

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.87380 of 2019

Arising Out of PS. Case No.-409 Year-2016 Thana- BHABHUA District- Kaimur (Bhabua)

SANDHYA KUMARI D/o Shankar Upadhyay Resident of Village- Kohari,
P.O.- Darauli, P.S.- Bhabua, Dist- Kaimur.

... .. Petitioner/s

Versus

1. The State of Bihar
2. Munna Upadhyay @ Ram Pravesh Upadhyay Son of Mahendra Upadhyay R/o Village- Kohari, P.O.- Darauli, P.S.- Bhabua, Dist- Kaimur.
3. Mahendra Upadhyay S/o Late Bachau Upadhyay @ Bachu Upadhyay R/o Village- Kohari, P.O.- Darauli, P.S.- Bhabua, Dist- Kaimur
4. Niraj Devi W/o Surendra Upadhyay @ Surendra R/o Village- Kohari, P.O.- Darauli, P.S.- Bhabua, Dist- Kaimur
5. Nirmala Devi @ Nirmal Devi W/o Pappu Tiwari R/o Village- Kohari, P.O.- Darauli, P.S.- Bhabua, Dist- Kaimur.
6. Saraswati Devi W/o Mahendra Upadhyay R/o Village- Kohari, P.O.- Darauli, P.S.- Bhabua, Dist- Kaimur.
7. Mamta Kumari @ Mamta Devi D/o Mahendra Upadhyay, W/o Upendra Tiwari R/o Village- Kulhariyan, P.S.- Ramgarh, Dist- Kaimur.
8. Meera Devi D/o Mahendra Upadhyay, W/o Sachchidanand Upadhyay R/o Village- Dugulpurawa, P.S.- Ramgarh, Dist- Kaimur.

... .. Opposite Party/s

Appearance :

For the Petitioner/s	:	Mr.Rajesh Kumar Pathak, Advocate
For the State	:	Mr. Ashok Kumar, APP

CORAM: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH
ORAL JUDGMENT

Date : 09-01-2020

The present petition has been filed for quashing the order dated 30.4.2019 passed by the learned Additional Sessions Judge, III, Kaimur at Bhabua in Criminal Revision No. 134 of 2018 whereby and whereunder the order dated 16.7.2018 passed by the learned A.C.J.M.-III, Bhabua (Kaimur) has been affirmed.



2. The brief facts of the case are that the informant of this case, namely, Sandhya Kumari i.e. the petitioner herein had filed a written complaint before the Officer in Charge, Bhabua Police Station dated 24.6.2016, inter alia stating therein that while she along with her mother and father was sitting outside the house, the accused persons namely, Mahendra Upadhyay, Munna Upadhyay, Niraj Devi, Nirmala Devi and Saraswati Devi had come there and started assaulting the mother and father of the informant as also had engaged in misbehaving with the informant. On the said complaint of the informant dated 24.6.2016, an FIR was lodged bearing Bhabua P.S. Case No. 409 of 2016.

3. It appears that the police had investigated the case and not finding any complicity of the accused persons had submitted final form as far as the accused persons, namely, Mahendra Upadhyay, Munna Upadhyay, Niraj Devi, Nirmala Devi and Saraswati Devi, are concerned. However, the learned court below appears to have differed and taken cognizance of the offence, whereafter charges were framed and the trial had commenced wherein various witnesses have been examined.

4. The petitioner herein had then filed a petition under Section 319 of the Code of Criminal Procedure dated



30.11.2017 before the learned court below, inter alia praying therein to array the private respondent nos. 7 and 8 i.e. Mamta Kumari and Meera Devi as accused persons and for holding the trial of all the accused persons together. The said petition filed by the petitioner under Section 319 Cr.P.C. was considered by the learned court of ACJM-III, Bhabhua and by an order dated 16.7.2018, the said petition filed by the petitioner was rejected on the ground that firstly, the name of Mamta Kumari and Meera Devi has not been taken / mentioned by the informant in the FIR and the Investigating Officer, in his deposition made in the ongoing trial as PW-5, has also not found the said two ladies to be having any complicity in the matter, during the course of entire investigation. Yet another ground considered by the learned trial court to reject the petition of the petitioner is that though the mother of the informant (PW-1), father of the informant (PW-2) and the informant (PW-4) have taken the name of the said two ladies, in their examination-in-chief, in the ongoing trial, however, the other prosecution witnesses have not taken the name of the said two ladies.

5. It appears that the petitioner had challenged the aforesaid order dated 16.7.2018 before the learned court of Additional Sessions Judge III, Kaimur at Bhabua by filing a revision



petition bearing Criminal Revision No. 134 of 2018, however, the same has also stood dismissed by an order dated 30.4.2019, which is a well reasoned and a detailed order, on the ground that perusal of the record shows that the learned trial court has applied its mind and after making an observation, based on the reasons furnished therein, has concluded that it is not in the interest of justice to include the names of Meera Devi and Mamta Kumari in the case and moreover, there is neither any illegality nor any irregularity in the order of the learned trial court.

6. The petitioner has now preferred the present petition against the order passed by the learned Additional Sessions Judge III, Kaimur at Bhabua in Criminal Revision No. 134 of 2018.

7. The learned counsel for the petitioner has submitted that though the petitioner had not taken the name of the respondent nos. 7 and 8 in her fardbeyan, however, subsequently, the role of the said two ladies has come to the fore in the evidence led by the mother and father of the informant as also that of the informant, adduced in the ongoing trial as PW-1, PW-2 and PW-4, hence, the said two ladies are required to be arrayed as accused.



8. I have heard the learned counsel for the petitioner and the learned APP for the State and I find that the informant i.e. the petitioner herein is the eye-witness to the alleged occurrence and in her written report to the Officer-in-Charge, Bhabua Police Station, she has categorically named the accused persons, who had come to her house and assaulted her parents as also misbehaved with her, however, she has failed to take the name of the private respondent nos. 7 and 8, which amply demonstrates that the said two ladies were not present at the place of occurrence. This Court further finds from the impugned orders under consideration that the Investigating Officer of the case in question has also been examined by the learned trial court in the ongoing trial as PW-5, however, he has nowhere stated about the complicity of the respondent nos. 7 and 8 in the alleged occurrence as also has nowhere stated that during the course of investigation, the role of the respondent nos. 7 and 8 had come to the fore. This Court further finds that only the interested witnesses i.e. the mother and father of the petitioner as also the petitioner herself, who have been examined as PW-1, PW-2 and PW-4 by the learned trial court in the ongoing trial, in their examination-in-chief, have disclosed about the said two ladies i.e. the respondent nos. 7 and 8 being present at the place



of occurrence, however, the rest of the independent witnesses have not named the respondent nos. 7 and 8 to be having any complicity in the alleged occurrence.

9. At this juncture, it would be relevant to refer to a judgment reported in (2019) 4 SCC 342 (**Periyasami & Ors. vs. S.Nallalsamy**), paragraph nos. 10 to 16 whereof are reproduced hereinbelow:-

10. The learned counsel for the appellants relies upon a Constitution Bench judgment of this Court in Hardeep Singh v. State of Punjab⁶ to contend that satisfaction required to invoke the power under Section 319 of the Code to arraign an accused is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is only where strong and cogent evidence occurs against a person from the evidence laid before the court, such power should be exercised and not in a casual and cavalier manner. The Court held as under: (SCC p. 138, paras 105-06)

“105. 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.

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 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."

(emphasis in original)

11. The learned counsel for the appellants also refers to a recent order of this Court in Labhuji Amratji Thakor v. State of Gujarat⁷, where, the order of summoning the additional accused on the basis of the statements of some of the witnesses in the witness box was set aside for the reason that there is not even suggestion of any act done by the appellants amounting to an offence under Sections 3 and 4 of the Protection of Children from Sexual Offences Act, 2012. It was held as under: (SCC OnLine SC para 12)

"12. ... The Court has to consider substance of



the evidence, which has come before it and as laid down by the Constitution Bench in Hardeep Singh⁶ has to apply the test i.e. '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.' ...”

12. We have heard the learned counsel for the parties and find that the order passed by the High Court is not sustainable in law. The present case is basically a matrimonial dispute wherein, the husband who is the complainant has levelled allegations against the wife and her other family members. Though in the FIR, the complainant has mentioned that 15 women and 35 men came by vehicles but the names of 11 persons alone were disclosed in the first information report.

13. In the statements recorded under Section 161 of the Code during the course of investigation, the complainant and his witnesses have not disclosed any other name except the 11 persons named in the FIR. Thus, the complainant has sought to cast net



wide so as to include numerous other persons while moving an application under Section 319 of the Code without there being primary evidence about their role in house trespass or of threatening the complainant. Large number of people will not come to the house of the complainant and would return without causing any injury as they were said to be armed with weapons like crowbar, knife and ripper, etc.

14. In the first information report or in the statements recorded under Section 161 of the Code, the names of the appellants or any other description has not been given so as to identify them. The allegations in the FIR are vague and can be used any time to include any person in the absence of description in the first information report to identify such person. There is no assertion in respect of the villages to which the additional accused belong. Therefore, there is no strong or cogent evidence to make the appellants stand the trial for the offences under Sections 147, 448, 294(b) and 506 IPC in view of the judgment in



Hardeep Singh case⁶. The additional accused cannot be summoned under Section 319 of the Code in casual and cavalier manner in the absence of strong ³⁴⁷ and cogent evidence. Under Section 319 of the Code additional accused can be summoned only if there is more than prima facie case as is required at the time of framing of charge but which is less than the satisfaction required at the time of conclusion of the trial convicting the accused.

15. The High Court has set aside the order passed by the learned Magistrate only on the basis of the statements of some of the witnesses examined by the complainant. Mere disclosing the names of the appellants cannot be said to be strong and cogent evidence to make them to stand trial for the offence under Section 319 of the Code, especially when the complainant is a husband and has initiated criminal proceedings against the family of his in-laws and when their names or other identity were not disclosed at the first opportunity.

16. Consequently, the order passed by the learned



High Court is set aside and that of the trial court is restored and the application under Section 319 of the Code is dismissed. The appeal is allowed.

10. Having regard to the facts and circumstances of the case and considering the factual aspect discussed hereinabove as also taking into account the judgment rendered by the Hon'ble Apex Court in the case of ***Periya Sami & Anr. (supra)***, this Court is of the opinion that the addition of accused persons not named in the FIR requires more than prima facie case, strong and cogent evidence, however, as far as the present case is concerned, neither the respondent nos. 7 and 8 have been named or described either in the FIR or in the statement made by the witnesses before the police under Section 161 Cr.P.C., during the course of investigation by the police nor the independent witnesses have taken the name of the private respondent nos. 7 and 8, in their evidence adduced during the course of the ongoing trial and it is only the interested witnesses i.e. the mother and father of the informant and the informant herself, who have, in their evidence adduced before the learned trial court, named the Respondent Nos. 7 and 8, however, without attributing any role to them in the alleged occurrence, hence it cannot be said that strong and cogent evidence have been led in



order to make the said two ladies stand trial. This Court is further of the view that a malicious and vexatious litigation has been launched at the behest of the petitioner, without any merit, all throughout i.e. firstly before the learned court of Additional Chief Judicial Magistrate III, Kaimur at Bhabua, then before the learned Additional Sessions Judge III, Kaimur at Bhabua and now before this Court, resulting in overburdening the already overburdened Courts, pointlessly and unnecessarily.

11. Considering the facts and circumstances of the case and for the reasons mentioned in the preceding paragraphs, I do not find any merit in the present petition, hence, the same stands dismissed with a cost of Rs. 10,000/- to be deposited by the petitioner before the Patna High Court Legal Services Committee, Patna within a period of three months from today.

12. Let this case be listed under the heading ***“TO BE MENTIONED”*** on 15.04.2020 at 10.30 am., for the purposes of ascertaining as to whether the amount of cost, as imposed hereinabove, has been deposited by the petitioner or not.

(Mohit Kumar Shah, J)

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AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	21.3.2020
Transmission Date	21.3.2020

