BRINDABAN DAS AND ORS. A

v.

STATE OF WEST BENGAL

(Criminal Appeal No. 9 of 2009)

JANUARY 7, 2009 B

[ALTAMAS KABIR AND MARKANDEY KATJU, JJ.]

CODE OF CRIMINAL PROCEDURE, 1973:

s.319 – Power of trial court to proceed against other persons appearing to be guilty of offence – Persons not named in FIR, nor mentioned in charge-sheet, nor sent up for trial, but after two years of their discharge from the case, trial court issuing warrants of arrest against them – Held: In order to invoke power u/s 319, court is not merely required to take note of the fact that name of a person has surfaced during trial but it has also to consider whether the evidence would be sufficient to convict him – In the instant case, on the evidence adduced as regards the persons summoned u/s 319, it cannot be said with any amount of certainty that the same would in all probability secure conviction against them -- Order of trial court issuing warrants of arrest, and of High Court staying execution of warrants and directing the addresees to surrender and then seek bail are set aside. C D E

An F.I.R. alleging murder of the father of the complainant was lodged on 29.11.2002 on the allegations that besides the assailant several other persons could have been behind the incident. The appellants applied for and were granted bail. The appellants were neither shown in the charge-sheet nor were they sent up for trial, on the other hand, by an order dated 30.6.2004, they were discharged from the case. Later, on an application filed u/s 319 Cr.P.C by the complainant, the trial court, on 22.6.2006, issued warrants of arrest against the appellants F G

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A for their alleged refusal to receive summons which had been issued to them earlier u/s 319 Cr.P.C. The High Court in its revisional jurisdiction stayed execution of the warrants holding that there was no willful defiance of the summons to necessitate issuance of warrants, and B directed the appellants to surrender before the court within three weeks and thereafter to apply for bail.

In the instant appeal, it was contended for the appellants that there was no direct evidence against them which could have formed the basis for issuance of C summons u/s 319 Cr.P.C. and the entire case was hearsay in nature, that the trial court ought not to have issued summons u/s 319 Cr.P.C. without recording satisfaction as to the sufficiency of evidence on record for securing conviction against the appellants.

D

Allowing the appeal, the Court

HELD: 1.1. In matters relating to invocation of powers u/s 319 Cr.P.C., the Court is not merely required to take E note of the fact that the name of a person who has not been named as an accused in the F.I.R. has surfaced during the trial, but it has also to consider whether such evidence would be sufficient to convict the person being summoned. Since issuance of summons u/s 319 Cr.P.C. entails a denovo trial and a large number of witnesses F may have to be examined and their re-examination could prejudice the prosecution and delay the trial, the trial court has to exercise such discretion with great care and perspicacity. [Para 18] [96-F-H; 97-A]

G 1.2. The power u/s 319 Cr.P.C. is to be invoked, not as a matter of course, but in circumstances where the invocation of such power is imperative to meet the ends of justice. The fulcrum on which the invocation of Section 319 Cr.P.C. rests is whether the summoning of persons H other than the named accused would make such a

difference to the prosecution as would enable it not only to prove its case but also to secure conviction of the persons summoned. [Paras 18 and 19] [97-B-C]

Municipal Corporation of Delhi vs. Ram Kishan Rastogi, **1983 (1) SCC 1;** *Michael Machado vs. CBI,* **2000 (3) SCC 262;** *Krishnappa vs. State of Karnataka,* **2004 (7) SCC 792 and** *Kuvuluri Vivekananda Reddy vs. State of A.P.* **2005 (12) SCC 432, relied on.**

Rajender Singh vs. State of U.P. **2007 (7) SCC 378 and** *Bholu Ram vs. State of Punjab* **2008 (9) SCC 140, referred to.**

1.3. In the instant case, on the quality of the evidence adduced by the prosecution as far as the appellants are concerned, it is difficult to hold with any amount of certainty that the same would in all probability secure a conviction against the appellants. The evidence which seeks to connect the appellants with the commission of the offence are hearsay in nature. Except for a statement in the F.I.R. that the complainant strongly believed that the murder of her father was pre-planned and there were many conspirators involved, there is no direct evidence of complicity of the appellants in the incident and, therefore, it would not be proper to subject them to trial by invoking the provisions of s. 319 Cr.P.C. The order passed by the trial court issuing summons to the appellants u/s 319 Cr.P.C. and the order of the High Court directing them to surrender before the trial court and to apply for bail are set aside. [Para 20 and 22] [97-H; 98-A-C]

Case Law Reference:

2000 (3) SCC 262	**relied on**	**Para 9**
2004 (7) SCC 792	**relied on**	**Para 10**
2005 (12) SCC 432	**relied on**	**Para 11**

A	**1983 (1) SCC 1**	**relied on**	**Para 12**
	2007 (7) SCC 378	**referred to**	**Para 14**
	2008 (9) SCC 140	**referred to**	**Para 16**

B CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 9 of 2009.

From the Judgment and Order dated 22.11.2006 of the High Court of Calcutta at Calcutta in C.R.R. No. 2058 of 2006.

C Pradip Ghosh, P.S. Narasima, Pijush K. Roy, Amit De and G. Ramakrishna Prasad for the Appellants.

Avijit Bhattacharjee, Saumya Kundu, H.K. Puri. V.M. Chauhan, S.K. Puri and Priya Puri for the Respondents.

D The Judgment of the Court was delivered by

ALTAMAS KABIR, J. 1. Leave granted.

2. On an application filed by the defacto complainant under Section 319 of the Code of Criminal Procedure, the Additional E District and Sessions Judge, Fast Track Court, Jhargram, by his order dated 14.6.2006 directed the appellants to appear before the Court on 22.6.2006 in connection with S.T. Case No.XXIX/February, 2006 under Section 302 of the Indian Penal Code (G.R. case No.450 of 2002).

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3. The complainant, Ashok Kumar Pattanayak, lodged the First Information Report at Gopiballabhpur PS on 29.11.2002 at about 8.25 a.m. alleging that on the same date at about 7.30/ 8.00 a.m. while his father, Ramesh Chandra Pattanayak, was G supervising the work in his brick field known as Hena Brick, he was assaulted on the head from behind with a spade (kodal), as a result whereof he died instantly. The driver of the truck to whom the deceased was speaking at the time of assault and the khalasi of the truck, as well as other labourers, raised a alarm. The police also arrived at the spot and apprehended the H

assailant, Laxman Murmu. In the FIR it was alleged that besides Laxman Murmu, several other persons could also have been behind the incident. The said FIR was written by Ila Pattanayak, the sister of the de-facto complainant, and on the basis of the said complaint, Gopiballabhpur PS Case No.48 of 2002 dated 29.11.2002, was started against the said Laxman Murmu under Section 302 IPC.

4. During the investigation of the above case, the appellants herein filed an application under Section 438 of the Code of Criminal Procedure before the Sessions Judge and such prayer for anticipatory bail was allowed on 14.8.2003. The appellants were directed to appear before the Sub-Judicial Divisional Magistrate, Jhargram, and on their appearance before the learned Magistrate on 16.8.2003, the appellants were released on temporary bail with a direction to them to bring appropriate orders from the higher Court. Subsequently, on an application under Section 439 Cr.P.C. the Sessions Judge, Paschim Midnapur, granted bail to the appellants on 23.9.2003. The de-facto complainant thereupon filed an application under Section 439(2) Cr. P.C. before the Sessions Judge praying for cancellation of the bail granted to the appellants but the same was rejected on 16.12.2003. After completion of investigation the police submitted charge-sheet against the accused Laxman Murmu. As there was no material against the appellants herein they were neither shown in the charge-sheet nor were they sent up for trial and on the prayer made by the Investigating Officer the appellants were discharged from the case by order dated 30.6.2004.

5. Two years later on 22.6.2006 the trial Court issued warrants of arrest against the appellants for their alleged refusal to receive summons which had been issued to them earlier under Section 319 Cr.P.C. The said order was challenged in the High Court in its revisional jurisdiction and it was submitted that once the appellants had been discharged on the prayer made on behalf of the Investigating Officer, the trial Court erred

A in issuing the summons under Section 319 of the Code on the same materials.

6. The High Court came to the conclusion that there had not been any wilful defiance of the summons which necessitated the issuance of warrant of arrest and disposed of the revision B application with a direction to the appellants herein to surrender before the Court within 3 weeks from the date of the order and thereafter to apply for bail. The execution of the warrant of arrest was stayed for a period of four weeks for the said purpose.

C 7. It is against the said order of the High Court that the present appeal has been filed.

8. Mr. Pradip Ghosh, learned senior advocate, appearing for the appellants, submitted that in the instant case there was D no direct evidence against the appellants which could have formed the basis for issuance of summons under Section 319 Cr.P.C. Not a single eye-witness had been cited in the instant case and the entire evidence was hear-say in nature. Mr. Ghosh submitted that even the complaint had been lodged by the daughter of the deceased who had not seen the incident and E had come to the place of occurrence after the offence had been committed on being informed of the same. Mr. Ghosh submitted that as provided in Section 60 of the Indian Evidence Act, 1872, oral evidence must in all cases, be direct and when an accused is discharged under Section 245 Cr.P.C., in the absence of any F fresh material, summons under Section 319 of the Code could not be issued on the same evidence. It was submitted that in the instant case, nothing new had surfaced during the trial and the evidence that was available before the Court at the stage of Sections 244 and 245 of the Code continued to be the only G evidence available when the application under Section 319 had been made. Mr. Ghosh submitted that the trial Court had committed an error in allowing the application of the de-facto complaintant under Section 319 and summoning the appellants in the absence of any evidence against them within the meaning H of Section 60 of the Evidence Act.

9. In this regard, Mr. Ghosh firstly referred to the oft-repeated decision of this Court in the case of *Michael Machado vs. CBI,* [2000 (3) SCC 262] where the essential conditions for the exercise of power under Section 319 of Cr.P.C. had been considered and it was held that the power under Section 319 vested in the Court should be used sparingly and the evidence on which the same was to be invoked should indicate a reasonable prospect of conviction of the persons to be summoned. This Court went on to hold that mere suspicion of the involvement of the person concerned in the offence was not enough, particularly when a large number of witnesses had been examined and no evidence on which conviction could be secured had been adduced on behalf of the prosecution. It was ultimately observed that in such a case there could be no justification for proceeding against the persons summoned under Section 319 which would entail recommencing the whole proceedings against the newly-added persons and re-examining the witnesses already examined.

10. Mr. Ghosh also referred to the decision of this Court in *Krishnappa vs. State of Karnataka,* [2004 (7) SCC 792] wherein a similar question fell for consideration and again a note of caution was sounded with regard to invocation of the extraordinary and discretionary powers under Section 319 of the Code. Their Lordships, while observing that a person can be summoned even though proceedings had earlier been quashed as far as he was concerned, held that the invocation of the power under Section 319 should not have been resorted to, since the chances of conviction on the basis of the evidence on record was remote. Holding that the Trial Court was right in rejecting such prayer, since the case against the appellant had been quashed nine years prior to issuance of summons under Section 319 Cr.P.C., this Court held that the High Court had erroneously reversed the order of the Trial Court even though the chances of conviction on the basis of the evidence adduced was very remote.

A 11. The same view was reiterated in the case of *Kuvuluri Vivekananda Reddy vs. State of A.P.* [2005 (12) SCC 432) where a similar challenge to the summons issued under Section 319 of the Code was repelled on the ground that the statement of the witnesses examined was only general in B nature on the basis of which summons under Section 319 of the Code ought not to have been issued. Once again a note of caution was sounded that the provisions of Section 319 are required to be used very sparingly and the summoning of the appellants after the expiry of eight years, on the facts and C circumstances of the case and having regard to the nature of the deposition of the witnesses, was not called for.

12. Mr. Ghosh finally referred to the decision of this Court in *Municipal Corporation of Delhi vs. Ram Kishan Rastogi,* [1983 (1) SCC 1], which is one of the earlier cases where the D scope of Section 319 had been dealt with and thereafter followed in the subsequent cases, wherein it had been observed as follows:-

> "In these circumstances, therefore, if the prosecution E can at any stage produce evidence which satisfies the Court that the other accused or those who have not been arrayed as accused against whom proceedings have been quashed have also committed the offence Court can take cognizance against them and try them along with the other F accused. 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 cognizance against the other person against whom action has not been taken. More G than this we would not like to say anything further at this stage. We leave the entire matter to the discretion of the Court concerned so that it may act according to law. We would, however, make it plain that the mere fact that the proceedings have been quashed against respondents 2 to 5 will not prevent the Court from exercising its discretion H

if it is fully satisfied that a case for taking cognizance against them has been made out on the additional evidence led before it.' A

13. On the basis of his aforesaid submissions, Mr. Ghosh urged that the Trial Court ought not to have issued summons against the appellants herein under Section 319 Cr.P.C. without recording satisfaction as to the sufficiency of the evidence on record for securing a conviction against the appellants. B

14. Appearing for the State of West Bengal, Mr. Avijit Bhattacharjee referred to the decision of this Court in *Rajender Singh vs. State of U.P.* [2007 (7) SCC 378] where it was reiterated that although a person may not have been charge-sheeted by the Investigating Agency or may have been discharged at an earlier stage, the Court could summon such person to face trial if it appeared to the Court that an offence had been committed by such person. It was held that while the decision to proceed or not to proceed against a person under Section 319 of the Code was in the discretion of the Trial Court, the said decision would have to be taken after the Court applied its mind to the evidence before it. Disagreeing with the earlier views expressed by this Court, it was held that the Court's powers under Section 319 Cr.P.C could not be fettered either by calling it extraordinary or by stating that it could be exercised only in exceptional circumstances. C D E

15. Mr. Bhattacharjee submitted that in the light of the aforesaid decision there could not be any controversy that the Court's powers under Section 319 Cr.P.C. was discretionary and unfettered, though dependent on the quality of the evidence adduced by the prosecution. Mr. Bhattacharjee submitted that no case had been made out for interference with the order of the High Court and the appeal was liable to be dismissed. F G

16. The same submissions were advanced by Mr. Puri appearing for the de-facto complainant, Ashok Pattanayak, who had been impleaded as respondent No.2 in the present appeal. H

A Mr. Puri referred to the decision of this Court in *Bholu Ram vs. State of Punjab* [2008 (9) SCC 140] wherein it had been held that Section 319 Cr.P.C. empowered the Court to proceed against any person not shown to be an accused, if it appeared from the evidence that such person had committed an offence B for which he could be tried along with the accused. It was further observed that when in a case against one or more accused a Magistrate finds from the evidence adduced that some person other than the accused was also involved in that very offence, it was only proper that the Magistrate should have power to C summon by joining such person as an accused in the case.

17. It was further observed that the primary object of Section 319 Cr.P.C. is that the whole case against all the accused should be tried and disposed of not only expeditiously, but also simultaneously. The power under Section 319 Cr.P.C. D must be regarded and considered as incidental and ancillary to the main power to take cognizance as part of the normal process in the administration of justice and that the same could be exercised either on an application made to the Court or by the Court *suo moto* and it was in the discretion of the Court to E take action under the said Section having regard to the facts and circumstances of each case. Mr. Puri also urged that the decision of the High Court could not be faulted and the appeal was liable to be dismissed.

F 18. The common thread in most matters where the use of discretion is in issue is that in the exercise of such discretion each case has to be considered on its own set of facts and circumstances. In matters relating to invocation of powers under Section 319, the Court is not merely required to take note of the fact that the name of a person who has not been named G as an accused in the F.I.R. has surfaced during the trial, but the Court is also required to consider whether such evidence would be sufficient to convict the person being summoned. Since issuance of summons under Section 319 Cr.P.C. entails a denovo trial and a large number of witnesses may have been H

examined and their re-examination could prejudice the prosecution and delay the trial, the Trial Court has to exercise such discretion with great care and perspicacity. Although, a somewhat discordant note was struck in *Rajender Singh's* case (supra) the views expressed in the majority of decisions of this Court on the point subscribe to the view that the power under Section 319 Cr.P.C. is to be invoked, not as a matter of course, but in circumstances where the invocation of such power is imperative to meet the ends of justice.

19. The fulcrum on which the invocation of Section 319 Cr.P.C. rests is whether the summoning of persons other than the named accused would make such a difference to the prosecution as would enable it not only to prove its case but to also secure the conviction of the persons summoned.

20. In the instant case, on the quality of the evidence adduced by the prosecution as far as the appellants are concerned, it is difficult to hold with any amount of certainty that the same would in all probability secure a conviction against the appellants. The evidence which seeks to connect the appellants with the commission of the offence are hearsay in nature. Section 319 Cr.P.C. contemplates a situation where the evidence adduced by the prosecution not only implicates a person other than the named accused but is sufficient for the purpose of convicting the person to whom summons is issued. The law in this regard was explained in *Ram Kishan Rastogi's* case (supra) and as pointed out by Mr. Ghosh, consistently followed thereafter, except for the note of discord struck in *Rajender Singh's* case (supra). It is only logical that there must be substantive evidence against a person in order to summon him for trial, although, he is not named in the charge-sheet or he has been discharged from the case, which would warrant his prosecution thereafter with a good chance of his conviction.

21. Since in the present case, except for a statement in the F.I.R. that the complainant strongly believed that the murder

A of her father was pre-planned and there were many conspirators involved, there is no direct evidence of the complicity of the appellants in the incident, it would not be proper to subject the appellants to trial by invoking the provisions of Section 319 Cr.P.C.

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22. We, therefore, allow the appeal and set aside the order dated 14.6.2006 passed by the Additional District and Sessions Judge, F.T.C., Jhargram, issuing summons to the appellants under Section 319 Cr.P.C. and the impugned order of the High Court dated 22.11.2006 directing the appellants to C surrender before the Trial Court and to apply for bail.

23. The appeal is accordingly allowed.

R.P. Appeal allowed.