

S.B. Criminal Revision Petition No.149/2007.
(Ram Karan Vs. State of Rajasthan & Another)

DATE OF ORDER : May 31st, 2007

HON'BLE MR. JUSTICE GOPAL KRISHAN VYAS

Mr. Sandeep Mehta and Mr. Vineet Jain
for the petitioner.
Mr. J.S. Choudhary for the respondent.
Mr. S.N. Tiwari, P.P.
Mr. Mukesh Rajpurohit, for the applicant.

In this revision petition, the complainant petitioner is challenging the order dated 15.02.2007 passed by Addl. Sessions Judge (Fast Track) No.2, Bikaner (hereinafter, "the trial court") in Sessions Case No.45/2005 whereby application filed by the prosecution under Section 319, Cr.P.C. for adding non-petitioner No.2 Ram Lal as accused was rejected.

According to facts narrated in the petition, the petitioner's grand son Sahi Ram, alongwith Mularam, Vikas, Sitaram, Kishna Ram and Sriram was campaigning in the village for election. At that time, according to the FIR filed by petitioner Ram Karan, it is alleged that due to enmity in the elections, on 29.01.2005, in front of the old well Ram Lal s/o Gopal Ram, Hari Ram, Kedar Ram and Subhash s/o Kheta Ram came out of whom, Ram Lal was armed with a gun and Hari Ram and Kedar Ram had barachhis with them.

Subhash was carrying a sela with him. After arriving there in Bellero vehicle, Ram Lal came out and aimed the gun at Sahi Ram, grand-son of the complainant and fired gun shot. It was alleged that due to the said gun-fire shot, Sahi Ram received injury in his chest, at that time, Hari Ram inflicted injury with barachhi to Moola Ram and Kedar Ram also inflicted barachhi blow on the leg of Mula Ram while Subhash caused injury to Mula Ram with sela on his back. Upon this report, case was registered at the Police Station, Nokha and, after usual investigation, challan was filed against Nimba Ram, Mohan Ram, Pathram, Bhanwarlal, Tejaram, Sravan, Jagannath, Hari Ram, Kedar Ram and Ranchhor Ram. It is contended that though specific allegation was levelled by the author of the FIR that Ram Lal inflicted the fatal injury by gun shot, no charge-sheet was filed against non-petitioner Ram Lal. After the challan was filed, the magisterial Court committed the case to the Court of Sessions for trial and, ultimately, the case was transferred to the Addl. Sessions Judge (Fast Track) No.2, Bikaner for trial.

While the trial is going on in the matter, during the course of prosecution evidence, as many as 15 witnesses were examined; and, thereafter, application was moved by the complainant petitioner Ram Karan under Section 319, Cr.P.C. for taking cognizance and

for adding non-petitioner Ram Lal s/o Gopal Ram as accused in the trial. The trial Court, after hearing the parties, rejected the application filed under Section 319, Cr.P.C. by an elaborate order dated 15.02.2007.

It is contended by learned counsel for the petitioner that the order passed by the trial Court rejecting the application filed by the petitioner complainant is erroneous in the eye of law and cannot be sustained because, as per the evidence recorded during the trial, there is sufficient material for addition of non-petitioner Ram Lal as accused in the case; but, the learned trial Court has committed serious error in rejecting the application. It is contended by the learned counsel that upon perusal of the order impugned it is revealed that the trial Court has minutely scanned the evidence, as it were, the trial Court was deciding the matter finally which is not permissible under the law. It is argued by learned counsel for the petitioner that upon application under Section 319, Cr.P.C. the Court is only required to see as to whether from the evidence on record there is a *prima facie* case against the person sought to be arrayed as accused in the trial; but, it seems that at the time of deciding the application, the trial Court embarked upon appreciation of the evidence for final adjudication

upon the question of guilt of the non-petitioner Ram Lal. It is further argued by learned counsel for the petitioner that the trial Court has failed to appreciate the allegations of most of the prosecution witnesses that the fatal gun-shot was fired by Ram Lal. It is contended that right from the FIR there are specific allegation of the gun-shot injury having been caused by non-petitioner No.2. According to learned counsel for the petitioner P.W.-5 Likhma Ram, P.W.-6 Mula Ram, P.W.-11 Ram Karan, P.W.-14 Kishna Ram and P.W.-15 Vikas categorically stated in their statements that the gun-shot injury was inflicted by Ram Lal, non-petitioner No.2. Learned counsel for the petitioner argued that the trial court sifted the evidence while deciding the application under Section 319, Cr.P.C. to arrive at the finding of guilt of the non-petitioner which, at the stage, is not permissible in law.

It is submitted by learned counsel for the petitioner that at the stage of deciding application under Section 319, Cr.P.C. the effect of eye-witnesses' testimony is not required to be looked into in the manner as when deciding the matter finally inasmuch as the observation of the trial Court that there is serious enmity between the prosecution witnesses and accused persons is, at the stage, unwarranted. The nature and effect of the testimony

is required to be judicially comprehended at the time of finally deciding the case. According to learned counsel for the petitioner, to arrive at these findings while deciding the application under Section 319, Cr.P.C. virtually seals the fate of the trial and, therefore, the trial court fell into serious error of law while minutely scanning the evidence so as to leave no room for trial at the stage when evidence was required to be appreciated only for the purpose of ascertaining the involvement of the person sought to be added for trial for commission of the alleged offence.

Learned counsel for the petitioner further contended that the trial court has over-looked the material aspect of the case that the investigating agency while filing challan did not take into consideration that there are specific allegation against the non-petitioner and despite that without giving any cogent reason non-petitioner No.2 was not charge-sheeted. According to him, during investigation sufficient material was collected upon which charge-sheet was required to be filed against non-petitioner Ram Lal also. He lastly contended that the trial court took into consideration the material which ought not to have been considered at the stage of deciding application under Section 319, Cr.P.C. It is pointed out that in the impugned order the learned

trial Judge has considered the contents of the case-diary as well as certain affidavits submitted by the defence which is not permissible at all in law because while deciding application under Section 319, Cr.P.C. the Court can only consider the evidence which means the evidence led before the court. It is urged that the trial court cannot be permitted to look into the contents of the case-diary and other enquiries.

In support of his submission, reliance is placed by learned counsel for the petitioner on the judgments reported in 2004 SCC (Cri.) 1153 and 2006 (3) SCC (Cri.) 532 and it is submitted that according to the evidence recorded by the trial court there is sufficient material for impleading non-petitioner Ram Lal as additional accused but the trial court has committed error while passing the impugned order which is totally contrary to law.

On the other hand, learned counsel for the non-petitioner urged that the order passed by the learned trial court is well reasoned order and the same was made after taking into account the authorities of the Supreme Court judgments. According to learned counsel for the non-petitioner the application has been rightly rejected in view of the apex court decision in the case of Michael Machado & Another vs. Central Bureau of Investigation & Another, 2000 Cr.L.R. (SC) 265, Jarnail Singh & Another vs. State of Haryana &

Another, 2003 Cr.L.R. (SC) 419, Palanisamy Gounder & Another Vs. State (represented by Inspector of Police), (2006) 1 SCC (Cri) 568 and Kavuluri Vivekananda Reddy & Another Vs. State of Andhra Pradesh & Another, (2006) 2 SCC (Cri) 324. It is contended by learned counsel for the non-petitioner that the learned trial Court has clearly observed in the impugned order that the complainant petitioner was not eye-witness of the incident whereas father of the deceased Sahi Ram, who was eye-witness, turned hostile before the Court and has not supported the prosecution version.

As per the counsel for the non-petitioner, the power under Section 319 Cr.P.C. is required to be exercised sparingly and discretionary power can be exercised if upon appreciation of evidence, it is revealed that ultimate conviction can be arrived at.

It is further contended by learned counsel for the non-petitioner that after completion of the prosecution evidence as well as evidence led in defence, the case is at the stage of final arguments and, at the time of recording defence evidence, affidavits have been filed in defence given by the mother, two brothers and father of the deceased Sahi Ram in which it is categorically stated by these persons that no gun-shot injury was inflicted by non-petitioner Ram Lal. It is submitted that these

affidavits were produced in defence and were exhibited in the trial before the Court, therefore, the trial Court rightly considered the effect of the evidence that ultimate conviction cannot be arrived at and accordingly rejected the application.

I have considered the rival submissions and carefully considered the material placed on record.

It is true that at the time of passing orders under Section 319, Cr.P.C. the trial Court is required to see the material on record keeping in mind the ultimate prospects of conviction of such accused. Having so appreciated the material on record, if the Court cannot arrive at a positive conclusion as to such prospects of conviction of the person so sought to be implicated for trial, the Court is not required to array such person as accused in the trial. Since the Court exercises discretion under Section 319, Cr.P.C. during the course of the trial, such stage is only after commencement of the evidence in the trial. Therefore, it is essential for the trial Court to ascertain at the time of exercising jurisdiction under Section 319 of the Code that there is evidence disclosing commission of the offence by the person sought to be arrayed as accused to stand trial together with the accused already before the Court.

In *Lok Ram Vs. Nihal Singh & Another, (2006) 3 SCC*

(Cri) 532, the apex Court held that the word “evidence” in Section 319 Cr.P.C. contemplates the evidence of witnesses given in Court. The trial Court can take such a step to add such persons as accused only on the basis of evidence adduced before it and not on the basis of materials available in the charge-sheet or the case diary, because such materials contained in the charge-sheet or the case diary do not constitute evidence.

At the time of deciding application under Section 319, Cr.P.C. the court is under obligation to consider the evidence which is on record, more specifically statements of the prosecution witnesses and to decide whether any other person is required to be arrayed as accused. In **Rukhsana Khatoon (Smt.) Vs. Sakhawat Hussain & Others, 2004 SCC (Cri) 1153**, the import of evidence of the prosecution witnesses corroborating the alleged role of the person sought to be arrayed as accused is held to be sufficient for the Court to exercise discretion under Section 319, Cr.P.C.

It is also required to be observed that application filed under Section 319, Cr.P.C. is required to be decided independently without even notice to such person against whom application has been filed for taking cognizance because at that stage the evidence means the evidence collected before the

Court upon examination of the prosecution witnesses. It appears from the perusal of the impugned order that without recording any evidence or without taking any cognizance the learned trial Court has written down the verdict which is illegal and contrary to the settled principles of law. The Court is, at that stage, only required to conclude *prima facie* on the basis of the evidence produce by the prosecution before it whether power under Section 319, Cr.P.C. is to be exercised or not. Section 319 of the Code of Criminal Procedure does not contemplate a close and deeper appreciation of the evidence so as to adjudicate upon the question of guilt finally.

Thus the "evidence" for exercise of power under Section 319, Cr.P.C. is the evidence which causes the Court's judicial mind to perceive that it appears from the evidence that person not arraigned before it is involved in the commission of the crime and, therefore, the Court for the purpose of Section 319, Cr.P.C. is only required to *prima facie* conclude that such person could be tried together with the accused for having committed the offence. Obviously the trial Court has not considered the application under Section 319, Cr.P.C. within correct parameters and committed grave error and illegality while deciding the application. The trial Court ought not to have taken into account the defence of the person sought to be arraigned for trial while

dealing with the application.

From careful perusal of the impugned order, it is obvious that the trial Court has sifted the evidence to adjudicate upon the question of guilt of the non-petitioner.

Before the learned trial Court, there was sufficient material on record including statements of the prosecution witnesses to implicate the non-petitioner No.2 and the trial Court, at that stage, was not required to take into account defence of the non-petitioner which could not be considered before taking cognizance of the offence against that person.

Upon perusal of the impugned order it is clear that the trial Court has decided the case as if it reached conclusion as to the innocence of the non-petitioner. The prosecution witnesses have specifically stated before the Court that Ram Lal, non-petitioner fired the gun-shot causing injury to deceased Sahi Ram. It is true that father of the deceased, Sri Ram turned hostile before the Court, but the complainant is also grand-father of the deceased Sahi Ram.

The further aspects of the matter that there is enmity in between the parties and there is political rivalry do not require to be gone into at the stage because these aspects of the matter are required to be gone into and taken into consideration at the time of

finally deciding the case. At the time of deciding application under Section 319, Cr.P.C. the trial Court committed error while concluding that the complainant was not eye-witness in the case and further placing reliance upon the affidavits filed in defence. From the side of the prosecution, P.W.-5 Likhma Ram, P.W.-6 Mula Ram, P.W.-11 Ram Karan, P.W.-14, Kishna Ram and P.W.-15 Vikas categorically stated in their statements that Ram Lal inflicted the gun-shot injury to the deceased. In my considered opinion, the trial Court exceeded its jurisdiction while deciding the matter upon assessing the credibility of the testimony of these witnesses viz-a-viz the defence of the non-petitioner, as it were, the trial Court was finally deciding the case against the non-petitioner No.2. In the facts and circumstances of the case, the impugned order dated 15.02.2007 deserves to be set aside.

Consequently, the revision petition is accepted. The impugned order dated 15.02.2007 is set aside.

The application under Section 319, Cr.P.C. is ordered to be allowed. The trial Court is directed to add non-petitioner No.2 as accused and for securing his presence bailable warrant for Rs.5,000/- may be issued and proceed with trial in accordance with law.

(Gopal Krishan Vyas) J.