

HIGH COURT OF MADHYA PRADESH: BENCH AT

INDORE

BEFORE HON. SHRI JUSTICE ALOK VERMA,J

Cr.R. No.561/2013

Naresh Vaswani S/o Shri Mohanlal Vaswani

Vs.

State of Madhya Pradesh and Others

Shri S.K. Vyas, learned Senior Counsel with Smt. Sudha Shrivastava, learned counsel for the applicant.

Shri R.S. Parmar, learned Panel Lawyer for respondent No.1/State.

ORDER

(Passed on 09/02/2015)

This criminal revision is directed against the order passed by the learned VII Additional Sessions Judge, Ujjain in Session Trial No.236/2010 dated 17.09.2012 by which the learned Sessions Judge allowed an application filed on behalf of prosecutrix under section 319 Cr.P.C. and summoned the

present applicant along with respondent No.5 as an accused in the aforesaid Session Trial.

2. The facts relevant for disposal of this revision are that complainant Santosh Rajput lodged an FIR in Police Station Neelganga, District Ujjain on 08.03.2010 at 11:30 am in respect of an incident which took place about 15 minutes back at 11:15 am. According to the averments in the FIR, the complainant who was working as property broker and builder raised a construction on a piece of land situated near Khanna Optical. Due to this construction some dispute was going on between him and Mohanlal Vasvani, father of the present applicant, due to which prior to the present incident also the said Mohanlal Vasvani sent some persons to beat the complainant. On the date of incident i.e. on 08.03.2010 at about 11:15 am. He was going towards Begum Baag on motorcycle bearing registration No.MP13-MB-0418 and Omprakash Choubey was sitting on the motorcycle as pillion rider and when they were under the Hari Phatak overbridge, the present applicant along with respondent Sonu Baba came there. The present applicant it is stated that he was driving motorcycle while the

respondent No.5 Sonu Baba was sitting on pillion of that motorcycle. They chased them and then respondent No.5 fired a gun shot which hit him on his right shin. Due to the incident, he suffered gun shot injury. After firing one single gun shot, they fled away on the same motorcycle.

3. On this information being received at the Police Station, Police registered Crime No.188/2010 and the investigation began. During the investigation, the complainant was medically examined and gun shot injury was found on his right shin. His statement under section 164 Cr.P.C. was also recorded and in this statement also he narrated the same story as narrated by him at the time of lodging the FIR.

4. However, during the investigation, the investigating officer found that the present applicant along with respondent No.5 were not present at the scene on incident as locations of their mobile phones and tower were found about 2 km. away in their shop at the time when the alleged incident took place and after investigation, he filed charge-sheet against three accused persons who are respondent No.2 to 4 before this Court, that is, Nana @ Rajesh S/o

Mangilal, Inder @ Inder Singh S/o Ambaram and Shammi @ Govind S/o Kishanlal. In the charge-sheet according to the prosecution story, the respondent No.4 Shammi entered into conspiracy with other two respondents to commit murder of the complainant while respondent No.4 was found under custody in a jail. Charges were framed against the respondents No.2 to 3 by the trial Judge and thereafter on 18.04.2011, the complainant Santosh Rajput filed an application under section 319 Cr.P.C. praying therein that the present applicant along with respondent No.5 be arraigned as accused in the case. However, on 13.09.2011 another application was filed supported by affidavit stating therein that the complainant had no dispute whatsoever with present applicant Naresh Vaswani and, therefore, he wants to withdraw the application. The learned trial Judge by order dated 13.09.2011 dismissed the application under section 319 Cr.P.C. as withdrawn.

5. Subsequent to this, the prosecution witness who was stated to be the pillion rider on the motorcycle being driven by the complainant was examined as PW-1, the complainant was examined as PW-3 and investigating officer examined

as PW-4. In their statement, the complainant Santosh Kumar Rajpur and Omprakash Choubey again stated the same story which they stated in the FIR and said that it was Naresh Vaswani, the present applicant who was driving the motorcycle while respondent No.5 was sitting on pillion and they fired gun shot injury on them. After recording the statement of these 4 prosecution witnesses, the prosecutrix filed a fresh application under section 319 Cr.P.C. which was disposed of by the impugned order and this application was allowed and present applicant along with respondent No.5 summoned as accused in the case.

6. Against this order, this criminal revision is filed on the grounds, inter-alia, namely :-

(i) After withdrawal of earlier application under section 319 Cr.P.C., a fresh application filed on behalf of prosecution is not maintainable. The application on behalf of the complainant that he had no dispute with the present applicant also bars consideration of second application.

(ii) There was no common intention between the present applicant and respondent No.5 Sonu Baba.

There was no evidence available to infer that they have prior meeting of mind and that the present applicant knew that Sonu Baba was carrying a revolver and would fire a gun shot on the complainant.

(iii) The gun shot was fired at low angle and hit on right shin of the complainant, accordingly, the facts would only constitute offence under section 324 and no offence under section 307 IPC shall be constituted.

(iv) Under section 323 Cr.P.C. the persons may be charged and tried together only when offences are committed in the course of some transaction and different offences are committed in the course of some transaction. However, the applicant in the present case had committed no such act which can be called committal under the same transaction with the persons who were already charge sheeted by the police in the present case and charged by the trial Judge.

(v) Charges were framed merely on suspicion that the present applicant was driving the motorcycle, however course cannot take place of proof. For this, the present applicant places reliance on judgments of

Hon'ble Supreme Court in **Gian Mehtani vs. State of Maharashtra, AIR 1971 SC 1898, Gambhir vs. State of Maharashtra AIR 1982 SC 1157** and **Bhugdomal Gangaram vs. State of Gujrat AIR 1983 SC 906.**

7. I have gone through the copies of charge-sheet available on record. So far, the arguments of the counsel for the applicant in respect of provisions of sections 223 and 228 Cr.P.C. are concerned, the arguments are not acceptable as offence is same and there is no doubt that offence was committed, as the matter was reported only within 15 days after the incident and immediately, after the incident the applicant was found with a gun shot injury and, therefore, when offence is committed only question to be decided is as to who committed the offence. In this regard, there are two sets of persons and, therefore, it would be decided by the Court as to who out of them are responsible for commission of offence.

8. So far as, the contention that the gun shot was fired at low angle which hit right shin of the complainant and, therefore, there was no intention to hit the complainant is also not acceptable as firing a gun shot pointing the gun towards

complainant, itself shows intention of the complainant. No further comments are required in this regard. Also the argument of the counsel for the complainant that there was no prior meeting of mind is also not acceptable as the averments in the FIR itself shows that on seeing complainant, the present applicant along with respondent No.5 chased the complainant on another motorcycle and then fired the gun shot injury. Prior meeting of mind in this regard can be assumed. This apart in the present case there was clear ocular evidence available against the present applicant along with respondent No.5. This ocular evidence cannot be substituted by other evidence like location of mobile phone and mobile phone tower as this is possible by leaving the mobile phone to another place. Clear ocular evidence in respect of a particular person who was known to the applicant cannot be replaced by such other auxiliary evidence. So far as, respondents No.2 to 4 are concerned, they did not challenge the order framing charges against them and, therefore, no comments can be offered so far their case is concerned in this revision petition.

9. The learned counsel for the applicant also argues that the second application under section 319 is not maintainable

however, in the present case first application was filed when the evidence of prosecution witnesses was not recorded. The complainant stated in the second application supported by affidavit that he had no dispute with the present applicant however, in his statement before the Court he again reiterated his avements in the FIR. Under these conditions the second application on the basis of evidence recorded by the Court and based on additional material available to the Court, to my mind, is tenable.

10. Accordingly, no illegality and irregularity was committed by the trial Judge while allowing the application under section 319 Cr.P.C. filed by the prosecution. The revision is devoid of merit and liable to be dismissed and dismissed accordingly.

**(ALOK VERMA)
JUDGE**