

CASE NO.:
Appeal (crl.) 1019 of 2007

PETITIONER:
Rajendra Singh

RESPONDENT:
State of U.P. & Anr

DATE OF JUDGMENT: 06/08/2007

BENCH:
G.P. Mathur & P.K. Balasubramanyan

JUDGMENT:
J U D G M E N T

CRIMINAL APPEAL NO. 1019 OF 2007
(Arising out of Special Leave Petition (Crl.) No.3182 of 2006)

G. P. MATHUR, J.

Leave granted.

2. This appeal, by special leave, has been preferred against the judgment and order dated 24.4.2006 of Allahabad High Court by which the petition filed by the respondent No. 2 Kapil Dev Singh under Section 482 Cr.P.C. was allowed and the order dated 26.5.2005 passed by the learned Sessions Judge, Allahabad under Section 319 Cr.P.C. summoning him to face trial under Section 302 IPC was set aside.

3. In the morning hours between 6.30 a.m. and 7.00 a.m. on 15.12.1995, three persons, viz., the wife, son and brother-in-law of Nigam Singh were murdered. An FIR of the incident was lodged by Nigam Singh at 8.10 a.m. on 15.12.1995 at P.S. George Town, Allahabad. After investigation, charge sheet was submitted and four persons, viz., Kapil Dev Singh (respondent No. 2 herein), Suresh Singh, Sukhpal Singh and Kamlesh Singh were put up for trial. The present incident took place on 16.3.2002 when the trial of the aforesaid tripple murder case was going on. According to the case of the prosecution, the accused of the tripple murder case were putting pressure on Nigam Singh not to give evidence in the said case. It is alleged that at about 6.00 p.m. on 16.3.2002, the first informant Rajendra Singh (appellant herein) and his brother Ajay Singh were returning after getting their field harvested. At that time, Nigam Singh also arrived there on a scooter. The accused in the present case, viz., Kapil Dev Singh (respondent No. 2 herein) and Daya Singh stopped him and asked him not to give evidence in the tripple murder case. Nigam Singh, however, did not agree to their suggestion not to give evidence and tried to move ahead on his scooter. Kapil Dev Singh then instigated his brother Daya Singh, who fired upon Nigam Singh from a country-made pistol. In spite of receiving the gun shot injury, Nigam Singh managed to escape from there and informed about the incident to his family members. Meanwhile, the first informant, Rajendra Singh, and his elder brother Ajay Singh also reached there. However, Nigam Singh succumbed to his injuries shortly thereafter. Thereafter, Rajendra Singh lodged an FIR of the incident at 8.30 p.m. on 16.3.2002 at P.S. Pipri. The police after investigation submitted charge-sheet only against Daya Singh and not against Kapil Dev Singh. In the trial before the learned Sessions Judge, Allahabad, the statement of the first informant, Rajendra Singh was recorded where

he specifically stated about the presence of Kapil Dev Singh and the role played by him in the incident. The prosecution then moved an application for summoning Kapil Dev Singh under Section 319 Cr.P.C. The learned Sessions Judge held that Kapil Dev Singh is named in the FIR and the first informant Rajendra Singh in his statement had corroborated the version given in the FIR and had assigned the role of exhortation to him and after taking note of the relevant law on the subject, allowed the application by the order dated 26.5.2005 and directed that Kapil Dev Singh be summoned to face the trial.

4. Kapil Dev Singh then filed a petition under Section 482 Cr.P.C. for quashing the aforesaid order before the High Court. It appears that in the petition under Section 482 Cr.P.C. the statements of certain witnesses who had been examined by the investigating officer during the course of investigation were annexed which included the statement of S.L. Yadav, Vijay Kumar Singh, Up Nagar Ayukta, Shankar Lal Jaiswal, Mukhya Nagar Adhikari and some other officials of Nagar Nigam, who had stated that respondent No. 2 Kapil Dev Singh was working as Sahayak Nagar Ayukta, Nagar Nigam, Allahabad and between 4.30 p.m. and 5.30 p.m. on 16.3.2002, he was attending a meeting in the Nagar Nigam. After referring to the aforesaid statements, the High Court concluded as under :
"The statement of those witnesses do not leave any room for doubt that the applicant was present in the meeting of Nagar Nigam at the time of incident and could not reach the place of occurrence which is 35 Kms. from Allahabad. The applicant is a brilliant student and has good academic career and has also been selected in U.P. Public Services Examination. The family of the applicant is well educated family. The father of the applicant was also selected in Provincial Civil Services (Judicial) in Uttar Pradesh in 1983 but because of the animosity prevalent in the village, he was murdered. Now the said animosity is the result of the present case."

The High Court then referred to Municipal Corporation of Delhi v. Ram Kishan Rohtagi (1983) 1 SCC 1, wherein it is observed that power under Section 319 is really an extraordinary power which 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. On the basis of the aforesaid authority, the High Court posed the question whether compelling ground existed or not and whether there was no option but to summon the accused. Thereafter, the High Court referred to the statements of six persons which had been recorded by the investigating officer, which showed that between 4.30 p.m. and 5.30 p.m. Kapil Dev Singh was present in the meeting and then observed as under :
"No doubt, it might have been a probable defence which the court could not consider at the time of proceeding under Section 319 Cr.P.C. but as the power has to be exercised sparingly, the Court should have examined all the aspects of the case."

Observing as above, the High Court allowed the petition under Section 482 Cr.P.C. and quashed the order dated 26.5.2005 passed by the learned Sessions Judge under Section 319 Cr.P.C. summoning the respondent No. 2 to face the trial.

5. We have heard Shri Manoj Goel, learned counsel for the petitioner, Shri S.R. Singh, learned senior counsel for respondent No. 2 and have perused the record. Sub-section (1) of Section 319 says that where in the course of any enquiry 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. The scope of power under Section 319 Cr.P.C. was explained in *Municipal Corporation of Delhi v. Ram Kishan Rohtagi* (1983) 1 SCC 1 and it was held as under :

"Section 319 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. If the prosecution 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, the court can take cognizance against them and try them along with the other accused. The mere fact that the proceedings have been quashed under Section 482 against some of the accused persons (respondents 2 to 5) will not prevent the court from exercising its discretion if it is fully satisfied that a case for taking cognizance against them has been made out on the additional evidence led before it."

In *Joginder Singh v. State of Punjab* (1979) 1 SCC 345 it was held as under :

"The summoning of additional persons by the Sessions Court under Section 319 of those who appear to be involved in the crime from the evidence led during the trial and directing them to stand their trial along with those who have been committed, must be regarded as incidental to the cognizance under Section 193 and part of the normal process that follows it. Section 319(4)(b) enacts a deeming provision in that behalf dispensing with the formal committal order against the newly added accused.

The phrase "any person not being the accused" in Section 319 does not exclude from its operation an accused who has been released by the police under Section 169."

In *Kishun Singh v. State of Bihar* (1993) 2 SCC 16, it was observed:

"11. On a plain reading of Sub-section (1) of Section 319 there can be no doubt that it must appear from the evidence tendered in the course of any inquiry or trial that any person not being the accused has committed any offence for which he could be tried together with the accused. This power, it seems clear to us, can be exercised only if it so appears from the evidence at the trial and not otherwise. Therefore, this sub-section contemplates existence of some evidence appearing in the course of trial wherefrom the Court can prima facie conclude that the person not arraigned before it is also involved in the commission of the crime for which he can be tried with those already named by the police. Even a person who has earlier been discharged would fall within the sweep of the power conferred by Section 319 of the Code."

It is, therefore, clear that if the evidence tendered in the course of any enquiry or trial shows that any person not being the accused has committed any offence for which he could be tried together with the accused, he can be summoned to face trial even though he may not have been charge sheeted by the investigating agency or may have

been discharged at an earlier stage.

6. The High Court has basically relied upon the statements of six witnesses which had been recorded by the investigating officer under Section 161 Cr.P.C. to record a positive finding that the respondent could not have been present at the scene of commission of the crime as he was present in a meeting of Nagar Nigam at Allahabad. A statement under Section 161 Cr.P.C. is not a substantive piece of evidence. In view of the proviso to sub-section (1) of section 162 Cr.P.C., the statement can be used only for the limited purpose of contradicting the maker thereof in the manner laid down in the said proviso. Therefore, the High Court committed a manifest error of law in relying upon wholly inadmissible evidence in recording a finding that Kapil Dev Singh could not have been present at the scene of commission of the crime.

7. That apart, the plea taken by the respondent Kapil Dev Singh in his petition under Section 482 Cr.P.C. was that of alibi. Section 103 of the Evidence Act says that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is proved by any law that the proof of that fact lie on any particular person. The second illustration to section 103 reads as under :

"B wishes the Court to believe that at the time in question, he was elsewhere. He must prove it."

This provision makes it obvious that the burden of establishing the plea of alibi set up by the respondent No. 2 in the petition filed by him under Section 482 Cr.P.C. before the High Court lay squarely upon him. There is hardly any doubt regarding this legal proposition. See Gurcharan Singh v. State of Punjab AIR 1956 SC 460, Chandrika Prasad Singh v. State of Bihar AIR 1972 SC 109 and State of Haryana v. Sher Singh AIR 1981 SC 1021. This could be done by leading evidence in the trial and not by filing some affidavits before the High Court. In such a case the prosecution would have got an opportunity to cross-examine those witnesses and demonstrate that their testimony was not correct. Learned counsel for the appellant has submitted that in fact no affidavits were filed in the High Court but what was filed were copies of two or three affidavits which were given by some persons before the Superintendent of Police, Allahabad. Thus, there was absolutely no legal evidence in support of the plea of alibi of Kapil Dev Singh, which the High Court chose to rely upon and accept for the purpose of quashing the order passed by the learned Sessions Judge.

8. Shri S.R. Singh, learned senior counsel for the respondent No. 2, has submitted that though the statements recorded by the investigating officer under Section 161 Cr.P.C. are not substantive piece of evidence, but the High Court while exercising power under Section 482 Cr.P.C. could have looked into attending circumstances, namely, the statements and the affidavits filed by some of these persons before the Superintendent of Police, Allahabad. Learned counsel has also submitted that the summoning order itself must exhibit special circumstances warranting such a course of action and if no special circumstances are demonstrated in the order, the summoning order is per se illegal. Learned counsel has further submitted that the trial of co-accused Daya Singh has concluded and he has been acquitted by the learned Sessions Judge and in such circumstances it will not be a sound exercise of discretion to set aside the order passed by the High Court and restore that of the learned Sessions Judge.

9. Shri Manoj Goel, learned counsel for the appellant, has, on the other hand, submitted that the name of Kapil Dev Singh was mentioned in the FIR and a specific role was attributed to him. In his

statement in Court the first informant Rajendra Singh had corroborated the version given in the FIR and had not only mentioned about the presence of Kapil Dev Singh at the scene of commission of the crime but had assigned specific role to him. He has also submitted that having regard to the background of the case, viz., the earlier tripple murder case in which Nigam Singh was the first informant and the main eye-witness, the accused had a strong motive to commit his murder. Learned counsel has thus submitted that the ingredients of Section 319 Cr.P.C. were fully satisfied and the learned Sessions Judge had rightly exercised the power and had summoned the accused. Shri Goel has also submitted that in the present case, the learned Sessions Judge while acquitting the co-accused Daya Singh in the trial which concluded much later has referred to the impugned order of the High Court dated 24.4.2006 at several places in the judgment and has observed that fifty per cent of the prosecution case has already been disbelieved by the High Court. Learned counsel has also made a statement that the first informant Rajendra Singh has filed Criminal Revision No.1828 of 2007 (Rajendra Singh v. Daya Singh) challenging the acquittal of Daya Singh which has been admitted by the High Court on 11.7.2007 and is pending for hearing.

10. Having considered the submissions made by learned counsel for the parties, we are of the opinion that the statements of the witnesses under Section 161 Cr.P.C. being wholly inadmissible in evidence could not at all be taken into consideration. The High Court relied upon wholly inadmissible evidence to set aside the order passed by the learned Sessions Judge. That apart, no finding on a plea of alibi can be recorded by the High Court for the first time in a petition under Section 482 Cr.P.C. As mentioned above, the burden to prove the plea of alibi lay upon the accused which he could do by leading evidence in the trial and not by filing some affidavits or statements purported to have been recorded under Section 161 Cr.P.C. The whole procedure adopted by the High Court is clearly illegal and cannot be sustained. The other argument based upon the acquittal of co-accused Daya Singh has also no merits. The question as to whether an order passed under Section 319 Cr.P.C. would cease to be operative if the trial of the co-accused has been concluded, has been considered in Shashikant Singh v. Tarkeshwar Singh (2002) 5 SCC 738. and it was held as under in para 9 of the report :

"9. The intention of the provision here is that where in the course of any enquiry into, or trial of, an offence, it appears to the court from the evidence that any person not being the accused has committed any offence, the court may proceed against him for the offence which he appears to have committed. At the stage, the court would consider that such a person could be tried together with the accused who is already before the Court facing the trial. The safeguard provided in respect of such person is that, the proceedings right from the beginning have mandatorily to be commenced afresh and the witnesses re-heard. In short, there has to be a de novo trial against him. The provision of de novo trial is mandatory. It vitally affects the rights of a person so brought before the Court. It would not be sufficient to only tender the witnesses for the cross-examination of such a person. They have to be examined afresh. Fresh examination in chief and not only their presentation for the purpose of the cross-examination of the newly added accused is the mandate of Section 319(4). The words 'could be tried together with the accused' in Section 319(1), appear to be only directory. 'Could be' cannot under these circumstances be held to be 'must be'. The provision cannot be interpreted to mean that since the trial in respect of a person who was before the Court has concluded with the result that the newly added person

cannot be tried together with the accused who was before the Court when order under Section 319(1) was passed, the order would become ineffective and inoperative, nullifying the opinion earlier formed by the Court on the basis of evidence before it that the newly added person appears to have committed the offence resulting in an order for his being brought before the Court."

Therefore the mere fact that trial of co-accused Daya Singh has concluded cannot have the effect of nullifying or making the order passed by the learned Sessions Judge on 26.5.2005 as infructuous.

11. The learned Sessions Judge trying the case of co-accused Daya Singh seems to have been swayed by the fact that the High Court had not only set aside the order passed by the learned Sessions Judge under Section 319 Cr.P.C. by which the respondent No. 2 Kapil Dev Singh was summoned to face trial but had also recorded a finding in his favour that he was present in a meeting in Nagar Nigam, Allahabad. Since we are setting aside the order of the High Court, the aforesaid finding of the learned Sessions Judge would automatically go and cannot stand.

12. Having regard to the facts and circumstances of the case and in the interest of justice, we consider it desirable that the criminal revision filed by Rajendra Singh against the acquittal of Daya Singh should be heard by the High Court as expeditiously as possible. We accordingly request the High Court to decide Criminal Revision No.1828 of 2007 (Rajendra Singh v. Daya Singh) expeditiously preferably within a period of four months of presentation of a certified copy of this order before the High Court.

13. In the result, the appeal succeeds and is hereby allowed. The impugned judgment and order dated 24.4.2006 of the High Court is set aside and the order dated 26.5.2005 passed by the learned Sessions Judge, Allahabad, summoning respondent No. 2 Kapil Dev Singh to face trial is restored.