(2009) 01 PAT CK 0116

Patna High Court

Case No: Criminal Rev. No. 497 of 2007

Bino Yadav @ Bindeshwari Yadav	APPELLANT
Vs	
State of Bihar and Another	RESPONDENT

Date of Decision: Jan. 23, 2009

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 151
- Criminal Procedure Code, 1973 (CrPC) - Section 161, 190, 204, 319, 319(1)
- Penal Code, 1860 (IPC) - Section 147, 148, 149, 323, 324

Citation: (2009) 2 PLJR 368

Hon'ble Judges: Samrendra Pratap Singh J., J

Bench: Single Bench

Advocate: Kanhaiya Prasad Singh and Neeraj Kumar, for the Appellant; Suresh Pd. Singh No. 1, Shailendra Kr. Singh, Vitesh Kr. Singh for the Opp. Parties and Mrs. Indu Bala Pandey for the State, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Samrendra Pratap Singh, J.
The instant revision application is directed against the order dated 20.3.2007 passed by the Additional Sessions Judge. Fast Track Court-VI, Saharsa in Sessions Trial No. 82 of 2002 whereby he allowed the petition dated 20.7.2006 filed by the prosecution u/s 319 Cr.P.C. and ordered to issue non-bailable warrant of arrest against the petitioner to face trial. The petitioner assails the aforesaid order on the ground that it amounts to reviewing and recalling its earlier order dated 18.1.2006 on the same set of evidence not summoning the petitioner to face trial. Before I address the main ground taken by the petitioner in support of his contention, it would be necessary to notice the facts of the case in brief. One Chandeshwari Mukhiya, Opposite Party No. 2, is the informant of Sonebarsa P.S. Case No. 23 of 2000 under

Sections 147, 148, 149, 447, 323, 324, 325, 326 of the Penal Code. He alleged that Bino Yadav (petitioner) made an objection, while he was passing from in front of his house on 18.3.2000 at about 7.30 P.M. The informant replied that it is a public path and any one is free to pass through it. This led to a hot exchange of words between the informant and Bino Yadav, the petitioner. Soon thereafter four persons namely Lahsan Yadav, Mahelar Yadav, Rajo Yadav and Pawan Yadav came to his house armed with lathi, danda, bow and arrow. They charged the informant with then-weapons causing injuries to him. One Chandrakala Devi, sister of informant too was assaulted by the aforesaid accused persons with arrow when she tried to intervene. The police after investigation submitted final report not sending the petitioner for trial.

2. The cognizance of offence was taken and accused persons who were charge-sheeted were summoned to face trial. Thereafter the case was committed to the court of sessions, charges were framed and two witnesses namely P.W. 1 (Chandrakala Devi) and P.W. 2, the informant, Chandeshwari Mukhiya were examined on 3.7.2004 and 8.12.2004 respectively.

3. Thereafter the informant (Opposite Party No. 2) filed a petition u/s 319 Cr.P.C. for summoning the petitioner to face trial as the evidence of P.Ws. 1 and 2 in trial would show that the petitioner also committed offence. However, the learned P.P. pleaded that no order need be passed at this stage on the aforesaid petition and order, if any, be passed after some more witnesses are examined in the case. The learned trial court after hearing the parties disposed of the aforesaid petition in terms of submissions made by learned P.P.

4. It is relevant to point out here that it was very much open for learned court to reject the prayer of learned P.P. and summon the petitioner to face trial as well, which he did not consider appropriate at that stage. Neither the informant nor the P.P. seemed aggrieved as no one challenged the aforesaid order in superior courts.

5. Thereafter again on 20.7.2006, on same set of evidence of P.W. 1 and P.W. 2, a petition was filed on behalf of prosecution praying therein to summon the petitioner Bino Yadav to face trial in view of evidence appearing in depositions of P.Ws. 1 and 2.

6. The learned trial court by order dated 20.3.2007 after hearing the parties allowed the application u/s 319 Cr.P.C. and issued non-bailable warrant of arrest against the accused Bino Yadav, who was not earlier charge-sheeted and summoned to face trial. The petitioner aggrieved by the aforesaid order has moved this court.

7. The main ground urged by learned counsel for the petitioner is that the trial court or for that matter a Court of Magistrate or that of Sessions have no jurisdiction to review its own order. He submits that the impugned order dated 20.3.2007 allowing petition u/s 319 Cr.P.C. amounts to reviewing or recalling its own order dated 18.1.2006, whereby similar application u/s 319 Cr.P.C. was not allowed by the trial

court on same set of evidence. He submits that the order dated 18.1.2006 impliedly amounts to rejection of the petition filed by the informant summoning the petitioner to face trial u/s 319 Cr.P.C. On the other hand learned counsel for the petitioner submits that the impugned order dated 20.3.2007 amounts to reviewing and recalling the earlier judicial order passed by the trial court in an application u/s 319 Cr.P.C. by which the Magistrate disposed of the application to summon the petitioner to face trial after examination of few more witnesses in trial. He submits that the first order passed by the Trial Judge is an implied rejection of the application of the Opposite Party to summon the petitioner to face trial.

8. Coming to the facts of the case, the informant did not allege that petitioner participated in assaulting the informant (P.W. 2) or his sister Chandrakala Devi, P.W. 1 in the F.I.R. In his fardbeyan, he specifically stated that four persons other than the petitioner assaulted the prosecution side by lathi, bows and arrows. Neither the informant (P.W. 2) nor his sister PW. 1 in their statements u/s 161 Cr.P.C. made any allegation that petitioner assaulted anyone much less P.W. 1 and P.W. 2 (informant). However, after four years of occurrence they for the first time in course of their deposition alleged that the petitioner also committed overt act. In support of his contention, learned counsel for the petitioner relied upon decisions of the Hon''ble Apex Court in the case of Bindeshwari Pd. Singh vs. Kali Singh, 1977 SC 2432 equivalent to 1978 Cr.L.J. 187; State of Himachal Pradesh vs. Krishna Lal Pradhan & Ors., 1987 SC 773 and Isham Singh vs. State of Haryana, 2004 Cr.L.J. 3235.

9. Learned counsel for the informant-Opposite Party No. 2 on the other hand submitted that the informant is as much competent as Public Prosecutor to file an application u/s 319 Cr.P.C. bringing to the notice of the court that there are sufficient materials on record to summon a person who has not been an accused in the case. He further submits that the court is also competent suo moto to exercise power u/s 319 Cr.P.C. He further submits that if the trial court from evidence appearing in enquiry or trial finds that a person who is not an accused has committed an offence and summons him to face trial, this court should refrain itself in interfering with the said order. He submits that in fact the informant earlier had filed a protest petition showing lack of faith in the investigating agency. In support of his contention, he relied upon decisions of this court in the case of Sk. Jamlu Quazi @ Md. Namaluddin and Others vs. State of Bihar and Anr., 1997(1) P.L.J.R. 811; Shashikant Singh Vs. Tarkeshwar Singh and Another, ; Gupteshwar Singh vs. State of Bihar, 2007(1) B.B.C.J. 602 and Hari Kishun Prasad Verma and Others Vs. The State of Bihar and Another, .

10. Much emphasis was put by learned counsel for the Opposite Party that in course of trial the informant could also file a petition before the court u/s 319 Cr.P.C. for summoning a person who has not been made as an accused. It was further his case that it was equally open for the court to summon a person to face trial u/s 319 Cr.P.C. even if learned P.P. or for that matter the informant does not press or seek

withdrawal of the application.

11. One cannot dispute the proposition laid down in the case of Sk. Jamlu Quazi @ Md. Namaluddin (supra) relied upon by learned counsel for the Opposite Party. The ratio would not help the Opposite Party as the issue in this case is entirely different. In the aforesaid case the informant filed an application for summoning the petitioner as an accused on 2.7.1988. The application remained pending and in the meantime the informant filed a withdrawal application not pressing the earlier application for issuing summons u/s 319 Cr.P.C. The trial court rejected the contention of the informant and summoned the petitioner Sk. Jamlu Quazi @ Md. Namaluddin who was neither sent up nor cognizance was taken against him earlier to face trial. In these circumstances this court held that the trial court is not bound by the withdrawal application of the informant and if it comes to the notice of the court that there was sufficient material to summon a person who is not an accused, the court could very well do so.

12. The fact of the case in hand is different. Here the trial court vide order dated 18.1.2006 disposed of the application of the informant acceded to the prayer of learned P.P. to consider the application to summon the petitioner u/s 319 Cr.P.C. after some more witnesses are examined. The trial court did not keep the petition pending rather disposed of the same in aforesaid terms which amounted to implied rejection to issue summons to the petitioner to face trial at that stage. However, the trial court on same set of evidence passed order dated 20.3.2007 summoning the petitioner to face trial. The matter would have been different if trial court had rejected the prayer of the P.P. and would have summoned the petitioner to face trial by the first order passed on 18.1.2006.

13. Learned counsel for the Opposite Party seems to have missed the issue involved in this case and relied upon a decision of the Apex Court in the case of Sashi Kant Singh vs. Tarkeshwar Singh & Anr. (supra). In the aforesaid case, the Apex Court was considering a different issue and the points involved in this case was not the issue in the aforesaid case. In the aforesaid case the Apex Court was considering the issue whether a person who was summoned u/s 319 Cr.P.C. could be tried de novo, if by the time he appeared in the court, the original trial against other accused persons stood concluded. The Apex Court answered the issue in affirmative stating that expression "could be tried together the accused" figuring in Section 319(1) is directory, whereas requirement of sub-section (4) of Section 319 regarding de novo trial of such person is mandatory. The aforesaid issue is not the issue in the case in hand and as such the aforesaid decision has no application in this case.

14. Similarly the decision in the case of Gupteshwar Singh (supra) is also of no help. In the aforesaid case it was held that if a court is satisfied on the basis of materials before it that there is sufficient evidence to summon an accused u/s 319 Cr.P.C. it can do so without any application from P.P. or even the informant. The case of Hari Kishun Prasad Verma (supra) next relied by the petitioner is to the extent that this

court would generally not appreciate the evidence on record or consider the reliability or sufficiency of evidence in issuing summons against the accused. The aforesaid decision would also be no help to the Opposite Party, as on the same set of evidence the trial court did not find it earlier expedient to summon the petitioner to face trial.

15. In support of his contention the learned counsel relied upon a decision in the case of Krishna Lal Pradhan & Ors. (supra), Isham Singh vs. State of Haryana (supra) and Bindeshwari Singh vs. Kali Singh (supra).

16. In the case of Krishna Lal Pradhan, the predecessor trial Judge finding sufficient material on record summoned the accused person not sent up for trial. However, the successor Judge finding that no summon existed discharged them at the stage of framing of charge. The Apex Court held that the order of Successor Judge amounts to reviewing of the order of Predecessor Judge which is not permissible in law.

17. In the case of Bindeshwari Prasad Singh (supra) the Apex Court held that there is no provision in Cr.P.C. empowering the learned Magistrate to review or recall a judicial order passed by him. Inherent power u/s 561(a) (Old Code) conforming to Section 482 (new Code) is vested with High Court only, unlike Section 151 C.P.C. which is available both to subordinate courts as well. The aforesaid decision delineating lack of jurisdiction in Magistrate to review or recall its order in absence of any statutory provisions would be equally applicable to Sessions Court as the latter too does not have any inherent power like High Court as provided u/s 482 Cr.P.C. Furthermore, the yardstick to be followed while exercising powers u/s 319 Cr.P.C. is different than the one, the court exercises while summoning the accused to face trial u/s 190 or Section 204 Cr.P.C.

18. The Apex Court in the case of Isham Singh (supra) observed that power u/s 319 is to be exercised sparingly and primarily to advance cause of criminal justice. Merely because the complainant names petitioner by attributing specific injury to them cannot infer their involvement in crime particularly when version of complainant was an improvement of his earlier written version and more so, when there was enmity between the parties.

19. Learned trial court on 18.1.2006 disposed of earlier application u/s 319 Cr.P.C. without summoning the petitioner to face trial. On same set of evidence on a subsequent petition the court vide order dated 20.3.2007 summoned the petitioner to face trial. Subsequent order of the trial Judge summoning the petitioner to face trial on same set of evidence would impliedly amount to recalling and reviewing his earlier order which is not permissible in law.

20. In aforesaid circumstances, as such the order dated 20.3.2007 passed by the learned Addl. Sessions Judge, F.T.C.-6, Saharsa in S.T. No. 82 of 2002 allowing the application of Opposite Party u/s 319 Cr.P.C. is set aside.

21. It appears that two more witnesses have been examined by the trial court. This court as such remits the matter to the trial court for fresh consideration of the matter u/s 319 Cr.P.C. taking into account the evidence of the subsequent witnesses as well as of P.W. 1 and P.W. 2. It is made clear that this court has not expressed any opinion on the merit of the matter whether there is evidence or not to summon the petitioner to face trial u/s 319 Cr.P.C. With the aforesaid direction, this application is allowed to the extent indicated above.