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Court : Patna

Decided On : Oct-01-2010

Judge : Akhilesh Chandra, J.

Acts : Code of Criminal Procedure (CrPC) - Sections 319, 161, 164, 482

Appeal No. : CRIMINAL MISCELLANIOUS No.6763 OF 2005

Appellant : Vijoy Kumar VermA.

Respondent : State of Bihar.

Advocate for Def. : Mr. Atul Chandra; Mr. Damodar Pd. Tiwary; Mr. Rajendra Singh Shastry, Advs.

Advocate for Pet/Ap. : Mr. Uma Shankar Prasad; Bhubneshwar Pandey; Dr. Ansuman; Mr. Kamlakant Tiwary, Advs.

Judgement :

1. All the four applications arise out of one order of the court below dated 31.01.2005 and involved common question of law and fact. So they are heard together and being disposed of by this common order.

2. All the six applicants have filed these four applications seeking quashing of entire proceeding before court below besides the order dated 31.01.2005 passed by learned 8th Additional Sessions Judge, Muzaffarpur in Sessions Trial No. 202 of 2003 arising out of Mithanpura P.S. Case No. 40/2004 through which they have

been summoned as additional accused under section 319 of the Criminal Procedure Code on the prayer of Additional Public Prosecutor dated 12.10.2004.

3. The relevant facts of this case is that on the statement of one Poonam Kumar Mishra now deceased in Mithanpura P.S. Case No. 40/2002 was instituted against one Asmith Disuza and his few unknown associates (not named) alleging that eldest daughter of the informant Swarnima Payal aged 16 years, an examinee of 10+2 while being out of house to purchase some essentials on 10.03.2002(Sunday) at about 7 P.M. but did not return. However, he could know from different sources that the named accused a teacher employed in nearby school and residing in hostel has kidnapped the girl with the help of his associates. After institution of case investigation proceeded, during which named accused was apprehended, victim was also recovered and her statement was also recorded under sections 161, 164 of the Criminal Procedure Code. Ultimately, charge sheet no. 124/2002 was submitted on 20.08.2002 against Asmith Disuza, keeping the investigation pending on other points. However, on the original charge sheet cognizance was taken and after commitment of the case trial proceeded by way of Sessions Trial No. 202/2003 wherein four witnesses were examined including the victim, her mother and investigating officer of the case, thereafter prayer was made by the prosecution to add as many as nine more persons who have been summoned by impugned order including these six petitioners.

4. It would not be out of place to mention here that subsequent to submission of 1st charge sheet another charge sheet no. 104 dated 18.09.2004 was submitted against one Meera Devi/Meera Singh but again keeping the investigation pending on other points and finally on conclusion of the investigation charge sheet no. 75/2005 dated 23.06.2005 was also submitted, exonerating other 8 persons including the petitioners of three cases, except Baleshwar Prasad Verma whose name never emerged earlier and remained subject to investigation.

5. Here, it would be also not out of place to mention that subsequent to filing of second charge sheet again, cognizance was taken and after commitment of the case reasons best known to prosecution, and the court below one Sessions Trial no. 620/2004 proceeded separately for co- accused Meera Singh, wherein also

the victim and her mother have been examined respectively as prosecution witnesses no. 8 and 7 on 11.11.2008 and 22.08.2008.

6. Learned counsel for the petitioner while assailing the impugned order submitted that the court below while passing the order has wrongly considered the documents not duly brought as evidence during trial. Para 3 of the impugned order indicates that court below has examined besides F.I.R. statement of victim girl under section 164 of the Criminal Procedure Code. case diary, supplementary case diary and the evidence adduced by way of four witnesses out of whom P.W.1 was formal, P.Ws. 2 and 3 were respectively mother of the victim and the victim and P.W.4 was Investigating Officer, but even beyond going and examining the materials going into ambit of provision of section 319 of the Criminal Procedure Code, court below has not properly appreciated the materials by the time of filing a petition under section 319 of the Criminal Procedure Code, second charge sheet was also submitted but only against one Meera Devi/Meera Singh, but the court below ignoring the fact that police after investigation did not find anything against the petitioners though in varying statement, stage by stage the victim has tried to implicate others including the petitioners and further it is submitted that even subsequent to impugned order summoning the petitioners. The two witnesses upon whose statements court below has relied have completely exonerated the petitioners and this subsequent fact brings the entire prosecution of the petitioners meaningless. Which too was initiated only at the instance of original informant to satisfy his personal vendetta and grudge, taking undue advantage of his daughter being out of house for some period and institution of case for her kidnapping? On the other hand, Additional Public Prosecutor tried to led emphasis that no wrong was committed by the court below. Though the Additional Public Prosecutor could not find any support from the counsel representing the victim and her mother.

7. It would be relevant to mention here that at the initial stage of these applications informant filed his counter affidavit and shown his intention to contest the prayer but he is now dead and his widow and daughter (victim) both subsequently have not only changed their stand by making a different statement in another sessions trial arising out of same case, but here also by filing affidavit they have supported their changed stand stating that under some compelling circumstances under

pressure of the informant they had to made such statements implicating the petitioners, though, they stick on the submission that named accused Asmith Disuza who has already been convicted and matter is pending in appeal and Meera Devi/Meera Singh whose trial is going on are the real culprit and petitioners there not at all involved in the trial.

8. My attention was drawn towards 1st statement of the victim under section 161 of the Criminal Procedure Code wherein she has not named anyone else than Asmith Disuza and Meera Devi/Meera Singh. However, a few days thereafter in her statement under section 164 of the Criminal Procedure Code, victim appears making some statement about presence of few petitioners at initiation of the occurrence when she was said to have provided some cold drink by Asmith Disuza and she was losing her sense, similarly in her statement during trial of Asmith Disuza she has stated almost in same manner but at the same time, she did not find the petitioners at any subsequent stage and again in her subsequent statement in second trial involving Meera Devi/Meera Singh, she excluded presence of the petitioners, similarly, her mother appearing as witness in first case stated what she could gathered from statement of the victim and again in second trial she likewise her daughter excluded presence of the petitioners at the spot. In fact, if there was any material evidence it was victim alone and her mother's status is anything but other persons reproducing the information collected from her daughter.

9. From the impugned order, it does not appear that court below has ever considered the fact that investigation of the case was going on at the relevant time and charge sheet against another person (Meera Devi) had already been received prior to filing of the petition under section 319 of the Criminal Procedure Code seeking addition of the petitioners. Assuming the trial court was in dark about subsequent events pendency of investigation and submission of charge sheet against another. Name of Meera Devi/Meera Singh was also disclosed by the victim. What prevented the trial court to summon her along with other persons is also missing. If at all, during evidence there was any material warranting exercise of extra ordinary jurisdiction conferred under section 319 of the Criminal Procedure Code. The trial court is not to wait for a prayer to be made from the prosecution or

even on behalf of the accused facing trial, but such jurisdiction, if required to be exercised under law can be exercised suo motu.

10. The Apex Court in case of Bholu Ram v. State of Punjab and Another reported in 2009(1) BBCJ 104; in para 22 has held as such:

22. It is also settled law that power under Section 319 can be exercised either on an application made to the Court or by the Court suo motu. It is in the discretion of the Court to take an action under the said section and the Court is expected to exercise the discretion judicially and judiciously having regard to the facts and circumstances of each case."

The Apex court in same case has further in para 37 referring another case states as such:

"On a careful reading of Section 319 of the Code as well as the aforesaid two decisions, it becomes clear that the trial court has undoubted jurisdiction to add any person not being the accused before it to face the trial along with other accused persons, if the Court is satisfied at any stage of the proceeding on the evidence adduced that the persons who have not been arrayed as accused should face the trial. It is further evident that such person even though had initially been named in the F.I.R. as an accused, but not charge sheeted, can also be added to face the trial. The trial court can take such a 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 charge-sheet or the case diary, because such materials contained in the charge sheet or the case diary does not constitute evidence."

11. But at the same time, merely because some witnesses have said something reflecting against persons not facing trial, court is not bound to summon such persons mechanically. Here in the case in hand, before the trial court there was in fact solitary evidence of the victim along with deposition of Investigating Officer and in the evidence of the victim. Her earlier statement under section 164 of the Criminal Procedure Code also made part of the record as Exhibit 2. The trial court also claims to have gone through the case diary obviously he could have gone through the statement of the victim recorded under section 161 of the Criminal

Procedure Code. It was duty of the court to at least consider her statement at all the three stages, but it appears that court below either did not consider or failed to appreciate properly. The variations made at stage by stage inclusion of the persons including the petitioners and passed a mechanical order, which is not permissible. Here, in this context decision of the Apex Court in a case Kailash vs. State of Rajasthan and another reported in 2008(4) PLJR 246 SC; may be referred. Wherein para 9 read as such:

"9. The powers under Section 319 Cr.P.C. to proceed against any person who is not the accused are couched in the following words: "319. Power to proceed against otherpersons 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 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.

A glance at these provisions would suggest that during the trial it has to appear from the evidence that a person not being an accused has committed any offence for which such person could be tried together with the accused who are also being tried. The key words in this Section are "it appears from the evidence" . "any person" "has committed any offence". It is not, therefore, that merely because

some witnesses have mentioned the name of such person or that there is some material against that person, the discretion under Section 319 Cr.P.C. would be used by the court. This is apart from the fact that such person against whom such discretion is used, should be a person who could be tried together with the accused against whom the trial is already going on. This Court has, time and again, declared that the discretion under Section 319 Cr.P.C. has to be exercised very sparingly and with caution and only when the concerned court is satisfied that some offence has been committed by such person. This power has to be essentially exercised only on the basis of the evidence. It could, therefore, be used only after the legal evidence comes on record and from that evidence it appears that the concerned person has committed an offence. The words "it appears" are not to be read lightly. In that the court would have to be circumspect while exercising this power and would have to apply the caution which the language of the Section demands."

12. Apart from the materials available before the court below, discussed above, the statements of victim and her mother in separated Sessions Trial, proceeding with respect to co-accused against whom police had submitted charge sheet also needs consideration. Herein, the duo had produced the materials in shape of making statements excluding involvement of the petitioners and at this stage this court cannot refuse to consider the subsequent developments. Here reference may be given to decision of the Apex Court in a case of Superintendent and Remembrance of Legal Affairs, W.B., Appellant vs. Mohan Singh and Others, Respondents reported in AIR 1975 SC 1002; dealing with section 561A of Old Criminal Procedure Code equivalent to section 482 of the new code in para 2, it has been held:

"Section 561A preserves the inherent power of the High Court to make such orders as it deems fit to prevent abuse of the process of the court or to secure ends of justice and the High Court must, therefore, exercise its inherent powers having regard to the situation prevailing at the particular point of time when its inherent jurisdiction is sought to be invoked."

13. In the instant case, as indicated above there was great variation in the statement of the victim stage by stage with respect to the petitioners who were not named in her initial statements and again have been left in subsequent version of course during mids of the case there is some statement of the victim against the petitioners with whom as appears from other materials produced with these applications. Father of the victim the informant had some professional rivalry and several cases were filed against them but the informant could not get any success except getting the order of summons issued against the petitioners by the impugned order.

14. This court finds no necessity to go into the details of all such materials produced by way of different annexures to show unsuccessful attempts of the informant to implicate the petitioners in different nature of cases including some financial irregularities and getting them also departmentally punished by their employers only after emergence of their names in the instant case but this much is evident specially considering the varying statement of victim and her mother right from investigation till this court by filing affidavits one after another including their statement that they had been forced by the informant to make such statement against the petitioners.

15. This court arrives at the conclusion that it was an attempt to satisfy the personal vendetta and the informant to get the petitioners summoned and if proceedings against them by way of Sessions Trial No. 202A of 2003 (as separated from the original) before the court below, it shall be nothing but abuse of process of law and sheer wastage of precious judicial time, which is not permissible under law. Thus, to prevent such wrongs interference of this court is required in exercise of extra ordinary inherent jurisdiction conferred under Section 482 of the Criminal Procedure Code.

16. Accordingly, the impugned order is hereby quashed and the entire four applications stand allowed.

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