

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Miscellaneous No.62543 of 2017

Arising Out of PS.Case No. -58 Year- 1999 Thana -KISHUNPUR District- SUPAUL

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1. Gufran Ahmad son of Late Hazi Muslim Husain

2. Gulam Haidar son of Late Md. Jahur Ansari

Both resident of village- Mokrahi, P.S.- Kishunpur, District- Supaul.

.... Petitioner/s

Versus

1. The State of Bihar

2. Abul Kaish son of Md. Hanif

3. Md. Motalliv son of Md. Iliyas

4. Md. Abu Horera son of Md. Motalliv

5. Md. Samsuddin son of Md. Badi

Opposite party nos. 2, to 5 are resident of village- Mokrahi, P.S.-
Kishunpur, Distirct- Supaul.

.... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. Arun, Advocate

: Mr. Sanjay Kr. @ S.K. Advocate

For the State : Mr. Jharkhandi Upadhyay, APP

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 13-04-2018

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

2. This application under Section 482 of the Code of Criminal Procedure (for short ‘the Cr.P.C.’) has been filed by the petitioners for quashing the order dated 22.08.2017 passed in Sessions Trial No.159 of 2009 arising out of Kishanpur P.S. Case No.58 of 1999 by which the learned Sessions Judge-II, Supaul rejected the petition dated 27.03.2017 filed by the petitioners under Section 319 of the Cr.P.C. to summon opposite party nos.2 to 5 as additional accused.

3. It is submitted by the learned counsel for the petitioners



that the informant Md. Dhoray had lodged a case under Sections 328 and 304B read with 34 of the Indian Penal Code against thirteen named accused persons with an allegation that they killed his grand daughter (Natni), namely, Bibi Sahana on account of non-fulfillment of demand of dowry. The investigating officer submitted charge-sheet on 30.05.2008 only against two accused persons, namely, Sirajuddin and Bibi Saida Khatoon and the rest accused persons were not sent up for trial and accusation against them were found untrue. The learned Magistrate took cognizance of the offence and accepted the finding of the investigating officer in respect of other accused persons and on 23.06.2009 committed the case to the Court of Sessions and charges were framed against two charge-sheet accused persons.

4. Learned counsel for the petitioners submitted that the petitioners are prosecution witnesses. They were examined as P.Ws.5 and 6 and they named the opposite party nos.2 to 5 as accomplice in the alleged offence but the trial court did not summon them in exercise of powers conferred under Section 319 of the Cr.P.C. in spite of their application filed before the court.

5. He submitted that the investigation conducted by the police was tainted and the learned Magistrate while taking cognizance of the offence also did not apply his judicial mind and failed to summon opposite party nos.2 to 5. Similarly, the trial court failed to apply its mind when the records were received by it after



commitment. Even after evidences were laid involving the culpability of opposite party nos.2 to 5 and petition was filed on 27.03.2017 under Section 319 Cr.P.C., the trial court failed to exercise its jurisdiction in order to summon the private opposite parties. He submitted that the petitioners are neighbours of the accused persons being in know of the alleged crime, they are competent witnesses. He submitted that in view of their deposition summoning of the opposite party nos.2 to 5 was essential.

6. On the other hand, learned Additional Public Prosecutor appearing for the State submitted that there is no error in the order impugned passed by the court below. The argument that the investigation was tainted has no substance. The culpability of opposite party nos. 2 to 5 in the alleged offence was not found in course of investigation and, therefore, the investigating officer rightly decided not to send them up for trial. He submitted that the petitioners have no locus to file any application under Section 319 of the Cr.P.C. and the court below ought not to have entertained any such petition in view of the provision prescribed under Section 301 of the Cr.P.C.

7. I have heard learned counsel for the parties and perused the record.

8. Admittedly, the opposite party nos.2 to 5 were named in the FIR registered for the offences punishable under Sections 328 and 304B read with 34 of the IPC along with several others. Though on



completion of investigation involvement of other accused persons were found true, the opposite party nos.2 to 5 were found innocent. They were not sent up for trial. The learned Magistrate accepted the police report submitted under Section 173(2) of the Cr.P.C. and the petitioners were not summoned for trial.

9. Since the cognizance of the offences was taken and the other charge-sheet accused persons were summoned and the offences were triable by Court of Sessions, the learned Magistrate committed the case to the Court of Sessions for trial. Since the accused persons pleaded not guilty, the trial court framed charges against them and in course of trial certain prosecution witnesses were examined.

10. From the order impugned, it would transpire that in course of trial, on behalf of the prosecution altogether four witnesses, namely, Md. Taiyab, Samsa Khatoon, Md. Basir and Saimun Khatoon were examined whereafter on 29.01.2013 the prosecution evidence was closed and the case was fixed for adducing evidence on behalf of the defence and arguments, but on the next date one of the charge-sheet witnesses Md. Gulfan filed an application under Section 311 Cr.P.C., which was rejected vide order dated 01.04.2013 against which three charge-sheet witnesses, namely, Jubaida Khatoon, Md. Gulam Haider (petitioner no.2) and Gufran Ahmad (petitioner no.1) filed an application under Section 482 of the Cr.P.C. before this Court vide Cr.Misc. No.27849 of 2013 in which plea of the petitioners was



accepted and thereafter, in terms of the order passed by this Court four witnesses namely, Md. Gulam Haider, Ghufra Ahmad, Dr. Mihir Kumar Verma and the investigating officer Ram Eshbal Prasad Yadav were examined. It would further transpire that the informant of the case had already died and, thus, after examining the aforesaid witnesses once again the evidence was closed on 23.01.2017. On 23.01.2017 statements of the accused persons were recorded under Section 313 of the Cr.P.C. and on 01.03.2017 arguments on behalf of the defence also closed and the case was fixed for arguments on behalf of the prosecution. It was at this stage, on 27.03.2017 an application was filed under Section 319 of the Cr.P.C. on behalf of the petitioners, who were examined as P.Ws. 5 and 6, for summoning the opposite party nos.2 to 5 as additional accused.

11. I further find from the impugned order that P.W.1 niece of the deceased, P.W.2 daughter-in-law of the deceased and P.W.4 mother of the deceased did not name the opposite party nos.2 to 5 in their deposition and P.W.3 was declared hostile. The trial court in its impugned order has recorded that P.Ws. 5 and 6 (petitioners) had not taken the name of opposite party nos. 2 to 5 in their previous statements given to the police under Section 161 of the Cr.P.C. However, in their deposition they named them. The trial court came to a conclusion that the case is of the year 1999 and P.Ws.5 and 6 have filed a petition under Section 319 of the Cr.P.C. just in order to delay



the completion of trial. It has held that there is no necessity to summon the opposite party nos.2 to 5 as additional accused in exercise of powers conferred under Section 319 of the Cr.P.C.

12. Be it noted that there is no dispute to the fact that the court has power to proceed under Section 319 of the Cr.P.C. even against those persons, who are not arraigned as accused. However, the said provision is meant to achieve the objective that real culprit should not be get away unpunished. The provisions prescribed under Section 319 of the Cr.P.C. enables the court to take appropriate steps for proceeding against a person not being an accused.

13. A Constitution Bench of the Supreme Court in **Hardeep Singh vs. State of Punjab [(2014) 3 SCC 92]** has considered the degree of satisfaction that is required for invoking powers under Section 319 of the Cr.P.C. and the question as to in what situation this power should be exercised in respect of a person named in the FIR and not charge-sheeted. The Bench ruled:-

“At the time of taking cognizance, the court has to see whether a prima facie case is made out to proceed against the accused. Under Section 319 CrPC, though the test of prima facie case is the same, the degree of satisfaction that is required is much stricter. A two-Judge Bench of this Court in *Vikas v. State of Rajasthan [(2014) 3 SCC 321]*, held that on the objective satisfaction of the court a person may be “arrested” or “summoned”, as the



circumstances of the case may require, if it appears from the evidence that any such person not being the accused has committed an offence for which such person could be tried together with the already arraigned accused persons....”

Power under Section 319 CrPC 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 a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

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 unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 CrPC. 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 CrPC to form any opinion as to the guilt of the accused.”

14. In Brijendra Singh & Ors. vs. State of Rajasthan [2017(7) SCC 706], the Supreme Court observed that degree of satisfaction to exercise power under Section 319 of the Cr.P.C. to summon any person not arraigned as accused is more than the degree which is warranted at the time of framing of charge against others in respect of whom charge-sheet was filed. In that case, some persons who were named in the FIR were not implicated as accused in the charge-sheet. During trial the witnesses reiterated the statements made to the police and on that basis the trial court exercising its power under Section 319 of the Cr.P.C. had summoned the accused persons. On challenge, the High Court also rejected their plea to quash the summoning order. On appeal the Supreme Court held:-

“The evidence recorded during trial was nothing more than the statements which was already there under Section 161 Cr.P.C. recorded at the time of investigation.....” In a case like the present where plethora of evidence was collected by the I.O. during investigation which suggested



otherwise, the trial court was atleast duty bound to look into the same while performing *prima facie* opinion”

15. While setting aside the order, The Supreme Court observed ‘only where strong and cogent evidence occurs against a person from the evidence led before the Court that such power should be exercised and not in casual and cavalier manner.’

16. Considering the aforesaid dictum of the Supreme Court, when I carefully examine the order passed by the trial court, I find that no illegality can be found with the order whereby the plea of the petitioners to summon the opposite party no.2 to 5 has been refused. In absence of strong evidence against the opposite party no.2 to 5, the trial court rightly rejected the prayer of the petitioners.

17. Having said so, I would like to briefly discuss the objection raised by the learned counsel for the State regarding maintainability of an application filed under Section 319 of the Cr.P.C. by third party. The learned Additional Public Prosecutor has referred to Section 301 of the Cr.P.C. in order to contend that there is no concept of third party intervention in criminal cases. Section 301 of the Cr.P.C. reads as under:-.

“301. Appearance by Public Prosecutors.-(1)

The Public Prosecutor or Assistant public Prosecutor in charge of a case may appear and plead without any written authority before any Court in which that case is under inquiry, trial or



appeal.

(2) 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.”

18. Section 301 of the Cr.P.C. states that the Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any court in which that case is under inquiry, trial or appeal. It further states that if in any such case any private person instruct a pleader to prosecute any person in any Court, the pleader so instructed shall act under the direction of the Public Prosecutor or Assistant Public Prosecutor may with the permission of the Court, submit written arguments after the evidence is closed in the case.

19. The above provision clearly indicate that normally there is no scope in the Cr.P.C. for inducing third party intervention in criminal cases. Section 301 of the Cr.P.C. has been interpreted by the Supreme Court in number of cases. In **Thakur Ram vs. State of Bihar [AIR 1966 SC 911]** the Supreme Court ruled that in a case



which has proceeded on a police report, a private party has no *locus standi*. It further held that, barring a few exceptions, in criminal matters the party who is treated as the aggrieved party is the State which is the custodian of the social interests of the community at large and so it is for the State to take all steps necessary for bringing the person who has acted against the social interests of the community to book.

20. In Shiv Kumar vs. Hukum Chand and Another [(1999) 7 SCC 467] the Supreme Court explained the rationale behind the provisions of Section 301 of the Cr.P.C. It stated that the reason behind the provision is to provide fairness to the accused during trial. It further stated that the duty of the Public Prosecutor is to ensure that justice is done. It stated that if there is some issue that the defence could not raise, but has failed to do so, then that should be drawn to the attention of the court by the Public Prosecutor. It stated that role of the Advocate appointed by the third party to the proceeding would be similar to junior counsel. The court cited the decision of **Queen-Empress vs. Durga [ILR(1894) 16 All 84]** where the Allahabad High Court ruled that it is the duty of the Public Prosecutor to see that justice is vindicated and his object should be not to obtain an unrighteous conviction. It also quoted the case of **Medichetty Ramakistiah vs. State of Andhra Pradesh [AIR 1959 A.P. 659]** where the court had ruled that the prosecution should not



mean persecution and the prosecutor should be more scrupulously fair to the accused and present his case with detachment and without evincing any anxiety to secure a conviction.

21. Regard being had to the above decisions of the Supreme Court, I do find substance in the submission made by the learned counsel for the State that the petition filed before the court below by the witnesses under Section 319 of the Cr.P.C. was not maintainable in view of the fact that third party intervention in criminal cases is not desirable and it is the duty of the Public Prosecutor to conduct the prosecution.

22. Accordingly, the application, being devoid of any merit, is dismissed.

(Ashwani Kumar Singh, J)

Md.S./-

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