

Sankar Naik and ors. Vs. State

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Court : Orissa

Decided On : Aug-26-2002

Reported in : 94(2002)CLT549

Judge : P.K. Tripathy, J.

Acts : Code of Criminal Procedure (CrPC) - Sections 317, 319(1), 319(4) and 482

Appeal No. : Crl. Misc. Case No. 4223 of 2002

Appellant : Sankar Naik and ors.

Respondent : State

Advocate for Def. : A.K. Mishra, Standing Counsel

Advocate for Pet/Ap. : A. Mohanty, J. Sahu, M.K. Rout, H.K. Tripathy, J.P. Patra, S.P. Nayak

Disposition : Case allowed

Judgement :

P. K. Tripathy, J.

1. Heard further argument.

2. In course of argument, the decision in the case of Michael Machado and Anr. v. C.B.I. and Anr. reported in (2000) 18 OCR (SC) 441 and Shashikant Singh v. Tarkeshwar Singh and Anr., (2002) 22 OCR (SC) 811 are cited at the Bar in the context of the procedure to be followed by the Trial court as per Section 319(4), Cr.P.C. once an application under Section 319(1), Cr.P.C. is allowed by adding accused.

3. The facts are not in dispute that petitioners have been added as accused pursuant to an order under Section 319(1), Cr.P.C. passed by learned Asst. Sessions Judge, Bhanjanagar in SC. No. 6 of 1999 arising out of Bhanjanagar P.S. Case No. 250 of 1997. That order under Section 319(1), Cr.P.C. is also not challenged at present before this Court. After their appearance petitioner insisted for a de novo trial and as per the order dated 12.7.1999 trial Court has turned down such a request and observed that petitioners are entitled to cross-examine the witnesses who have already been examined and no useful purpose would be served by resorting to de novo trial.

4. Learned counsel for the petitioners referring to the statutory provision in Sub-section (4) of Section 319, Cr.P.C. and the ratio in the case of Shashikant (supra) states that the impugned order of learned Asst. Sessions Judge is illegal and contrary to the provisions of law. Learned Standing Counsel while referring to the case of Michael (supra) states that when large number of witnesses have already been examined, in such a case, the trial Court should have the option of avoiding de novo trial.

5. In Michael (supra) the Apex Court finding that because of the invoking of the provision under Section 319(1), Cr.P.C. and including new accused persons, the whole process as undertaken by the trial Court in examining 54 witnesses was to be set at naught for following the procedure of de novo trial and therefore on an examination of the materials on record found the order under Section 319(1), Cr.P.C. was not worth allowing. Accordingly, order passed to add the accused was set aside. Therefore, no ratio was laid down in that case against the statutory law for de novo trial.

6. The statutory provision in Clause (a) of Sub-section (4) of Section 319, Cr.P.C. provides that pursuant to an order under Sub-section (1) by adding accused ;

'(a) the proceeding in respect of such person shall be commenced afresh, and the witness re-heard.'

The above quoted language in Section 319 clearly mandate the direction of the law for a de novo trial with respect to the added accused. In a case where large number of witnesses have already been examined and substantial evidence has been adduced on a strenuous effort and prolonged trial, in such cases the above provision of law prima facie appears to be harsh. But if the salutary principle of law, equity and criminal jurisprudence shall be borne in mind then it appears that the quoted provision in Sub-section (4) of Section 319, Cr.P.C. is just and proper inasmuch as 'no person shall be condemned unheard or without hearing him' and evidence in a criminal trial shall be recorded in presence of the accused and not in his absence unless the case is found covered by Section 317 of Cr.P.C. Thus, in a case where accused is added in accordance with Section 319(1), Cr.P.C., then the trial Court is bound to follow the provision of law in Sub-section (4) relating to re-hearing the witnesses. That is the view which has been expressed and propounded by the Apex Court in the case of Shashikant (supra). Their Lordships have held :

'10. The intention of the provision here is that where in the course of any enquiry into, or trial of an offence it appears to the Court from the evidence that any person not being the accused has committed any offence, the Court may proceed against him for the offence which he appears to have committed. At that stage, the Court would consider that such a person could be tried together with the accused who is already before the Court facing the trial. The safeguard provided in respect of such person is that, the proceedings right from the beginning have mandatorily to be commenced afresh and the witness re-heard. In short, there has to be a de novo trial against him. The provision of de novo trial is mandatory. It vitally affects the rights of a person so brought before the Court. It would not be sufficient to only tender the witnesses for the cross-examination of such a person. They have to be examined afresh. Fresh examination in chief and not only their presentation for the

purpose of the cross-examination of the newly added accused is the mandate of Section 319(4). The words 'could be tried together with the accused' in Section 319(1), appear to be only directory. 'Could be' cannot under these circumstances be held to be 'must be'. The provision cannot be interpreted to mean that since the trial in respect of a person who was before the Court has concluded with the result that the newly added person cannot be tried together with the accused who was before the Court when order under Section 319(1) was passed, the order would become ineffective and inoperative, nullifying the opinion earlier formed by the Court on the basis of evidence before it that the newly added person appears to have committed the offence resulting in an order for his being brought before the Court.'

'14. Reliance by learned counsel for the respondent No. 1 has been placed on *Municipal Corporation of Delhi v. Ram Kishan Rohtagi and Ors.*, (1983) 1 SCC 1 in support of the contention that respondent No. 1 could be tried only with Chandra Shekhar Singh and his trial having concluded, respondent No. 1 cannot be now tried pursuant to order under Section 319(1) of the Code. This Court in the cited decision was not concerned with the issue which has fallen for consideration before us. The same is the position in respect of *Michael Machado and Anr., v. Central Bureau of Investigation and Anr.*, (2000) 3 SCC 262.

There this Court considered the scope of the provision as to the circumstances under which the Court may proceed to make an order under Section 319 and not the question as to the effect of the conclusion of the trial after passing an order under Section 319(1). None of these decisions has any relevance for determining the point in issue.'

7. It is apparent on the face of the impugned order that the trial court has rejected the prayer of the petitioners for de novo trial with respect to them and thereby he has rendered the impugned order to be illegal being contrary to Law. Hence the impugned order stands quashed with a direction to the trial Court to proceed with the case in accordance with law.

The Criminal Misc. Case is accordingly allowed.

