

**Kishori Vs. State**

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**Court :** Delhi

**Decided On :** Oct-24-1997

**Reported in :** 1998IAD(Delhi)90; 1998CriLJ1194; 69(1997)DLT445; 1997(43)DRJ683

**Judge :** Y.K. Sabharwal and; A.K. Srivastava, JJ.

**Acts :** [Indian Penal Code \(IPC\), 1860](#) - Sections 302

**Appeal No. :** Criminal Appeal No. 238 of 1996

**Appellant :** Kishori

**Respondent :** State

**Advocate for Pet/Ap. :** R.K. Bali and; M.S. Butalia, Advs

**Judgement :**

**Y.K. Sabharwal, J.**

(1) This case arises out of Sessions Case No. 45/95.

(2) Kishori has been found guilty by learned Additional Sessions Judge of offence under Sections 148 and 302 Indian Penal Code and sentenced to death for offence under Section 302 Indian Penal Code subject to the confirmation of the death sentence by this Court. That is subject matter of Murder Reference No.

4/96. Kishori has challenged his conviction and sentence in Criminal Appeal No. 238 of 1996. Firstly, facts in brief may be noticed.

(3) The prosecution had initially submitted the challan against two persons, namely, Ram Pal Saroj and Shabnam. Devi Bai, Public Witness -3 gave a statement in another case (Sessions Case No. 18/95) wherein she named Kishori for killing her son Jagat Singh. In that statement she did not name any other accused. The Senior Public Prosecutor filed an application, in the present case, before learned Additional Sessions Judge stating that in Session Case No. 18/95 statement of Devi Bai had been recorded wherein she has implicated Kishori as one of the members of the rioters who had assaulted her family members who were killed by the rioters and praying that Kishori may be summoned to face trial along with other accused persons. A copy of the examination-in-chief of Devi Bai as Public Witness -7 in Session Case No. 18/95 recorded on 15th October 1995 was annexed with the application. The cross examination of Devi Bai had been deferred in the said case. On the said application dated 29th November, 1995, the learned Additional Sessions Judge passed the following order:-

'29.11.95Pr:A.B.Tandon Spp for the State. Sh. Promod Singh for accused Mukri @ Abdul. Copies given to Ram Pal Saroj and Mukri in person. An application has been made by Spp to summon Kishori as an accused in this case. Kishori be summoned in this case as an accused. To come up for 13.12.95. sd/- ASJ'

(4) By order dated 13th December 1995 passed by the Sessions Court the case was directed to be put up for arguments on charge for 11th January 1996 and Malti Goel, advocate, was appointed as amicus curiae for Kishori on State expense. The order also records that accused Kishori has been summoned on the basis of statement of Smt. Devi Bai. On 11th January 1996 all the accused were charged for commission of offences punishable under Sections 188, 148, 302 read with Sections 149, 397 read with Sections 149 and 436 read with Section 149 Indian Penal Code for disobeying the prohibitory Curfew orders on 1st November 1984 and having caused riots in the area; the accused with several other persons having formed an unlawful assembly the common object of which was to kill Sikhs and loot and burn their properties and at that time the accused were armed with

deadly weapons which they used for committing the riots; the accused were members of unlawful assembly of which the common object was to kill Surjan Singh, husband of Devi Bai and her two sons Ranbir Singh and Jagat Singh; accused were members of unlawful assembly which in prosecution of a common object looted House No. 32/18, Tirlokpuri, belonging to Devi Bai and while committing the offence they used deadly weapons and caused death of Surjan Singh, Ranbir Singh and Jagat Singh and burnt their said house.

(5) Ram Pal Saroj died during the trial. Shabnam was acquitted. Kishori, as already noticed, was convicted and death sentence was inflicted on him.

(6) Learned counsel for the State fairly submitted that there was no material other than the statement of Devi Bai in Sessions Case No. 18/95 to summon and charge Kishori. It was admitted by learned counsel for the State that the only provision empowering the Court to summon an accused not named in the chargesheet is Section 319 Criminal Procedure Code . That section reads as under:-

'SECTION 319. Power to proceed against other persons appearing to be guilty of offence (1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed. (2) Where such person is not attending the Court, he may be arrested or summoned as the circumstances of the case may require, for the purpose aforesaid. (3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of the offence which he appears to have committed. (4) Where the Court proceeds against any person under sub-section (1) then - (a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard; (b) Subject to the provisions of Clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced.'

(7) The learned Trial Court has not directed summoning of Kishori on the basis of the evidence recorded during the trial of Sessions Case No. 45/95. The learned

Court also did not record the statement of Devi Bai in the Sessions case out of which the present appeal and the reference has arisen and on that basis summoned Kishori. Kishori was summoned as an accused, on the basis of evidence recorded during the trial of another Sessions Case No. 18/95. A bare reading of the aforesaid provision would show that an accused cannot be summoned on the basis of evidence recorded during the trial of another case. Assuming Section 319 has any applicability the order of summoning has to be reasoned and speaking one. A person cannot be summoned in exercise of power under Section 319 Criminal Procedure Code . by a cryptic order like the one reproduced above. Learned State counsel did not contend that Kishori was summoned by learned Additional Sessions Judge independently of Section 319 on the basis of documents furnished under Section 173 Criminal Procedure Code . The power under Section 319 Criminal Procedure Code . is not to be exercised in routine. Such a power is required to be exercised sparingly. In this view, we are of the opinion that the order summoning Kishori cannot be sustained and consequently he could not be charged. It may also be noticed that Devi Bai in her statement recorded by the Police under Section 161 Criminal Procedure Code . did not name Kishori but had named Ram Pal Saroj and Shabnam for having beaten her husband and sons and for setting them on fire by pouring kerosene.

(8) The prosecution has examined 7 witnesses but the case hinges on the testimony of Public Witness -3 Smt.Devi Bai. Regarding other witnesses we may only note that Public Witness -7 Inspector Manphool Singh stated that 107 persons were apprehended on the spot. Admittedly, none of them who were apprehended from the spot were booked under Section 302 Indian Penal Code and Kishori was not one out of those 107 persons. The witness was confronted with her statement not naming Kishori. Kishori was named for the first time when statement of Devi Bai was recorded by learned Additional Sessions Judge on 15th October 1995 in another Sessions Case No. 18/95 which was made basis for summoning Kishori as an accused in the present case. As already held, order of summoning cannot be sustained in law. In the present case while appearing as Public Witness -3 Devi Bai now does not implicate Shabnam who was implicated by her in statement recorded by the Police on 21st December 1984.

(9) In our view the aforesaid are material contradictions on vital aspects and thus, in our opinion, it is not safe to base conviction of Kishori on sole testimony of Devi Bai. We have full sympathy with those who lost their near and dear ones during the unfortunate, inhuman and barbaric events of 1984 riots but that does not mean, that the conviction can be based or maintained on emotions whatever be the extent of the sympathy.

(10) For the aforesaid reasons we allow the appeal, set aside the impugned judgment and conviction and sentence awarded to Kishori. This order would also dispose of the Murder Reference 4 of 1996.

(11) The appellant Kishori shall be released forthwith unless wanted in any other criminal case.

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