(2009) 01 JH CK 0025

Jharkhand High Court

Case No: Criminal M.P. No. 129 of 2005

Gaurchandra Gorain and Others		APPELLANT
	Vs	
The State of Jharkhand and Another		RESPONDENT

Date of Decision: Jan. 9, 2009

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 167, 319, 319(1), 319(4)
- Penal Code, 1860 (IPC) - Section 201, 302, 34

Citation: (2009) 57 BLJR 1450

Hon'ble Judges: Narendra Nath Tiwari, J

Bench: Single Bench

Advocate: Mahesh Tiwari, for the Appellant; Assistant Public Prosecutor and Shekhar Prasad Sinha, For O.P. No. 2, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Narendra Nath Tiwari, J.

An F.I.R. was lodged by one Dinbandhu Gorai, alleging that Nemai Gorai who happens to be his relative, informed him on phone that his son Sumanto had come from Kolkata and requested him to give company for going to his in-laws'' house-at village Chhota Ambona. Thereafter, both of them had gone there by motorcycle and when they were returning, Sumanto asked him to stop for urination. Nemai stopped motorcycle near Panchayat Bhwan, Ambona, Sumanto got down and fled away without disclosing the destination. On that information, the informant went to search his son. The next morning he spotted the dead body of his son, lying near the railway track. Sumanto was married that very year, but relation with his wife was not very cordial. Sumanto''s ''Sarhu'' had sometime back threatened him. On the basis of the said statement of Dinbandhu Gorai, Dhanbad Rail P.S. Case No. 80 of

2002 was registered under Sections 302, 201 and 34 of the Indian Penal Code against unknown.

2. The police investigated into the case and submitted charge sheet against Nemai Gorai. 14 witnesses were named in the charge sheet. Cognizance was taken of the offences under Sections 302, 201 and 34 of the Indian Penal Code. The trial proceeded against Nemain Gorai and Six prosecution witnesses were examined.

3. At that stage, an application u/s 319 Cr.P.C. was filed on behalf of the prosecution through the A.P.P., praying the Trial Court to summon the petitioners to face trial along with the charge-sheeted accused. In the said application, it was stated that the Investigating Officer did not take into consideration the materials, suggesting complicity of the petitioners in committing the said offences. The medical evidence clearly revealed that the death was not suicidal or accidental. It was homicidal and a murder.

4. It was further stated that P.W. 2-Kailash Gorain, who is brother-in-law of the deceased Sumanto Gorai and son-in-law of Dinbandhu Gorai, is not the charge-sheeted witness. He has not given any statement before the police. P.W. 6-Diwakar Gorain has deposed contrary to the statement given by him u/s 167 Cr.P.C. However, P.Ws. 2 and 6 had deposed regarding strained relationship of Sumanto Gorai with his wife and about illicit relationship of Dilip Gorain with the deceased''s wife. A Panchayati was held in the village and Dilip Gorain had declared that he shall spend two to four lacs for killing Sumanto. In his deposition he had raised suspicion also against Mitul Gorain, Gaur Gorai and Satyanarayan Gorai having played some role in the murder of Sumanto. P.W. 6-Diwakar Gorai in his examination-in-chief also stated about illicit relationship of Dilip Gorain with the wife of Late Sumanto and that was the reason for the strained relation between Sumanto and his wife. A Panchayati was held regarding illicit relationship of the deceased''s wife with Dilip Gorain. At that time, Dilip Gorain had threatened the deceased with consequences.

5. On the said application filed by learned A.P.P., learned Additional Sessions Judge-X passed the impugned order dated 6th December, 2004, whereby summonses were sought to be issued against the petitioners, Gaurcharan Gorain- uncle of Mitul Gorain-wife of Sumanto Gorai, Rakhal Gorain-brother-in-law of Gaurchandra Gorai, Dilip Gorain-brother-in-law of Mitul Gorai invoking power u/s 319 Cr.P.C.

6. In this petition, the petitioners have challenged the said order dated 6th December, 2004 passed by learned Additional Sessions Judge-X on the following grounds:

(i) In course of investigation, no material was found against the petitioners.

(ii) Petitioner No. 1 was made as one of the witnesses of the charge sheet. There was no protest petition against the charge sheet.

(iii) There is no sufficient material against the petitioners, suggesting their conviction for the alleged offences.

(iv) The trial commenced long back and six witnesses have been examined including the Petitioner No. 1. Only formal witnesses remained to be examined. Exercising discretion by the Court u/s 319 Cr.P.C. and summoning the petitioners at the fag end of the trial is not proper.

(v) The evidence on record, on the basis of which summons have been issued u/s 319 Cr.P.C., casts only the mist of suspicion. There is no cogent basis to show the complicity of the petitioners even circumstantially, except the alleged threat by the Petitioner No. 4 at one point of time.

(vi) The evidence of P.Ws. 2 and 6 does not suggest any complicity of the Petitioner Nos. 1 to 3, who are said to be only related to the Petitioner No. 4, who allegedly had given threat at one point of time.

7. Mr. Mahesh Tiwari, learned Counsel, appearing on behalf of the petitioners, submitted that there is no material on record for reasonable satisfaction for invoking power u/s 319 Cr.P.C. and to proceed against the petitioners. Learned court below has improperly summoned the petitioners to face trial along with other accused persons. Learned Court has not taken into consideration that almost all the material witnesses have been already examined. Reopening the case for de novo trial would be a sheer waste of the valuable time. There is no hope on the said evidence for ending the case in conviction. The impugned order is without any legal basis and is liable to be quashed.

8. In support of the said contentions, learned Counsel has referred to and relied upon the decision of the Apex Court in Michael Machado and Another Vs. Central Bureau of Investigation and Another, and the decisions of this Court in Samir Kumar Sinha v. State of Jharkhand and Ors. 2005 (2) ECC 443 and Sahdeo Rai v. State of Jharkhand 2005 (2) ECC 449.

9. Learned Counsel appearing on behalf of Opposite Party No. 2 as also learned A.P.P. opposed the petition. It has been submitted that if the police on investigation failed to collect the evidence and submit charge sheet against the petitioners, learned Trial Court is not precluded from invoking power u/s 319 Cr.P.C. and issue summons in course of the trial on the basis of material, suggesting commission of offence against any person not being an accused. There is no impediment in exercising such discretion even if there was no protest petition against submission of the charge sheet. There are sufficient materials in the evidences of P.Ws.2 and 6 on the basis of which the petitioners'' complicity can be reasonably linked. Learned Counsel further submitted that there are 14 charge sheet witnesses and the trial is still going on and it cannot be said that the summonses have been issued against the petitioners at the fag end of the trial.

10. Learned Counsel for the Opposite Party No. 2 as also learned A.P.P., however, have fairly admitted that there is no clear evidence either in the depositions of P.Ws. 2 and 6 or any clear material on record, showing direct involvement of the petitioners suggesting their conviction, but there may be some material which may be linked with any further evidence to be adduced in the case to hold the petitioners guilty for the offences. The impugned order of the learned Additional Sessions Judge, thus, cannot be said to be improper and without any basis.

11. I have heard learned Counsel for the parties and considered their submissions and facts and materials on record. I have also perused the impugned order of the learned court below.

12. Section 319 Cr.P.C. confers power on the Court to issue summons to any person not being the accused, if it appears from the evidence on record that such person has committed any offence. Section 319 Cr.P.C. is reproduced herein below:

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 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 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.

13. From bare reading of the above provision, it is evident that for exercising discretion under the said provision, the basic requirement is that the evidence must be already collected on record during the trial or the enquiry from which it should appear that the person, who is not an accused in the case, has committed an offence for which that person could be tried along with the accused already facing trial.

14. In Michael Machado''s case (Supra), the Apex Court has held that it is not enough that if the Court finds some doubt from the evidence about the involvement of

another person in the offence, the Court must have reasonable satisfaction from the evidence already collected regarding two aspects; (i) that the other person has committed an offence; and (ii) that the other person as alleged will be tried along with the accused already facing trial. In Paragraph-14 of the said decision, the Apex Court has held thus:

14. The Court while deciding whether to invoke the power u/s 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 re-commenced 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 a large in number the Court must seriously consider whether the objects sought to be achieved by such exercise is worth wasting the whole labour already undertaken. Unless the Court is hopeful that there is reasonable prospect of the case as against the newly brought accused ending to conviction of the offence concerned we would say that the Court should refrain from adopting such a course of action.

15. In Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others, it has been ruled that the power of the Court under the said provision is an extraordinary power and the same should be used very sparingly and only in compelling circumstance against the person, who is not an accused and against whom cognizance has not been taken.

16. In Sahdeo Rai''s case (Supra), learned Single Judge of this Court has held that the most vital factor worth consideration is that summoning a person at the fag end of the trial of the case in exercise of power u/s 319 Cr.P.C. is an abuse of the process of the Court in view of the fact that the witnesses shall have to be called up again and re-examined which will take long time. It has been further held that when a person was not sent up for trial even after consideration of the case diary, no cognizance was taken against him and even after examination of one or two witnesses, the petitioner was not summoned, it is not proper to summon a person at the fag end of the trial.

17. On consideration of the facts of the instant case in the context of the provisions of Section 319 Cr.P.C. as also the judicial pronouncements, I do not find sufficient material/reason, justifying the impugned order. The material on the basis of which learned Trial Court has sought to issue summons to the petitioners only raises some doubts against some of the petitioners, particularly, Petitioner No. 4, who is said to have given threat for dire consequences at one point of time to the deceased. Such doubts how so ever strong cannot be said to be sufficient material, giving reasonable prospect for conviction of the petitioners under Sections 302, 201 and 34 of the Indian Penal Code.

18. Learned Counsel for the opposite party submitted that evidences which may be later on adduced may supply proper links for completing the chain of circumstantial evidence for establishing charges against the petitioner. The said contention, however, cannot be accepted. For exercising power u/s 319 Cr.P.C. the Court has to be satisfied from the materials/evidences already collected and available on record, giving firm impression of commission of the penal offence by the person sought to be summoned for taking trial of the offence along with the accused person already facing trial. Materials and evidences, copies of which have been annexed with the petition, do not provide any clinching material or cogent evidence, which can be said to be sufficient for summoning the petitioners for taking trial of the aforesaid offences. In absence thereof, the impugned order, summoning the petitioners u/s 319 Cr.P.C., is an abuse of the process of the Court and the same has to be interfered with and quashed.

19. This petition is, accordingly, allowed. Impugned order dated 6th December, 2004 is quashed. Learned court below is directed to proceed with the trial against the existing accused expeditiously.