

(Supreme Court Of India)

Kailash Dwivedi

v.

State of M.P. & Another

N. SANTOSH HEGDE HON'BLE MR. JUSTICE S.B. SINHA

CrI.A.No.214 of 2005 | 03-02-2005

1. Heard learned counsel for the parties.

2. Leave granted.

3. From the incident which led to sessions trial ST No. 269 of 2001 on the file of learned Sessions Judge, Chatarpur three persons, after investigation, were sent for trial for offences punishable under S.302 read with 34 IPC. It is also stated that one other accused named Om Prakash was absconding hence trial against him was separated. During the pendency of the trial and after the material witnesses were examined an application under S.319 of the Code of Criminal Procedure was filed by the complainant, the 2nd respondent herein, to include the appellant herein as accused on the ground that during the course of trial the appellant's participation in the crime has been established. The learned Sessions Judge who entertained the said application came to the conclusion, after considering the material on record, all that was mentioned in the FIR did not show anything more than the presence of the appellant and no other overt act was attributed to him. He also came to the conclusion that the evidence recorded at the time of trial also did not implicate the appellant so as to invoke his jurisdiction under S.319 of the Code. Learned Sessions Judge also observed that the main witnesses in the trial have all been examined and from the same nothing implicating the appellant was noticed. The trial court thereafter relying upon the judgment of this Court in the case of Michael Machado v. CBI (2000 (3) SCC 262) the learned Sessions Judge rejected the said application.

4. In a revision filed by the aggrieved complainant before the High Court of Judicature at Jabalpur, the High Court wrongly recorded the fact that in the FIR it was mentioned that the appellant herein along with four others was standing

at the time of the attack armed with guns. It is not denied and cannot be denied that the appellant was so present is an incorrect statement because we have noticed in the FIR that there is no such statement that the appellant was armed with any weapon. It is also clear from the statements recorded that no active part whatever has been attributed to this appellant hence most likely the prosecution after investigation did not find any material against this appellant. Hence the prosecution has not sent the appellant for trial, and therefore, S.149 IPC was not relied on. The High Court without noticing the above factor by reappreciating the material which was considered by the trial court and distinguishing the judgment of this Court in the case of Michael Machado (2000 (3) SCC 262) came to the conclusion that there is material to come to the conclusion that the appellant was also involved in the incident, and, therefore, held that the application under S.319 of the Act ought to have been allowed. It also noticed the fact that only five witnesses in the trial have been examined, therefore, the trial court was in error in coming to the conclusion that the trial was at a concluding stage.

5. We have heard the learned counsel for the parties and we have been taken through the records. We find from the material on record that the High Court did not properly take into consideration the absence of overt act attributed to the appellant in the FIR. It also did not take into consideration the fact that the prosecution did not send him for trial after investigation and it also did not take into consideration the fact that the only one witness of all the five witnesses examined has said that the appellant was carrying a gun and at the same time, he has not attributed any overt act to the appellant. In this background in our opinion the High Court was not justified in taking a different view on facts.

6. In the case of *Krishnappa v. State of Karnataka* (2004 (7) SCC 792) this Court, considering the appeal on almost similar factual background, held that:

"6[A]. It has been repeatedly held that the power to summon an accused is an extraordinary power 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.

7[B]. In the present case, we need not go into the question whether prima facie the evidence implicates the appellant or not and whether the possibility of his conviction is remote, or his presence and instigation stood established, for in our view the exercise of discretion by the Magistrate, in any event of the matter, did not call for interference by the High Court, having regard to the facts and circumstances of the case.

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9[C]. ... for exercise of discretion under S.319 CrPC, all relevant factors, including the one noticed above, have to be kept in view and an order is not required to be made mechanically merely on the ground that some evidence had come on record implicating the person sought to be added as an accused.

10[D]. Applying the test as aforesaid to the facts of the present case, in our view, the trial Magistrate is right in rejecting the application. The incident was of the year 1993. Seventeen witnesses had been examined.

The statements of the accused under S.313 CrPC had been recorded. The role attributed to the appellant, as per the impugned judgment of the High Court, was of instigation. Having regard to these facts coupled with the quashing of proceedings in the year 1995 against the appellant, it could not be held that the discretion was illegally exercised by the trial Magistrate so as to call for interference in exercise of revisional jurisdiction by the High Court."

7. We find that the facts of the above case and the case in hand are almost similar and in our opinion, the law laid down in the said case applies in full force to the facts of this case.

8. For the reasons stated above, we are of the considered opinion that the High Court was not justified in reversing the order of the trial court rejecting the application of Respondent 2 filed under S.319 CrPC.

9. The appeal is, accordingly, allowed.