

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.18816 of 2016

Arising Out of PS. Case No.-567 Year-2013 Thana- TURKAULIYA District- East
Champaran

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1. Md. Noorullah @ Nurullah, Son of Late Sarfuddin,
 2. Abdul Faij @ Faij Ahmad, Son of Late Jainuddin,
 3. Shahid Ali, Son of Sheikh Anwar @ Anwarul Haque,
 4. Md. Irfanullah @ Kubara @ Irfanullah, Son of Obaidullah, All are resident
of village - Mokhishpur, P.S. - Banjariya, District - East Champaran,
Motihari.

... .. Petitioner/s

Versus

1. State of Bihar
2. The Informant Seraj Ahmad, Son of Late Sheikh Amerullah, Resident of
Village Post - Mokhilshpur, P.S. - Banjariya, District - East Champaran.

... .. Opposite Party/s

with

CRIMINAL MISCELLANEOUS No. 3665 of 2017

Arising Out of PS. Case No.-567 Year-2013 Thana- TURKAULIYA District- East
Champaran

Md. Azamatullah @ Jamshed Khan @ Jamshed Alam @ Jamshed S/o Md.
Nurullah, r/o Mokhishpur, P.S. Banjaria, District East Champaran.

... .. Petitioner/s

Versus

1. State of Bihar
2. Seraj Ahmad, S/o Late Sheikh Amirullah, R/o Mokhlshpur, P.S. Banjariya
District East Champaran.

... .. Opposite Party/s

Appearance :

(In CRIMINAL MISCELLANEOUS No. 18816 of 2016)



For the Petitioner/s : Mr. Patanjali Rishi, Advocate
For the Opposite Party/s : Mr. L.K. Sharma, APP
For the O.P. No. 2 : Mr. Shiva Shankar Sharma, Advocate
(In CRIMINAL MISCELLANEOUS No. 3665 of 2017)
For the Petitioner/s : Mr. Patanjali Rishi, Advocate
For the Opposite Party/s : Mr. Nirmal Kumar Sinha, APP

CORAM: HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA
ORAL JUDGMENT

Date : 14-05-2024

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

2. The present quashing petition has been
preferred to quash the order dated 10.02.2016 passed
in Turkoliya (Banjariya) P.S. Case No. 567 of 2013
(Sessions Trial No. 358 of 2014), where learned 12th
Additional Sessions Judge, Motihari at East Champaran,
issued summon to petitioners under Section 319 of the
Code of Criminal Procedure (in short Code) against the
petitioners.

3. Opposite Party No. 2 join the present
proceedings.

4. From the crux of written information, it
appears that F.I.R. has been lodged by the Informant,



Seraj Ahmad before the Police-in-Charge, Banjariya P.S. Motihari, East Champaran, which has been registered as Turkoliya (Banjariya) P. S. Case No. 567/2013 for the offences punishable under Sections- 364, 302, and 201/34 of the Indian Penal Code on 05.11.2013 against the accused Sandip Kumar and Brajesh Kumar as named accused persons. The prosecution in brief speaks that the Informant's brother, Ejaj Ahmad had gone with accused Sandip Kumar on 01.11.2013 from his house at 7.30 P.M. and for that an Informatory petition was filed on 03.11.2013, and when on 04.11.2013 the dead body of Informant's brother, Ejaj Ahmad was found in the river, aforesaid FIR was lodged. It is further alleging thereof that the accused Sandip Kumar and Brajesh Kumar alongwith others miscreants committed murder of his brother and threw the dead body in the river. Informant also filed protest-cum-complaint petition against the named accused persons alongwith petitioners on 17.12.2013 saying that he came to know about



petitioners involvement in crime in question, subsequent to lodging the FIR, which is available on records. During investigation, accused, Sandip Kumar named Jamshed and Kubara (Md. Irfanullah @ Kubara @ Irfanullah) petitioner no. 4 (Cr. Misc. No. 18816 of 2016). During investigation, Investigating Officer (IO) found no complicity/involvements of above petitioners including Md. Azmatullah @ Jamshed (Cr. Misc. No. 3665 of 2017), accordingly the final form has been submitted before the learned C.J.M., Motihari at East Champaran, vide Final Report no. 140 dated 06.05.2016 by exonerating petitioners. Learned C.J.M., after taking consideration of supplementary final report as well as supplementary case diary and other evidences as available on record, accepted the Final Form by its order dated 23.12.2015.

4.1. After commitment of case under Section 209 of the Code, it was transferred to the court of the learned 2nd Additional Session's Judge East Champaran



at Motihari for trial and disposal against named accused Sandip Kumar only, where during course of trial 9 witnesses have been examined by prosecution side who are all closed relatives of informant. On the basis of which, prosecution filed a petition dated 24.12.2014 under Section 319 of the Code for summoning the petitioners for facing their trial, which was allowed by learned Trial Court vide impugned order dated 10.02.2016.

4.2. Aggrieved with aforesaid order present quashing petitions preferred by above mentioned petitioners.

5. Learned counsel Mr. Patanjali Rishi, while appearing on behalf of petitioners submitted that from the evidences as available on record it can be gathered safely that there is no sufficient material as to summon the petitioners under Section 319 of the Code, where petitioners have been grabbed in this case out of local disputes and differences. It is submitted that at the time



of occurrence, petitioner no. 1 Md. Noorullah @ Nurullah, who is a Govt. Teacher and posted at Govt. Middle School Bakhari, petitioner no. 2 Abdul Faij @ Faij Ahmad is a co-villager, petitioner no. 3 Shahid Ali, who is a student of Polytechnic College at Meerut U.P. and petitioner no. 4 Md. Irfanullah, who is also student of intermediate at Govt. High School, Mokhlispur, Banjariya, East Champaran, were not present thereof. It is submitted that there is no sufficient material, which is required under the law for summoning the petitioners under Section 319 of the Code as settled by Hon'ble Apex Court through catena of its judgments. It is also submitted that the alleged occurrence took place on 01.11.2013 for which FIR was lodged after four days, when the dead body was recovered, having sufficient room for an afterthought. It is pointed out that even after lodging the FIR the name of petitioners were not disclosed by the informant and it was added subsequently after one month on hearsay basis. It is also



submitted by learned counsel that the statement of witnesses, during the course of investigation is completely contrary to the fact, what they deposed during the trial and same appears completely improved version, suggesting involvement of petitioners, which not appears travel beyond "last seen".

6. In support of the submissions learned counsel for the petitioners relied upon the legal reports of Hon'ble Supreme Court in the case of **Hardeep Singh Vs. State of Punjab and Others** as reported in **(2014) 3 SCC 92 & Sagar Vs. State of Uttar Pradesh and Another** as reported in **(2022) 6 SCC 389**.

7. Learned APP duly assisted by learned counsel appearing for O.P. No. 2, while opposing the application submitted that witnesses during the trial supported the involvement of petitioners as they were also "last seen" with deceased along with named co-accused Sandeep, which is sufficient to summon the



petitioners under Section 319 of the Code.

8. It would be apposite to reproduce the paragraph nos. 103, 104, 105 and 106 of the **Hardeep Singh Case (supra)** which reads as under:-

103. Similarly in *State of Bihar v. Ramesh Singh* [(1977) 4 SCC 39 : 1977 SCC (Cri) 533 : AIR 1977 SC 2018] , while dealing with the issue, this Court held : (SCC p. 42, para 4)

"4. ... If the evidence which the prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial."

104. In *Palanisamy Gounder v. State* [(2005) 12 SCC 327 : (2006) 1 SCC (Cri) 568] , this Court deprecated the practice of invoking the power under Section 319 CrPC just to conduct a fishing inquiry, as in that case, the trial court exercised that power just to find out the real truth, though there was no valid ground to proceed against the person summoned by the court.



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.

9. It would be apposite to reproduce the paragraph nos. 8 and 9 of the **Sagar Case (supra)** which reads as under:-

8. The scope and ambit of Section 319 of the Code has been well-settled by the Constitution Bench of this Court in *Hardeep Singh v. State of Punjab* [*Hardeep Singh v. State of Punjab*, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] and paras 105 and 106 which are relevant for the purpose are reproduced hereunder : (SCC p. 138)

"105. Power under Section 319CrPC 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 319CrPC. In Section 319CrPC 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 319CrPC to form any opinion as to the guilt of the accused." (emphasis in original)

9. The Constitution Bench has given a caution that power under Section 319 of the Code is a discretionary and extraordinary power which should be exercised sparingly and only in those cases where the circumstances of the case so warrant and the crucial test as noticed above 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. The learned Single Judge of the High Court has even failed to consider the basic principles laid down by this Court while invoking Section 319 of the Code, which has been considered by the learned trial Judge under its order dated 30-1-2018.

10. In view of the aforesaid factual and legal backgrounds, it appears that prosecution examined altogether eight prosecution witnesses during trial before



issuing summon to petitioners under Section 319 of the Code, who are P.W. 1 namely Abdus Salam, P.W. 2 namely Kalimullah, P.W. 3 namely Kamaluddin, P.W. 4 namely Samiullah, P.W. 5 namely Jiyauddin, P.W. 6 namely Sahena Parveen, P.W. 7 namely Seraj Ahmad (informant) & P.W. 8 namely Sadarun Nisha, where almost all prosecution witnesses supported the "last seen" of deceased with co-accused Sandeep & petitioners, where Sandeep is facing trial. Informant examined as P.W. 7 specifically stated in his examination-in-chief that co-accused Sandeep called over phone to his deceased brother, while he was eating and after sometime accused Sandeep came to his house, with whom his deceased brother went away. He stated nothing in his examination-in-chief incriminating petitioners except that he gave a written information regarding occurrence to police on 05.11.2013. It appears from his depositions that he came to know about the involvement of petitioners from the other



prosecution witnesses. He did not name any petitioners in his examination-in-chief having such information/knowledge. Deposition of informant, who is the eye-witness to the fact, speaks only that co-accused Sandeep only came to his house, without naming other petitioners, with whom his deceased brother went away.

11. Accordingly, by taking note of guidelines as mentioned in **Hardeep Singh Case (supra)** and **Sagar Case (supra)**, it appears that nature of evidence is not so strong and cogent before the learned trial court as discussed above, while exercising the power under Section 319 of the Code which otherwise to be exercised sparingly to summon the petitioners under Section 319 of the Code, rather it appears that it was used by learned Trial Court in very casual and cavalier manner. It appears from the impugned order that merely witnesses stated, except informant that they saw petitioners alongwith co-accused Sandeep and deceased before the occurrence, they were summoned under Section 319 of



the Code.

12. Accordingly, impugned order of cognizance dated 10.02.2016 with all its consequential proceedings before learned Trial Court, *qua*, all above named petitioners (of both petitions) arising thereof as passed in Turkoliya (Banjariya) P.S. Case No. 567 of 2013 (Sessions Trial No. 358 of 2014), pending before learned 12th Additional Sessions Judge, Motihari at East Champaran is hereby quashed and set aside.

13. Accordingly both aforesaid petitions stands allowed.

14. Let a copy of this order be sent to learned Trial Court, immediately.

(Chandra Shekhar Jha, J.)

S.Tripathi/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	20.05.2024
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