

Calcutta High Court

HON'BLE JUDGE(S): **BIBEK CHAUDHURI , J**

BISWA SARDAR ALIAS BHISMA SARDAR V. STATE OF WEST BENGAL

CRR - 1807 of 2022, decided on 14/12/2022

Criminal P.C. (2 of 1974) , S.319— Summoning of additional accused - Prima facie case - Offence of murder - From evidence of witnesses it was clear that petitioner was not present at time of commission of murder - Lack of evidence regarding direct involvement of petitioner - Petitioner refused to marry accused as she was staying with her minor son - Merely on that basis it cannot be held that petitioner aided and abetted or instigated accused to commit murder of her son - Petitioner only gave a proposal that he would not stay with accused till she was living with her minor son - If accused so desired she could very well send her son to house of her grand- parents or make any other arrangement - Trial judge acted illegally and with material irregularity in arraying petitioner as additional accused.

2012 Cri LJ 430 (SC)-FollowedAIR 2014 SC 1400-Followed

(Para 15, 16)

Case Referred :

Chronological Paras

AIR 2014 SC 1400 : 2014 Cri LJ 1118 (SC) : 2014 AIR SCW 667 (Followed)

Para No.(12)

2012 Cri LJ 430 (SC) : 2011 AIR SCW 5829 (Followed)

Para No.(10, 11)

Name of Advocates

Subhasree Patel, Saini Das for Petitioner; Madhusudan Sur, Dipankar Paramanick for Respondent.

1. **ORDER:-**Legality, validity and propriety of an order dated 26th April, 2022 passed by the learned Additional District and Sessions Judge Ranaghat at Nadia in GR Case No.1457 of 2017 arising out of Hanskhali P.S Case No.237 of 2017 dated 4th August, 2017 under Section 302 of the Indian Penal Code (hereafter IPC for short) corresponding to Sessions Case No.5(11) of 2017/ Sessions Trial No.2(1) of 2018 is assailed in the instant revision.

2. For proper appreciation and adjudication of the instant revision it is necessary to narrate the following facts:-

3. Hashkhali P.S Case No.237 of 2017 dated 4th August, 2017 under Section 302 of the IPC was registered on the basis of a written complaint submitted by one Baikuntha Rajawar before the Officer-in-Charge of the said P.S on 4th August, 2017. In the written complaint, it is alleged that one Smt. Jharna Rajawar is the widow of the son of the defacto complainant namely, Rabi Rajawar, since deceased. In the wedlock of Rabi Rajawar and Jharna Rajawar there was a male child aged about two years. After the death of Rabi, Jharna fell in love with one Biswa Sardar and she left her matrimonial home with her minor child and started to stay at her paternal home in order to marry the said Biswa Sardar. However, the said Biswa Sardar did not want to accept the son of Jharna and on 4th August, 2017 at about 8/ 8.30 am Jharna committed murder of her minor child aged about two years by thwarting. On the basis of the said complaint police registered the aforesaid FIR case against Jharna Rajawar and on completion of investigation submitted charge- sheet against her under Section 302 of the IPC. Trial of the case is under progress.

4. After recording evidence of the witnesses on behalf of the prosecution, the learned trial judge invoked Section 319 of the Code of Criminal Procedure and came to the conclusion that there are sufficient ingredients and prima facie case against the petitioner for proceeding under Section 319 of the Code and accordingly the petitioner was arrayed as co-accused in the said case.

5. Being aggrieved, the petitioner has challenged the impugned order dated 26th April, 2022 by filing the instant revision.

6. It is submitted by the learned Advocate for the petitioner that police did not register any case against the present petitioner. Only Jharna Rajawar was implicated as FIR named accused. During investigation no material forth came against the present petitioner. The witnesses in their

statement recorded under Section 161 of the Cr.P.C did not make any statement implicating the present petitioner in the alleged offences. Therefore, the Investigating Officer submitted charge-sheet against Jharna Rajawar. The evidence on record is conspicuously silent with regard to involvement of the present petitioner in the alleged offence. The learned trial judge acted illegally and with material irregularity withholding that sufficient material against the present petitioner was brought during evidence of the witnesses and also in the case diary.

7. It is further contended by the learned Advocate for the petitioner that he was not heard by the learned trial judge before being added as a co-accused under Section 319 of the Code. Extraordinary power under Section 319 of the Code can be exercised only if very strong and cogent evidence is brought forth before the Court which is higher than the standard of proof employed for framing a charge against an accused.

8. Learned P.P-in-Charge on the other hand referring to the statements of the witnesses namely, Sandhya Sardar, Pashupati Sardar, Budheswar Sardar and Paban Sardar recorded under Section 161 of the Cr.P.C. submits that all the witnesses stated before the Investigating Officer that principal accused, namely, Jharna Rajawar had married to Biswa Sardar. They used to stay together. Biswa Sardar could not accept the child of Jharna who was born in her first wedlock and one day prior to the incident he left Jharna after having a quarrel. On the next day Jharna committed murder of her son. According to the learned P.P-in-Charge, the aforesaid witnesses made the same version of incident in their evidence during trial. Therefore, there is sufficient material to hold that the petitioner aided and abated commission of murder of minor child of Jharna. Therefore, he has been a rightly booked in the case to face trial along with Jharna following the provision of Section 319 of the Cr.P.C.

9. Section 319 of the Cr.P.C runs thus:-

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 together 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 the 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 a fresh, and the 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.

10. In *Sarojben Ashwinkumar Shah Ors. v. State Of Gujarat and Anr.* : (2011) 13 SCC 316 : (2012 Cri LJ 430 (SC)) the Hon'ble Supreme Court had dealt with the scope and object of the Section 319 of the Code. It is observed by the Hon'ble Supreme Court that the power to proceed against any person, not being the accused before the court, must be exercised only where there appears during inquiry or trial sufficient evidence indicating his involvement in the offence as an accused and not otherwise. The word "evidence" in Section 319 contemplates the evidence of witnesses given in court in the inquiry or trial. The court cannot add persons as accused on the basis of materials available in the charge-sheet or the case diary but must base on the evidence adduced before it. In other words, the court

must be satisfied that a case for addition of person as accused, not being the accused before it, has been made out on the additional evidence led before it.

11. It is also observed by the Hon'ble Supreme Court in Sarojben Ashwinkumar Shah (2012 Cri LJ 430 (SC)) (supra) that the power conferred upon the court although discretionary, cannot be exercised in a routine manner. In a sense, it is an extraordinary power which should be used very sparingly and only if evidence has come on record which sufficiently establishes that the other person has committed an offence. A mere doubt about the involvement of the other person on the basis of evidence is not enough. The court must also be satisfied that circumstances justify and warrant that other person be tried with the already arraigned accused.

12. In *Hardweep Singh v. State of Punjab* : (2014) 3 SCC 1992 : (**AIR 2014 SC 1400**) the Hon'ble Supreme Court was pleased to observe:-

"A person not named in the FIR or a person though named in the FIR but has not been charge- sheeted or a person who has been discharged can be summoned under Section 319 Cr.P.C. provided from the evidence it appears that such person can be tried along with the accused already facing trial."

13. It is found from the lower court record that till date eight numbers of witnesses have been examined amongst them PW1 Baikuntha Rajawar is the defacto complainant. PW2 Sandhya Sardar is a neighbour of the principal accused, PW3 Pashupati Sardar is also a neighbor of Jharna. PW4 Buddhiswar is the cousin brother of the accused. PW5 Rajlaxmi Sardar is the wife of PW4 Buddhiswar Sardar. The above named witnesses are material witnesses for the purpose of coming

to a decision as to whether the learned trial judge was justified in passing the impugned order directing trial of the petitioner as a co-accused along with the principal accused Jharna Rajawar.

14. In his examination in chief PW1 stated that her daughter-in-law was planning with the petitioner to murder his grand-son. This fact was however not stated by the defacto complainant in his written complaint. It is ascertained from the evidence of PW2 Sandhya Sardar that at the relevant point of time another male person from Sundarban area used to come and stay with Jharna. She did not utter a single word about the involvement of the petitioner in committing the offence with Jharna. PW3 Pashupati Sardar did not utter any word against the petitioner. It transpires from the evidence of PW4 Buddhiswar Sardar that Jharna was involved with an affair with another person who used to come and stay with her. Once he took a sum of Rs.500/- from Jharna and went to Kolkata. Then he told that he would not marry Jharna as she was living with her minor son. The question that falls for adjudication at this stage is as to whether the above evidence is sufficient to hold that the present petitioner was also involved in committing murder of the minor son of Jharna. In my considered opinion answer to the question is in the negative. Let me assign the reason.

15. From the evidence of the witnesses it is absolutely clear that the petitioner was not present at the time of commission of murder of the minor son of Jharna. Therefore, there is no evidence whatsoever regarding direct involvement of the petitioner in the commission of offence. It is found from the evidence that the petitioner used to stay with Jharna at her paternal home. He also refused to marry her as she was staying with her minor son. If a person does not want to stay with a lady for her child who was born in the wedlock of the said lady and her first husband and the said child is subsequently murdered by her mother, it cannot be held in the absence of any further evidence that the said person aided and abated or instigated the principal accused to

commit murder of her son. The petitioner gave a proposal that he would not stay with Jharna till she was living with her minor son. If Jharna had the desire to stay with the petitioner she could very well send her son to the house of her grand- parents. The petitioner never instigated Jharna saying that unless her son was murdered he would not stay with her. He only disclosed that it was not possible for her to stay with Jharna along with her child born in her first wedlock. This fact under no stretch of imagination can be equated with the offence of commission of murder or intentionally aiding or abating the principal accused in committing murder of her minor son.

16. For the reasons stated above, I have no other alternative but to hold that the learned trial judge has acted illegally and with material irregularity in passing the order dated 26th April, 2022.

17. Accordingly the impugned order is set aside.

18. The instant revision is allowed.

19. The petitioner be discharged from the case at once.

20. Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

Petition Allowed