A ANIL SINGH AND ANR.

*v.*

STATE OF BIHAR AND ORS.

OCTOBER 19, 2006

B [S.B. SINHA AND DALVEER BHANDARI, JJ.]

*Code of Criminal Procedure, 1973—Section 319—Power to summon person as accused, against whom action not taken earlier—Nature and scope of—Rejection of application for issuance of summons against persons named in FIR but not sent up for trial upon investigation—Order quashed by High Court directing trial court to proceed in the matter—Trial court proceeding on the basis that direction was to issue process—On appeal held: Courts have power to summon such persons—Being an extra-ordinary power, it is to be done cautiously—Courts should arrive at a reasonable satisfaction that the prosecution would be able to prove charges against whom the processes are to be issued—Some evidence brought on record cannot be a ground to issue processes—Direction to the trial court was merely to proceed in the matter and not that processes be issued—Thus, matter remitted back to the trial judge to consider afresh.*

**Appellants were named in the first information report. However, upon investigation, Investigating Officer submitted a final form and the Magistrate accepted the same. During trial some evidence came against the appellant. Prosecution filed an application under section 319 Cr.P.C. Sessions Judge dismissed the application since there was doubt regarding the identity of the appellants. Informant filed application under section 482 Cr.P.C. High Court quashed the order and directed the trial court to proceed with the matter. In pursuance thereof, Sessions Judge proceeded on the basis that the High Court had issued direction upon it to issue processes. Hence the present appeals.**

**Partly allowing the appeal, the Court**

**HELD: 1.1. The jurisdiction of the court to issue processes against a person who has not been sent up for trial is not disputed. Processes can also be issued against such persons who although were named in the first information report, but were not sent up for trial upon investigation. The**

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jurisdiction of the court is limited. While it can exercise an extraordinary power, it is required to be done cautiously. The court while issuing the processes should arrive at a reasonable satisfaction that the prosecution would be able to prove the charges against whom the processes are sought to be issued. If the court comes to the conclusion having regard to the materials on record, that the prosecution ultimately may not be able to bring home the charge as against the persons against whom processes were to be issued, it would decline to do so. [510-B-D; 512-D-E] A B

1.2. It may be true that the court at that stage may not enter into the merit of the matter. Its opinion in the nature of things would be a *prima facie* one. But, the court must also consider that innocent persons may not be prosecuted. The court is not bound by the opinion of the investigating officer. It is required to apply the tests on the touchstone of the materials brought on record. A balance is required to be maintained. The court must pose unto itself a right question. It is required to scrutinize the materials more closely. A power under Section 319 Cr.P.C. is not to be exercised in a mechanical manner. Only because some evidence has been brought on record, the same by itself may not be a ground to issue processes. [512-E-G] C D

1.3. Sessions Judge, as observed by the High Court, proceeded on a wrong premise in holding that as no chargesheet was filed as against appellants by the police the same was not sufficient to refuse to issue summons. The question which was necessary to be posed was as to whether any case has been made out for exercise of extraordinary jurisdiction by the court keeping in view the fact as to whether the prosecution would be able to bring home the charge. [512-C-D] E

1.4. High Court did not direct that the processes be issued. It merely directed the trial judge to proceed in the matter in accordance with law. The same evidently did not mean that High Court has already arrived at a conclusion that the processes must be issued. High Court merely laid down a law as the trial judge went wrong in formulating the correct question of law. High Court did not have any occasion to consider the merit of the matter. Thus, the matter is remitted back to the trial judge to consider the question afresh. [512-H; 513-A-C] F G

*Municipal Corporation of Delhi* v. *Ram Kishan Rohtagi and Ors.*, [1983] 1 SCC 1; *Kishun Singh and Ors.* v. *State of Bihar*, [1993] 2 SCC 16; *Michael Machado and Anr.* v. *Central Bureau of Investigation and Anr.*, [2000] 3 SCC 262; *Krishnappa* v. *State of Karnataka*, [2004] 7 SCC 792; *Kavuluri* H

A *Vivekananda Reddy and Anr.* **v.** *State of A.P. and Anr.*, **[2005] 12 SCC 432;** *Palanisamy Gounder and Anr.* **v.** *State Represented by Inspector of Police,* **[2005] 12 SCC 327;** *Rukhsana Khatoon (Smt.)* **v.** *Sakhawat Hussain and Ors.,* **[2002] 10 SCC 661 and** *Girish Yadav and Ors.* **v.** *State of M.P.,* **[1996] 8 SCC 186, relied on.**

B CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1082 of 2006.

From the Final Judgment and Order dated 8.7.2004 of the High Court of Judicature at Patna in Criminal Misc. No. 33544 of 2001.

C Jaideep Gupta, Satyakam, Nikhil Nayyar, Chandra Bhushan Prasad and Jagjit Singh Chhabra for the Appellants.

Gopal Singh, Shakil Ahmed Syed and Anil K. Chopra for the Respondents.

The Judgment of the Court was delivered by

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**S.B. SINHA, J.** Leave granted.

These appeals are directed against a judgment and order dated 8.7.2004 passed by a learned Single Judge of the Patna High Court in Criminal Miscellaneous No. 33544 of 2001 whereby and whereunder an application E filed under Section 482 of the Code of Criminal Procedure on behalf of Respondent No. 2 herein has been allowed.

The question revolves round interpretation of Section 319 of the Code of Criminal Procedure. Respondent No. 2 herein lodged a first information report inter alia against Appellants alleging that in an incident which took F place at 8.30 a.m. on 16.7.1997, one Ranjit Singh (deceased) S/o Dileswara Singh was shot from behind as a result whereof he sustained bullet injuries. In the first information report, Appellants herein were specifically named. Upon an investigation, the Superintendent of Police having come to the conclusion that they had been falsely implicated, a final form was filed in their G favour. The said final form as against Appellants was accepted by the learned Magistrate. However, as a chargesheet was filed against the other accused, cognizance was taken against them.

Before the learned Sessions Judge, the prosecution examined three witnesses including the first informant. They, in their deposition, stated that H Respondents herein with the chargesheeted accused took part in commission

of the offence of murder of Ranjit Singh. A

Navin Kumar Singh (PW-1) in his evidence stated:

"Ranjit Singh, Prahlad Singh were there. They were sitting on the shop of Mahender Yadav. Ranjit and Prahlad went to the shop of Uchit Lal Mahto for taking tea. The witnesses state that at first B Prahlad Singh went to take tea. After some time, Ranjit was also going to the shop of Uchit Lal for taking tea. Ranjit was going from the shop of Mahender and when he reached at Pakki road, Pancha Mahto, Anil Singh, Biltu Mahto, Siyavar Singh reached there from the North side. Anil Singh was having a country-made Pistol in his hand." C

Prahalad Singh (PW-2) in his deposition stated:

"As Ranjit reached the road from the North, Anil Singh, Siyavar Singh, Pancha Mahto, Biltu Mahto came towards Ranjit. Anil Singh fired from the country-made Pistol from behind. On receiving the bullet shot, Ranjit fell on the road and died there." D

In cross-examination, he, however, stated:

"10. There are four persons by the name of Anil Singh in my village, Anil Singh s/o Sita Sharan, Anil S/o Upendra, Anil Singh s/o Ram Bujhavan, Anil Singh S/o Yugal Singh, they are all of my caste. I have E acquaintance with them. The house of Anil Singh s/o Sitasharan Singh is at a distance of ¼ K.M. from my house. The house of Mahtos is at a distance from my house. I recognize the faces of all the persons of Mahto Tola. I do not know the names of every one. I know about 100 persons of Mahto Tola by name..... F

20. After coming out of the shop of Uchit Lal, I ran towards East, West. I was injured of my own. I recognize Sanjivan and Hari Narain. Both of them are my uncles. Ranjit Singh was also my uncle in relation. I have no relationship with Anil Singh s/o Sita Sharan Singh. The house of Anil Singh is in my Tola..... G

28. I know Biltu Mahto for the past many days. He was not a leader of the Communist Party."

Harsh Narain Singh (PW-3), however, stated:

"3. Anil, Biltu, Siyavar, Pancha Mahto were coming from North. Anil H

A came near Ranjit and shot him dead by the Revolver. On being hit by Revolver, Ranjit died on the road. Siyavar Singh, Biltu Mahto, Pancha Mahto, asked to kill Prahalad. Pancha Mahto got ready to kill Prahalad by the knife and gave a blow on his stomach. When Prahalad stopped him, then his left hand was cut. Prahalad threw the bench and ran away. I recognize the accused Pancho Mahto who is present. I can B recognize on being seen. There was no opposition."

The prosecution thereafter filed an application for summoning Appellants purported to be in terms of Section 319 of the Code of Criminal Procedure. By a judgment and order dated 22.9.2001, the Second Addl. Sessions Judge C dismissed the said application *inter alia* holding that Appellants have been found to be innocent as there was doubt as regards their identity.

On an application filed under Section 482 of the Code of Criminal Procedure by the informant, the High Court, however, opined:

D "In the present case, the Opposite Parties 1 to 3 were named in the first information report and in the case diary there were sufficient materials against them, even then the final form was submitted by the Investigating Officer which was accepted by the learned Magistrate without observing the mandatory provisions of law. Now at the stage of trial some evidence has come against them and, as such, the order E passed by the learned trial court is wholly without jurisdiction. The finding of the learned trial court that identity of the Opposite Parties 1 to 3 cannot be established as their parentage is not given is against the materials on record as in the first information report and also in the charge-sheet the parentage of the Opposite Parties 1 to 3 have been given. In the deposition the parentage of the Opposite Parties F 1 to 3 has also been stated by the prosecution witnesses. As such, the petition filed by the prosecution under Section 319 of the Code should not have been dismissed on this ground. As far as the submission made by the learned counsel appearing on behalf of Opposite Parties 1 and 2 that rightly or wrongly they were made G accused by an earlier order, which was quashed by this Hon'ble Court, therefore, they cannot be summoned under Section 319 of the Code is concerned, I must say that this argument has no leg to stand. Once the order dated 16.8.1998 that status of the Opposite Parties was not as an accused and, as such, they can be summoned under Section 319 of the Code.

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One consideration of the entire materials and arguments advanced on behalf of the parties I am of the view that the order impugned is without jurisdiction. The order impugned dated 22.9.2001 passed by the IInd Additional Sessions Judge, Madhubani is quashed. The trial court is directed to proceed in the matter in accordance with law."

Appellants are, thus, before us.

Mr. Jaideep Gupta, learned senior counsel appearing on behalf of Appellants, would submit that although there is no bar in law in issuing summons to an accused, who had been named in the first information report but had not been sent up for trial, by the court in exercise of its jurisdiction under Section 319 of the Code of Criminal Procedure, the power of the court being extraordinary in nature is required to be exercised very sparingly. It was contended that the learned Sessions Judge at the later stage of the proceeding proceeded on the basis that the High Court had issued a direction upon it to issue processes and, thus, the processes have since been directed to be issued.

Mr. Gopal Singh, learned standing counsel appearing on behalf of Respondent-State, on the other hand, would contend that the High Court cannot be said to have committed any error in passing the impugned judgment having regard to the evidences brought on records.

Section 319 of the Code of Criminal Procedure reads, thus:

"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

A (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
B if such person had been an accused person when the court took cognizance of the offence upon which the inquiry or trial was commenced."

As noticed, the jurisdiction of the court to issue processes against a person who has not been sent up for trial is not disputed. Processes can also
C be issued against such persons who although were named in the first information report, but were not sent up for trial upon investigation.

The jurisdiction of the court indisputably is limited. While it can exercise an extraordinary power, it is required to be done cautiously. The court while issuing the processes should arrive at a reasonable satisfaction that the
D prosecution would be able to prove the charges against whom the processes are sought to be issued.

The law in this behalf has been laid down in *Municipal Corporation of Delhi* v. *Ram Kishan Rohtagi and Ors.*, [1983] 1 SCC 1 in the following terms:

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"But, we would hasten to add that this is really an extraordinary power which is conferred on the court and should be used very sparingly and only if compelling reasons exist for taking cognisance against the other person against whom action has not been taken."

F [See also *Kishun Singh and Ors.* v. *State of Bihar,* [1993] 2 SCC 16]

In *Michael Machado and Anr.* v. *Central Bureau of Investigation and Anr.*, [2000] 3 SCC 262, this Court opined:

"11. The basic requirements for invoking the above section is that it
G should appear to the court from the evidence collected during trial or in the inquiry that some other person, who is not arraigned as an accused in that case, has committed an offence for which that person could be tried together with the accused already arraigned. It is not enough that the court entertained some doubt, from the evidence, about the involvement of another person in the offence. In other
H words, the court must have reasonable satisfaction from the evidence

already collected regarding two aspects. First is that the other person has committed an offence. Second is that for such offence that other person could as well be tried along with the already arraigned accused." A

Yet again in *Krishnappa* v. *State of Karnataka,* [2004] 7 SCC 792, this Court observed:

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"9. In *Michael Machado* v. *Central Bureau of Investigation* construing the words "the court may proceed against such person" in Section 319 CrPC, this Court held that the power is discretionary and should be exercised only to achieve criminal justice and that the court should not turn against another person whenever it comes across evidence connecting that other person also with the offence. This Court further held that a judicial exercise is called for, keeping a conspectus of the case, including the stage at which the trial has already proceeded and the quantum of evidence collected till then, and also the amount of time which the court had spent for collecting such evidence. The court, while examining an application under Section 319 CrPC, has also to bear in mind that there is no compelling duty on the court to proceed against other persons. In a nutshell, it means that for exercise of discretion under Section 319 CrPC, all relevant factors, including the one noticed above, have to be kept in view and an order is not required to be made mechanically merely on the ground that some evidence had come on record implicating the person sought to be added as an accused." C D E

The said dicta has been followed by this Court in *Kavuluri Vivekananda Reddy and Anr.* v. *State of A.P. and Anr.*, [2005] 12 SCC 432 and *Palanisamy Gounder and Anr.* v. *State Represented by Inspector of Police,* [2005] 12 SCC 327. F

In *Rukhsana Khatoon (Smt.)* v. *Sakhawat Hussain and Ors.*, [2002] 10 SCC 661, whereto our attention has been drawn by learned standing counsel, this Court did not law down any lay having universal application. It merely opined that the court may exercise its power under Section 319 of the Code of Criminal Procedure also in relation to such accused who had although been named in the first information report, but was not sent up for trial stating: G

"6. The learned counsel for the respondents contended that the High Court was justified in passing the impugned order and in support of his contention he has relied upon the decision in *Municipal Corpn.* H

A *of Delhi* v. *Ram Kishan Rohtagi.* In our view, there is no substance in his contention. In that case also, after considering Section 319 CrPC, this Court held that the said provision gives ample power to any court to take cognizance and add any person not being an accused before it and try him along with other accused, if there appears during the trial sufficient evidence indicating his involvement in the offence. The Court also observed that this power is really an extraordinary power and should be used very sparingly."

[See also *Girish Yadav and Ors.* v. *State of M.P.*, [1996] 8 SCC 186, at page 197]

C The court's power, as noticed hereinbefore, is not disputed. The learned Sessions Judge, however, as has been observed by the High Court, proceeded on a wrong premise in holding that as no chargesheet was filed as against Appellants by the police the same was not sufficient to refuse to issue summons. The question, which was necessary to be posed in view of the D propositions of law as noticed supra, was as to whether any case has been made out for exercise of extraordinary jurisdiction by the court keeping in view the fact as to whether the prosecution would be able to bring home the charge. If the court comes to the conclusion having regard to the materials on record, that the prosecution ultimately may not be able to bring home the charge as against the persons against whom processes were to be issued, it E would decline to do so. The court must also take into consideration the fact as to whether an appropriate case has been made out for exercise of the extraordinary jurisdiction.

It may be true that the court at that stage may not enter into the merit F of the matter. Its opinion in the nature of things would be a *prima facie* one. But, the court must also consider that the innocent persons may not be prosecuted. The court is not bound by the opinion of the investigating officer. It is required to apply the tests on the touchstone of the materials brought on record. A balance is required to be maintained. The court must pose unto itself a right question. It is required to scrutinize the materials more G closely. A power under Section 319 of the Code of Criminal Procedure is not to be exercised in a mechanical manner. Only because some evidence has been brought on record, the same by itself may not be a ground to issue processes.

The learned Judge of the High Court by its judgment did not direct that H

the processes be issued. It merely directed the learned Trial Judge to proceed in the matter in accordance with law. The same evidently did not mean that the High Court has already arrived at a conclusion that the processes must be issued. The High Court merely laid down a law as the learned Trial Judge went wrong in formulating the correct question of law. The High Court, however, did not have any occasion to consider the merit of the matter. In that view of the matter, we would remit the matter back to the learned Trial Judge and direct that the question be considered afresh in the light of the observations made hereinbefore. As the case is pending for a long time, we would request the learned Trial Court to consider the desirability of disposing the matter as expeditiously as possible. The appeals are allowed to the aforementioned extent.

A B C

N.J. Appeals partly allowed.