

CASE NO.:
Appeal (crl.) 416 of 2008

PETITIONER:
Kailash

RESPONDENT:
State of Rajasthan & Anr

DATE OF JUDGMENT: 03/03/2008

BENCH:
S.B. Sinha & V.S. Sirpurkar

JUDGMENT:
J U D G M E N T

CRIMINAL APPEAL NO 416 OF 2008
(Arising out of SLP (Crl.) 647 of 2006)

V.S. SIRPURKAR, J.

1. Leave granted.

2. Aggrieved by the order passed by the High Court in Criminal Revision, the accused comes up before this Court by way of this appeal.

3. By its impugned order, the High Court allowed the Revision and directed the Trial Court to re-hear the application filed under Section 319 of the Code of Criminal Procedure by applying its judicious mind and to pass the appropriate order according to law.

4. The following facts will be necessary for our purpose. On 12.11.2003 a written report came to be made at Police Station Neem-ka-Thana, District Sikar, Rajasthan by one Rohitas Kumar, contending therein that while he was having his dinner at his home, he was attacked by Ram Prasad Kailash, Pawan Kumar, Krishan Kumar, Chameli and Manju. It was asserted therein that Chemely and Manju also assaulted his wife Maya Devi. On the basis of this report offences were registered under Sections 147, 148, 341, 452, 24/149, 323, 324/149 and 308/149 IPC. The investigation proceeded and a charge-sheet came to be filed. However, in that charge-sheet the present appellant Kailash was not arrayed as an accused. During the course of trial when the prosecution witnesses were examined, the complainant moved an application under Section 319 Cr.P.C. However, that application came to be rejected. In that application, the complainant alleged that the present appellant Kailash was bound to be joined as an accused as it was clear from the records and the evidence that there was enough material against him.

5. This application was opposed by the other accused persons on the ground that there was no material against Kailash and, therefore, there was no basis for taking cognizance on the basis of the application made by the complainant. The State supported the application contending that the witnesses had stated that Kailash had held an axe in his hand that he had hit on the hand and head of Rohitas. The injury on the head of Rohitas was proved from the medical report and that Rohitas, Ram Singh Ramavtar and Maya Devi had also involved Kailash in their statements before the police under Section 161 Cr.P.C.

6. The learned Sessions Judge took stock of the evidence which was led during the trial and came to the conclusion that there was nothing in the First Information Report (Exh.P-1) to suggest that Kailash was having an axe in his hand and that he had caused the injury on the head or finger of the injured Rohitas. He also found that in the statements of the witnesses including injured Rohitas, Ram Singh, Ramavtar and Maya Devi, nobody had stated that Kailash was having an axe in his hand and he

caused any injury to Rohitas with axe. He found that Rohitas, in his police statement, has stated to have been hit with a lathi. The Sessions Judge also observed that even if Kailash was presumed to be present at the place of occurrence, it was not proved that he took part in the assault and there was no justification for taking any cognizance against him. He found that Rohitas (PW1) in his statement had improved upon his evidence before the court and had added that Kailash inflicted axe blow on his hand and head, however, his injuries suggested that they were caused by a blunt weapon. It was also found by the learned Sessions Judge that even Ramavtar (PW3) had deposed that nobody struck Rohitas with an axe before him. Even Maya (PW-4) had also not stated in her statement about Kailash to have inflicted injuries to Rohitas with an axe. Although these witnesses had stated in their evidence that Kailash was having an axe in his hand, the Sessions Judge found that they have made improvement in their evidence. He accordingly dismissed the application by his order dated 24.4.2004.

7. It was this order of the Sessions Judge which was challenged by way of a Revision Petition. The Revision remained on pending and in the meantime, however, the other five accused, against whom the prosecution was going on, were acquitted of the charges under Sections 147, 148, 452, 324 or 324/149, 325 or 325/149, 308/149 and 341 of the Indian Penal Code. Only three accused came to be convicted for offences under Section 323 IPC, they were accused Krishna Kumar, Smt. Manju Devi and Chameli. They were, however, not awarded with any punishment and were given the benefit of Section 4 of the Parole Act. Very strangely, the trial was not stayed during the pendency of the Revision Petition before the High Court.

8. Learned counsel appearing on behalf of the appellant pointed out that the High Court, while exercising its revisional jurisdiction, has patently erred in relying on the observations made by the Sessions Judge in his acquittal judgment. According to the learned counsel, the High Court has not applied itself as to the correctness of the discretion exercised by the Trial Court in not summoning the accused. It was pointed out that merely because some witnesses in their evidence had involved Kailash, that by itself would not be sufficient to exercise the powers under Section 319 Cr.P.C. As against this the learned counsel for the respondents supported the order and pointed out that there were some observations made by the learned Sessions Judge in his judgment while acquitting the other accused persons. On these rival submissions it is to be seen as to whether the High Court was right in allowing the Revision and directing the Sessions Judge to reconsider the application under Section 319 Cr.P.C. afresh.

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 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 \026

(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.

10. In a reported decision in Mohd. Shafi v. Mohd. Rafiq & Anr. [JT 2007 (5) SC 562], to which one of us (Sinha, J.) was a party, this Court had observed in para 7 as under:

"Before, thus, a trial court seeks to take recourse to the said provision, the requisite ingredients therefore must be fulfilled. Commission of an offence by a person not facing trial, must, therefore, appear to the court concerned. It cannot be ipse dixit on the part of the court. Discretion in this behalf must be judicially exercised. It is incumbent that the court must arrive at its satisfaction in this behalf."

In the above case this Court referred to the decision reported in Municipal Corporation of Delhi v. Ram Krishan Rohtagi & Ors. [(1983) 1 SCC 1] and highlighted the following remarks made in para 19 therein which are to the following effect:

"19. 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."

It was further stated in para 13:

"It is evident that before a court exercises its discretionary jurisdiction in terms of Section 319 of the Code of Criminal Procedure, it must arrive at the satisfaction that there exists a possibility that the accused so summoned in all likelihood would be convicted. Such satisfaction can be arrived at inter alia upon completion of the cross-examination of the said witness. For the said purpose, the court concerned may also like to consider other evidence." (Emphasis supplied).

11. In Krishnappa v. State of Karnataka [(2004) 7 SCC 792] this Court, while relying on another reported decision in Michael Machado v. Central Bureau of Investigation [(2000) 3 SCC 262] went on to hold that the power under Section 319, Cr.P.C. 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. The Court further observed: "a judicial exercise is called for, keeping in conspectus of the case, including the stage at which the trial has already

proceeded with the quantum of evidence collected till then, and also the amount of time which the court had spent for collecting such evidence."

The Court further observed:

"The Court, while examining an application under Section 319 Cr.P.C., 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 Cr.P.C., 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."

12. Turning to the present case, we find that the Trial Court had properly considered the evidence of injured Rohitas, Ram Singh, Ramavtar and Maya Devi and had found that none of the witnesses had stated that Kailash was having an axe in his hand and that he caused any injury to Rohitas with the axe. In that the court found that the witnesses had improved their version only at the stage of trial. The court even went to the extent of saying that even if Kailash was presumed to be present at the spot, that by itself could not prove that he took part in the assault. The Trial Court had also very specifically noted the improvement made by Rohitash (PW-1) in stating that Kailash inflicted axe blow on his hand and head which claim was belied by the medical report recording his injuries. Same was the situation regarding the evidence of Ramavatar (PW3) as also Maya (PW4). The trial court found that all these witnesses were giving improved versions during their evidence in the court. Thus, it was clear that the Trial Court had come to a conclusion that there was no possibility of convicting Kailash, the present appellant on the basis of the evidence led before it.

13. On this backdrop when we see the order passed by the High Court, there does not appear to be any such effort on the part of the High Court. Basically, the High Court merely relied on the reported decision in Shashi Kant Singh v. Tarkeshwar Singh & Anr. [JT 2002 (4) SC 386] where the question was entirely different. There the question was as to whether if the trial itself was over, could the revisional court direct the said person against whom the Trial Court had refused to exercise discretion under Section 319 Cr.P.C. to be tried afresh. In the present case also the conclusion of the trial was irrelevant in so far as the trial of the appellant is concerned. That by itself was no reason to try him with the aid of Section 319 Cr.P.C. The High Court should have applied itself independently to the question as to whether there was any material in the evidence not only to connect the appellant but whether it was sufficient to justify the words "it appears that such person has committed the crime". We do not see any such effort in the judgment of the High Court. On the other hand, the High Court has commented on the language of the judgment by the Trial Court while acquitting the other accused. That is an irrelevant consideration. Merely because the Sessions Judge commented upon the present appellant not being a party accused, that by itself did not justify the interference that there was evidence against him and the evidence was of such nature as would justify his being added as an accused much less under Section 319 Cr.P.C. We are, therefore, quite convinced that the judgment of the High Court is erroneous and must be set aside.

14. In the result the appeal is allowed, the judgment of the High Court is set aside and the judgment of the Trial Court is restored.