



THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Revisional Jurisdiction)

DATED : 11th April, 2023

SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

Crl.Rev.P. No.02 of 2022

Petitioners : Ashal Kumar Thapa and Another

versus

Respondent : State of Sikkim
through the Director,
Vigilance Department

Revision Petition under Sections 397 and 401
of the Code of Criminal Procedure, 1973.

Appearance

Mr. N. Rai, Senior Advocate with Mr. A. J. Sharma, Mr. Rahul Rathi
and Ms. Tara Devi Chettri, Advocates for the Petitioners.

Mr. Yadev Sharma, Additional Public Prosecutor with Mr. Sujan
Sharma, Assistant Public Prosecutor for the State-Respondent.

O R D E R (ORAL)

Meenakshi Madan Rai, J.

1. This petition filed under Sections 397 and 401 of the Code of Criminal Procedure, 1973, (hereinafter, the "Cr.P.C."), assails the Order, dated 07-02-2022 of the Learned Special Judge (PC Act, 1988), Gangtok, Sikkim, in Sessions Trial (Vigilance) Case No.01 of 2019 [*State of Sikkim (Through Vigilance Department) vs. Ashal Kumar Thapa and Others*].

2. Briefly, the submissions put forth by Learned Senior Counsel for the Petitioners is that the Petitioners herein filed an application under Section 319 read with Sections 227/228 of the Cr.P.C. (for short, "Section 319 Cr.P.C. petition") before the Learned Trial Court, praying that in view of the evidence appearing against the persons named in the said petition, they also be arrayed as accused persons along with the three Petitioners, who were facing trial in the aforementioned case. That, the persons to



be arrayed as accused, along with the Petitioners herein, are the witnesses presently arraigned in the Charge-Sheet in the following order; P.W.1 Smt. Rinzing Doma Bhutia; P.W.2 Smt. Lily Bhutia; P.W.27 Shri B. B. Subba; P.W.28 Shri Bikram Tamang; P.W.32 Ms. Laxmi Rai; P.W.33 Smt. Bina Gurung; P.W.47 Smt. Passangkit Lepcha and P.W.48 Smt. Tshering Ongmu.

(i) That, the Prosecution while making a categorical admission in Paragraphs 4, 5 and 6 of their response to the Section 319 Cr.P.C. petition, to the effect that P.Ws 1, 2 and 47 were complicit in the said offences, failed to advert to the role of the other persons (P.Ws) named *supra*, in the offence. Instead, the Prosecution by a tangential prayer sought to make the said three persons (P.Ws 1, 2 and 47) "Approvers" in the instant case, without filing a petition under Section 306 of the Cr.P.C., thereby depriving the Petitioners of an opportunity of contesting the petition. That, the Learned Trial Court while rejecting the prayer of the Petitioners under Section 319 Cr.P.C. instead of giving a reasoned Order, proceeded first to deal with the prayer of the Prosecution pertaining to the question of Approvers, sans a petition under Section 306 Cr.P.C. That, it is apparent that the Learned Trial Court has failed to appreciate the legal issues involved in its correct perspective, hence the impugned Order be set aside and the Section 319 Cr.P.C. petition be ordered to be heard afresh.

3. Learned Additional Public Prosecutor conceded fairly that no petition was filed by the Prosecution under Section 306 of the Cr.P.C., however the Order of the Learned Trial Court cannot be said to be suffering from any infirmity, hence the Revision Petition be dismissed.



4. Having heard learned Counsel for the parties, I have also perused the impugned Order of the Learned Trial Court and the Section 319 Cr.P.C. petition as well as the response filed by the Prosecution.

5. Indeed, the records of the Learned Trial Court do not reveal any application filed by P.Ws 1, 2 and 47 themselves under Section 306 of the Cr.P.C. or for that matter by the Prosecution. It may also relevantly be noted that the Section 319 Cr.P.C. petition was filed by the Petitioners on 03-09-2021, to which response was submitted by the Special Public Prosecutor, Vigilance, on 22-09-2021. Evidently, the Section 319 Cr.P.C. petition sought arraignment of the persons named therein as accused persons, in light of the documentary evidence submitted by the Prosecution allegedly indicating their involvement and collusion in the offences under which Charge-Sheet was filed.

(i) Pausing here momentarily, the Charge-Sheet filed by the Prosecution reflects that only the three Petitioners are arrayed as accused persons. The Special Public Prosecutor in his response to the Section 319 Cr.P.C. averred that the Prosecution had already prayed for making P.Ws 1, 2 and 47 Approvers, when the Charge-sheet was submitted.

(ii) At this juncture, it is essential to reiterate that although no application under Section 306 Cr.P.C. was filed either by P.Ws 1, 2 and 47 or by the Vigilance Department, the Learned Trial Court by taking into consideration the response of the Vigilance Department proceeded to treat it as a petition under Section 306 Cr.P.C. and recorded *inter alia* as follows;

“ ”



17. *Insofar as the joint petition filed by the accused Nos.1 & 3 under Section 319 read with Sections 227/228 of the Cr.P.C, 1973 for arraigning the concerned individuals and officials including the above two individuals as additional accused in the matter, it is only seen to be an attempt to scuttle the prosecution case. In fact, the prayer with regard to Ms. Passingkit Lepcha and Ms. Lily Bhutia is seen to be made only as an offshoot to the above prayer of the prosecution. It is only seen to be ruse to frustrate the prayer of the prosecution in that regard. Although it was also contended on behalf of the accused persons that the prosecution having earlier failed to take timely recourse to Section 306 Cr.P.C vis-à-vis the above two individuals the only course open to this Court is to summon them under Section 319 Cr.P.C the said contentions are also without merit. The decision of the Hon'ble Supreme Court in Girish Sharma's case(supra) is itself clear in this regard.*
18. *It needs no reiteration that the power to summon additional accused is an extraordinary power and should be exercised sparingly. Such powers cannot be exercised in a casual and cavalier manner. Merely making bald claims that the concerned individuals are somehow involved in the preparation of the concerned false bills and having it approved officially and so on would certainly not suffice and justify summoning them as additional accused, moreso, where no other culpable overt acts have been attributed to them. This Court is required to look into the entirety of the case set up by the prosecution. Further, it is now well-settled that the power under Section 319 Cr.P.C can be exercised only on the basis of the 'evidence' brought before the Court during the trial and not on the basis of materials collected during investigation. We may refer to the cases of S.Mohammed Ispahani v. Yogendra Chandak & Ors. AIR 2017 SC 4994; and Hardeep Singh v. State of Punjab & Ors. AIR 2014 SC 1400 in this regard. Needless to say, the above joint petition cannot as such be allowed.*
19. *Resultantly, the prayer of the prosecution is allowed. Ms. Passingkit Lepcha and Ms. Lily Bhutia shall be present before this Court on the next date. The joint petition of the accused Nos.1 & 3, on the other hand, stands rejected.*
....." [emphasis supplied]

(iii) In the first instance, while referring to Paragraph 17 of the impugned Order, extracted *supra* for convenience, it becomes



evident that the Learned Trial Court failed to appreciate that the prayer with regard to arraying the persons as accused was not an offshoot to the prayer of the Prosecution, in view of the fact that the Section 319 Cr.P.C. petition was obviously prior in time to the response filed. Secondly, it is evident thus that the Learned Trial Court in fact allowed a tangential prayer of the Vigilance Department seeking to make P.Ws 1, 2 and 47 Approvers sans an application under Section 306 Cr.P.C. filed by the Prosecution or by the concerned persons, while at the same time failing to give a reasoned order for rejecting the Section 319 Cr.P.C. petition of the Petitioners/Revisionists.

6. Now, reverting back to the Section 306 Cr.P.C., it deals with tender of pardon to accomplice. It is relevant to notice that only P.W.2 and P.W.47 were granted pardon by the Learned Trial Court with no reason for exclusion of P.W.1 from such pardon, although the response of the Special Public Prosecutor, Vigilance makes mention of P.W.1 as well.

(i) It needs no reiteration that the object of Section 306 Cr.P.C. is to allow pardon in cases where a heinous offence is alleged to have been committed by several persons, so that, with the aid of the evidence of the person granted pardon, the offence may be brought home to rest. [See **Suresh Chandra Bahri vs. State of Bihar**¹]. The Learned Special Judge was to previously have ascertained what evidence the accused will give, to enable him to decide whether pardon should be granted [See **Emperor vs. Pir Imamshah**²]. The concerned Special Judge may tender a full pardon to such person on condition of his making a full and true

¹ AIR 1994 SC 2420

² AIR 1944 Sind 184



disclosure of the whole of the circumstance within his knowledge relative to the offence and to every other person concerned. The Order of 07-02-2022 was pronounced allowing the prayer of the Prosecution, but questions were put to P.W.2 and P.W.47 only on 14-02-2022 enquiring whether they sought to make full disclosure. On this facet in **Central Bureau of Investigation vs. Ashok Kumar Aggarwal and Another**³ the Supreme Court while considering the scope of Section 306 Cr.P.C. referred to the decision of **Lt. Commander Pascal Fernandes vs. State of Maharashtra and Others**⁴ wherein it was *inter alia* observed that before the Learned Special Judge acts to tender pardon, he must, know the nature of the evidence the person seeking conditional pardon is likely to give, the nature of his complicity and the degree of his culpability in relation to the offence and in relation to the co-accused. Pardon cannot be prior in time to the persons agreeing to make a disclosure, the pardon is in anticipation of the truth being told.

(ii) That apart, Section 306(4)(b) requires that every person accepting a tender of pardon made under sub-Section (1) shall unless he is already on bail, be detained in custody until the termination of the trial. No orders of the Learned Trial Court in this context is seen. The impugned Order of the Learned Trial Court thus is revelatory of non-application of judicial mind.

7. In light of all that has emerged in the discussions hereinabove, while examining the correctness, legality and propriety of the impugned Order dated 07-02-2022, it emerges with clarity that the Learned Trial Court proceeded to grant a relief to the Prosecution sans petition under the relevant provision of law

³ (2013) 15 SCC 222

⁴ AIR 1968 SC 594



and even while doing so failed to adhere to the legal requirements prescribed therein. Consequently, I am of the considered view that the Order dated 07-02-2022 deserves to be and is accordingly quashed and set aside.

8. The matter is remanded back to the Learned Trial Court for fresh consideration of the Section 319 Cr.P.C. petition.

9. The Learned Trial Court while considering the matter shall give a reasoned order, uninfluenced by any of the observations of this Court made hereinabove and shall decide the application purely on merits.

10. The stay order passed by this Court on 12-05-2022 stands vacated.

11. Crl.Rev.P. No.02 of 2022 is disposed of accordingly as also pending applications, if any.

12. Copy of this Order be remitted to the Learned Special Judge (PC Act, 1988), Gangtok.

(Meenakshi Madan Rai)
Judge

11-04-2023

Approved for reporting : **Yes**