

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Crl.REV.P. 427/2007**

% Date of reserve: 19.05.2009
Date of decision: 03.07.2009

SHIV KUMAR SHARMA ...PETITIONER
Through: Mr. Vikas Arora, Mr. Ajay Marwah,
Mr. Puneet Popli, advs.

Versus

THE STATE ...RESPONDENT
Through: Mr. Navin Sharma, APP for State

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

1. Whether the Reporters of local papers
may be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be
reported in the Digest? Yes

: **MOOL CHAND GARG, J.**

1. The present revision petition has been filed under Sections 397/401 along with Section 482 Cr.P.C. for quashing and setting aside the summoning order dated 24.02.2007 passed under Section 319 Cr.P.C. and the order framing charge dated 12.3.2007 passed by Ld. Additional Sessions Judge in the proceedings arising out of FIR No. 26/2006 registered under Section 302/307/147/148/149 /452/ 506 IPC at Police Station Sangam Vihar.

2. The brief facts giving rise to filing of the present revision petition are:-

Satish Chand/complainant had taken premises bearing no. F-3/478, Sangam Vihar, New Delhi from accused/ Kamla on rent for one and a half years. On 13.01.2006 at about 12.30 Noon, complainant along with his brother

Bhagwati, sister-in-law Kusum, and his mother was present at home. At that time Kamla came along with Ashok, Raj Kumar, Rambir, Chunna, Dr. Sharma and 5/6 more persons and forcibly entered in the house with arms and weapons. They also started beating the complainant and his family and caused death of Bhagwati and injuries to others.

3. The aforesaid incident resulted in lodging of an FIR at the instance of the complainant, namely, Satish Chand, who made the following statements before the Police:-

Today on 13.01.06 at about 12.30 noon I, my brother Bhagwati, my sister-in-law Kusum and my mother were present at home. At that time Kamla aforesaid came along with Ashok, Rajkumar, Rambir, Chunna and Dr. Sharma and 5-6 other persons and forcibly entered into my house who were armed with weapons. These persons started beating us. Rajkumar caught hold of my brother Bhagwati and Ashok stabbed my brother with the knife which he had held in his hand under his chest because of which he started bleeding and fell down. Chunna attacked me with the knife in his hand I tried to protect myself with my hand and it injured my hand and again he attacked and it caused injury at my elbow. Rambir started beating me with rod, I shouted then my sister-in-law came to rescue me then Rambir put Katta on her head and said that if she would shout then he would shoot her. On my sister-in-law creating hue and cry they all ran away.

4. However, the Investigating Officer after investigating the case filed a charge sheet, wherein on the basis of a supplementary statement made by Satish Chand and statement made by one Kusum, it has been observed that there was no evidence available on record against Dr.Shiv Kumar Sharma and accordingly, the name of Dr.Shiv Kumar Sharma was kept in column No.2 and not in column No.4. Accordingly, the Metropolitan Magistrate concerned or the Additional Sessions Judge did not thought it appropriate to summon Dr.Shiv Kumar Sharma as an accused till such time the statement was made by Satish Chand before the trial court by appearing as PW-3. In his statement made before the trial court he has reiterated his statement made to the Police and deposed as under:-

On 13.01.2006 at about 12.30 p.m. I was taking bath in the room on the ground floor. My bhabhi Kusum and my brother Bhagwati were also there in that house. My nephew a small child was also there in the house. My mother had gone to school to bring back my elder nephew from the school. Kamla, Dr.Sharma, accused Raj Kumar, accused Ashok, accused Rambir, accused Luv Kush, accused Chuna came to our house. All the accused except Dr.Sharma are present in Court [correctly identified]. All the accused persons were armed with weapon. Accused Ashok was having a knife. Accused Rambir was having a katta, accused Luv Kush was having a katta, accused Chuna was having a knife. They started beating me. Accused Chuna hit me with knife and I sustained injuries on my left hand. He again inflicted injury on my left arm with the knife. Hearing my cries my brother came down to the room. Accused Raj Kumar, 2-3 more persons whose name I do not know caught hold of my brother. Accused Ashok hit my brother with knife on the right side of the abdomen just below the chest. When my bhabhi reached there she was caught hold by accused Rambir and put the katta over her tangel and threatened her that if she raised already he would spot her. The other persons started removing out belonging from the back side of our house. In the meantime, after getting an opportunity my bhabhi ran to the roof of the house. She raised alarm on which all the accused persons ran away from the back door. My bhabhi called at 100 number. After sometime police arrived there. Police removed me and my brother to AIIMS Hospital where my statement Ex.PW-3/A was recorded which bears my signature at point A. I do not remember when the accused person were arrested but accused Luv Kush was arrested in the evening but I do not remember the date. When accused Luv Kush was arrested he got the clothes recovered from the room of the house but I do not remember which clothes he got recovered. Police had seized those clothes after sealing side memo Ex.PW-3/B which bears my signature at Point A. Accused Luv Kush also disclosed that the danda which he was having was thrown in the vacant plot situated at the rear of our house. That danda was recovered from that plot and was seized by the Police."

5. It is only on the basis of the examination-in-chief of this witness and without confronting him with his supplementary statement or the letter which he gave to the Police after lodging of the FIR, wherein he categorically stated that Dr.Shiv Kumar Sharma was not present at the spot, the Additional Sessions Judge, who was trying this matter on the basis of the application moved under Section 319 Cr.P.C., has observed that the deposition of PW-3 in his examination-in-chief reflected prima facie involvement of the petitioner for summoning him as an accused under Section 319 Cr.P.C. and accordingly passed an order dated 24.2.2007 summoning Dr.Shiv Kumar Sharma as an accused. He thereafter framed charges against the present petitioner vide order dated 12.3.2007 despite the fact that the supplementary

statement made by Satish Chand/complainant, the letter written by him as well as the statement made by Kusum was brought to the notice of the Additional Sessions Judge. The relevant portion of the order dated 2.3.2007 of the Additional Sessions framing charge against the present petitioner is reproduced hereunder:-

Ld. Defence counsel submitted there is no legal admissible evidence against the applicant warranting framing of charge against him. No witness has deposed against him. In the complaint made by Satish Chand Ex.PW-3/A, he simply says that accused was also there but no role is assigned to him. He was not armed with any weapon. The other eye witness Kusum specifically states that applicant/accused was not there. Vidyawati is the another five witness who reached the spot immediately thereafter and was told by Kusum about the incident and Kusum did not tell her that accused was also there. Even Satish Chand in his supplementary statement before the police says that accused was not there. Accused has come to their house about $\frac{3}{4}$ days prior to the incident so that the matter can be compromised with Kusum and due to this he has been falsely implicated. Ld. Counsel submitted that keeping in view all these facts there is no legal evidence against him on record. Even in the disclosure statements of accused persons it has come specifically that accused Dr.Shiv Kumar Sharma was not there. Ld. Counsel submitted that keeping in view all these facts there is no evidence against the accused Dr.Shiv Kumar Sharma. The supplementary statement of witness Satish Chand clearly shows that accused was not there. From the basis of evidence on record two views are possible, the one favouring the accused that he was not there and it is well settled principle of law that on the basis of evidence available, if two views are possible than the one favouring the accused shall be followed. Ld. Counsel submitted that in the present case even if the prosecution case is taken as it is, there is no chance of convicting the accused person and prayed that keeping in view all these facts, he be discharged.

After bearing the arguments and going through the record. I found that no doubt there is supplementary statement of Satish Chand that accused was not there but despite that when Satish Chand appeared in the witness box he has specifically stated that accused was there. He came along with other accused persons who were armed, started beating his inmates and caused death. The allegations clearly show that they all came there with preparations for committing the offence that is why they were armed with weapons, they extended threats to Kusum and attempted to kill Satish Chand and kill Bhagwati. It is well settled principle of law that from the evidence collected by the prosecution if strong suspicion is created against the accused that he is

involved in the commission of offence he be charged. In the present case it has come in the testimony of Satish Chand recorded in the court that applicant was there as a member of unlawful assembly and members of the unlawful assembly were armed with weapons, after trespass they attacked the inmates and committed the offence of murder and attempted to kill Satish. Prima facie there is sufficient material on record making out a case punishable under Section 147 read with Section 149 IPC, 148 read with Section 149 IPC, 307 read with Section 149 and 506 read with Section 149 IPC is made out. Accordingly, charged is framed against accused Dr. Shiv Kumar Sharma to which he pleaded not guilty and claimed trial.

6. It is the case of the petitioner that he was nowhere involved in the crime, moreover there was nothing in the FIR or in the chargesheet from which it can be inferred that he was involved in the crime. There is no occasion which justifies the trial Court to summon him and frame a charge against him by exercising powers envisaged under Section 319 Cr.P.C.

7. The petitioner has made the following submissions to support this revision petition:

- (I) Kusum, bhabhi of the complainant, has made a statement to the Police on 13.1.2006 under Section 161 Cr.P.C., wherein she has stated that the petitioner was not present with the accused persons at the spot on the date of the incident. The relevant portion of her statement is reproduced hereunder for the sake of reference:-

At about 12 noon my Devar Satish who does Paint Polish work came back from contractor and my mother-in-law went to take my elder son Yuvraj from Shivani Public School at F Block, Sangam Vihar and my Devar Satish started taking bath in the lower front room. Bhagwati was sitting on the roof with me. At about 12.30 PM our landlady Kamla, Jeth Rambir and Nandoi Ashok, Rajkumar, who used to reside in the adjacent house and

Chunna and Luvkush and 5-6 other persons came to us at F-3/475, Gali No.4, Sangam Vihar. Rambir was carrying an Iron rod, Luvkush was having a danda and other persons were having rod, pipe. I did not know few of them but can recognize them on seeing them. Kamla pointed out towards my devars and stated that these persons have ruined my life, beat them and throw them out of the house and kill them. In the meantime Rambir, Luvkush, Chunna, Rajkumar, Ashok and others entered in our house forcibly. On seeing this my devar Bhagwati went downstairs and then I heard a noise bachao-bachao and I came down from the roof and saw Rambir, Luvkush, Rajkumar, Chunna, Ashok were beating my devars with pipe rod and dandas and Luvkush was hitting with danda and Rajkumar caught hold of Bhagwati and Ashok stabbed Bhagwati in his chest with a knife. Bhagwati started bleeding. I suddenly shouted. Chunna attacked devar Satish with his knife which hit Satish in his hand and elbow and Satish held the hand of Chunna and because of which Chunna also received injury in his hand. Bhagwati fell down on floor, I started shouting. Rambir caught hold of my hair and said he would shoot me. I got scared and kept mum. Rambir was having katta like iron thing. These persons started throwing the belongings of the house. On finding an opportunity I went on the roof and cried bachao-bachao. On hearing this Rambir, Ashok, Rajkumar, Chunna, Luvkush ran away from the rear gate. Few persons who were standing outside the door also ran away, Kamla also ran away. Rambir, Luvkush, Ashok, Rajkumar, Chunna, Kamla and few other persons had entered into our house and have attacked and caused injuries to my devars and have killed Bhagwati. **Dr. Shiv Kumar Sharma who is the President of the Block had not come with Kamla at the time of incident. Police Gypsy came on making a phone call and took away my devars to Hospital.**

- (II) It is further submitted by the petitioner that on the very next day the complainant, Satish Chand went to the Police station and handed over a letter dated 14.1.2006 writing of which was in Hindi to SHO where he specifically stated that *“Dr. Sharma jo F-3 block association ke pradhan hein kal varda mein shamil nahin thee, vey kewal pradhan ke natee faisla karane kuch din pehale aaye thee. Mein inke khilaf koi karyavahi nahin chahta hoon”*.

(III) It is also submitted by petitioner that it was thereafter the Police conducted the investigation and found that the petitioner was not at all involved in the commission of offence nor he was present at the spot at the time of the incident and as such, the investigating agency declared that no evidence came on record which may show the involvement of Dr. Sharma and on that basis his name was placed in column 2 and he was not arrested.

8. It has been submitted that in these circumstances when there was ample evidence available on record that the petitioner was not present at the spot at the time of the incident, mere examination in chief of PW-3, the complaint, was not sufficient to satisfy that the petitioner was guilty of commission of crime for which he has been summoned by the trial court and therefore, the order dated 24.2.2007 passed under Section 319 Cr.P.C. summoning him as an accused was bad in law and without any basis. Consequently, the order framing charge against the petitioner dated 12.3.2007 is also perverse and shows complete non-application of mind by the Trial Judge and thus charges are liable to be set aside.

9. The petitioner has relied upon a judgment delivered by the Apex Court in Guriya @ Tabassum Tauquir & Ors. Vs. State of Bihar & Anr. 2007 (4) JCC 3004, wherein the Hon'ble Supreme Court while discussing the law related to Section 319 Cr.P.C. discussed previous judgments pertaining to this issue and observed as under:

6. The parameters for dealing with an application under

Section [319](#) Cr.P.C. have been laid down by this Court in several cases.

7. In Michael Machado and Anr. v. Central Bureau of Investigation and Anr. AIR 2000 SC 1127 it was observed as follows:

The basic requirements for invoking the above section is that **it should appear to the court from the evidence collected during trial or in the inquiry that some other person, who is not arraigned as an accused in that case , has committed an offence for which that person could be tried together with the accused already arraigned. It is not enough that the court entertained some doubt, from the evidence, about the involvement of another person in the offence.** In other words, the court must have reasonable satisfaction from the evidence already collected regarding two aspects. First is that the other person has committed an offence. Second is that for such offence that other person could as well be tried along with the already arraigned accused.

But even then what is conferred on the court is only a discretion as could be discerned from the words "the court may proceed against such person." The discretionary power so conferred should be exercised only to achieve criminal justice. It is not that the court should turn against another person whenever it comes across evidence connecting that other person also with the offence. A judicial exercise is called for, keeping a conspectus of the case, including the stage at which the trial has proceeded already and the quantum of evidence collected till then, and also the amount of time which the court had spent for collecting such evidence. It must be remembered that there is no compelling duty on the court to proceed against other persons.

The court while deciding whether to invoke the power under Section [319](#) of the Code, must address itself about the other constraints imposed by the first limb of Sub-section (4), that proceedings in respect of newly-added persons shall be commenced afresh and the witnesses re-examined. The whole proceedings must be recommended from the beginning of the trial, summon the witnesses once again and examine them and cross-examine them in order to reach the stage where it had reached earlier. If the witnesses already examined are quite large in number the court must seriously consider whether the objects sought to be achieved by such exercise are worth wasting the whole labour already undertaken. Unless the court is hopeful that there is a reasonable prospect of the case as against the newly-brought accused ending in being convicted of the offence concerned we would say that the court should refrain from adopting such a course of action

14. Power under Section [319](#) of the Code can be exercised by the Court suo motu or on an application by

someone including accused already before it, if it is satisfied that any person other than accused has committed an offence and he is to be tried together with the accused. The power is discretionary and such discretion must be exercised judicially having regard to the facts and circumstances of the case. Undisputedly, it is an extraordinary power which is conferred on the Court and should be used very sparingly and only if compelling reasons exist for taking action against a person against whom action had not been taken earlier. The word "evidence" in Section 319 contemplates evidence of witnesses given in Court. Under Sub-section (4)(1)(b) of the aforesaid provision, it is specifically made clear that it will be presumed that newly added person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced. That would show that by virtue of Sub-section (4)(1)(b) a legal fiction is created that cognizance would be presumed to have been taken so far as newly added accused is concerned. (See Lok Ram v. Nihal Singh and Anr. AIR 2006 SC 1892)

15. The factual position noted above goes to show that there was no new material after examination of the accused persons under Section 313 Cr.P.C., which threw any light on the incident. The evidence of PWs 4 and 5 is not the basis of the application under Section 319 Cr.P.C. as they have not spoken anything about the appellants.

16. As noted above, PWs 1,2 and 3 have stated about the presence of the appellants without any definite role being ascribed to them in their evidence recorded on 16.04.2001, 08.01.2002 and 29.04.2002. If really the complainant had any grievance about the appellants being not made accused, that could have, at the most, be done immediately after the recording of evidence of PWs 1,2 and 3. That has apparently not been done. Additionally, after the charge-sheet was filed, a protest petition was filed by the complainant which was dismissed. No explanation whatsoever has been offered as to why the application in terms of Section 319 Cr.P.C. was not filed earlier. The revisional court did not deal with these aspects and came to an abrupt conclusion that all the PWs have stated that the appellants have committed overt acts and their names also find place in the protest petition. Undisputedly, no overt act has been attributed to the appellants by PWs 1, 2 and 3. Nothing has been stated about the appellants by PWs 4 and 5. There was mention of their names in the FIR. A protest petition was filed. Same was also rejected. These could not have formed the basis of accepting the prayer in terms of Section 319 Cr.P.C. The High Court's order, to say the least, is bereft of any foundation. It merely states that there are materials against the petitioners before it. It also did not deal with various aspects highlighted above.

10. In this case, it is apparent that whatever PW-3 has stated in his

examination-in-chief is nothing new than what he has stated in the complaint made by him. What has been stated in the complaint was reflected by this witness when he made supplementary statement and also gave in writing to the IO that the petitioner was not present at the spot when the incident took place and in fact, he had only tried to bring conciliation between the parties three/four days prior to the incident.

11. I have also heard learned counsel for the parties and perused the record.

12. For invoking powers under Section 319 Cr.P.C., the foremost requirement is that it should appear to the Court from the evidence collected during trial or in the inquiry that some other person, who is not arrayed as an accused in that case, has committed an offence for which that person could be tried together with the accused already arrayed. At this stage, it would be proper to take note of the provisions contained under Section 319, which reads as under:

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 trader arrest or upon a summon, 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 subsection (1) then-

(a) The proceedings in respect of such person shall be commenced afresh, and 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.

13. The main purpose of the above-mentioned Section is that the whole case against all known suspects should be proceeded with expeditiously and convenience requires that cognizance against the newly added accused should be taken in the same manner as against the other accused persons. This Section springs out from the doctrine of Judex damnatur cum nocens absolvitur (Judge is condemned when guilty is acquitted).

14. It would also be appropriate to take note of the observations made by a Division Bench of the Punjab and Haryana High Court in the case of Mohan Singh and Ors. Vs. State of Punjab, CRR 2099/2007 decided on 15.2.2008 laying down the principles followed under Section 319 Cr.P.C., which reads as under:-

8. This Court in Criminal Misc. No. 11407-M of 2007 (Ashok Kumar v. State of Haryana) decided by a separate detailed order passed today, while considering number of judgments of Hon'ble the Supreme Court and this Court in Rukhsana Khatoon (Smt.) v. Sakhawat Hussain and Ors., Krishnappa v. State of Karnataka 2004 (7) SCC 792, Kailash Dwivedi v. State of M.P. and Anr. (2005) 11 Supreme Court Cases 182, Palanisamy Gounder and Anr. v. State represented by Inspector of Police (2005) 12 Supreme Court Cases 327, Kavuluri Vivekananda Reddy and Anr. v. State of A.P. And Anr. (2005) 12 Supreme Court Cases 432, Lok Ram v. Nihal Singh 2006 (2) RCR (Criminal) 707, Popular Muthiah v. State represented by Inspector of Police (2006) 7 Supreme Court Cases 296, Mohd. Shafi v. Mohd. Rafiq and Anr. 2007 (2) RCR (Criminal) 762, Rajendra Singh v. State of U.P. and Anr. 2007 (3) R.C.R. (Criminal) 1021, Municipal Corpn. of Delhi v. Ram Kishan Rohtagi 1983 (1) RCR (Criminal) 73, Joginder Singh v. State of Punjab (1979) 1 SCC 345, Kishan Singh v. State of Bihar 1993 (1) RCR (Criminal) 647, Guriya @ Tabassum Tauquir and Ors. v. State of Bihar and Anr. 2007 (4) Recent Criminal Cases 518, Y. Saraba Reddy v. Puthur Rami Reddy and Anr. (2007) 4 Supreme Court cases 773, Smt. Rani v. State of Haryana 2006 (1) R.C.R. (Criminal) 985, Surinder Kumar Changli v. State of Punjab 2006 (2) R.C.R. (Criminal) 359, Surjit Kaur and Ors. v. State of Punjab and Anr. 2006 (1) RCR (Criminal) 565, Rajbir

Singh v. State of Haryana and Ors. 2006 (3) RCR (Criminal) 195, Manoj Kumar v. Prabhu Ram 2003 (4) RCR (Criminal) 887, Isham Singh and Ors. v. State of Haryana 2004 (2) RCR (Criminal) 279, Bharat Bhushan alias Sonu v. State of Haryana and Anr. 2005 (1) RCR (Criminal) 976, Surinder Kumar v. State of Punjab Changli 2006 (2) RCR (Criminal) 359, Smt. Rajjo and Anr. v. State of Haryana and Anr. 2006 (3) RCR (Criminal) 635, Om Parkash and Ors. v. State of Haryana 2007 (1) RCR (Criminal) 632, Ram Karan alias Roda and Anr. v. State of Haryana 2007 (1) RCR (Criminal) 977, Ganesha v. State of Haryana and Anr. 2007 (2) RCR (Criminal) 633 and Hukam Chand and anotehr v. State of Haryana 2007 (3) RCR 141 has summed up the broad principles, as to under what circumstances power under Section 319 of the Code should be exercised, which are in the following terms:

- i) Power to summon an accused is discretionary and extra-ordinary power, which should be exercised sparingly and only if compelling reasons exist at any stage of case.**
- ii) The order passed under Section 319 of the Code of Criminal Procedure summoning an additional accused should not be a mechanical exercise. Court should record reasonable satisfaction and reasons in support of the order.**
- iii) Power cannot be exercised to conduct a fishing enquiry.**
- iv) There should be reasonable prospects of the case against the newly added accused ending in their conviction.**
- v) Step to summon an accused can be taken only on the basis of evidence adduced before the Court and not on the basis of materials available in the charge-sheet or the case-diary as such material does not constitute evidence.**
- vi) Power can be exercised suo-moto or on an application by some one including accused already before the Court.**
- vii) An accused is not entitled to be heard before the Court exercises power under Section 319 of the Code of Criminal Procedure.**
- viii) Satisfaction of the Court is paramount before summoning an accused, which can be arrived at inter- alia upon completion of cross-examination of the witness.**
- ix) Mere statement of the complainant without there being any other evidence on record may not be sufficient to summon the accused. Each case on this aspect needs cautious examination on facts before passing order of summoning of additional accused.**
- x) Each case has to be considered on its own facts as there may be different stages of the case where the Court can reach to a conclusion that a prima facie case is made out against the accused sought to be summoned.**

15. At this juncture, I may also refer to a judgment delivered by the Apex Court in Criminal Appeal titled as *Ram Singh & Ors. Vs. Ram*

Niwas & Anr. decided on 13.05.2009 arising out of *SLP (Crl.) No. 6723 of 2005*, wherein it has been observed,

11. An application under the aforementioned provision would be maintainable not only during pendency of an inquiry but also in the course of a trial. In the event, it appears from the evidence that any person, not being an accused, has committed any offence for which he could be tried together with the accused, the court may proceed against him for the offence which he appears to have committed. The provision of Section [319](#) of the Code confers an extraordinary power upon a court to summon a person who, at the relevant time, was not being tried as an accused, subject, of course, to fulfillment of the condition that it appears to the court that he had committed an offence. A finding to that effect must be premised on the evidence that had been brought on record.

12. Indisputably, the court must satisfy itself about the existence of an extraordinary situation enabling it to exercise an extraordinary jurisdiction. It is true that the court is not denuded of its power to exercise the said jurisdiction only because a person named as an accused in the FIR was not charge-sheeted as a result whereof no cognizance has been taken against him. What is necessary for the said purpose is that the person concerned was not being tried as an accused before the Court at that stage.

13. This Court in the case of *Kailash v. State of Rajasthan* 2008 (3) Scale 338, has held that a glance of the provision would suggest that during the trial it has to appear from the evidence that a person not being an accused has committed any offence for which such person could be tried together with the accused who are also being tried. This Court has laid emphasis on the words, 'it appears from the evidence', 'any person', and 'has committed any offence'. It was further held that the power under Section [319](#) has to be essentially exercised only on the basis of the evidence brought on record of the case. The discretionary jurisdiction could, therefore, be exercised only after the legal evidence comes on record and from that evidence it appears that the concerned person has committed an offence.

14. In the case of *Raj Kishore Prasad v. State of Bihar and Anr.* (1996) 4 SCC 495, this Court opined:

Learned Counsel differs however on the other question posed in *Kishun Singh case* *Kishun Singh v. State of Bihar*, 1993 (2) SCC 16. It was whether a Court of Session, to which a case is committed for trial by a Magistrate, could, without itself recording evidence, summon a person not named in the police report

presented under Section [173](#) of the Code of Criminal Procedure, 1973, to stand trial along with those named therein; if not in exercise of power conferred by Section [319](#) of the Code, then under any other provision? The answer given was in the affirmative, on the basis of Section [193](#) of the Code, as it presently stands, providing that once the case is committed to the Court of Session by a Magistrate, the restriction placed on the power of the Court of Session to take cognizance of an offence as a Court of Original Jurisdiction gets lifted, thereby investing the Court of Session unfettered jurisdiction to take cognizance of the offence which would include the summoning of the person or persons whose complicity in the crime can prima facie be gathered from the material available on the record. It is on this reasoning that this Court sustained the order of the Court of Session (though it ostensibly was under Section [319](#) CrPC terming material of investigation before it as 'evidence') summoning the unnamed accused to stand trial with the named accused. A stage has thus been discovered, before the reaching of the stage for exercise of power under Section [319](#) CrPC, on the supposition and premise that it is pre-trial when the question of charge was being examined. Such power of summoning the new accused has been culled out from the power exercisable by the Court of Session under Sections [227](#) and [228](#) of the Code, enabling it to discharge under Section [227](#) or charge under Section [228](#) the accused persons before it and while so to summon another accused involved in the commission of the crime, prima facie appearing from the material available on record of the case. Thus at a stage posterior to the stage envisaged under Section [319](#), the Court of Session has been held empowered to summon an accused if a prima facie case is made out from the material available on the record.

15. In the case of Rakesh and Anr. v. State of Haryana, (2001) 6 SCC 2481, it was held:

11. In support of his contention, learned Senior Counsel Mr. Ranjit Kumar referred to the decision of this Court in Joginder Singh v. State of Punjab, (1979) 1 SCC 345. In our view, this decision nowhere lays down that before a person is added as accused in a sessions trial case, he should be permitted to cross-examine the witnesses whose evidence is recorded. On the contrary, it lays down that once the Sessions Court is seized of the matter as a result of the committal order against some accused the power under Section [319\(1\)](#) can come into play and the court can add any person, not an accused before it, as an accused and direct him to be tried along with other accused. The Court has further observed that the very purpose of enacting Section [319\(1\)](#) clearly shows that even persons who have been dropped by the police during investigation but against whom evidence

showing their involvement in the offence comes before the criminal court are included in the expression 'any person not being the accused'.

16. We must, however, at this stage also place on record that this Court, in the case of *Municipal Corporation of Delhi v. Ram Kishan Rohtagi and Ors.* 1983 (1) SCC 1, opined that the power under the said provision must be exercised very sparingly and not as a matter of course. In the case of *Joginder Singh and Anr. v. State of Punjab and Anr.* 1979 (1) SCC 345, this Court even opined that such a power can be exercised even without there being a committal order passed against a person. [see also *Lok Ram v. Nihal Singh and Anr.* (2006) 10 SCC 192; *Shashikant Singh v. Tarkeshwar Singh and Anr.* 2002 (5) SCC 738; *Michael Machado and Anr. v. Central Bureau of Investigation and Anr.* 2000 (3) SCC 262; *Palanisamy Gounder and Anr. v. State represented by Inspector of Police* (2005) 12 SCC 327; *Kailash Dwivedi v. State of M.P. and Anr.* (2005) 11 SCC 182 and *Mohd. Shafi v. Mohd. Rafiq and Anr.* 2007 (5) Scale 611.

17. The High Court, in our opinion, however, has committed a serious error in proceeding on the premise that mere existence of a prima facie case would be sufficient to exercise the court's jurisdiction under Section [319](#) of the Code. We have noticed hereinbefore the importance of the word 'appears'. What is, therefore, necessary for the court is to arrive at a satisfaction that the evidence adduced on behalf of the prosecution, if unrebutted, would lead to conviction of the persons sought to be added as accused in the case.

16. It would also be appropriate to refer to a subsequent judgment of the Hon'ble Supreme Court in *Hardeep Singh Vs. State of Punjab & Ors.* as well as in the case of *Manjit Pal Singh Vs. State of Punjab & Anr.*, AIR 2009 SC 483. In the aforesaid judgment, a Division Bench of the Apex Court has taken note of the earlier judgments delivered in the case of *Rakesh and Anr. Vs. State of Haryana*, AIR 2001 SC 2521 and *Mohd. Shafi Vs. Mohd. Rafiq & Anr.*, AIR 2007 SC 1899, wherein two conflicting views were taken in similar circumstances. In the case of *Mohd. Shafi (supra)* the Apex Court took a view that merely because in the examination-in-chief the witness alleged the role of a person who is

not before the Court, would not be sufficient to form an opinion to summon such a person without completion of the cross-examination of such witness. However, in the case of *Rakesh (supra)* a contrary view was taken and it was held that examination-in-chief would be sufficient for enabling the trial court to find an opinion under Section 319 Cr.P.C. However, the Apex Court in the aforesaid case while discussing both these judgments did not bring an end to the conflict and rather referred the issues for a decision of the Full Bench by making the following observations:-

79. We, therefore, refer the following two questions for the consideration of a Bench of three Hon'ble Judges;

(1) When the power under Sub-section (1) of Section 319 of the Code of addition of accused can be exercised by a Court? Whether application under Section 319 is not maintainable unless the cross-examination of the witness is complete?

(2) What is the test and what are the guidelines of exercising power under Sub-section (1) of Section 319 of the Code? Whether such power can be exercised only if the Court is satisfied that the accused summoned in all likelihood would be convicted?

80. We direct the Registry to place the matter before the Hon'ble the Chief Justice of India for taking an appropriate action.

81. Ordered accordingly.

17. I have not been able to locate any decision on the questions referred to above by the Apex Court to a Larger Bench in the case of *Hardeep Singh (supra)*.

18. At this juncture, it would be appropriate to take note of the observations made by the Apex Court in the case of *Hardeep Singh (Supra)* in respect of *Mohd. Shafi's case (supra)*, which applies with full force in the facts of the present case. The relevant paragraphs are reproduced hereunder:-

45. In this connection, reference was made to a two Judge Bench decision of this Court in *Mohd. Rafi Vs. Mohd. Rafiq and Anr.* (2007) 4 SCR 1023. In Mohd. Shafi, an FIR was lodged against the accused alleging commission of an offence punishable under Section 302 IPC. The police submitted charge-sheet against K but not against M (appellant). At the trial, PW-1 was examined and in his examination-in-chief, he asserted that M also participated in the incident. An application was filed for summoning him under Section 319 of the Code which was rejected by the trial Court but allowed by the High Court. M approached this Court.

46. Allowing the appeal and setting aside the order passed by the High Court, this Court observed that the order passed by the High Court was not sustainable. It was held that satisfaction under Section 319 of the Code could be arrived at only after cross-examination of the witness is over. The Court stated;

The Trial Judge, as noticed by us, in terms of Section 319 of the Code of Criminal Procedure was required to arrive at his satisfaction. ***If he thought that the matter should receive his due consideration only after the cross-examination of the witness is over, no exception thereto could be taken*** far less at the instance of a witness and when the state was not aggrieved by the same.

19. In the present case also, the cross-examination of PW-3 has not taken place and there is also material contrary to what has been stated by PW-3 in his examination-in-chief in the form of his own supplementary statement recorded under Section 161 Cr.P.C. as well as his letter, wherein he has categorically stated that Shiv Kumar Sharma, petitioner herein, was not present at the time of the incident. Similarly, the statement made by Kusum, bhabhi of the complainant, has also exonerated the petitioner from commission of any offence as alleged as noticed by the Additional Sessions Judge in his order dated 12.3.2007

20. Applying the aforesaid principles in the facts of this case, I am satisfied that neither the order dated 24.2.2007 nor the order dated 12.3.2007 can stand the judicial scrutiny and thus, both orders are set aside. However, nothing stated herein would cause any reflection on

the merits of the case and the trial court shall be free to pass an order under Section 319 Cr.P.C., after the cross-examination of PW-3 is completed and the statement of Kusum is also recorded during the course of trial, if the trial court is satisfied for doing so.

21. With these observations, the revision petition is disposed of. Let the parties now appear before the Additional Sessions Judge on 15.7.2009. The trial court record be sent back forthwith along with a copy of this judgment.

Crl.M.A.7310/2007 (Stay)

In view of the orders passed above, the application stands disposed of.

MOOL CHAND GARG, J.

JULY 03, 2009
ag/dc