LAL SURAJ @ SURAJ SINGH & ANR. A

v.

STATE OF JHARKHAND

(Criminal Appeal No. 2062 of 2008)

DECEMBER 18, 2008 B

[S.B. SINHA AND CYRIAC JOSEPH, JJ.]

Code of Criminal Procedure, 1973 – s. 319 – Summoning of other persons appearing to be guilty of offence under – Power of – Held: Is wide but is to be exercised very C *sparingly – Before summoning an accused, trial court must form opinion on basis of evidences brought before it that case has been made out that such person could be tried together with the other accused – Person not charge sheeted, may come within the purview of description of person as contained* D *in s.319 – On facts, appellants were not charge sheeted and also not named in FIR – Deposition of prosecution witnesses relied upon by courts below while allowing the application to summon appellants not reliable – No substantial evidence on record to make out a case against appellants – Thus, order of courts below set aside.* E

The question which arose for consideration in this appeal was whether the courts below relying on evidence of prosecution witnesses were justified in allowing the application for summoning the appellants in exercise of his power u/s. 319 of the Code of Criminal Procedure, F **1973.**

Allowing the appeal, the Court

HELD: 1.1. Section 319 Cr.P.C. is a special provision. It seeks to meet an extraordinary situation. It although confers a power of wide amplitude but is required to be G **exercised very sparingly. Before an order summoning an accused is passed, the trial court must form an opinion on the basis of the evidences brought before it that a case has been made out that such person could be tried**

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A together with the other accused. Even if a person had not been charge sheeted, he may come within the purview of the description of such a person as contained in s. 319 of the Code. [Paras 11 and 12] [1065-B-D]

1.2. The principle of strong suspicion may be a B criterion at the stage of framing of charge as all the materials brought during investigation were required to be taken into consideration, but, for the purpose of summoning a person, who did not figure as accused, a different legal principle is required to be applied. A court C framing a charge would have before it all the materials on record which were required to be proved by the prosecution. In a case where, however, the court exercises its jurisdiction under Section 319 of the Code, the power has to be exercised on the basis of the fresh evidence brought before the court. There lies a fine but D clear distinction. [Para 15] [1066-G-H; 1067-A-B]

2.1. The prosecution concededly did not file any chargesheet against the appellants. Even in the First Information Report only the appellant No. 1 was named. The case was committed to the Court of Sessions. There E cannot be any doubt or dispute that although a person named in the First Information Report or another who was found to be involved in the commission of the offence may be summoned at a subsequent stage by the trial judge, legality of an order summoning such an F accused, however, would depend on the nature of evidence brought on record by the prosecution witnesses and other relevant factors. [Paras 8 and 9] [1064-A-C]

2.2. The Sessions Judge as also the High Court relied G upon the deposition of PW-6 and PW-7. PW-6 is not an eye-witness to the occurrence. PW-7 is only hearsay witness. No evidence worth the name had been brought on record to arrive at a satisfaction that there was a reasonable prospect of conviction of the appellants. The approach of the Sessions Judge was wholly incorrect. H [Paras 13 and 14] [1066-B, F, G]

2.3. Applying the legal principles to the fact of the case, Sessions Judge as also the High Court committed a serious error in passing the impugned judgment. On the basis of the aforementioned evidence, there was no possibility of recording a judgment of conviction against the appellants at all. Thus, the impugned order are set aside. [Para 21] [1069-E-F]

Municipal Corporation of Delhi v. Ram Kishan Rohtagi **(1983) 1 SCC 1;** *Yuvaraj Ambar Mohite v. State of Maharashtra* **(2006) 10 SCALE 369;** *Guriya alias Tabassum Tauquir and Others v. State of Bihar and Another* **(2007) 8 SCC 224;** *Mohd. Shafi v. Mohd. Rafiq & Anr.* **AIR (2007) SC 189 and** *Kailash v. State of Rajasthan & Anr.* **(2008) 3 SCALE 338, Relied on.**

Y. Saraba Reddy v. Puthur Rami Reddy and Another **(2007) 4 SCC 773, Distinguished.**

Joginder Singh v. State of Punjab **(1979) 1 SCC 345 and** *Sohan Lal v. State of Rajasthan* **(1990) 4 SCC 580, Referred to.**

Case Law Reference:

(2007) 4 SCC 773	**Referred to.**	**Para 7**
(1979) 1 SCC 345	**Referred to.**	**Para 12**
(1983) 1 SCC 1	**Referred to.**	**Para 12**
(1990) 4 SCC 580	**Referred to.**	**Para 12**
(1983) 1 SCC 1	**Referred to**	**Para 16**
(2006) 10 SCALE 369	**Referred to**	**Para 17**
(2007) 8 SCC 224	**Referred to**	**Para 18**
AIR (2007) SC 189	**Referred to**	**Para 19**
(2008) 3 SCALE 338	**Referred to**	**Para 20**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2062 of 2008.

From the final Judgment and Order dated 19.12.2007 of the High Court of Jharkhand at Ranchi in Crl. M.P. No. 1188 of 2005.

P.S. Narasimha, M.S. Madhu Sharan, S. Chandra Shekhar

A and L. Roshmani for the Appellants.

Manish Kumar Saran for the Respondent.

The Judgment of the Court was delivered by

S.B. SINHA, J. 1. Leave granted.

B 2. On the basis of a fardbeyan of one Bihari Singh, a First Information Report was registered against seven persons for commission of offences under Sections 147, 148, 149, 307 and 302 of the Indian Penal Code and Section 27 of the Arms Act as well as under Section 3/4 of the Explosive Substance Act inter alia alleging that on 24.10.2000 at around 4 p.m. when C he along with one Ajay Singh was sitting in his shop near bus stand, Nagendra Choubey, Mukesh Choubey, Pradeep Vishwakarma, Sharvan Vishwakarma, Suraj Singh, B.N. Singh and Arbind Singh came in two vehicles and started firing. Appellant No. 1 was specifically named therein. In the said D incident, the complainant and Ajay Singh suffered fire arm injuries. When the people started assembling there, accused persons fled away. The motive for commission of the offence was said to be the murder of one Jagdev wherein the complainant and the said Ajay Singh were accused. The first E informant was taken to the hospital and died on 25.10.2000. He gave a dying declaration which was treated to be the First Information Report.

3. Indisputably, no chargesheet was filed against the appellants. No cognizance, therefore, was taken against them.

F 4. Upon commitment of the case to the Court of learned Sessions Judge, the prosecution examined eleven witnesses. The learned Sessions Judge relied upon the evidence of PWs 6 and 7 to allow an application for summoning the appellant in exercise of his power under Section 319 of the Code of G Criminal Procedure (for short "Code") , holding:

> "There cannot be any two opinion that suspicion however strong it may be cannot take shape of evidence and it cannot be a ground for conviction but so far issuance of process is concerned strong suspicion can be a ground H to proceed against any person in a criminal case. In the

facts of the present case when the statement of the injured formed basis of fardbeyan, who died subsequently then value of first statement will also be a point for consideration. The statement of PW 7 is also said to be statement of dead person, then that statement of PW7 will also be under the scrutiny on the touchstone of evidence. The name of above referred two persons Suraj Singh and Arbind Singh is stated by the informant.

Thus in consideration of the entire material on record I am of the view that the materials on record is sufficient to proceed against above named Suraj Singh and Arbind Singh. Thus in view of the above observation it will be proper that summons against Suraj Singh son of Madhu Singh and Arbind Singh son of late Amarnath Singh, both resident of village – Bandubar, P.S. Panki, Distt – Palamau be issued and are arrayed as accused in GR. 1256/2000 corresponding to Sadar P.S. Case No. 381/2000 to face trial.

The office is directed to open a separate record for those two persons bearing no. 209B/2004 and is further directed to issue summons against the above named two accused persons for their trial."

5. Appellants filed criminal revision application thereagainst before the High Court. By reason of the impugned judgment, the same was dismissed.

6. Mr. P.S. Narasimha, learned counsel appearing on behalf of the appellants, has taken us through the evidences of PWs 6 and 7 and submitted that both the learned Sessions Judge as also the High Court committed a serious error insofar as they failed to take into consideration the legal principles required to be applied while summoning an accused in exercise of the court's power under Section 319 of the Code.

7. Mr. Manish Kumar Saran, learned counsel appearing on behalf of the respondent, on the other hand, submitted that from a perusal of the judgment of the High Court it would appear that the only contention raised therein was that no charge-sheet having been filed against them, they could not have been

summoned by the Court in exercise of its power under Section 319 of the Code, which has rightly been rejected by the High Court in view of the decision of this Court in *Y. Saraba Reddy v. Puthur Rami Reddy and Another* [(2007) 4 SCC 773].

8. The prosecution concededly did not file any chargesheet against the appellants. Even in the First Information Report only the appellant No. 1 was named.

9. The case was committed to the Court of Sessions. There cannot be any doubt or dispute that although a person named in the First Information Report or another who was found to be involved in the commission of the offence may be summoned at a subsequent stage by the learned Trial Judge, legality of an order summoning such an accused, however, would depend on the nature of evidence brought on record by the prosecution witnesses and other relevant factors. At that stage what is material is the evidence of prosecution witnesses and other materials which have been brought on the record.

10. Section 319 of the Code reads, thus:

"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 -

(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."

11. Section 319 of the Code is a special provision. It seeks to meet an extraordinary situation. It although confers a power of wide amplitude but is required to be exercised very sparingly.

Before an order summoning an accused is passed, the Trial Court must form an opinion on the basis of the evidences brought before it that a case has been made out that such person could be tried together with the other accused.

12. There is no dispute with the legal proposition that even if a person had not been chargesheeted, he may come within the purview of the description of such a person as contained in Section 319 of the Code.

In *Y. Saraba Reddy* (supra), this Court did not lay down any new principle. It relied upon several well-known decisions of this Court in *Joginder Singh v. State of Punjab* [(1979) 1 SCC 345], *Municipal Corporation of Delhi v. Ram Kishan Rohtagi* [(1983) 1 SCC 1] and *Sohan Lal v. State of Rajasthan* [(1990) 4 SCC 580].

We may, however, notice that therein the High Court took an extraordinary step which was described by this Court as a basic fallacy in its approach. It had called for the file to satisfy itself as to whether the enquiry conducted was to be preferred to the evidence of PW-1. In the aforementioned situation, it was observed:

"...If the satisfaction of the investigating officer or supervising officer is to be treated as determinative, then the very purpose of Section 319 of the Code would be frustrated. Though it cannot always be the satisfaction of the investigating officer which is to prevail, yet in the instant case the High Court has not found the evidence of PW 1 to be unworthy of acceptance. Whatever be the worth of

A his evidence for the purposes of Section 319 of the Code it was required to be analysed. The conclusion that the IO's satisfaction should be given primacy is unsustainable..."

No exception can be taken to the said dicta.

The fact involved herein, however, is completely different.

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13. The learned Sessions Judge as also the High Court, as indicated hereinbefore, relied upon the deposition of Jogendra Singh (PW-6) and Karu Singh (PW-7).

Jogendra Singh in his deposition merely stated that the C appellants were sitting in the said jeep. The vehicle, however, was being driven at a very high speed and, thus, he could not even see as to whether people sitting therein were holding any weapon or not. He is, therefore, not an eye-witness to the occurrence.

D PW-7 in his deposition stated:

"1. Occurrence had taken place on 24.10.2003 at about 4-1/2 P.M. in the evening. At that time I was at my house. On receipt of the information of the occurrence, we reached at the Hospital. After reaching at the Hospital, I E saw that my father and Ajay Singh were on bed. Ajay Singh had died and my father was giving statement and his statement was being recorded by Ram Sagar Tiwari Darogaji. I had also talk with my father. He told me that Suraj Singh, Arbind Singh, B.N. Singh, Pradeep Vishwakarma, Shravan Vishwakarma, Nagendra Chaubey F and Mukesh Chaubey had committed the crime (occurrence with him)."

He is, thus, only hearsay witness.

14. No evidence worth the name, therefore, had been G brought on record to arrive at a satisfaction that there was a reasonable prospect of conviction of the appellants.

15. The approach of the learned Sessions Judge was wholly incorrect. The principle of strong suspicion may be a criterion at the stage of framing of charge as all the materials H brought during investigation were required to be taken into

consideration, but, for the purpose of summoning a person, who did not figure as accused, a different legal principle is required to be applied. A court framing a charge would have before it all the materials on record which were required to be proved by the prosecution. In a case where, however, the court exercises its jurisdiction under Section 319 of the Code, the power has to be exercised on the basis of the fresh evidence brought before the court. There lies a fine but clear distinction.

16. In *Ram Kishan Rohtagi* (supra), this court 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..."

17. In *Yuvaraj Ambar Mohite v. State of Maharashtra* [2006 (10) SCALE 369], it was observed that there is a possibility of the accused being convicted on the basis of the evidences brought on record even if the same is taken to be correct in its entirety.

18. In *Guriya alias Tabassum Tauquir and Others v. State of Bihar and Another* [(2007) 8 SCC 224], referred to by the High Court, it was held that where there was no new material, the discretionary jurisdiction under Section 319 of the Code can be exercised, holding:

> "12. 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 16-4-2001, 8-1-2002 and 29-4-2002. 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 CrPC 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 CrPC. 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."

19. The said principle has been reiterated by this Court in *Mohd. Shafi v. Mohd. Rafiq & Anr.* [AIR 2007 SC 1899] stating:

"6. 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, appears 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."

20. Yet again in *Kailash v. State of Rajasthan & Anr.* [2008 (3) SCALE 338] Sirpurkar, J. speaking for the Bench held:

"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."

21. Applying the aforementioned legal principles to the fact of this case, we are of the opinion that the learned Sessions Judge as also the High Court committed a serious error in passing the impugned judgment. On the basis of the aforementioned evidence, there was no possibility of recording a judgment of conviction against the appellants at all.

22. The appeal is, thus, allowed and the impugned orders are set aside.

N.J. Appeal allowed.