a person against whom action had not been taken earlier. The word "evidence" in Section 319 contemplates that evidence of witnesses given in Court. Under Sub-section (4)(1)(b) of the aforesaid provision, it is specifically made clear that it will be presumed that newly added person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced. That would show that by virtue of Sub-section (4)(1)(b) a legal fiction is created that cognizance would be presumed



to have been taken so far as newly added accused is concerned.

The above position was highlighted in *Lok Ram v. Nihal Singh and Anr.* (2006 (10) SCC 192).”

15. In *Bholu Ram v. State of Punjab* as reported in (2008) 9 SCC 140, it has been held under para-22 which is as follows:-

“22. It is also settled law that power under Section 319 can be exercised either on an application made to the Court or by the Court suo motu. It is in the discretion of the Court to take an action under the said section and the Court is expected to exercise the discretion judicially and judiciously having regard to the facts and circumstances of each case.”

16. In the aforesaid backdrop of settled principle of law as referred above, it is crystal clear that the court either on its own or on an application filed on behalf of any party including an accused, since before, will pass an order relating to Section 319 CrPC and there happens to be no clutch prescribed therefor. That being so, the order impugned survives. In the aforesaid event, the citation having been referred at the end of appellant has got no relevancy on present controversy.

17. Now coming to the present controversy, it is



evident that appellant, Naresh Sah @ Ram Naresh Sah is not named in the Fard-e-beyan of informant, Punam Kumari while putting allegation against other co-accused to have sprinkled acid over her in order to kill her. From the order impugned, it is evident that witnesses have named the appellant during trial and that happens to be reason behind that on that very score, the order impugned has not been challenged.

18. That being so, the objection having been raised on behalf of appellant is not at all found acceptable, legally entertainable and consequent thereupon, the instant appeal is found deficient one, hence is dismissed.

(Aditya Kumar Trivedi, J)

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