

**Baskar Vs. State, Represented by Inspector of Police**

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**Court :** Chennai

**Decided On :** Mar-02-2001

**Reported in :** 2001CriLJ3426

**Judge :** A. Ramamurthi, J.

**Acts :** Code of Criminal Procedure (CrPC) , 1974 - Sections 213, 313 and 319

**Appeal No. :** Crl. Revn. No. 433 of 1999 and Crl M.P. No. 3549

**Appellant :** Baskar

**Respondent :** State, Represented by Inspector of Police

**Advocate for Def. :** C.M. Gunasekaran, G.A.

**Advocate for Pet/Ap. :** K.V. Sridharan, Adv.

**Disposition :** Revision allowed

**Judgement :**

ORDER

**A. Ramamurthi, J.**

1. Petitioner/Accused in S.C. No. 26 of 1998 on the file of Additional Sessions Judge, Thanjavur at Kumbakonam has preferred the revision. Aggrieved against the orders passed in Cri. M.P. No. 217 of 1999 dated 1-4-1999.

2. The case in Brief is as follows :

The Additional Public Prosecutor filed a memo under Section 319 of Criminal Procedure Code that PWs 1, 5 and 13 have implicated the father of the accused and also Selvaraj and Mani, who are the brothers of the accused. All the three of them have not been arrayed as accused. The respondent accused filed a counter and opposed the application after hearing the parties, The learned Judge allowed the application and aggrieved against this the present revision is filed.

3. Heard the learned counsel of both sides.

4. The point that arises for consideration is whether the order passed by the Court below is proper and correct ?

5. Point, the Additional Public Prosecutor filed a Memo under Section 319 of Criminal Procedure Code stating that as per the evidence given by PWs 1,5 and 13, the father of the accused Marimuthu and Selvaraja and Mani, the brothers of the accused have also taken part in the occurrence and they should be arrayed as accused. The petitioner/accused opposed the application and contended that the prosecution wants to fill up the lacuna belatedly after the completion of the examination under Section 313, of the Criminal Procedure Code. The case was posted for examination of the defence witnesses and only at that stage, the memo was filed by the prosecutor. Further, the Investigation Officer who was examined as PW 18 categorically stated that he did not find any material to show the involvement of the proposed three persons and as such, they were not included in the charge sheet already filed. It is also not the case of the prosecution that three proposed persons have also conspired in the commission of the offence. The learned Judge had extracted the evidence of PWs 1, 5 and 13 in the order, perusal of the evidence only indicates that the father of the accused had only directed them to settle the matter among themselves. They also stated that the two brothers of the accused also came there. Even under Ex. P. 1 it is stated that the father of the accused came there and the two brothers also came there. The learned Judge also looked into the 161 statement relating to the three witnesses referred to above and came to such a conclusion.

6. It is relevant to note that according to Section 319 of Criminal Procedure Code only when it appears from the evidence that any persons not being the accused, has committed any offence for which such person should be tried together with the accused the Court may proceed against such persons for the offence which they appear to have committed. The language employed under Section 319 would clearly indicate that only if it appears from the evidence that the proposed parties have also committed an offence, then only they can be proceeded for the offence together with the other accused. Now admittedly the examination of the accused under Section 313 of Criminal Procedure Code is over. If the prosecution felt that the three proposed persons are also the persons committed the offence, then even before the examination under Section 313 he should have filed the memo. The reasoning given by the learned Judge that the case has not been closed and as such the prosecution filed the application at any time cannot be accepted as a valid and sound one. The evidence given by the three persons was to the effect that the three proposed persons were also seen and apart from that, nothing has been stated about any overt act by any of them. The Court unfortunately without issuing any notice to the proposed persons have added them as accused and also directed issue of non bailable warrant to secure them to answer the charges. The procedure followed by the Court below is also not a correct one.

7. Learned counsel for the petitioner relied on the decision reported in Arunachalam Chairman, EID Parry v. R. Palaniapan (1995) 2 WMN (Cri) 260 wherein it was that under the guided Judicial principle of policy and principle of natural justice, if there is any evidence the persons sought to be added as accused before proceeding under Section 319 must be heard in person and Court should exercise judicial function as provided under the Code by serving notice upon the new person to be added as accused. The principle has not been adhered to in the present case and on this ground itself the order passed by the Court below is liable to be set aside.

8. Learned counsel for the petitioner also relied on the decision Michael Machado v. Central Bureau of Investigation wherein it was held as follows (Para 11):

The basic requirement of Section 319 Cr.P.C. is that the Court must have reasonable satisfaction from the evidence already collected during trial or in the inquiry regarding two aspects. First, that some other person, who is not arraigned as an accused in that case has committed an offence. Second, that for such offence that other person could as well be tried along with the already arraigned accused. It is not enough that the Court entertained some doubt, from the evidence about the involvement of another person in the offence. But even then what is conferred on the Court is only a discretion as could be discerned from the words 'the Court may proceed against such person'. The discretionary power so conferred should be exercised only to achieve criminal justice. It is not that the Court should turn against another person whenever it comes across evidence connecting that other person also with the offence. A judicial exercise is called for, keeping a conspectus of the case, including the stage at which the trial has proceeded already and the quantum of evidence collected till then and also the amount of time which the Court had spent for collecting such evidence. It must be remembered that there is no compelling duty on the Court to proceed against other persons unless the Court is hopeful that there is a reasonable prospect of the case as against the newly brought accused ending in being convicted of the offence concerned, the Court should refrain from adopting such a course of action...if the order of the Magistrate is to sustain, the proceedings in respect of the newly added persons are to be recommended afresh which means that the entire massive evidence thus far collected and the time which the Court has thus far spent for recording the evidence of such a large number of witnesses besides the costs involved for all concerned to reach up to the present stage, would all become for all practical purposes a waste a colossal waste.

This decision is applicable to the case on hand in all fours.

9. It is clear from the decisions cited above and also the decision in that so far as this case is concerned the prosecution has examined its witnesses including the Investigation Officer. The accused also examined under Section 213 of Criminal Procedure Code and the case was posted for examination of the defence witnesses and only at that! stage, the prosecution has come forward with the application under Section 319 of the Criminal Procedure Code. The Investigation

Officer had also clearly stated that during investigation nothing has come to light against the three proposed persons and as such they were not included in the charge sheet. As adverted to in Ex.P. 1 as well as the evidence of the three witnesses referred to above by Court below, there is nothing to indicate that there is sufficient material to proceed against them also and the case will end in conviction against them. Under the circumstance I am of the view that the trial Court has committed an error in not sending any notice to the proposed persons and passing an order without application of mind and such the order is liable to be set aside. Hence, the point is answered accordingly.

10. For the reasons stated above, the revision petition is allowed and the order passed by the Court below dated 1-4-1999 is set aside and Cri. M.P. No. 217 of 1999 is dismissed consequently Cri. M.P. No. 3549 of 1999 is closed.

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