

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Revision No.443 of 2016

Arising Out of PS. Case No.- Year- Thana- District-

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1. Md. Shahnawaj, Son of Late Islamuddin, resident of Mohalla Mirjabhag, P.O., P.S. and District- Araria.
 2. Bibi Sabina, W/o Md. Jumman, resident of Mohalla Azad Nagar, P.O., P.S. and District- Araria.

... .. Petitioner/s

Versus

1. State of Bihar
2. The Superintendent of Police, Araria.

... .. Respondent/s

Appearance :

For the Petitioner/s	:	Mrs. Asha Verma, Advocate. Mr. Sanjana, Advocate. Mr. Amrendra Kumar Singh, Advocate.
For the O.P/s	:	Mr. Murlidhar App Mr. B. Mishra, Advocate. Ms. Tanuja Mishra, Advocate.

CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA
C.A.V. JUDGMENT

Date : 07-02-2019

This revision application has been preferred against the order dated 10.03.2015 passed by the Adhoc Additional District and Sessions Judge-IV, Araria in S.T.No. 1061 of 2008, arising out of Araria P.S. Case No. 71 of 2004, under Sections 302 and 120B of Indian Penal Code, whereby and whereunder petition dated 18.01.2011 filed by the learned public prosecutor, under Section 321 Cr.P.C., for according his consent to withdraw the prosecution against petitioners, was rejected.

2. The facts in short giving rise to the present case is that one Mehrunisha, to whom petitioner no. 1, Md. Shahnawaz happens to be nephew (Bhatiza), was murdered for which two



cases were lodged. Said Mehrunisha was the fourth wife of Rashid Ansari and she was issueless. She had some landed property from her parent's side and her husband had greedy eyes over her property. When her husband and step sons came to know that she had gifted the said property to Madarsa and other charitable institution, they planned to kill her.

3. It is also the case of the petitioners that deceased's husband and step sons forced her to execute sale deed in their favour to which she refused. Thereupon, on the order of Rashid Ansari, his son killed her and she died in presence of petitioner no. 1. Accordingly, petitioner no. 1 lodged Araria P.S. Case No. 326 of 2003 and her husband Rashid Ansari was arrested at the spot and after investigation of the above case, charge sheet was submitted on 13.12.2003 vide charge sheet No. 272 of 2003.

4. Further case of the petitioners is that after 17 days of said occurrence, husband of deceased, namely, Rashid Ansari, filed a complaint in the court of learned CJM, Araria, vide Complaint Case No. 1874C of 2003 against the petitioner no. 1 and others, which was sent to Araria Police Station, under Section 156(3) of the Cr.P.C., to register an FIR but the police returned the same narrating that for the same offence, already a case has been registered and police has submitted a report to the



court of CJM, Araria, but on repeated reference, another FIR vide Araria P.S.Case No. 71 of 2004 was registered against the present petitioners and others. The police, after investigation, found the case untrue and recommended for prosecution of informant namely Rashid Ansari, under Section 181 and 211 Cr.P.C. vide report dated 20.06.2004.

5. Further case of the petitioners is that thereafter, informant of Araria P.S.Case No. 71 of 2004 filed Cr.W.J.C. No. 254 of 2004 and vide order dated 25.01.2005, this Court directed the Superintendent of Police, Araria to get the case of the petitioner investigated in accordance with law and if he finds that there is merit in the case then he must order for further investigation into both the cases after amalgamation so that prosecution may proceed only with one definite case regarding the accused persons who, as per the police investigation, may be found responsible for causing death. The Court further directed that such investigation should be completed at an early date preferably within six months.

6. Further case of the petitioners is that police, after the order aforesaid, submitted charge sheet bearing Charge Sheet No. 281 of 2005 dated 08.11.2005. Thereafter, petitioners were arrested in said case i.e., in Araria P.S.Case No. 71 of 2004,



who then filed Cr. Misc. No. 1947 of 2006 for grant of bail. This Court, while granting the bail to petitioners, has directed the Superintendent of Police, Araria to take all required steps to ensure the compliance of order dated 25.1.2005 passed in Cr.W.J.C. No. 254 of 2004 in its letter and spirit within three months and then prosecution proceed only with one definite case regarding murder of the deceased.

7. It further appears that at the instance of prosecution, learned Chief Judicial Magistrate, Araria amalgamated both the cases vide orders dated 21.03.2006 and 26.04.2006. It further appears that thereafter on joint investigation of both the cases, a progress report was submitted in the court finding Araria P.S.Case No. 326 of 2003 true and its charge sheet was reaffirmed and Araria P.S.Case No. 71 of 2004 was found to be untrue. Thereafter the public prosecutor filed a petition dated 25.12.2006 in the court of Chief Judicial Magistrate stating that cognizance vide charge sheet no. 281 of 2005, arising out of Araria P.S.Case No. 71 of 2004, should not be taken up. But the matter did not stop here rather the Chief Judicial Magistrate committed this case to the court of sessions in 2008, which gave rise to S.T.No. 1061 of 2008.

8. Further case of the petitioners is that they filed a writ



application, being Cr.W.J.C. No. 406 of 2008 for issuance of a direction to the respondent/prosecution to withdraw the prosecution against the petitioners and thereafter a long lapse, on 18.01.2011, a petition under Section 321 Cr.P.C. was filed in S.T.No. 1061 of 2008 before the trial court in which ultimately order was passed 10.03.2015 rejecting the prayer for withdrawal of prosecution against the petitioners. Against the above order, the petitioners preferred Cr.W.J.C. No. 442 of 2015 which was disposed of vide order dated 29.01.2016 with observation that in view of an equally efficacious and statutory remedy, under Sections 399 and 401 Cr.P.C., being available to petitioners for redressal of their grievance, the Court is not inclined to entertain the present application in extraordinary writ jurisdiction.

9. Thereafter, against the order dated 10.03.2015 passed in S.T.No. 1061 of 2008 dismissing the application filed by the public prosecutor under Section 321 Cr.P.C. for withdrawal of the cases, the present revision application has been preferred by the petitioners.

10. The grounds for preferring this revision application is that the impugned order suffers from serious illegality and impropriety as the learned trial court, without applying its judicious mind and also misconstruing the matter, has passed the



impugned order in an arbitrary manner. It has further been pointed out that arbitrarily, two cases were lodged for the murder of deceased, one by petitioner no. 1, Md. Shahnawaj, informant of Araria P.S.Case No. 326 of 2003 and another lodged by Md. Rashid Ansari, informant in Araria P.S.Case No. 71 of 2004 and the police, after investigation found Araria P.S.Case No. 71 of 2004 untrue and recommended for initiation of prosecution against the informant of that case, under Sections 181 and 211 of Cr.P.C. It has also been pointed out that Hon'ble Bench of this Court, vide order dated 25.01.2005 passed in Cr.W.J.C. No. 254 of 2004 preferred by Md. Rashid Ansari, directed the Superintendent of Police, Araria, if he finds merit in petitioner's case, being Araria P.S.Case No. 71 of 2004, then he must order for further investigation into both cases after amalgamation so that prosecution may proceed only with one definite case regarding the murder of deceased for which two police cases have been lodged, but Investigating Officer neither obeyed the direction of this Hon'ble Court nor got both cases amalgamated for the purpose of investigation of a definite case and submitted charge sheet in Araria P.S.Case No. 71 of 2004 in an arbitrary and contemptuous manner ignoring the direction of this Court given order dated 25.01.2005 in letter and spirit.



11. Further contention of learned counsel for the petitioner is that in Cr.Misc. No. 1947 of 2006 filed by the petitioners for grant of bail, the Superintendent of Police, Araria was show caused as to why the said direction of the Hon'ble Court, was ignored and why not suo motu contempt proceeding be initiated against him. It appears that show cause was submitted and thereafter this Court, vide order dated 26.04.2006 passed in Cr.Misc.No. 1947 of 2006, directed the Superintendent of Police, Araria to take all required steps to ensure that said order i.e., order dated 25.01.2005 passed in Cr.W.J.C. No. 254 of 2004, be complied with its letter and spirit.

12. Further contention is that after the above direction, at the instance of prosecution, both the cases were amalgamated, vide order dated 26.04.2006 (Annexure-11) by the Chief Judicial Magistrate, Araria and then a joint investigation progress report was submitted vide Annexure-3 recording that Araria P.S.Case No. 326 of 2003 is found to be true and its charge sheet was reaffirmed and Araria P.S.Case No. 71 of 2004 was found to be untrue. However, to utter surprise, the matter of prosecution did not stop against the petitioners in spite of the order dated 26.04.2006 (Annexure-11), and the Chief Judicial Magistrate, Araria independently committed the Araria P.S.Case



No. 71 of 2004 to the court of sessions giving rise to S.T.No. 1061 of 2008 and amalgamated both cases, as stated above. Hence, order of commitment is in utter violation of direction of the Hon'ble Court. It has also been contended that the public prosecutor, later on, when realised the mistake, filed a petition dated 18.01.2011 in S.T.No. 1061 of 2008 under Section 321 Cr.P.C. for according consent to withdraw the prosecution against the petitioners.

13. It has further been contended that in spite of direction of this Court, both cases have been amalgamated by the learned trial court misconstruing the facts and circumstances of the case and also without considering the subsequent re-investigation after amalgamation of both the cases and joint investigation progress report, which has superseded the earlier charge sheet submitted in Araria P.S.Case No. 71 of 2004 against the petitioners as such no case remains against the petitioners, but in spite of all the above facts dismissed the petition filed under Section 321 Cr.P.C. by the public prosecutor to accord consent to withdraw the prosecution against the petitioners. Hence, the impugned order in this case suffers from illegality, impropriety, erroneous and perverse and deserves to be set aside.

14. On the contrary, learned counsel for the informant



though has not been made party in this case, has appeared by filing Vakalatnama and argued that petitioners have no *locus standi* to maintain this revision application, as Section 321 of Cr.P.C. mandates that public prosecutor on its own initiative would file an application for withdrawal of the prosecution for the consent of court and thus, it's a matter between the court and the public prosecutor and petitioners, being the accused of Araria P.S.Case No. 71 of 2004, have no *locus standi* to challenge the order as such this revision application is fit to be dismissed on the above ground alone.

15. Further contention of learned counsel for the informant is that, it is manifest from the order of the trial court that charge sheet in the said case was submitted on 10.11.2005 and cognizance of the offence against the petitioners was taken on 05.12.2005 and the learned trial court further referring various paras of the case diary, has opined that witnesses have fully supported the case and after objective appraisal of the materials available on record rightly rejected the prayer of the public prosecutor.

16. Further contention of learned counsel for the informant is that mandate of law is that a prosecution under Section 321 Cr.P.C. shall be withdrawn if it is in good faith and



in the interest of public policy and justice. Thus, the court concerned even empowered to under the law to exercise its judicial discretion whether to grant consent for withdrawal of prosecution or not and learned trial court considering the facts and circumstances and materials available on record, rightly found it not a fit case for withdrawal of prosecution as contemplated under Section 321 Cr.P.C. Hence, the impugned order does not suffer from any infirmity, illegality or impropriety.

17. Having heard both sides and on careful perusal of the material available on record and considering the rival submissions of the parties, it is manifest that on 15.09.2003, deceased Mehrunisha was done to death, for which two cases were lodged, first was lodged by petitioner no. 1 Md. Shahnawaj that in his presence on the order of Md. Rashid Ansari, husband of deceased, his sons and others killed her by firing and the case was lodged on the date of occurrence itself. It further appears that the present case, being Araria P.S. Case No. 71 of 2004, giving rise to S.T.No. 1061 of 2008, was filed after 17 days of the incident on the complaint filed by Md. Rashid Ansari, husband of deceased, which was sent to local police station for registration of case, but the same was returned to the



court of Chief Judicial Magistrate informing it that already in this regard Araria P.S.Case No. 326 of 2003 has been lodged, which is under investigation and after collecting evidence, accused Md. Rashid Ansari has been arrested and after investigation, the report will be submitted in the court. The report submitted by the police appears to be in consonance with the provisions of Section 210 Cr.P.C. which mandates that when during the course of inquiry or trial of a case instituted otherwise then on the police report, if it appears to the Magistrate that investigation by the police is in progress in relation to the offence, which is subject matter of enquiry, the Magistrate shall stay the proceeding of such enquiry or trial and he shall proceed with after the receipt of the police report as contemplated under Section 210(2)and (3) of the Cr.P.C.

18. Further, the record reveals that despite the above report of police, the Chief Judicial Magistrate, Araria issued direction for registration of case and thus, giving rise to second FIR with respect to same occurrence vide Araria P.S.Case No. 71 of 2004. It is manifest that after investigation of first FIR lodged by petitioner no.1, charge sheet No. 272 of 2003 dated 13.12.2003 was submitted in the court.

19. The record further reveals that Md. Rashid Ansari,



informant of Araria P.S. Case No. 71 of 2004, has filed Cr.W.J.C. No. 254 of 2004 raising grievance that police has not arrested the accused persons at his case nor conducting investigation expeditiously and this Court, considering the facts and circumstances of both the cases, directed the Araria police vide order dated 25.01.2005 (Annexure-1) to investigate the case of the petitioner and if he finds that there is merit in petitioner's case then further investigation of both cases be carried out after amalgamation of both cases, so that prosecution may proceed only with one definite case regarding murder of deceased.

20. The record also reveals that in spite of above direction, police did not get both the cases amalgamated rather unilaterally submitted charge sheet in Araria P.S. Case No. 71 of 2004 on 11.11.2005 (Annexure-10) against the petitioners and accordingly, cognizance was taken on 05.12.2005 and the above cognizance order has never been assailed or challenged before any superior court of law.

21. The record further reveals that when the present petitioners were arrested in Araria P.S. Case No. 71 of 2004 then they filed Cr. Misc. No. 1947 of 2006 before the High Court for grant of bail and vide order dated 26.04.2006 (Annexure-2A), this Court finally granted bail to the petitioners and the



Superintendent of Police, Araria was also directed to take all steps for ensuring that said order i.e., order dated 25.01.2005 passed in Cr.W.J.C. No. 254 of 2004 (Annexure-1), be complied in its letter and spirit within three months and for that purpose, it will be open for the police to seek reopening of cases closed earlier.

22. It further appears from perusal of record that vide order dated 26.04.2006 i.e., Annexure-11 and Annexure-11A, the learned Chief Judicial Magistrate, Araria amalgamated both the cases i.e., Araria P.S.Case No. 326 of 2003 and Araria P.S.Case No. 71 of 2004 and further directed that the record of Araria P.S.Case No. 71 of 2004 be tagged with Araria P.S.Case No. 326 of 2004.

23. It would not be out of place to mention here that before the above amalgamation, cognizance of offence, so far the present petitioners are concerned, was taken in the light of charge sheet submitted in Araria P.S.Case No. 71 of 2004. It is further manifest from Annexure-12 that thereafter a joint investigation of both cases was carried out, the contention of petitioners is that after joint investigation, a progress report (Annexure-3) was submitted in the court by the Superintendent of Police, Araria, O.P. No. 2 through the public prosecutor on



25.12.2006, that cognizance of offence may not be taken on the basis of charge sheet submitted earlier in Araria P.S.Case No. 71 of 2004. However, as discussed above, before joint investigation progress report, cognizance had already been taken up in Araria P.S.Case No. 71 of 2004.

24. The record further shows that present petition for withdrawal of prosecution, under Section 321 Cr.P.C., was filed in the trial court on 18.01.2011, however, trial court vide order dated 10.03.2015 has rejected the petition of withdrawal filed by the public prosecutor on the ground that sufficient materials are available making out a *prima facie* case against the accused persons including the petitioners.

25. Under the above circumstances, this Court has to examine the materials, as discussed above, to come to conclusion as to whether impugned order suffers from illegality, impropriety and also is erroneous on the face of record.

26. Admittedly, two FIRs were lodged with respect to same incident. First was lodged by the petitioner no. 1, Md. Shahnawaj, against accused Md. Rashid Ansari for committing murder of deceased, who happens to be wife of Rashid Ansari and later on, after 17 days of the occurrence, a complaint was filed by Md. Rashid Ansari against the petitioners for



committing murder of deceased on the basis of which Araria P.S.Case No. 71 of 2004 was registered at the instance of Chief Judicial Magistrate, Araria though police has already given a report that already an FIR has been registered with respect to death of the deceased. This Court vide order dated 25.01.2005, Annexure-1, on the writ application filed by Md. Rashid Ansari, had directed the police to re-investigate the case in accordance with law and if he finds merit in petitioner's case then to further investigate after amalgamation of both cases so that prosecution may proceed only with one definite case regarding the accused persons, who was responsible for cause of death of the deceased, but it appears that ignoring the direction of this Court, in letter and spirit, police submitted charge sheet in second FIR being Araria P.S.Case No. 71 of 2004 against the petitioners and accordingly, cognizance was taken up though the same has never been assailed in any superior court and has become final. The present petitioners, after being arrested, filed Cr. Misc. No. 1947 of 2006 for grant of bail and at that time also grievances were raised that charge sheet in Araria P.S.Case No. 71 of 2004 has been submitted ignoring the direction of this Court vide order 25.01.2005 in Cr.W.J.C.No. 254 of 2004 and this Court, vide order dated 25.04.2006 passed in Cr. Misc. No. 1947 of



2006 granted bail to the petitioners and further directed the police to take all steps so that order dated 25.01.2005 is fully complied with in its letter and spirit. Thereafter both the cases were amalgamated and after joint investigation, progress report was submitted in the court. It appears from Annexure-2 and 2A, as stated above, that cognizance of offence has already been taken and later on Araria P.S. Case No. 71 of 2004 has been committed to the court of sessions in the year 2008 which gave rise to S.T. No. 1061 of 2008. It further appears that realizing the mistake on the part of police, prosecution as well as the court, the prosecution has filed a petition on 18.01.2011 under Section 321 Cr.P.C. for according consent for withdrawal of the prosecution against the petitioners initiated vide Araria P.S. Case No. 71 of 2004, which was finally rejected vide impugned order saying that sufficient materials are available on record to proceed with the trial.

27. The present revision application has been filed by the petitioners, who are accused in S.T.No. 1061 of 2008, arising out of Araria P.S. Case No. 71 of 2004, but so far withdrawal is concerned, it is matter between the prosecution and the court and as such petitioners have no *locus standi* to challenge the dismissal of order of withdrawal petition.



28. Further, the police has no absolute or unfettered discretion as to whether to prosecute an accused or not to prosecute him rather the Magistrate is given power to control the discretion of the police.

29. Learned counsel for the informant has also cited a decision reported in AIR 1987 SC 877 in the case of *Sheo Nandan Paswan vs. State of Bihar* to show that Apex Court has already held that cases under Section 321 Cr.P.C. can be withdrawn if it is made in good faith in the interest of public policy and justice and not to thwart or stifle the process of law and the court after considering the above facts has to see whether application suffers from such improprieties or illegality as to cause manifest injustice, if consent is given. But in the present case, there is no interest of public policy involved when other than there are sufficient materials against the petitioners as such the court has rightly rejected the petition for withdrawal.

30. I find force in the above contention and moreover, as I have discussed above, the petitioners, accused persons, have no *locus standi* to challenge the order rejecting withdrawal petition as such the revision application preferred by the petitioners is not sustainable in the eye of law.

31. However, in the peculiar facts and circumstances, as



discussed above, where two cases have been filed with respect to the same incidents and in spite of being direction of this Court to amalgamate the same and investigate to come to a definite case, passed vide order dated 25.01.2005 passed in Cr.W.J.C. No. 254 of 2004, even though charge sheet has been submitted and cognizance has been taken in Araria P.S. Case No. 71 of 2004 and the same has been allowed to commit giving rise to S.T.No. 1061 of 2008. As such in the above circumstances, when there is case and cross case filed by the petitioner no. 1 and Md. Rashid Ansari, the complainant in cross case, which gave rise to a case and cross case lodged under the same offence. There is no provisions in the Criminal Procedure Code or the Evidence Act dealing exclusively with the trial of the cross-case. However, the Apex Court in case of *Nathi Lal & Ors. v. State of U.P. and Anr.* reported in 1990(Supp) SCC 145 in this context, which lays down as under:

“We think that the fair procedure to adopt in a mater like the present where there are cross cases, is to direct that the same learned Judge must try both the cross cases one after the other. After the recording of evidence in one case is completed, he must hear the arguments but he must reserve the judgment. Thereafter, he must proceed to hear the cross case and after recording all the evidence he must her the arguments but reserve the judgment in that case. The same learned Judge must thereafter dispose of the maters by two separate judgments. In deciding



each of the cases, he can rely only on the evidence recorded in that particular case. The evidence recorded in the cross case cannot be looked into. Nor can the judge be influenced by whatever is argued in the cross case. Each case must be decided on the basis of the evidence which has been placed on record in that particular case without being influenced in any manner by the evidence or arguments urged in the cross case. But both the judgments must be pronounced by the same learned Judge one after the other.”

32. On perusal of the impugned order, I find that similar direction has been given by this Court vide order dated 26.02.2008 passed in Cr.Misc. No. 7603 of 2008, which was related to grant of bail to accused of Araria P.S. Case No. 326 of 2003 i.e., first FIR lodged by petitioner no. 1, Md. Shahnawaz, and this Court passed a direction as follows:

“However, I would like to direct the District and Sessions Judge, Purnia that in a situation as obtained present on account of two FIRs relating to one incident, what the court is to do it to hear the two cases simultaneously and that hearing has to be done by one trial Judge. The hearing has to be placed in such manner as to concluding it simultaneously so as to delivering the judgment in two cases independently but on the same date. I believe that learned Sessions Judge, Purnea or the Judge who would be receiving the cases adheres to the principle as indicated above.”

33. The impugned order reveals that after the above order passed in Cr.Misc. No. 7603 of 2008, both the cases were committed to the court of sessions one after the other, but



S.T.No. 1047 of 2008, arising out of Araria P.S.Case No. 326 of 2003, was transferred to ADJ-FTC-IV, Araria. It further reveals that S.T.No. 1047 of 2008 was taken up after framing of charge, which is now pending for arguments and so far S.T. No. 1061 of 2008 is concerned, it is still pending for framing of charge.

34. In the light of discussions made above, though I find no illegality and impropriety in the impugned order, the criminal revision application appears to be devoid of any merit. However, considering the peculiar facts and circumstances of the case, the trial court is directed to proceed with the trial of S.T.No. 1047 of 2008 and S.T.No. 1061 of 2008 in the light of guidelines laid down by the Apex Court in *Nathi Lal's* case (supra) as well as the direction of this Court passed in Cr. Misc. No. 7603 of 2008, so as to trial may be conducted one after other by the same trial court and pass the judgment one after other on the same date.

35. Accordingly, this revision application is dismissed with direction made above.

36. Let a copy of this order be sent to the trial court as well as learned Sessions Judge, Araria to direct the trial court to pronounce the judgments of both cases separately on the same day after concluding the trial preferably within a period of nine



months from the date of receipt of a copy of this judgment.

(Vinod Kumar Sinha, J)

sujit/-

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