

Praveen Dhama Alias Dumpy vs State Of Uttarakhand And Others on 26 April, 2022

Author: Ravindra Maithani

Bench: Ravindra Maithani

HIGH COURT OF UTTARAKHAND AT NAINITAL

Criminal Misc. Application No. 370 of 2022

Praveen Dhama alias Dumpy

..... Petitioner

Vs.

State of Uttarakhand and others

..... Respondents

Present : Mr. Vikas Anand, Advocate for the petitioner.

Mr.Lalit Miglani, A.G.A. for the State/respondent no.1.

Mr. Lalit Sharma, Advocate for respondent nos.2 and 3.

JUDGMENT

Hon'ble Ravindra Maithani, J. (Oral) The challenge in the instant petition is made to the order dated 21.09.2021, passed in Sessions Trial No.12 of 2018, State vs. Vineet and others, by the court of 1st Additional District and Sessions Judge, Rudrapur, District Udham Singh Nagar (for short, "the case"). By the impugned judgment and order, an application filed under Section 311 of the Code of Criminal Procedure, 1973 (for short, "the Code") by the petitioner has been rejected.

2. Facts necessary to appreciate the controversy, briefly stated are as hereunder. An FIR was lodged by the private respondents ("the informants") against the petitioner and two others, according to which, on 29.09.2017, the petitioner and co-accused killed Bittu Chaudhary. After investigation in this matter, charge-sheet was submitted against four persons excluding the petitioner. The trial proceeded. Initially two witnesses PW1 Rakesh Kumar and PW2 Sanjeev Pal Singh, both the informants were examined. An application under Section 319 of the Code was filed by the prosecution.

3. By an order dated 05.01.2019, the application under Section 319 of the Code was allowed and the petitioner was also summoned to face trial with the existing accused. This order dated 05.01.2019, passed in the case was unsuccessfully challenged by the petitioner before this Court and before the Hon'ble Supreme Court (in this Court, it was Criminal Revision No.137 of 2019 and challenge was made before the Hon'ble Supreme Court in SLP Criminal No.9947 of 2019). It appears that post

summoning of the petitioner under Section 319 of the Code opportunity to cross-examine the PW1 Rakesh Kumar was closed by the court but, subsequently, on an application filed by the petitioner, PW1 Rakesh Kumar was cross-examined by the petitioner. PW2 Sanjeev Pal Singh was also cross-examined. It is, at that stage, an application under Section 311 of the Code was filed by the petitioner with the averments therein that PW2 Sanjeev Pal Singh could not be cross-examined with regard to his previous statements given during investigation. It is this application, which has been rejected by the impugned order.

4. Heard learned counsel for the parties and perused the record.

5. Initially the grounds taken for further cross-examination of PW2 Sanjeev Pal Singh is non cross-examination of the witness with regard to his previous statements in view of Section 145 of the Indian Evidence Act, 1872 (for short, "the Evidence Act"). In fact, PW2 Sanjeev Pal Singh was cross-examined by the petitioner on 12.03.2020. On that date, his examination-in-chief was also recorded, in which, his previous examination-in-chief recorded on 31.10.2018 was read over, which he affirmed and PW2 Sanjeev Pal Singh then stated that whatever he had stated on 31.10.2018, is his statement. He does not want to add anything more. Based on this examination-in-chief, the cross-examination of PW2 Sanjeev Pal Singh was recorded. On 20.04.2022, this Court recorded as follows:-

".....When PW2, Sanjeev Pal was produced again for cross examination by the petitioner, he was read over his examination-in-chief recorded earlier, which he verified and that was taken as examination-in-chief.

The question is, how could, under what procedure, such examination-in-chief could be recorded as the statement of PW2 Sanjeev Pal Singh was recorded on 12.03.2020."

6. Learned counsel for the petitioner would submit that the manner in which examination-in-chief of PW2 Sajeew Pal Singh was recorded on 12.03.2020 is not in accordance with any procedure established under the Evidence Act. According to him, the examination-in-chief is to be recorded in the presence of an accused in view of Section 273 of the Code.

7. It is argued that in cases where an accused is summoned under Section 319 of the Code, the witnesses already examined are to be re-heard. Reference has been made to Section 319 Sub-Section (4) of the Code.

8. Learned counsel for the petitioner has also referred to the judgment in the case of Atma Ram and others vs. State of Rajasthan 2019 SCC OnLine SC 523.

9. In the case of Atma Ram (supra), the Hon'ble Supreme Court observed that, " the right of an accused to watch the prosecution witnesses deposing before a court is a valuable right and infringement of such a right is gravely prejudicial."

10. On the other hand, learned counsel for the private respondents would submit that on 12.03.2020, when PW2 Sanjeev Pal Singh appeared for his examination, he was read over his examination-in-chief recorded on 31.10.2018. This witness affirmed his statement and also stated that he has nothing to say more than that he had already stated. Learned counsel for the private respondents would submit that it fulfills the requirement of the examination-in-chief of a witness. It is also argued that thereafter, the PW2 Sanjeev Pal Singh has been cross-examined by the petitioner, it according to the learned counsel for the private respondents, means that the petitioner has owned up the statement of PW2 Sanjeev Pal Singh recorded in his examination-in-chief on 31.10.2018, as his examination-in-chief. Therefore, no irregularity has been committed in the matter and no interference is warranted.

11. With regard to the further examination on the ground of change of counsel it is argued that this may not be a ground to allow an application under Section 319 of the Code. In this matter, learned counsel has placed reliance on the principle of law as laid down in the case of State of Haryana vs. Ram Mehar and others (2016)8 SCC 762.

12. In the case of Ram Mehar (supra), the Hon'ble Supreme Court inter alia observed that "it has come on record that number of lawyers were engaged by the defence. The accused persons had engaged counsel of their choice. In such a situation recalling of witnesses indubitably cannot form the foundation. If it is accepted as a ground, there would be possibility of a retrial. There may be an occasion when such a ground may weigh with the court, but definitely the instant case does not arose the judicial conscience within the established norms of Section 311 of the Code for exercise of such jurisdiction."

13. The Evidence Act regulates the examination of witnesses in court. Chapter X of it deals with the examination of witnesses. The order of examination, the examination-in-chief and cross-examination and re- examination and other provisions have been given under this Chapter. In fact, there are provisions, which deals with as to which questions may be asked from the witnesses. There are provisions with regard to leading questions, etc. also.

14. Chapter XXVIII of the Code deals with evidence in inquiry and trials. Section 273 of the Code provides that evidence should be taken in the presence of an accused. It is as hereunder:-

"273. Evidence to be taken in presence of accused.-- Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader.

Provided that where the evidence of a woman below the age of eighteen years who is alleged to have been subjected to rape or any other sexual offence, is to be recorded, the court may take appropriate measures to ensure that such woman is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused.

Explanation.--In this section, "accused" includes a person in relation to whom any proceeding under Chapter VIII has been commenced under this Code."

15. In the instant case, the petitioner has been summoned under Section 319 of the Code. It was so done, after examination of PW1 Rakesh Kumar and PW2 Sanjeev Pal Singh. Section 319(4) of the Code provides the procedure post summoning of an accused under Section 319 of the Code. It is as hereunder.

"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)

(3)

(4) Where the Court proceeds against any person under sub-

section (1) then--

(a) the proceedings in respect of such person shall be commenced afresh, and the 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."

16. A bare perusal of Section 319(4)(a) of the Code categorically speaks that the proceedings in respect of a person summoned under Section 319 of the Code shall be commenced afresh and the witnesses re- heard. Even the literal meaning of it, makes it clear that the witnesses already examined should be produced again for their examination in the presence of accused and it includes the examination-in-chief.

17. Previous statement of a witness may be used for certain purposes. Section 145 of the Evidence Act, makes provisions with regard to contradictions that may appear in the previous statement of a witness. It may be conveniently referred to a statement given under Section 161 of the Code by a witness during investigation. There are other situations, as well. A witness may also be examined under Section 164 of the Code. Statement given under Section 164 of the Code may not only be used for contradiction but, it may also be used for corroboration as held by the Hon'ble Supreme Court in the case of R. Shaji vs. State of Kerala, (2013)14 SCC 266.

18. Examination of a witness prior to summoning of an accused under Section 319 of the Code may not be termed previous statement qua the newly summoned accused. Even if for the sake of argument it is termed as previous statement, it cannot form examination-in-chief of the witness by merely reading over it to him, when such witness is produced for his examination qua an accused summoned under Section 319 of the Code. In view of Section 319(4)(a) the witnesses already examined are to be re-heard.

19. In the case of Shashikant Singh vs. Tarkeshwar Singh and another, (2002)5 SCC 738, the Hon'ble Supreme Court categorically dealt with the provision of Section 319 and examination of the witnesses. In para 9 of the Judgment, the Hon'ble Supreme Court elaborated the procedure that is to be adopted post summoning of an accused under Section 319 of the Code. It is as hereunder:-

"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 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).
....."

20. At the cost of repetition it may be reiterated that in the case of Shashikant Singh (supra) it has categorically observed, "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 cross-examination of a newly added accused is the mandate of Section 319(4)".

21. In the instant case, not only PW2 Sanjeev Pal Singh but even PW1 Rakesh Kumar was examined in the same manner post summoning of the petitioner under Section 319 of the Code. They both have been read over their previous examination-in-chief which they affirmed as their statement. But, it is not a manner in which, examination-in-chief are recorded.

22. During the course of arguments, learned State counsel would submit that what if tomorrow these witnesses are again tendered for examination-in-chief and they speak the same language. This Court cannot speculate as to what would happen if a witness is asked of an incident and he does not reply to. Perhaps, the law may take care of such eventuality. There are provisions under the Indian Penal Code, 1860 which may deal with such situations.

23. In the instant case, in fact, the examination- in-chief of PW1 Rakesh Kumar and PW2 Sanjeev Pal Singh has not been recorded afresh. Reading over previous statements and taking it as an examination-is- chief is an irregularity. The trial has yet not concluded.

24. Learned counsel for the private respondents would submit that there has been directions of this Court for expeditious disposal of the trial and, in fact, the Investigating Officer has already been examined In the instant case, an irregularity has been crept in while tendering PW1 Rakesh Kumar and PW2 Sanjeev Pal Singh for their examination post summoning of the petitioner under Section 319 of the Code. This Court is of the view that this irregularity may be cured at this stage.

25. There is another aspect of the matter. It is true that change of counsel may not be a ground for allowing an application under Section 311 of the Code but, it is admitted position that when PW2 Sanjeev Pal Singh was cross-examined on behalf of the petitioner on 12.03.2020, he was not asked about his previous statement recorded during investigation. Since this Court is considering to rectify the irregularity which has crept in while examining PW1 Rakesh Kumar and PW2 Sanjeev Pal Singh after summoning of the petitioner under Section 319 of the Code, this Court leaves this aspect at it.

26. In view of the foregoing discussion, this Court is of the view that an irregularity, which has been committed during fresh examination of PW1 Rakesh Kumar and PW2 Sanjeev Pal Singh is to be rectified and accordingly the petition may be disposed of.

27. PW1 Rakesh Kumar and PW2 Sanjeev Pal Singh shall be examined afresh. Their examination-in-chief shall be recorded and thereafter, the petitioner shall have an opportunity to cross-examine them. Both the witnesses may be called on one day and examination and cross-examination shall be conducted in continuity on day-to-day basis. The parties shall have no liberty to seek any adjournment for this purpose.

28. Learned counsel for the private respondents would submit that 07.05.2022 is the date fixed in the case and PW1 Rakesh Kumar and PW2 Sanjeev Pal Singh shall remain present before the court below on that date for their examination and cross-examination.

29. Learned counsel for the petitioner submits that on 07.05.2022, the petitioner shall cross-examine both PW1 Rakesh Kumar and PW2 Sanjeev Pal Singh. Accordingly, the Court directs private respondents PW1 Rakesh Kumar and PW2 Sanjeev Pal Singh to remain present in the court below on 07.05.2022 at 10:30 AM. The court shall proceed to record their statements as indicated hereinbefore.

30. Accordingly the petition stands disposed of.

(Ravindra Maithani, J.) 26.04.2022 Sanjay