

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.58736 of 2017

Arising Out of PS. Case No.-7 Year-2017 Thana- NAGARNAUSA District- Nalanda

Vikash Kumar @ Shivam Kumar, Son of Sri Ram Pravesh Rai, Resident of Village - Dedaur, P.S. - Bakhtiyarpur, District - Patna.

... .. Petitioner/s

Versus

1. The State of Bihar
2. Sri Suresh Prasad, Son of Late Siya Gope, Resident of Village - Kajura, P.S. - Nagarnausa, District - Nalanda.

... .. Opposite Party/s

Appearance :

For the Petitioner/s	:	Mr. Ashok Kumar Choudhary, Advocate Mr. Bhola Kumar, Advocate Mr. A. Ankit, Advocate
For the O.P. No. 2	:	Mr. Shyamal Prakash, Advocate
For the State	:	Mr. Umeshanand Pandit, Advocate

CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR
C.A.V. JUDGMENT

Date :04-11-2019

The petitioner has challenged, in this application under Section 482 Cr.P.C., the summoning order dated 02.11.2017 passed in exercise of power under Section 319 Cr.P.C. by the learned 1st Additional Sessions Judge, Hilsa in Sessions Trial No. 393 of 2017 arising out of Nagar Nausa P.S. Case No. 07 of 2017, a case under Section 302/34 of the Indian Penal Code. The impugned order has been passed considering the material surfaced in the prosecution evidence of P.Ws. 1, 2 and 3.

It is worth to be pointed out that the informant P.W. 4 was already examined and his evidence has not been considered while the impugned was passed.



2. The challenge is on the ground that the law has already been well settled by the Constitution Bench of the Hon'ble Supreme Court in **Hardeep Singh Versus State of Punjab And Others** reported in **2014(3)SCC 92** that the evidence led before the trial court requires much stronger evidence than mere probability of complicity of the accused summoned. 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.

3. Learned counsel has relied on the judgment in **Shiv Prakash Mishra Versus State of Uttar Pradesh And Another** reported in **2019(7)SCC 806** for his submission that in identical situation the Hon'ble Supreme Court did not interfere with the order of the trial Judge refusing to summon the accused under Section 319 Cr.P.C. or against dismissal of the criminal revision by the High Court against order of the trial Judge.

4. Learned counsel for the State-opposite party submits that on the basis of prosecution evidence, the learned trial Judge came to the conclusion that the petitioner should also be asked to face trial along with other co-accused and the finding is based on material on the record. Hence, this Court in exercise of extra



ordinary power should not interfere with the summoning order which is based on material more than needed for framing of the charge.

5. According to FIR Sanju Kumari, the daughter of the informant was married with co-accused Nitish Kumar. Since the girl was not beautiful Nitish Kumar was not liking her. On 23.01.2017 Nitish Kumar along with other named persons including the petitioner took his wife Sanju Kumari from the house of her parents to take her to his own house. However, murder of Sanju was committed in the same night and dead body was found from the field side. Murder was committed by causing injuries with dagger. Hence, the named accused persons including the petitioner were suspected to have committed the said murder. Petitioner is son of maternal uncle of co-accused Nitish Kumar.

6. After investigation of the case, the police submitted charge sheet against other accused persons and investigation was kept pending only against the petitioner. Later on a report under Section 173 Cr.P.C. submitted stating therein that implication of the petitioner is false one. A copy of the report is at Annexure-2. After hearing the informant, the learned court below by order dated 06.09.2017 accepted the final report submitted against the petitioner and the said order got finality.



7. When trial of other co-accused was going on in Sessions Trial No. 393 of 2017, after examination of four prosecution witnesses, the prosecution filed application under Section 319 Cr.P.C. which was allowed by the impugned order. There is no eyewitness of the actual occurrence of murder. The informant did not file any protest petition in this case.

8. During trial, informant was examined as P.W. 4 and he deposed that when the female members of the village had gone to attend the call of nature, they made an alarm that murder has been committed in Damodarpur Khanda. When the informant reached there, he found Sanju dead. The police came and the dead body was dispatched for postmortem. The informant stated that Nitish and Binni along with three others have committed murder of his daughter. In the cross-examination, he admitted that when he reached near the dead body about 50 people were there but he could identify none. The witness is specific that he had not seen the occurrence nor he has stated that who disclosed to this witness that the accused persons had committed the murder. Other three witnesses are either daughter of the informant or full-brothers of the informant.

9. P.W. 1 Ranju Devi, the daughter of the informant has stated that on 23.01.2017 at about 06:00 p.m. Nitish and others



took the deceased saying that they are going to the village of Nitish. In the next morning dead body of the victim was noticed in the field side. She stated that she saw Nitish, Vikash and Binni near the dead body. She was confronted with the police statement wherein she had not said that she had seen the petitioner and others near the dead body. In the cross-examination, she stated that mother of Nitish had lodged a separate case relating to murder of the deceased wherein this witness and her husband is an accused. Allegation is that for property of father murder was committed.

10. P.W. 2 Lali Prasad has also admitted that he is not an eyewitness of the occurrence and mother of Nitish, namely, Kamala Devi had lodged a case that the victim was murdered by Ranju Devi and her husband to get entire property of the father.

11. P.W.3 Mahesh Prasad said that in the next morning of murder of Sanju Devi, the people started saying in the village that husband of Ranju had committed her murder.

12. In the matter of requirement of standard of evidence to summon an accused under Section 319 Cr.P.C. in Hardeep Singh's case (**supra**), the Hon'ble Supreme Court in para 106 of the judgment observed as follows:

“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 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.”

13. In Brijendra Singh Versus State of Rajasthan reported in **2017(7)SCC 706**, the Hon’ble Supreme Court stated in paragraph 13 of the judgment observed as follows:-

“13. In order to answer the question, some of the principles enunciated in Hardeep Singh case may be recapitulated:... However, since it is a discretionary power given to the court under Section 319 CrPC and is also an extraordinary one, same has to be exercised sparingly and only in those cases where the circumstances of the case so warrant. The degree of satisfaction is more than the degree which is warranted at the time of framing



of the charges against others in respect of whom charge-sheet was filed. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised. It is not to be exercised in a casual or a cavalier manner. The prima facie opinion which is to be formed requires stronger evidence than mere probability of his complicity.”

14. In Shiv Prakash Mishra’s case (**supra**), the fact of the case was that the complainant P.W. 1 alleged that on 06.09.2013, all the accused persons came to his house forming an unlawful assembly and started hurling abuse due to old enmity. One of the accused fired pistol and others assaulted with *lathi* and *danda* whereas the accused, who was sought to be summoned, allegedly assaulted with butt of the pistol at the head of the deceased. The accused to be summoned, under Section 319 Cr.P.C., was named in the FIR, however, the Investigating Officer had not sent up him for trial as several witnesses stated that he was not present at the time of occurrence, rather he was in his office at the time of the incident. The complainant had not filed any protest petition on the police report. The learned trial Court had refused to summon the accused, under Section 319 Cr.P.C., as he was found on duty at the time of incident at a different place. There was contradictory evidence of the prosecution witnesses examined during trial.



15. In the case in hand also, there is no eyewitness of the occurrence and no new material came during trial against the petitioner, rather a different story surfaced saying that husband of the sister of the deceased was suspected to have committed the murder.

16. Therefore, in my view, the requirement of law that for summoning, under Section 319 Cr.P.C., there should be stronger evidence than mere probability of complicity of the petitioner is lacking in this case. On the very same material, the learned Magistrate after hearing the informant refused to take cognizance against the petitioner and the said order was not challenged either before the superior court or by filing a protest petition. Therefore, unless some more clinching evidence should have surfaced during trial, the petitioner should not have been summoned. Hence, in my view, if the impugned order is allowed to stand, it would cause failure of justice. Accordingly, the same stands hereby quashed against the petitioner and this application is allowed.

(Birendra Kumar, J)

Kundan/-

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