Guriya @ Tabassum Tauquir And Ors vs State Of Bihar And Anr on 28 September, 2007

Equivalent citations: AIR 2008 SUPREME COURT 95, 2007 (8) SCC 224, 2007 AIR SCW 6146, 2007 CRI LJ (NOC) 873, 2008 (1) AIR JHAR R 986, (2007) 2 CRILR(RAJ) 820, (2007) 4 JCC 3004 (SC), 2007 CRILR(SC&MP) 820, (2008) 1 MH LJ (CRI) 403, 2007 CRILR(SC MAH GUJ) 820, 2007 (11) SCALE 533, 2007 (4) JCC 3004, 2008 (1) CALCRILR 7, 2008 (1) CRI RJ 132, 2007 (3) SCC(CRI) 521, 2007 ALL MR(CRI) 2928, (2007) 58 ALLINDCAS 427 (MPG), (2007) 11 SCALE 533, (2007) 4 CHANDCRIC 37, (2007) 2 ORISSA LR 817, (2007) 6 SUPREME 599, (2007) 4 EASTCRIC 223, (2008) 1 MAD LJ(CRI) 881, (2007) 38 OCR 668, (2007) 4 PAT LJR 195, (2007) 4 CURCRIR 69, (2008) 1 WLC(SC)CVL 57, (2007) 4 JLJR 187, (2007) 4 ALLCRILR 635, (2007) 4 CRIMES 95, (2008) 3 MPLJ 387, 2008 CHANDLR(CIV&CRI) 230, 2006 FAJ 521, (2006) 3 KER LJ 277, (2006) 2 FAC 118, (2007) 1 CRIMES 224, (2008) 1 RAJ LW 19, (2007) 4 RECCRIR 497

Author: Arijit Pasayat

Bench: Arijit Pasayat, D.K. Jain

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           CASE NO.:
Appeal (crl.)  1305 of 2007

PETITIONER:
Guriya @ Tabassum Tauquir and Ors

RESPONDENT:
State of Bihar and Anr

DATE OF JUDGMENT: 28/09/2007

BENCH:
Dr. ARIJIT PASAYAT & D.K. JAIN

JUDGMENT:
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J U D G M E N T CRIMINAL APPEAL NO. 1305 OF 2007 (Arising out of S.L.P.(Crl.) No.6219 of 2005) DR. ARIJIT PASAYAT, J.

1. Leave granted.

2. The appellants call in question legality of the order passed by a learned Single Judge of the Patna High Court dismissing the Criminal Revision filed by them. Challenge before the High Court was to the revisional order passed by learned Additional Sessions Judge, Fast Track Court No.1, Motihari. By order dated 10.09.2004, learned Additional Sessions Judge set aside the order of learned Judicial Magistrate, Motihari in G.R. No.996 of 99/Tr. No.693 of 2004.

3. Background facts in a nutshell are as follows:-

> FIR was lodged on 29.05.1999 by Manzoor Baitha alleging that his parents, brother and sisters had a fight with his family members. Annu Siddiqui hit on the head of his son Akbar Hawari with the butt of a pistol and he also snatched away a wrist watch of his son. Cognizance was taken on 27.9.1999 and charge-sheet was filed on 09.09.1999. Charges were framed on 14.3.2000. Only three persons were arrayed as accused persons and the present appellants were not arrayed as accused. It appears that a protest petition was filed before charges were framed on 14.03.2000 but the same was rejected. Recording of prosecution evidence commenced on 16.04.2001 and continued till 29.04.2002. The prosecution evidence was thereafter closed and the statement of accused persons was recorded in terms of Section 313 of the Code of Criminal Procedure, 1973 (in short 'Cr.P.C.') on 19.02.2003. Thereafter on 07.05.2003, an application in terms of Section 311 Cr.P.C. was filed and was allowed and two more witnesses i.e. PWs 4 and 5 were examined. An application under Section 319 Cr.P.C. was filed on 14.01.2004 stating that new evidence has surfaced which requires the trial of the present appellants.

It is to be noted that PWs 4 and 5 were examined on 6.1.2004 pursuant to the order in the application filed under Section 311 Cr.P.C. The petition filed under Section 319 Cr.P.C. was rejected by the Trial Court holding that no case was made out for putting the appellants on trial. Learned Sessions Judge was moved for revision and the same was allowed. The High Court dismissed the revision petition filed on the ground that there are materials against the appellants.

4. Learned counsel for the appellants submitted that the application under Section 319 Cr.P.C. was nothing but an abuse of process of the court as the narration of facts above would go to show. Every possible attempt was made to introduce materials against the appellants which were not on record. Even after the examination of the accused under Section 313 Cr.P.C., an application under Section 311 Cr.P.C. was allowed. Two witnesses were examined on 6.1.2004. Even their evidence in no way connects the appellants to the alleged incident. PWs 1, 2 and 3, who were examined on 16.04.2001, 8.01.2002 and 29.04.2002 merely stated about the alleged presence of the appellants. No definite role was ascribed to them. Therefore, the application in terms of Section 319 Cr.P.C. was not maintainable and in any event was mala fide.

5. Learned counsel for the State submitted that the prosecution has not filed any application under Section 319 Cr.P.C. It was only PW-1, the informant who had filed such an application. Learned counsel for the complainant respondent No. 2 submitted that the appellants were named in the FIR. PWs 1, 2 and 3 spoke about their presence. Therefore, they should have been arrayed as

accused persons.

6. The parameters for dealing with an application under Section 319 Cr.P.C. have been laid down by this Court in several cases.

7. In Michael Machado and Anr. v. Central Bureau Of Investigation and Anr. (2000 (3) SCC 262) it was observed as follows:-

> "The basic requirements for invoking the above section is that it 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 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.
>
> But even then what is conferred on the court is only a discretion as could be discerned from the words "the court may proceed against such person." The discretionary power so conferred should be exercised only to achieve criminal justice. It is not that the court should turn against another person whenever it comes across evidence connecting that other person also with the offence. A judicial exercise is called for, keeping a conspectus of the case, including the stage at which the trial has proceeded already and the quantum of evidence collected till then, and also the amount of time which the court had spent for collecting such evidence. It must be remembered that there is no compelling duty on the court to proceed against other persons.
>
> The court while deciding whether to invoke the power under Section 319 of the Code, must address itself about the other constraints imposed by the first limb of sub-section (4), that proceedings in respect of newly-added persons shall be commenced afresh and the witnesses re-examined. The whole proceedings must be recommended from the beginning of the trial, summon the witnesses once again and examine them and cross-examine them in order to reach the stage where it had reached earlier. If the witnesses already examined are quite large in number the court must seriously consider whether the objects sought to be achieved by such exercise are worth wasting the whole labour already undertaken. Unless the court is hopeful that there is a reasonable prospect of the case as against the newly-brought accused ending in being convicted of the offence concerned we would say that the court should refrain from adopting such a course of action"

8. Shashikant Singh Vs. Tarkeshwar Singh and Anr. (2002 (5) SCC 738), it was, inter-alia observed as follows:-

> "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 courts may proceed against him for the offence which he appears to have committed. At that 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 reheard. 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 the 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."

9. Again in Krishnappa Vs. State of Karnataka (2004 (7) SCC 792), it was observed as follows:-

> "It has been repeatedly held that the power to summon an accused is an extraordinary power 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.
>
> In the present case, we need not go into the question whether prima facie the evidence implicates the appellant or not and whether the possibility of his conviction is remote, or his presence and instigation stood established, for in our view the exercise of discretion by the Magistrate, in any event of the matter, did not call for interference by the High Court, having regard to the facts and circumstances of the case.
>
> 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.
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> Applying the test as aforesaid to the facts of the present case, in our view, the trial Magistrate is right in rejecting the application. The incident was of the year 1993. Seventeen witnesses had been examined. The statements of the accused under Section 313 CrPC had been recorded. The role attributed to the appellant, as per the impugned judgment of the High Court, was of instigation. Having regard to these facts coupled with the quashing of proceedings in the year 1995 against the appellant, it could not be held that the discretion was illegally exercised by the Trial Magistrate so as to call for interference in exercise of revisional jurisdiction by the High Court."

10. The scope and ambit of Sec. 319 of the Code have been elucidated in several decisions of this Court. In Joginder Singh and another v. State of Punjab and another (AIR 1979 SC 339), it was observed:

> "6. A plain reading of Sec. 319 (1) which occurs in Chapter XXIV dealing with general provisions as to inquiries and trials, clearly shows that it applies to all the Courts including a Sessions Court and as such a Sessions Court will have the power to add any person, not being the accused before it, but against whom there appears during trial sufficient evidence indicating his involvement in the offence, as an accused and direct him to be tried along with the other accused; ."

11. It was further observed in paragraph 9:

> "9. As regards the contention that the phrase 'any person not being the accused' occurred in Sec. 319 excludes from its operation an accused who has been released by the police under Sec. 169 of the Code and has been shown in column No. 2 of the charge sheet, the contention has merely to be stated to be rejected. The said expression clearly covers any person who is not being tried already by the Court and the very purpose of enacting such a provision like Sec. 319(1) clearly shows that even persons who have been dropped by the police during investigation but against whom evidence showing their involvement in the offence comes before the Criminal Court are included in the said expression."

12. In Municipal Corporation of Delhi v. Ram Kishan Rohtagi and Ors. (1983 (1) SCC 1) after referring to the decision in Joginder Singh's case (supra), it was observed:-

> "19. In these circumstances, therefore, 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. 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 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 respondent Nos. 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."

13. On a careful reading of Sec. 319 of the Code as well as the aforesaid two decisions, it becomes clear that the trial court has undoubted jurisdiction to add any person not being the accused before it to face the trial along with other accused persons, if the Court is satisfied at any stage of the proceeding on the evidence adduced that the persons who have not been arrayed as accused should face the trial. It is further evident that such person even though had initially been named in the F.I.R. as an accused, but not charge sheeted, can also be added to face the trial. The trial court can take such a step to add such persons as accused only on the basis of evidence adduced before it and not on the basis of materials available in the charge-sheet or the case diary, because such materials contained in the charge sheet or the case diary do not constitute evidence. Of course, as evident from the decision reported in Sohan Lal and others v. State of Rajasthan, (AIR 1990 SC 2158) the position of an accused who has been discharged stands on a different footing.

14. Power under Section 319 of the Code can be exercised by the Court suo motu or on an application by someone including accused already before it, if it is satisfied that any person other than accused has committed an offence and he is to be tried together with the accused. The power is discretionary and such discretion must be exercised judicially having regard to the facts and circumstances of the case. Undisputedly, it is an extraordinary power which is conferred on the Court and should be used very sparingly and only if compelling reasons exist for taking action against a person against whom action had not been taken earlier. The word "evidence" in Section 319 contemplates evidence of witnesses given in Court. Under Sub- section (4)(1)(b) of the aforesaid provision, it is specifically made clear that it will be presumed that newly added person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced. That would show that by virtue of Sub-section (4)(1)(b) a legal fiction is created that cognizance would be presumed to have been taken so far as newly added accused is concerned. (See Lok Ram v. Nihal Singh and Anr. (AIR 2006 SC 1892)

15. The factual position noted above goes to show that there was no new material after examination of the accused persons under Section 313 Cr.P.C., which threw any light on the incident. The evidence of PWs 4 and 5 is not the basis of the application under Section 319 Cr.P.C. as they have not spoken anything about the appellants.

16. As noted above, PWs 1,2 and 3 have stated about the presence of the appellants without any definite role being ascribed to them in their evidence recorded on 16.04.2001, 08.01.2002 and 29.04.2002. If really the complainant had any grievance about the appellants being not made accused, that could have, at the most, be done immediately after the recording of evidence of PWs 1,2 and 3. That has apparently not been done. Additionally, after the charge-sheet was filed, a protest petition was filed by the complainant which was dismissed. No explanation whatsoever has been offered as to why the application in terms of Section 319 Cr.P.C. was not filed earlier. The revisional court did not deal with these aspects and came to an abrupt conclusion that all the PWs have stated that the appellants have committed overt acts and their names also find place in the protest petition. Undisputedly, no overt act has been attributed to the appellants by PWs 1, 2 and 3. Nothing has been stated about the appellants by PWs 4 and 5. There was mention of their names in the FIR. A protest petition was filed. Same was also rejected. These could not have formed the basis of accepting the prayer in terms of Section 319 Cr.P.C. The High Court's order, to say the least, is bereft of any foundation. It merely states that there are materials against the petitioners before it. It also did not deal with various aspects highlighted above.

17. Above being the position, the order of the High Court and that of learned Additional Sessions Judge cannot be maintained and are set aside. The Trial Court had rightly rejected the application filed under Section 319 Cr.P.C.

18. The appeal is, accordingly, allowed.