

HIGH COURT OF MADHYA PRADESH
BENCH GWALIOR

SINGLE BENCH: HONOURABLE SHRI JUSTICE B.D. RATHI

Criminal Revision No.879 OF 2013

Petitioner:

Omprakash S/o Shri Mawasiya Sharma
Aged about 35 years, Occupation
-Agriculture R/o Village Kumheri, P.S.
Bagcheeni District Morena (M.P.).

Vs.

Respondent:

- 1- State of Madhya Pradesh,
Through Police Station Bagcheeni
District Morena (M.P.).
- 2- Rakesh Sharma S/o Shri Siyaram
Sharma R/o Village -Kumheri, P.S.
Bagcheeni District Morena (M.P.).

For petitioner : Shri R.K. Sharma, Advocate
For respondent No.1 : Ms. Nutan Saxena, Public Prosecutor.
For respondent No.2 : Shri V.D. Sharma, Advocate.

ORDER
(18/11/2014)

By invoking the supervisory powers of this Court, petitioner has preferred this petition under Section 397/401 of Code of Criminal Procedure, 1973 (in short 'the Code') being aggrieved by the order dated 05-09-2013 passed by learned Second Additional Sessions Judge, Jaura District Morena in S.T.No.171/2011 whereby the application filed by the petitioner/complainant under Section 319 of the Code was dismissed. The instant petition has been filed by the petitioner seeking the following relief:

“By allowing this petition, impugned order dated 05-09-2013 passed by learned Second Additional Sessions Judge, Jaura District Morena in S.T.No.171/2011 be quashed and trial Court be directed to implead respondent No.2 -Rakesh Sharma as an accused person in the aforesaid S.T.”

2- In brief, facts of the case are that incident has occurred on 06-11-2010 and Dehati Nalish was recorded on the spot to the effect that since in the election campaign of Gram Panchayat the petitioner/complainant -Omprakash has supported the opposite candidate Banwari, therefore, there was enmity between Rakesh Sharma, Ravindra, Akhilesh, Munshi and complainant -Omprakash. On 06-11-2010 at about 2:15 pm quarrel took place between Arvind (brother of complainant) and Rakesh Sharma, Ravindra, Akhilesh and Munshi. When Arvind was coming to his house, he was chased by the aforesaid accused persons, Ravindra and Rakesh Sharma both were armed with pistol, when they reached at the house of complainant, they all started hurling the abuses. On objections, one fire was made by Ravindra at the stomach of complainant and he fell down. Crime No.162/2010 was registered at Police Station Bagchini against Rakesh Sharma, Ravindra, Akhilesh and Munshi. Investigation was made and on completion of investigation charge-sheet was filed only against Ravindra, Akhilesh and Munshi. No case against respondent No.2 -Rakesh Sharma was found by the Investigating Officer. He was not chargesheeted on the ground that as per the evidence collected during the investigation, Rakesh Sharma -respondent No.2 was not present on the spot and in the FIR, allegations were levelled against him because of enmity of Panchayat election.

3- On committal, S.T.No.171/2011 was registered for the offence punishable under Sections 307/34 of IPC. Before the trial Court evidence of Omprakash (PW-1) and Arvind Sharma (PW-2) was recorded. Thereafter, an application under Section 319 of the Code was preferred by the complainant in the month of April, 2013 which was dismissed by the trial Court vide impugned order on the ground as discussed in para 14 that because of material contradictions and omissions in the evidence of Omprakash (PW-1) and Arvind Sharma (PW-2), respondent No.2 -Rakesh Sharma cannot be convicted.

Second ground has been discussed by the trial Court in para 20 of its impugned order that as per investigating agency at the time of commission of offence, respondent No.2 was present at his house situated at Morena and he was not present on the spot at village Kumheri because as per mobile details, his location was at Nainagarh, Morena and this fact was also corroborated from the statements of prosecution witnesses.

4- Counsel for the petitioner submitted that in the named FIR allegations were made against respondent No.2 and as per the statements of Omprakash (PW-1), Arvind Sharma (PW-2) and other witnesses, respondent No.2 was present on the spot and on his instigation, fire was made by Ravindra. With malafide intention, charge-sheet has not been filed by the prosecution against respondent No.2 in order to save him. It is further submitted that at this stage, plea of alibi of respondent No.2 cannot be considered. It is also submitted by Shri R.K. Sharma that statements of witnesses recorded under Section 161 of the Code by police to prove the fact that respondent No.2 was not present on the spot cannot be taken into consideration in view of proviso to sub-section (1) of Section 162 of the Code. In support of his contention he has relied over the judgment of Apex Court in the matter of **Rajindra Singh Vs. State of U.P. & Anr. AIR 2007 SC 2786** and **Y. Saraba Reddy Vs. Puthur Rami Reddy and another (2007) 2 SCC 412.**

5- Combating the submission of petitioner's counsel, counsel for respondent No.2 submitted that there is material contradictions and omissions between the evidence of Omprakash (PW-1) and Arvind Sharma (PW-2). Apart that, it was the conclusion of Investigating Officer that respondent No.2 was not present on the spot. The Investigating Officer -Dy. Superintendent of Police had prepared a detailed report dated 22-11-2010 and sent to the Superintendent of Police, Morena whereby it was found that because of election inimical relationship, respondent No.2 has been falsely implicated in this case while he was not present on the spot. Call details of mobile No.94254-19108 and tower location shows that at the time of commission of offence, respondent No.2 was present at his house situated at Jiwajiganj, Morena. From his mobile phone respondent

No.2 has called and received the calls from Ravindra Sharma and Akhilesh Sharma and their mobile numbers were also mentioned in the report. This fact of absence of respondent No.2 at the spot has been duly supported from the statements given by Kamlesh Kumar Bansal, Sanjay Parashar, Dataram, Pramod Kumar, Ramkrishna and Deepak and recorded under Section 161 of the Code and are part and parcel of the charge-sheet. Further, it is submitted that the plea of alibi was not raised by respondent No.2, it was the conclusion of Investigating Officer, therefore, the judgments of Apex Court cited by petitioner's counsel are not applicable.

6- Counsel for respondent No.2 further submitted that if the opinion and conclusion of Investigating Officer is not taken into consideration then the sacredness of conducting fair investigation will be defeated. It is also submitted that the statements recorded under Section 161 of the Code can be taken into consideration for framing the charges and only because of that, charges are always framed also on the basis of such statements. Apart that this was not the only reason to prove absence of respondent No.2 on spot but the fact of absence had come before the Investigating Officer on collection of scientific evidence i.e. mobile and tower location of cell phone of respondent No.2 which is admissible under Sections 45-A, 65-A&B and 85-B of the Evidence Act, 1872. It is also submitted that only general omnibus allegations were made against respondent No.2 in FIR and in police statement by complainant and his brother in regard to instigation made by respondent No.2. On such premises, respondent No.2 cannot be convicted. In order to strengthen his contention, counsel for respondent No.2 placed reliance on the judgment of Apex Court in the matter of **Prashant Bharti Vs. State of NCT of Delhi, (2013) 3 SCC (Cri) 920**, **Kavuluri Vivekananda Reddy and another Vs. State of A.P. And Another, (2006) 2 SCC (Cri) 324** and **Krishnappa Vs. State of Karnataka, 2004 SCC (Cri) 2093**. Further reliance has been placed on the judgment of this Court in the matter of **Virendra Singh Vs. State of M.P. and another 2014 (2) MPLJ (Cri.) 68**.

7- Having regard to the arguments advanced by learned

counsel for the parties, entire record has been perused.

8- On perusal of record, it seems that in Dehati Nalish name of respondent No.2 has been mentioned and allegation was also made that at his instigation offence was committed by another co-accused Ravindra. Crime was registered and during the course of investigation, it was found by the Investigating Officer that respondent No.2 was not present on the spot. The report dated 22-11-2010 addressed by Dy. Superintendent of Police to Superintendent of Police, Morena shows that there was inimical relationship between respondent No.2 and complainant and after taking into consideration the call records of mobile of respondent No.2 and tower location at the time of commission of offence, it was found that respondent No.2 was not present on the spot but in fact he was present at his house situated at Morena far away from the spot. This fact find concurrence from the statements of witnesses, namely, Kamlesh Kumar Bansal, Sanjay Parashar, Dataram, Pramod Kumar, Ramkrishna and Deepak. Apart that, from perusal of evidence of Omprakash (PW-1) and Arvind Sharma (PW-2) it seems that there is material contradictions and omissions between the evidence of these witnesses as Omprakash (PW-1) has deposed that at the relevant time, respondent No.2 armed with revolver was present on the spot while Arvind Sharma (PW-2) did not say that respondent No.2 was armed with any firearm. Inimical relationship on the basis of election rivalry was admitted by Omprakash (PW-1) in para 3 of his evidence.

9- It is settled law that addition of additional accused warranted only when there is reasonable prospect of case against such accused ending in their conviction. It is also settled law that order under Section 319 of Cr.P.C. cannot be passed only because first informant or one of witnesses seeks to implicate other persons. The evidence adduced against such persons must be substantive evidence in order to summon him for trial, there should be a good chance for his conviction.

10- It is imperative of note that, the case in hand is not a case where plea of alibi was taken by respondent No.2 but it was the conclusion of Investigating Officer based on the evidence collected during the course of investigation, that respondent No.2 was not

present on the spot. If the entire evidence in relation to absence of respondent No.2 on spot, statements and evidence of other witnesses named above and material contradictions between the evidence of Omprakash (PW-1) and Arvind Sharma (PW-2). Omprakash (PW-1) and Arvind Sharma (PW-2) have not uttered single word before the Court that wrong statements were given to police by the other prosecution witnesses in regard to presence of respondent No.2 at his house situated at Morena, far away from the spot.

11- If the entire evidence collected by prosecution during the course of investigation and evidence recorded by the trial Court is considered then because of material contradictions and omissions, because of general omnibus allegation, also because respondent No.2 was not present on the spot well supported from the statements of prosecution witnesses and scientific evidence, respondent No.2 cannot be convicted. Therefore, in the considered view of this Court, impugned order passed by the trial Court is well merited and no interference is warranted.

12- For the abovementioned cumulative reasons, the petition filed by the petitioner has no merit and is hereby dismissed being bereft of merits.

Copy of this order be sent to the trial Court for information and compliance.

(B.D. Rathi)
Judge
(18/11/2014)

Anil*