MOHD. SHAFI

v.

MOHD. RAFIQ & ANR.

APRIL 9, 2007

[S.B. SINHA AND MARKANDEY KATJU, JJ.]

Code of Criminal Procedure, 1973:

s.319—Person not arrayed as accused—Power to summon—Duty of Court—Held: Is to arrive at satisfaction that there exists a possibility that the accused so summoned is in all likelihood would be convicted—Such satisfaction can be arrived at upon completion of cross-examination of witnesses.

An FIR was lodged against the appellant alleging the commission of offence u/ss. 307/324 IPC. The injured died and the case was converted to one u/s. 302 IPC. The police submitted charge sheet against one 'K' and not against appellant. Before the trial judge, respondent No. 1 was examined as PW-1. In his examination-in-Chief, he alleged that the incident had taken place in his presence and the appellant had taken part in the incident. An application was filed for summoning the appellant under s.319 Cr.P.C. Sessions Judge dismissed the application. Respondent No.1 filed an application under s.482 Cr.P.C., against the said order which was allowed.

In appeal to this Court, appellant contended that keeping in view the fact that the Sessions Judge had refused to exercise his discretionary jurisdiction at that stage of the trial, the impugned judgment cannot be sustained.

Respondent contended that in view of the fact that the appellant was named in the FIR and the witnesses in their examination before the police under s.161 Cr.P.C. alleged some overt act against him, the impugned judgment should not be interfered with.

Allowing the appeal, the Court

HELD: 1. Before the trial Court seeks to take recourse to s.319 Cr.P.C.,

A **the requisite ingredients must be fulfilled. Commission of an offence by a person not facing trial, must, appear 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. [Para 7] [1026-F]**

B **2. Respondent No. 1 states that he was merely a witness. He had/no say in the matter. Therefore, it is not understandable as to how, at his instance, and, that too, at that stage, the High Court could entertain an application under s.482 Cr.P.C. The judgment passed by the Sessions Judge was not even an interim order affecting the rights of the parties. Even revision application**
C **thereagainst was not maintainable at that stage. [Para 11] [1027-E]**

Municipal Corporation of Delhi **v.** *Ram Kishan Rohtagi and Ors.*, **[1983] 1 SCC 1 and** *Yuvrag Ambar Mohite* **v.** *State of Maharashtra,* **[2006] 10 Scale 369, referred to.**

D **3. The trial Judge, in terms of s.319 was required to arrive at this satisfaction. If he thought that the matter should receive his due consideration only after cross-examination of the witnesses is over, no exception thereto could be taken far less at the instance of witness and when the State was not aggrieved by the same. [Para 12] [1027-F]**

E **4. Before a court exercises its discretionary jurisdiction in terms of Code of Criminal Procedure, it must arrive at the satisfaction that there exists a possibility that the accused so summoned is in all likelihood would be convicted. Such satisfaction can be arrived at upon completion of the cross-examination of the said witness. For the said purpose, the Court concerned**
F **may also like to consider other evidence. Therefore, the High Court has committed an error in passing the impugned judgment.**

[Para 13] [1027-H; 1028-A]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 530 of 2007

G From the Judgment and Order dated 25.09.2006 of the High Court of Judicature at Allahabad in Criminal Misc. Petition No. 11468 of 2006.

Kunwar C.M. Khan and Aftab Ali Khan, for the Appellant.

Ashok Kumar Singh and Sanjay Misra, for the Respondents.

H The Judgment of the Court was delivered by

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

2. A First Information Report was lodged against the appellant herein by one Rafiq on 10.11.2005 alleging commission of an offence under Section 307/324 IPC. In view of the death of the injured, the case was converted to one under Section 302 IPC. The police submitted a chargesheet only against one Karimullah @ Aarif. No chargesheet was submitted as against the appellant herein. After the matter was taken up for hearing before the learned Trial Judge, respondent No.1 examined himself as P.W.1. In his examination-in-chief, he alleged that the incident had taken place in his presence and the appellant had taken part in the incident. An application was filed for summoning the appellant herein under Section 319 of the Code of Criminal Procedure only on the basis thereof. The Learned Sessions Judge refused to accede to the said prayer stating :-

> "File is taken up. Statement has been perused in regard to the application U/s 319 Cr.P.C. On perusal of the statement of the witness PW1 Rafiq, uptil now, witness's chief examination is only done. The witness had stated the incident has taken place in his presence and has further stated to reach the spot on hearing the noise. On going through statement given u/s 161 Cr.P.C. of the witness, it is found to be recorded in Paper No. 1 dated 10.11.2005 that he reached Reaching the sport after the incident as stated by this witness. And accused Karimullah is said to be the incident doer. Hence, the application is not acceptable at this stage. The application u/s 319 Cr.P.C. is being dismissed at this stage."

3. Respondent No.1 filed an application before the High Court of Judicature at Allahabad under Section 482 Cr.P.C. against the said order and by reason of the impugned order, the same has been allowed. The appellant is, thus, before us.

4. Contention of the learned counsel appearing for the appellant before us is that keeping in view the fact that the learned Sessions Judge had refused to exercise his discretionary jurisdiction at that stage of the trial, the impugned judgment cannot be sustained.

5. Learned counsel appearing on behalf of the respondent, on the other hand, submitted that in view of the fact that the appellant was named in the FIR and the witnesses in their examination before the police under Section 161 of Cr.P.C. alleged some overt act against him, the impugned judgment should

A not be interfered with.

6. Section 319 of the Code of Criminal Procedure 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
B 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
C 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
D 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
E 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."

F

7. 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
G satisfaction in this behalf.

8. As interpretation of the above-mentioned provision is now covered by some decisions of this Court, we need not state ingredients at this stage..

9. In *Municipal Corporation of Delhi* v. *Ram Kishan Rohtagi and Ors.*,
H [1983] 1 SCC 1, A Division Bench of this Court while holding that even if a

person had not been sent for trial by the police, the trial court would be entitled to invoke its jurisdiction after taking evidence, stating;

> "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."
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> (Emphasis supplied)

10. This aspect of the matter has also recently been considered in *Yuvrag Ambar Mohite* v. *State of Maharashtra,* reported in (2006) 10 Scale 369.

11. Respondent No.1 states that he was merely a witness. He had no say in the matter. We thus fall to understand as to how, at his instance, and, that too, at that stage, the High Court could entertain an application under Section 482 Cr.P.C. The judgment and order dt. 26.08.2006 passed by the learned Sessions Judge was not even an interim order affecting the rights of the parties. Even revision application thereagainst could not have been maintained at that stage.

12. The Trial Judge, as noticed by us, in terms of Section 319 of the Code of Criminal Procedure was required to arrive at his satisfaction. If he though that the matter should receive his due consideration only after the cross-examination of the witnesses is over, no exception thereto could be taken far less at the instance of a witness and when the State was not aggrieved by the same.

13. From the decisions of this Court, as noticed above, it is evident that before a court exercises its discretionary jurisdiction in terms of Section 319 of the Code of Criminal Procedure, it must arrive at the satisfaction that there exists a possibility that the accused so summoned is in all likelihood would

A be convicted. Such satisfaction can be arrived at inter alia upon completion of the cross-examination of the said witness. For the said purpose, the court concerned may also like to consider other evidence. We are, therefore, of the view that the High Court has committed an error in passing the impugned judgment. It is accordingly set aside. The appeal is allowed.

B D. G. Appeal allowed.