

% 15.12.2009

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Present:- Mr. D.C. Mathur, Sr. Adv. with Mr. Ajay Burman and Mr. Rajesh Samanotra,, advs. for the petitioner.
Mr. Harish Gulati with Mr. Anindya Malhotra, advs. for the CBI.

+ CrI.M.C. 3198/2008 & CrI. M.A.11843/2008

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1 The short point involved in this case is as to whether the petitioner could have been summoned by the Trial Court at the stage at which she has been summoned. The order sheet goes to show that on 18th September, 2008 the trial court was in the midst of hearing arguments on the question of framing of charge against the other accused persons, who were arrayed as accused persons. It seems that when an application was moved on behalf of the other accused persons regarding the requirement of sanction under Section 197 Cr.P.C., the trial court vide order dated 18th September, 2008 decided to summon Rosy Dabbas, the present petitioner.

2. The only argument advanced on behalf of the petitioner is that this procedure is illegal as the powers under Section 319 Cr.P.C. to summon another person after taking cognizance of the offence on the basis of the charge sheet filed by the police are available to the trial court only when the evidence on record implicate such person. It is for that reason the petitioner

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submits that the order dated 18th September, 2008 cannot be sustained.

3. It seems that the trial court has been persuaded to take this course of action only because the Prosecutor has decided not to summon Rosy Dabbas despite being availability of enough material on record against her. Reference can be made to the observations made by the Trial Court in this regard:-

"In view of precedents, referred above, it is apparent that an accused, who has not been sent for trial, can be summoned by the Court, when matter is still at the stage of an inquiry. No stage for invoking provision of Section 319 of the Code has reached, as charge is yet to be framed. Therefore, at this stage powers contained in Section 190 read with Section 204 of the Code and 5 of the Act can be invoked for summoning Rosy Dabas.

Though ample material was there over the record to proceed against Rosy Dabas, yet no steps were taken by the investigating officer to chargesheet her. Sub-section (2) of Section 173 of the Code enjoins a duty on him to submit a police report in the prescribed form, stating - (a) the name of the parties; (b) the nature of the information (c) the names of the person who appear to be acquainted with the circumstances of the case; (d) whether any offence appears to have been committed and, if so, by whom (e) whether the accused has been arrested; (f) whether he has been released on his bond and, if so, whether with or without sureties; (g) whether he has been forwarded in custody under Section 170. Not to talk of foisting any accountability on Rosy Dabas for the above offences, he has not detailed at all that she was involved in the crime. It is evident that he was not at all oblivious of the fact that Rosy Dabas had posed herself to be a member of the managing committee of the society and recorded minutes of various meetings,

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referred above, but he gave a clean chit to her. Hence, these facts make it clear that he knowingly disobeyed direction of law contained in sub-section (2) of the section 173 of the Code. His acts were designed with an intent to save Rosy Dabas from legal punishment.

Circumstances detailed above are sufficient to announce that offence punishable under Section 217 of the Penal Code is made out against the officers, who submitted the charge-sheet. Therefore, Director of CBI is commanded to get a case registered against the guilty officers, cause it to be investigated and get them punished, in accordance with law.

Accused Rosy Dabas be summoned for offences punishable under Section 120 B read with Section 420 and 468 of the Penal Code. Case is adjourned for procuring attendance of accused Rosy Dabas for 21.10.08."

4. However the aforesaid order passed by the learned Additional Sessions Judge / Special Judge suffers from infirmity in view of the provisions contained under Section 319 Cr.P.C., 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 under arrest or upon a summons, may be detailed 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

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under sub-section (1) then -

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

5. The term evidence referred to above in Section 319 Cr.P.C. has been interpreted as the evidence which comes on record during the course of trial. Thus, after taking cognizance of the offence, the second stage for summoning an accused, who has not been named in the charge sheet, would only be the stage when any evidence comes on record against him during the course of trial. Once the case reaches at the stage of consideration of charges, then the second stage obviously would be the stage when evidence is led and recorded on behalf of the prosecution.

6. In case the Trial Court was satisfied that there was some material available in the charge sheet, nothing prevents it to summon Rosy Dabbas at the stage of initial cognizance. However, he could not have taken the cognizance again. The power is very much available to the Court under Section 319 Cr.P.C. but that can only be exercised after some evidence comes on record to support such conclusion.

7. In this regard, it would be appropriate to take note of the

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judgment delivered by a learned Single Judge of this Court in *Anirudh Sen Vs. State (NCT of Delhi) 2009 (93) DRJ 70*, where a similar view has been taken. The relevant observations made in the said judgment are :-

20. The third contention of the learned Counsel for the petitioner is that summons could not have been issued to the petitioner at the stage of consideration of charge against the accused Bhupinder Singh. It is the contention of the petitioner that the stage of taking cognizance and issuing summons was over. The documents that were required to be supplied under Section 207 CrPC had also been supplied to accused Bhupinder Singh. According to the learned Counsel for the petitioner, the stage thereafter was an "inquiry" as contemplated under Section 2(g) CrPC. That being the case, it was contended, the petitioner could only be called under Section 319 CrPC and that too on the basis of evidence that would come before the court in the course of the inquiry. He submits that clearly the provisions of Section 319 CrPC were not invoked. Nor was there any evidence which had come up in the course of the inquiry. Accordingly, he submitted that the impugned order was bad on this ground also. In response, as noted above, the learned Counsel for the state submitted that the decision of a learned single judge of this Court in the case of Jitender Singh (supra) was a complete answer to the contention raised by the learned Counsel for the petitioner. It would, therefore, be necessary to examine the decision in Jitender Singh (supra) in some detail. In that case, a charge sheet had been filed and the magistrate had taken cognizance of the offences under Section 394 and 506 IPC and issued summons to one Gurvinderpal Singh. Thereafter, the case was adjourned for hearing on the question of charge and the magistrate considered the case and at that stage passed an order indicating that the investigating officer had not fairly investigated the

case and directed that the other accused named in the complaint but who had not been sent up for trial should also be summoned as they were equally involved in the commission of the offence. Those persons, who were not sent up for trial along with Gurvinderpal Singh but were subsequently summoned by the aforesaid order, were aggrieved and they approached the High Court by filing a petition under Section 482 CrPC for setting aside of the said order. In the context of these facts, it was argued that the magistrate after having taken cognizance had no power and jurisdiction to take cognizance again and summon these persons to face trial. It was also argued that, after taking cognizance under Section 190 CrPC, the magistrate had proceeded further in the case and, therefore, the magistrate could not revert back to the first stage, that is, of taking cognizance and that the additional accused persons could be summoned by the magistrate only under Section 319 CrPC which power could be exercised only after evidence had been recorded. This argument is virtually the same as is being canvassed by the learned Counsel for the petitioner in the present case.

21. The learned single judge who decided the case of Jitender Singh (supra) explained the difference between the provisions of Sections 190 and 319 CrPC. It is a well settled proposition that cognizance is taken of the offence and not of the offender. The learned single judge observed that the magistrate has power and jurisdiction to take cognizance of the offence under Section 190 CrPC against another person who has not been sent by the police as an accused person if from the evidence collected by the police or the material or information placed before him it appears to the magistrate, prima facie, that an offence has been committed by such person. There is no quarrel with this proposition. Nor is there any quarrel with the observation that the power and jurisdiction of the magistrate is such that he is not bound by what has been disclosed or stated in the charge-sheet alone.

Section 190 is of the widest amplitude and sufficiently arms the magistrate to proceed with the trial of those persons whom the police did not care to send for trial naming them as accused in the charge-sheet or who have not been referred to in the charge-sheet if, from the evidence and the material place before him, it appears to him that some other persons are also involved in the commission of the offence. There is no dispute with this proposition either. What is relevant is, at what stage can these powers of summoning be exercised under Section 190 CrPC. It is also clear that Section 319 CrPC applies to a situation where, if, during the trial or inquiry, it appears to the trial court, whether it is a magistrate's court or a sessions court, that some other persons are involved in the commission of the offence for which the trial is or inquiry is being held, then the said persons can be summoned to be arrayed as accused to stand trial in the same case. The question that arises is -- has the stage contemplated under Section 190 CrPC been crossed in the facts of the present case or not? It is clear that the two provisions, Section 190 CrPC and Section 319 CrPC apply to different situations. Once an inquiry or a trial commences, Section 190 CrPC would have no application. On the other hand before an inquiry or a trial ensues, the provisions of Section 190 CrPC would have full amplitude. It appears that in Jitender Singh (supra) a concession was made by the counsel for the petitioner that the stage at which the learned magistrate had summoned the petitioner to be arrayed as an accused and face trial was not one where the Section 319 could have been invoked. This is observed in paragraph 9 of the said decision as under: --

Counsel for the petitioner has fairly conceded that the stage at which the learned magistrate has summoned the petitioner to be arrayed as an accused and face trial Section 319 could not have been invoked. No quarrel has been based on this point by any of the parties. This

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leaves for decision a critical question whether the learned magistrate had power to summon the petitioner to be arrayed as an accused and face trial along with Gurvinderpal Singh in this case.

It, therefore, appears that the crucial question which arises for consideration in the present case was not at all considered or debated upon in Jitender Singh (supra). There is no dispute with the proposition that at the time of taking cognizance or shortly thereafter persons placed in column number two of the charge-sheet can be summoned on different dates. This has been settled by the Supreme Court in SWIL Ltd (supra). There is also no dispute with the proposition that even those persons who have not been named in the chargesheet as accused could be summoned by the magistrate after taking cognizance of the offence. But these questions do not arise in the present case. What arises in the present case is: whether the magistrate could have issued summons in respect of the petitioner at the stage of considering the question of framing charges against the accused Bhupinder Singh? Therefore, I am of the view that the decision in Jitender Singh (supra) does not satisfactorily answer or cover the issue raised in the present case.

22. I shall now consider the decision of another learned single judge of this Court in the case of Itender Singh Chadha (supra). In that case, the learned single judge, after referring to the Supreme Court decision in SWIL Ltd (supra), observed as under: --

In view of the above referred judgment of the Hon'ble Supreme Court of India which is a complete answer to the contention raised on behalf of the petitioners, there remains no doubt about the legal opposition that Sections 319 and 190 of the code operate in entirely different fields and Section 319 in no manner whatsoever impinges upon the

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powers of the magistrate under Section 190 of the code. The impugned order passed by the learned Metropolitan Magistrate was on the basis of the report submitted to him under Section 173 of the code of criminal procedure and the material available on record and as such it cannot be held that the learned Metropolitan Magistrate has no powers to take cognizance of the offence and summon the petitioners as accused, two of whom had been shown in column number two and regarding remaining two, and there was some material available to summon them as accused persons. The impugned order, therefore, does not suffer from any infirmity.

The question that was raised in Itender Singh Chadha (supra) was that on the one hand, it was argued on behalf of the petitioners therein that the Metropolitan Magistrate had acted in violation of the provisions of Section 319 of the Code by taking cognizance against the accused petitioners without recording any evidence whatsoever. On the other hand, the learned Counsel for the State had contended that the order impugned in that case was passed by the Metropolitan Magistrate under Section 190 of the Code and, therefore, there was no violation of the provisions of Section 319 of the Code. The above extracted observations of the learned single judge have clearly proceeded on the foundation of the distinction made between the ambit and sweep of the provisions of Section 190 and 319 of the Code in the Supreme Court decision in SWIL Ltd (supra). As explained above, there is no quarrel with this proposition that the ambit and sweep of the said two provisions are entirely different. What is necessary for the purposes of the present case is to find out as to whether the provisions of Section 190 of the Code could be invoked at the stage of considering the question of framing of charges against the accused

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Bhupinder Singh. The answer to this question cannot be found in either the case of Jitender Singh (supra) or that of Itender Singh (supra), which have not addressed this question. The latter case was entirely on the question as to whether the Magistrate had the power to summon the accused petitioners therein under Section 190 of the Code or not. The learned single judge, relying on the decision of SWIL Ltd (supra), held that the Metropolitan Magistrate had such a power. But, this in no way, answers the question that needs to be examined in the present case.

8. This Court in Criminal Miscellaneous Case No.1021/2009 titled as *Shashi Kant Vs. State of Another* decided on 2nd July, 2009 has held that :-

"26. It is well settled proposition that once the Court takes cognizance of the offence it becomes the duty of the Court to find out that who are the real offenders and if the Court comes to the conclusions that besides the persons put up for the trial by the investigating agency some other persons are also involved in the commission of the crime. It becomes the duty of the Court to summon them also, to stand for trial along with those already arrayed, since summoning them would only be a part of process of taking cognizance. Anirudh Sen (supra) does not differ from above proposition but facts of the case shows that in that case Trial Court had crossed the stage of cognizance and was at the charge stage and therefore it was not appropriate for the Trial Court to revert back to the stage of issue of process but in the present case from the order dated 20.11.2007 it is crystal clear that Court is still at the stage of taking cognizance of the offenders and proceeded well within the powers envisaged under Section 190 (1)(b) Cr.P.C."

9. In the present case, cognizance has already been taken by

the learned Magistrate and the case has reached at the stage of arguments on charge, where the part arguments have already been heard. It is not a case wherein supplementary charge sheet has been filed and therefore, in the facts of the case the judgment in the case of *Anirudh Sen (Supra)* squarely applies.

10. The learned counsel appearing on behalf of the CBI submits that subject to protection of the rights of the CBI to pray for summoning of the petitioner at an appropriate stage if evidence comes on record, they have nothing else to add.

11. In view of the aforesaid, the order dated 18th September, 2008 passed by the Additional Sessions Judge/ Special Judge is set aside. However, the liberty is granted to the Special Judge to exercise powers under Section 319 Cr.P.C. against the petitioner if evidence comes on record against her during the course of trial.

12. The petition and application stand disposed of.

DECEMBER 15, 2009

J



MOOL CHAND GARG