

CASE NO.:
Appeal (crl.) 621 of 2008

PETITIONER:
KUNWAR SARVESH KUMAR

RESPONDENT:
STATE OF U.P.

DATE OF JUDGMENT: 08/04/2008

BENCH:
A.K.MATHUR & ALTAMAS KABIR

JUDGMENT:
JUDGMENT
O R D E R

CRIMINAL APPEAL NO.621 OF 2008
(Arising out of SLP(Crl.)No. 3005 of 2007)

We have heard learned counsel for the parties.
Leave granted.

This appeal by special leave is directed against the judgment and order dated 3rd April, 2007 passed by the learned Single Judge of the High Court of Judicature at Allahabad in Criminal Misc. Application No.7343 of 2007 whereby the learned Single Judge upheld the order dated 24th March, 2007 passed by the Additional Sessions Judge-I, Muradabad whereby the learned Additional Sessions Judge had taken a cognizance against the accused appellant under Section 319 of the Criminal Procedure Code on the statement of Dharam Pal Singh (PW-1).

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The brief facts which are necessary for the disposal of this appeal are that Dharam Pal Singh (PW-1) filed an FIR before the SHO, Kotwali, Thakurdwar, Moradabad alleging that after the meeting was over at the PWD Guest House about 10.30 p.m. about 50-60 supporters of MLA Kanwar Sarvesh Kumar Chauhan who were carrying rifles, pistols, guns in dozen vehicles came to the block premises amongst other namely, (i) Yogesh Kumar, son of Ram Pal Singh, resident of Ratupura, (ii) Yogendra alias Bhura, resident of Humanyun Pur, (iii) Neeraj Chauhan, resident of Kheda Paschimi, (iv) Narendra, son of Lekhraj, resident of Ratupura, (v) Balram Singh, resident of Faizulla Ganj, (vi) Balkar Singh, resident of Pega, (vii) Naresh Pal, son of Khanoi, resident of Phaleda, (viii) Zaibul, resident of Wazidpur, (ix) Bijrendra Chauhan, son of Chatrag Singh, resident of Majhradak etc. and some other persons who could be identified if produced before us. These people immediately after arrival, gave warnings and started giving dirty abuses and when we opposed these people, they started firing at us wildly in order to kill us and during the course of

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above firing, the driver Nem Singh, son of Shri Vishwambh Singh, resident of Dada Ami Chandra, Bajpur died on the spot and Radhey Sham Yadav, Wakil Sahab Shamsher, Raju etc. sustained bullet injuries and taken to the hospital for treatment. Dead body of Nem Singh was lying at the crime scene. On the basis of this information, a case was registered against the persons under Sections 147, 148, 149, 302/307 of the Indian Penal Code. Thereafter the statement of Dharam Pal Singh was recorded under Section 161 Cr.P.C. in which he had stated that when we were coming out from the

PWD Guest House after the meeting, mob of 50-60 supporters of MLA Sarvesh Kumar came there with guns, pistols and rifles and made a rash firing which resulted in the death of the driver. After the investigation a challan was filed against the accused persons but no challan was filed against Kanwar Sarvesh Kumar Singh Chauhan. After that the trial began and statement of PW-1, Dharam Pal Singh was recorded and in that he disclosed in the Examination Chief that on 11th June, 2004 at about 10.30 a.m. when we were coming out from the PWD Guest House after the meeting, mob of 50-60 persons under the leadership of MLA Sarvesh Kumar Singh

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Chauhan (accused) who were having rifles, guns, pistols in their hands started firing in which the driver Nem Singh died on the spot. On the basis of this statement made by PW-1 in the Examination Chief, an application under Section 319 was made by the Public Prosecutor for taking cognizance against the accused Kanwar Sarvesh Kumar Singh Chauhan. Learned Additional Sessions Judge-I on the basis of the FIR and statement of PW-1 prima facie found involvement of Kanwar Sarvesh Kumar Singh Chauhan and accordingly he issued summons against Kanwar Sarvesh Kumar Singh Chauhan for taking cognizance of offence against him and to face a trial. The order dated 24th March, 2007 was challenged by Kanwar Sarvesh Kumar Singh Chauhan before the High Court and the High Court confirmed the order. Hence the present appeal.

Mr. S.K. Dubey, learned senior counsel appearing for the appellant has taken us to the FIR as well as the statement of Dharam Pal Singh recorded under Section 161 and statement recorded by Dharam Pal Singh in the trial as PW-1. After going through the FIR and statement under Section 161, it is apparent that the PW-1 who filed the FIR did not mention the name of Kanwar Sarvesh Kumar Singh

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Chauhan as leading this unruly mob of 50-60 persons with fire arms. Neither in the statement under Section 161 at any point of time, he alleged that the mob was being led by Kanwar Sarvesh Kumar Singh Chauhan. It is only for the first time that during the trial in Examination Chief he has alleged that Kanwar Sarvesh Kumar Singh Chauhan led this unruly mob. It is true that under Section 319 the Trial Court has a full discretion to take a cognizance after it is found that there is a prima facie case against any of the accused who has not been charge sheeted by the police. But before exercising its discretion the Trial Court has applied its mind properly. We have gone through the FIR and the statement under Section 161 and we find that there is no mention that alleged accused took leading part in heading unruly mob. It is only for the first time in trial came out that alleged accused took leading part. Therefore, it will be very hazardous in a situation like one to take the cognizance against the accused, when for the first time, such a statement was made in the Court. The cognizance can be taken but the Trial Court should also be very cautious in taking cognizance on such statement unless there is

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some material to support the statement in the Trial Court. The Court should not proceed barely on the basis of the statement made for first time in Court but should apply its mind cautiously looking to the attending circumstances of the case. In this case, we are satisfied that the Trial Court has not applied its mind properly and mechanically proceeded to issue notice to the cause on the statement of PW-1 who neither name the accused in the FIR nor did he disclose this fact in his statement under Section 161 Cr.P.C. It was not proper for the Court to have proceeded on the basis of the statement of PW-1 disclosing the name of accused for first time without

verification from the attending circumstances. The power under Section 319 has to be exercised very sparingly and in cautious manner. If proper caution is not exercised then it may cause great miscarriage of justice.

However, in the present case apart from the fact that power was not properly exercised by learned Additional Sessions Judge, all the accused have been acquitted in trial.

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Consequently, we allow this appeal, set aside the order passed by the Additional Sessions Judge-I, Muradabad dated 24th March, 2007 and the order of the High Court dated 3rd April, 2007.

The appeal is accordingly, allowed.