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Court : Patna

Decided On : Jan-17-2008

Judge : Abhijit Sinha, J.

Acts : Code of Criminal Procedure (CrPC) - Sections 161, 319 and 482; Indian Penal Code (IPC) - Sections 34 and 302; Arms Act - Sections 27

Appeal No. : Cr. Misc. No. 38792 of 2007

Appellant : Suresh Singh @ Harami and ors.

Respondent : State of Bihar and anr.

Advocate for Def. : Jharkhandi Upadhyay, A.P.P. and Shiv Prasad Gupta, Adv. for O.P. No. 2

Advocate for Pet/Ap. : Rana Pratap Singh, Sr. Adv. and Akhileshwar Prasad Singh, Adv.

Disposition : Application dismissed

Judgement :

Abhijit Sinha, J.

1. The three petitioners who are F.I.R. named accused of Piro (Hassan Bazar) P.S. Case No. 148 of 2002 giving rise to Sessions Trial No. 100 of 2004 are

aggrieved by the order dated 12.7.2007 passed by the learned Presiding Judge, Fast Track Court No. III, Bhojpur at Ara, whereby he has summoned the petitioners who had not been sent up to face trial along with others in exercise of powers conferred under Section 319 Cr.P.C.

2. Briefly stated, the prosecution case as available in the fardbeyan of the informant, Baleshwar Singh, O.P. No. 2 herein, inter alia is that he had gone to sleep at about 9.30 P.M. in the night of 30.8.2002 in the room situated at the east of the Dalan after taking his meal and at about 10 P.M. he was suddenly awakened by the barking of the dogs who had observed the movement of some persons near the eastern door of the Dalan. The informant is said to have flashed his torch in the light whereof he identified accused Surendra Sah and Suresh Singh alias Harami standing armed with pistol. According to the informant when he wanted to say something they fired at Srinivas Singh, the son of the informant who was sleeping and who sustained injuries and started writhing with pain on his Chowki. It is further alleged that in the mean time accused Vidya Sagar Sah standing on the Verandah exhorted that they should not be left alive. It has also been alleged that both the accused fled outside the Dalan after shooting Srinivas Singh whereafter the informant came out and identified in the light of the torch accused Nilu Sah, Saroj Sah, Ramesh Singh and Dinesh Singh while fleeing towards east and all of them were armed with pistol. It is said that on hearing sound of gun fire, Sanotsh Kumar, Pappu Kumar, the daughter-in-law and eldest grand daughter along with several villagers arrived who are said to have seen the assassins fleeing away and would disclose the factual matrix of the occurrence on being asked. The motive behind the occurrence is said to be the dispute over Gali and previous Panchayat Elections.

3. It appears that on the basis of the said fardbeyan Piro (Hassan Bazar) P.S. Case No. 148 of 2002 was registered under Sections 302/34 I.P.C. and 27 Arms Act and after due investigation the police submitted a chargesheet on 18.12.2002 in which Surendra Sah, Nilu Sah, Vidya Sagar Sah and Saroj Sah were sent up for trial and the investigation was kept pending against the others and by order dated 7.3.2003, the learned Chief Judicial Magistrate, Bhojpur at Ara, took cognizance against the four persons sent up. Eventually on 18.5.2005, the police submitted a

final form regarding Suresh Singh alias Harami, Ramesh Singh and Dinesh Singh showing that the accusations against them were false and by order dated 7.12.2006, the final form was accepted and the proceedings against the petitioners were dropped.

4. It further appears that in course of the trial of the aforesaid four persons, three witnesses, Pappu Kumar (P.W.1), Uttam Devi (P.W.2) and the informant Baleshwar Singh (P.W.3) were examined as prosecution witnesses and they in course of their deposition divulged the names of these three petitioners as having participated in the occurrence. Following this the prosecution on 29.5.2007 filed a petition for summoning these petitioners as accused under Section 319 Cr.P.C. on the ground that during the course of the trial the petitioners' participation for offence under Sections 302/34 I.P.C. and 27 Arms Act had been established and the same was allowed by the impugned order.

5. It has been submitted by the learned Counsel for the petitioners that no overt act has been alleged against Dinesh Singh and Ramesh Singh and they were allegedly seen only while fleeing away. It was also submitted that the evidence brought on record do not inspire confidence and evidence of P.Ws.1 and 2 have been thoroughly contradicted in view of their statements having been made before the police under Section 161 Cr.P.C., so far as the accusations against the petitioners are concerned. The further submission was that in view of the intrinsic evidence brought on record by the prosecution there is no chance of success against the petitioner so far proving of guilt against them beyond reasonable doubt is concerned. So far as the ambit of power under Section 319 Cr.P.C. is concerned, the learned Counsel for the petitioners sought to submit that the same was not to be exercised in a mechanical manner but that the learned trial court ought to have appreciated as to whether there was any chance of ultimate success in proving guilt of the petitioners beyond all reasonable doubts. In support of its submission reliance was placed on the judgments of *Kailash Dwivedi v. State of M.P.*, reported in (2005) 11 SCC 182 and *Kavuluri Vivekananda Reddy v. State of A.P.*, reported in (2005) 12 SCC 432.

6. So far as Kavuluri Vivekananda Reddy's case (supra) is concerned, their Lordships of the Apex Court allowed the appeal only because general statements were made qua the appellants by witnesses as to part played by them in instigating the main accused. The second reason prevailing with their Lordships was that the appellants were being summoned after 8 years of the incident.

7. So far as Kailash Dwivedi's case (supra) is concerned, their Lordship's while allowing the appeal were of the view that the names of accused persons could be added under Section 319 Cr.P.C. when some evidence or materials are brought on record in course of trial or when reference is made either by Magistrate while passing an order of commitment or by the Sessions Judge to High Court and High Court on examining the materials comes to conclusion that sufficient materials exist against them even though they may not have been chargesheeted.

8. The learned Counsel for O.P. No. 2 in opposing the submissions of the learned Counsel for the petitioners referred to a larger Bench judgment in Y. Saraba Reddy v. Puthur Rami Reddy reported in 2007(4) PLJR 144(SC) where their Lordships observed thus:

Undisputedly, it is an extraordinary power which is conferred on the court and should be used very sparingly and only if compelling reasons exist for taking action against a person against whom action had not been taken earlier. The word 'evidence' in Section 319 contemplates that evidence of witnesses given in Court. Under Sub-section (4)(1)(b) of the aforesaid provision, it is specifically made clear that it will be presumed that newly added person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced. That would show that by virtue of Sub-section (4)(1)(b) a legal fiction is created that cognizance would be presumed to have been taken so far as newly added accused is concerned.

9. Prior to this in Municipal Corporation of Delhi v. Ram Kishan Rohtagi's case reported in 1983(1) SCC 2, the Supreme Court observed as under:

In these circumstances, therefore, if the prosecution can at any stage produce evidence which satisfies the Court that the other accused or those who have not

been arrayed as accused against whom proceedings have been quashed have also committed the offence the Court can take cognizance against them and try them along with the other accused.

We leave the entire matter to the discretion of the Court concerned so that it may act according to law. We would, however, make it plain that the mere fact that the proceedings have been quashed against respondent Nos. 2 to 5 will not prevent the court from exercising its discretion if it is fully satisfied that a case for taking cognizance against them has been made out on the additional evidence led before it.

10. Again in Lok Ram v. Nihal Singh's case, reported in : 2006 CriLJ2366 , their Lordships were of the opinion that the trial court has undoubted jurisdiction under Section 319 Cr.P.C. to add any persons not being accused before it to face the trial along with other accused persons, if the court is satisfied at any stage of the proceeding of the evidence adduced that the persons who have not been arrayed as accused should face the trial. This power, according to their Lordships, can be exercised by the court suo motu or on an application by some one including the accused already before it. Such person even though had initially been named in the F.I.R. as an accused but not chargesheeted, can also be added to face the trial.

Their Lordships in Lok Ram's case (supra) were further of the opinion that the word 'evidence' in Section 319 Cr.P.C. contemplates the evidence of witnesses given in court. The trial court can take such step to add such persons as accused only on the basis of evidence adduced before it and not on the basis of materials available in the chargesheet or the case diary because such materials contained in the chargesheet or the case diary do not constitute evidence.

11. The learned Counsel for the petitioners in the instant case made strenuous efforts to show the discrepancies in the evidence adduced by the P.Ws. in court. However, such discrepancies are to be looked into at the time of judgment and not for the purpose of summoning or not summoning the person under Section 319 Cr.P.C.

12. Admittedly, the petitioners are named in the F.I.R. and are said to have been armed with pistol. Other witnesses have had the occasion to identify them with arms while fleeing. This, to my mind, amounts to sufficient materials against the petitioners to summon them to face the trial along with other accused for offence under Sections 302/34 I.P.C. and Section 27 Arms Act where the principle of joint liability comes into play and sharing of the common intention of all. It will also appear from the impugned order of the learned Presiding Judge that he has given cogent reasons for summoning the petitioners under Section 319 Cr.P.C. and such reasons are not a matter to be examined in a proceeding under Section 482 Cr.P.C.

13. Due regard being had to the facts and the circumstances of the case, I do not find any merit in this application which is accordingly dismissed.