

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.1264 of 2018

Arising Out of PS. Case No.-110 Year-2013 Thana- VIDYAPATINAGAR District-
Samastipur

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1. Arjun Singh, S/o Late Sukan Singh
 2. Mithlesh Singh @ Mithilesh Kumar Singh, S/o Late Sukan Singh
 3. Bachcha Singh, S/o Arjun Singh. All R/o Village- Mou Dhaneshpur (South), P.S.- Vidyapati Nagar, District- Samastipur,

... .. Appellant/s

Versus

1. The State of Bihar.
2. Munshi Paswan, S/o Late Anand Lal Paswan, R/o Village- Mou Dhaneshpur (South), P.S.- Vidyapati Nagar, District- Samastipur,

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Awadhesh Kumar, Advocate
For the Respondent/s : Smt. Usha Kumari No-1, SPP247

CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR
ORAL JUDGMENT

Date : 12-12-2018

1. By order dated 23.05.2017 passed in Sessions Trial No.94 of 2014/23 of 2014, State of Bihar versus Mithlesh Singh, the learned Special Judge under S.C./S.T. (P.O.A.) Act, Samastipur has issued summons against the appellants in exercise of power under Section 319 of the Code of Criminal Procedure, to face trial.
2. The appellants have challenged the aforesaid order in this appeal.
3. The aforesaid trial arises out of Vidyapati Nagar Police Station Case No.110 of 2013 dated 31.08.2013, registered under Sections 302, 201/34 of the Indian Penal Code as well as under



Sections 3 (2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

4. According to F.I.R., *Parmanand Paswan* (deceased), son of the informant had gone along with co-accused, *Mithlesh Singh*, son of *Rajgir Singh* to bring 10 litres of milk. *Parmanand Paswan* was in business terms with *Mithlesh Singh*, son of *Rajgir Singh*. In the night, *Parmanand Paswan* did not return. The informant suspected that he might have gone to visit local fair in *Mou*. On the very next day, in the early morning, the dead body of *Parmanand Paswan* was noticed in a field. Some injuries on his person were also noticed. Thereafter, suspicion was raised against appellant, *Arjun Singh* to have committed the murder, for the reason that deceased had taken loan of Rs.5,000/- (Rupees Five Thousand) from *Arjun Singh* and *Arjun* was charging Rs.20,000/- (Rupees Twenty Thousand) along with interest and for that reason *Arjun* had threatened to kill him. Another reason was that three to four years back, *Arjun* had threatened the informant to not to go on the land which *Arjun* had taken on lease. For the aforesaid reasons, informant was confident that *Arjun Singh*, son of *Sukan Singh*, *Mithlesh Singh*, full brother of *Arjun Singh* and son of *Sukan Singh* as well as *Bachcha Singh*,



son *Arjun Singh* along with *Mithlesh Singh*, son of *Rajgir Singh* have committed the murder.

5. After investigation, the Police did not sent up the appellants for trial, rather charge sheet was submitted only against *Mithlesh Singh*, son of *late Rajgir Singh*. Accordingly, the Magistrate did not take cognizance against the appellants and only *Mithlesh Singh*, son of *late Rajgir Singh* was facing trial in the aforesaid sessions trial, when at the stage of prosecution evidence, the appellants were summoned to face trial.

6. On the date of the impugned order, altogether eight prosecution witnesses were examined by the prosecution and the learned trial Judge relied on the evidence of P.W.1, *Bindu Devi*, the wife of the deceased, P.W.2, *Munshi Paswan*, the informant of the case as well as father of the deceased and P.W.3, *Sanjay Paswan*, the full brother of the deceased.

7. Before coming to the evidence of the aforesaid three witnesses, it would be apt to look into the evidence of P.W.8, *Shankar Pandit*, who stated that he does not no how *Parmanand Paswan* died. P.W.7, *Govind Mishra* also stated that he does not know how *Parmanand Paswan* died. P.W.6, *Suraj Paswan* stated that *Parmanand Paswan* is dead now but how he died, he does not know. P.W.5, *Raso Mahto* stated that he does not know how



Parmanand Paswan died. P.W.4, *Uttam Sah* stated that he does not know how *Parmanand Paswan* died.

8. P.W.1, *Bindu Devi*, the wife of the deceased deposed that on the date of occurrence *Mithlesh Singh*, son of *Rajgir Singh* came and asked to her husband to bring 10 litres of milk from his house for his children. The deceased was persuading that the children of the family would go but *Mithlesh Singh*, son of *Rajgir Singh* asked him to go with him. Thereafter, the deceased did not return. The witness anticipated that he might have gone to visit local fair. In the morning, she got information that dead body of her husband is lying in the field. She went there and found that blood was coming from the ears and injury was there on the neck of the deceased. She stated that her husband had taken loan from *Arjun Singh* and *Arjun Singh* was charging more interest and had threatened to kill her husband. In the circumstances, *Arjun Singh* and other family members, who are appellants herein might have committed the murder. Practically the witness supported the F.I.R.

9. P.W.2, *Munshi Paswan*, who is informant of the case and father of the deceased stated that on the date of occurrence he was in his house. Appellant, *Mithlesh Singh*, son of *Sukan Singh* came to his house and took the deceased with him. This witness



followed but *Arjun Singh* asked him to return. In the morning, dead body of his son was noticed. Hence, he suspected that his murder was committed for the referred enmity by the appellants.

In the cross examination, the witness is specific that co-accused, *Mithlesh Singh*, son of *Rajgir Singh* was not involved in the occurrence.

10. From the protest petition as well as evidence of this witness, it is evident that the witness is aware that two *Mithlesh Singh* are there and both are sons of two different persons. Both *Mithlesh Singh* are co-villagers. Therefore, the witness has taken U-turn in his evidence before the court to what he stated in the First Information Report regarding identity of *Mithlesh Singh*.

11. Likewise, P.W.3, *Sanjay Paswan* stated that appellant *Mithlesh Singh*, son of *Sukan Singh* had taken the deceased on the pretext of supplying him milk. The deceased never returned, rather his dead body was noticed in the morning. Suspicion is that the appellants have committed the murder. The witness identified *Mithlesh Singh*, son of *Rajgir Singh* standing in the dock. Thus, he was also aware that two *Mithlesh Singh* are different persons.

On the prayer of the prosecution, P.W.2 and P.W.3 were declared hostile and were cross examined by the prosecution that



before Police they had stated that *Mithlesh Singh*, son of *Rajgir Singh* had taken the deceased with himself.

12. It is surprising that the same prosecution filed a petition under Section 319 of the Code of Criminal Procedure for summoning the appellants on the basis of evidence of the hostile witnesses.

13. Learned counsel for the appellants submits that in ***Hardeep Singh versus State of Punjab and Others***, reported in 2014 (3) SCC 92, the Constitution Bench of the Supreme Court has exhaustively dealt with the object and scope of Section 319 of the Code of Criminal Procedure as well as the stage and circumstances in which the power should be exercised. The Hon'ble Apex Court laid down the degree of satisfaction required for invoking power under Section 319 of the Code of Criminal Procedure. He further submits that in ***Brijendra Singh and Others versus the State of Rajasthan***, reported in 2017 (7) SCC 706, the Hon'ble Apex Court followed the ratio in *Hardeep Singh's* case and set aside the summoning order passed under Section 319 of the Code of Criminal Procedure. Learned counsel next relied on the unreported judgment of this Court dated 05.09.2017 passed in Criminal Miscellaneous No.9805 of 2016, ***Pammi Kumari and Others versus State of Bihar*** for his



contention that *Pammi's case* was identical to this case, wherein the summoned accused were named in the F.I.R. without any overt act alleged against them. They were not charge sheeted and after prosecution evidence they were summoned. On consideration of the material which was considered for summoning, this Court held that the summoning order suffered from being passed in casual and cavalier manner.

Contention is that impugned order has been passed ignoring the settled principle that mere suspicion cannot be a ground to ask a person, who is not an accused before court to face trial along with others. In the present case, only material against the appellants is suspicion and that suspicion is based on the evidence of the witnesses who have been declared hostile by the prosecution itself.

14. Learned counsel for the State submits that the law does not require that on the basis of prosecution evidence conviction should necessarily be recorded and only on that satisfaction order under Section 319 of the Code of Criminal Procedure can be passed. In the present case, the consistent suspicion is there against the appellants from the date of F.I.R. to the stage of prosecution evidence. Hence, the order asking the appellants to face trial cannot be faulted with.



15. The relevant paragraph of the Constitution Bench judgment in *Hardeep Singh's* case are quoted below:-

“93. Section 319(1) Cr.P.C. empowers the court to proceed against other persons who appear to be guilty of offence, though not an accused before the court. The word “appear” means “clear to the comprehension”, or a phrase nearer to, if not synonymous with “proved”. It imparts a lesser degree of probability than proof.

*“95. 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 Cr.P.C., 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 versus State of Rajasthan*, 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.*

16. The Constitution Bench further held that the discretionary power under Section 319 of the Code of Criminal Procedure is an extraordinary power and is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. The



Bench has cautioned that such power should not be exercised in a casual and cavalier manner. The Bench observed 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 a 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 Cr.P.C. 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.

17. In ***Michael Machado and Another versus Central Bureau of Investigation and Another [(2000) 3 SCC 262]***, the Supreme Court on extensive consideration of the provision in Section 319 stated as under:-

*“11. The basic requirements for invoking the above section is that it should appear to the court from the evidence collected during trial or in the inquiry that some other person, who is not arraigned as an accused in that case, has committed an offence for which that person could be tried together with the accused already arraigned. **It is not enough that the court entertained some doubt, from the evidence, about the involvement of another person in the offence.** In other words, the court must have reasonable satisfaction from the evidence already collected regarding two aspects. First is that the other person has committed an offence. Second is that for such offence that other person could as well be tried along with the already arraigned accused”.*



12. But even then, what is conferred on the court is only discretion as could be discerned from the words “the court may proceed against such person”. The discretionary power so conferred should be exercised only to achieve criminal justice. It is not that the court should turn against another person whenever it comes across 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 such evidence. It must be remembered that there is no compelling duty on the court to proceed against other persons.

“14. The court while deciding whether to invoke the power under Section 319 of the Code, must address itself about the other constraints imposed by the first limb of sub-section (4), that proceedings in respect of newly-added persons shall be commenced afresh and the witnesses re-examined. The whole proceedings must be recommended from the beginning of the trial, summon the witnesses once again and examine them and cross-examine them in order to reach the stage where it had reached earlier. If the witnesses already examined are quite large in number the court must seriously consider whether the objects



sought to be achieved by such exercise are worth wasting the whole labour already undertaken. Unless the court is hopeful that there is a reasonable prospect of the case as against the newly-brought accused ending in being convicted of the offence concerned we would say that the court should refrain from adopting such a course of action.”

18. In view of the principles laid down above, I find that the learned trial court has acted in a casual and cavalier manner in passing the summoning order against the appellants. Even credibility of the prosecution witness Nos.2 and 3 has been doubted by the prosecution itself by declaring them hostile and the same evidence has been relied by the court below while passing the impugned order. Though suspicion was raised against the appellants in the F.I.R., during investigation the Police did not find any material against them and accordingly, they were not sent up for trial. The learned Magistrate did not differ with the Police report and no cognizance was taken against the appellants. Even at the stage of section 193 of the Code of Criminal Procedure, the court of sessions did not summon the appellants. The impugned order was passed under Section 319 of the Code of Criminal Procedure at the stage of prosecution evidence. The relevant portion is being reproduced below:-



“P.W.1 Bindu Devi, P.W.2 Munsu Paswan (informant) and P.W.3 Sanjay Paswan have already stated that the accused persons namely, (1) Arjun Singh (2) Mithlesh Singh, S/o Late Sukan Singh and (3) Bachcha Singh were also involved in the occurrence. Hence in the interest of natural justice, I think it proper to summon these accused persons also for facing trial.”

19. It is evident from the reading of the summoning order passed by the learned trial Judge that the appellants were summoned, only because suspicion was raised by the three prosecution witnesses, out of which two were declared hostile by the prosecution itself. Thus, the summoning order lacks basic requirement that it is not enough for the court to entertain some doubt from the evidence about involvement of another persons (appellants) for the offence. Thus, the impugned order is not in consonance with the requirements of Section 319 of the Code of Criminal Procedure. Mere naming the person during trial by the witness and suspecting them to be involved in the crime cannot justify the impleadment of the accused in exercise of power under Section 319 of the Code of Criminal Procedure. The law requires much stronger evidence than mere probability of the complicity of the accused to be summoned.



20. In the result, the impugned order is not sustainable in law.
Accordingly, the same is hereby set aside and this appeal stands
allowed.

(Birendra Kumar, J)

abhishek/-

AFR/NAFR	AFR
CAV DATE	N.A.
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