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

Date of Decision: 4th May, 2016

+ **CRL.REV.P. 656/2014**

PREETI SHARMA

..... Petitioner

Through

Mr. Krishan Kumar and Ms.
Vidushi, Advocates

versus

STATE NCT OF DELHI

..... Respondent

Through

Mr. Ashok K. Garg, APP along
with Sub Inspector Ajay Singh,
Police Station Darya Ganj

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CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

ORDER

: SUNITA GUPTA, J.

For detailed order, pl. see Crl.Rev.P.601/2014.

Sunita Gupta
(SUNITA GUPTA)
JUDGE

MAY 04, 2016

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Crl..Rev.Pet.601/14

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HON'BLE MS. JUSTICE SUNITA GUPTA

ORDER

• : **SUNITA GUPTA, J.**

1. Feeling aggrieved by the summoning order dated 8th July, 2014 and consequential framing of charge dated 13th October, 2014 by learned Additional Sessions Judge, Special Fast Track Court-II

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(Central), Tis Hazari Courts, Delhi in Sessions Case No.83/2013 arising out of FIR 248/09 u/s 376 IPC, present Revision Petitions No. 601/2014 and 656/2014 have been filed by the petitioner.

2. Facts germane to the filing of the present petition lie in a narrow compass. FIR in the instant case was registered on the basis of the statement of the prosecutrix wherein she alleged that her husband had suffered heart attack, as such, she was in financial difficulty. She met one Daya Nand Khatri at RML Hospital and apprised him about her problems. He offered her a salary of Rs.5000/- besides transportation charges. She started working with him and used to go with him. About 5-7 days prior to the registration of FIR, she went to the office of Oriflame, Connaught Place where she met Preeti and came to know about her because Preeti was a prior acquaintance of Khatri uncle and Khatri uncle told her not to talk to anyone without his permission. On 26th November, 2009, she reached Rajiv Chowk Metro Station at about 11:00 AM, however, Khatri uncle was not present there and told her that he would reach after about 1-1½ hour and asked her to sit in Palika. Meanwhile, Preeti came out of Oriflame office and took her upstairs and started talking to another lady about making her a member. After that she brought her outside the office. One person namely, Naresh Dahiya came and started talking to Preeti. Preeti told her that she will come within 10-15 minutes and asked her not to go anywhere. She tried to talk to Preeti on telephone several times but the call was on waiting for more than 10 minutes. Naresh Dahiya told her that Preeti had gone from back door and asked her to accompany him.

Naresh Dahiya took her in his car to Priya Guest House, Darya Ganj, Delhi where he committed rape upon her. Thereafter, she came out of the guest house in anger. She and Naresh Dahiya ate *golgappa* near Sablok Clinic. She informed Preeti that because of her, wrong thing had happened with her. Preeti came and informed the police. Ambulance came and took her to JPN Hospital. She prayed for action against Naresh Dahiya. During the course of her deposition before the Court, she stated that she also want action to be taken against Preeti and Daya Nand Khatri as they were *hand in glove* with accused Naresh Dahiya. Thereupon vide impugned order dated 8th July, 2014, Preeti and Daya Nand Khatri were ordered to be summoned as accused.

3. Learned counsel for the appellant has challenged the summoning order on the ground that neither in her initial statement made before the police which resulted in registration of FIR nor in her subsequent statement u/s 161 Cr.P.C. or 164 Cr.P.C. recorded by the Metropolitan Magistrate, the prosecutrix has leveled any allegations against the petitioner. It was for the first time that in her examination-in-chief before the Court, she merely stated that the petitioner was *hand in gloves* with Naresh Dahiya and prayed for action against her.

4. Learned counsel for the petitioner submits that the evidence/documents available on record do not constitute commission of any offence much less *prima facie* evidence against the petitioner which warrants summoning under Section 319 Cr.P.C. Counsel

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further submits that even the cross-examination of the prosecutrix was not recorded, therefore, there was no occasion for invoking the powers u/s 319 Cr.P.C. Reliance in this regard is placed on *Mohd. Shafi vs. Mohd. Rafiq*, AIR 2007 SC 1899.

5. By placing reliance on *Anil Singh and Anr. vs. State of Bihar*, CrI. Appeal No. 1082/2006; *Hardeep Singh & Ors. vs. State of Punjab and Ors.*, MANU/SC/0025/2014; *Prabhdyal Singh vs. State of Punjab & Ors.*, CrI.A.3848/2012; *Jogendra Yadav and Anr. vs. State of Bihar and Ors.*, MANU/SC0833/15, it was submitted that standard of proof employed for summoning a person as accused u/s 319 Cr.P.C. is higher than the standard of proof employed for framing a charge against an accused. A satisfaction is required to be arrived at before passing a summoning order that the evidence adduced on behalf of prosecution, if not rebutted, may lead to conviction of a person sought to be added of the accused in the case. In the instant case, absolutely no ground has been given by the learned Sessions Judge for summoning the petitioner who was in fact cited as a witness by the prosecution, as such, the impugned order summoning the petitioner and subsequent framing of charge are liable to be set aside.

6. Per contra, learned Additional Public Prosecutor for the State submitted that the impugned order does not call for any interference, as such, the revisions are liable to be dismissed.

7. I have given my considerable thoughts to the respective submissions of the learned counsel for the parties and have perused the record.

8. Section 319 Cr.P.C. as it exists today, is quoted hereunder:

"319 Cr.P.C. -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 afresh, 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."

9. Section 319 Cr.P.C. springs out of the doctrine *judex damnatur cum nocens absolvitur* (Judge is condemned when guilty is acquitted) and this doctrine must be used as a beacon light while explaining the ambit and the spirit underlying the enactment of Section 319 Cr.P.C. It is the duty of the Court to do justice by punishing the real culprit. Where the investigating agency for any reason does not array one of

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the real culprits as an accused, the court is not powerless in calling the said accused to face trial. The question remains under what circumstances and at what stage should the court exercise its power as contemplated in Section 319 Cr.P.C.?

10. There were divergent views having been expressed by the Supreme Court and several High Courts of the country on the scope and extent of the powers of the courts under the criminal justice system to arraign any person as an accused during the course of inquiry or trial as contemplated under Section 319 of the Code of Criminal Procedures 1973 (hereinafter referred to as the 'Cr.P.C.'). Therefore, reference was made to the Constitution Bench in **Hardeep Singh** (supra). The doubts as categorised in paragraphs 75 and 78 of the reference order led to the framing of following two questions:-

"(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?"

11. After referring to various earlier decisions rendered by the Supreme Court as well as different High Courts, as regards the question whether the word 'evidence' in Section 319 Cr.P.C. means as arising in Examination-in-Chief or also together with Cross-Examination, it was held that once examination-in-chief is conducted, the statement becomes part of the record. It is evidence as per law and in the true sense, for at best, it may be rebuttable. An evidence being

rebutted or controverted becomes a matter of consideration, relevance and belief, which is the stage of judgment by the court. Yet it is evidence and it is material on the basis whereof the court can come to a *prima facie* opinion as to complicity of some other person who may be connected with the offence. Therefore, even on the basis of Examination-in-Chief, the Court or the Magistrate can proceed against a person as long as the court is satisfied that the evidence appearing against such person is such that it *prima facie* necessitates bringing such person to face trial. In fact, Examination-in-Chief untested by Cross Examination, undoubtedly in itself, is an evidence. While so observing, the Court had taken into consideration the decision rendered in *Mohd. Shafi v. Mohd. Rafiq & Anr.*, AIR-2007 SC 1899 on which reliance has been placed by the learned counsel for the petitioner. Under the circumstances, the submission that only on the basis of examination-in-chief the petitioner could not have been summoned cannot be sustained.

12. While dealing with the degree of satisfaction required for invoking the power under Section 319 Cr.P.C., it was observed as under:-

"98. Power under Section 319 Cr.P.C. is a discretionary and an extraordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

99. Thus, we hold that though only a *prima facie* case is to be established from the evidence led before the court not necessarily tested on the anvil of Cross-Examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than *prima facie* case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes un rebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Cr.P.C. In Section 319 Cr.P.C. the purpose of providing if 'it appears from the evidence that any person not being the accused has committed any offence' is clear from the words "**for which such person could be tried together with the accused.**" The words used are not 'for which such person could be convicted'. There is, therefore, no scope for the Court acting under Section 319 Cr.P.C. to form any opinion as to the guilt of the accused."

13. It was further observed that though u/s 319(4) (b) Cr.P.C., the accused subsequently impleaded is to be treated as if he had been an accused when the Court initially took cognizance of the offence, the degree of satisfaction that will be required for summoning a person under Section 319 Cr.P.C. would be the same as for framing a charge. The difference in the degree of satisfaction for summoning the original accused and a subsequent accused is on account of the fact that the trial may have already commenced against the original accused and it is in the course of such trial that materials are disclosed against the newly summoned accused. Fresh summoning of an accused will result in delay of the trial. Therefore the degree of satisfaction for summoning the accused (original and subsequent) has to be different.

14. As regards the question whether power under Section 319 Cr.P.C. extend to persons not named in the FIR or named in the FIR but not chargesheeted or who have been discharged, it was observed

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that a person not named in the FIR or a person though named in the FIR but has not been chargesheeted 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. However, in so far as an accused who has been discharged is concerned the requirement of Sections 300 and 398 Cr.P.C. has to be complied with before he can be summoned afresh.

15. Again while dealing with the powers of the Court u/s 319 Cr.P.C., in *Anil Singh* (supra), it was observed that the jurisdiction of the Court to issue processes against a person who has not been sent up for trial is not disputed. Processes can also be issued against such persons who although were named in the first information report but were not sent up for trial upon investigation. The jurisdiction of the Court undisputedly is limited. While it can exercise an extraordinary power, it is required to be done cautiously. The Court while issuing the processes should arrive at reasonable satisfaction that the prosecution would be able to prove the charges against whom the processes are sought to be issued. Reference was made to the *Municipal Corporation of Delhi vs. Ram Kishan Rohtagi and Ors.*, 1983(1) SCC 1 where the law in this regard was laid down in following terms:-

"But, we would hasten to add that this is really an extraordinary power which is conferred on the court and should be used very sparingly and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken."

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16. Reliance was also placed on *Michael Machado and Anr. v. Central Bureau of Investigation and Anr.*, 2000 Cri LJ 1706, where the Court opined:

"11. 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."

17. Yet again in *Krishnappa v. State of Karnataka*, 2004 Cri LJ 4185, Court observed:

"9. In *Michael Machado v. Central Bureau of Investigation* construing the words "the court may proceed against such person" in Section 319 CrPC, this Court held that the power is discretionary and should be exercised only to achieve criminal justice and that the court should not turn against another person whenever it comes across evidence connecting that other person also with the offence. This Court further held that a judicial exercise is called for, keeping a conspectus of the case, including the stage at which the trial has already proceeded and the quantum of evidence collected till then, and also the amount of time which the court had spent for collecting such evidence. The court, while examining an application under Section 319 CrPC, has also to bear in mind that there is no compelling duty on the court to proceed against other persons. In a nutshell, it means that for exercise of discretion under Section 319 CrPC, all relevant factors, including the one noticed above, have to be kept in view and an order is not required to be made mechanically merely on the ground that some evidence had come on record implicating the person sought to be added as an accused."

18. In **Prabhdyal Singh**(supra), after referring to various judgments, Punjab and Haryana High Court also took the view that power u/s 319 Cr.P.C. should be used only when sufficient and cogent reasons are there to satisfy the ingredients of the provisions. Mere *ipse dixit* would not serve the purpose. Such an evidence must be convincing one at least for the purpose of exercise of extraordinary jurisdiction. A very high standard is required to invoke jurisdiction under Section 319 Cr.P.C. and unless, a higher standard for the purpose of forming an opinion to summon a person as an additional accused is laid down, the ingredients thereof viz a viz an extraordinary case and also a case for sparingly exercise of jurisdiction would not be satisfied. Otherwise also, summoning of an additional accused is a serious matter.

19. Recently in **Jogendra Yadav** (supra), following **Hardeep Singh** (supra), it was held that extraordinary power u/s 319 of the Code of Criminal Procedure can be exercised only if very strong and cogent evidence occurs against a person from the evidence led before the Court.

20. Testing on the anvil of the aforesaid legal proposition, it is to be seen whether there was strong and cogent evidence against the petitioner for invoking the power u/s 319 Cr.P.C. In her initial complaint made by the prosecutrix on 26th November, 2009, she leveled allegation of commission of rape by one Naresh Dahiya at Priya Guest House, Daryaganj, Delhi. In this complaint, it was stated

that the petitioner who was working with Oriflame Office, Cannaught Place met her and told her that she was coming within 10-15 minutes but she did not return, thereupon Naresh Dahiya told her that Preeti has asked her to accompany him and thereupon she went with him where she was subjected to rape. The prosecutrix informed the petitioner on telephone about the commission of illegal act by Naresh Dahiya whereupon the petitioner reached the spot and informed the police. Ambulance came and took the prosecutrix to hospital.

21. On the same day, MLC of prosecutrix was conducted at LNJP hospital, New Delhi. She was referred to gynecologist for further evaluation and management. She was examined by the gynecologist. As per the report of doctor, the patient was changing her statement continuously. It was stated that the patient has come out of home to meet her alleged aunt Mrs. Preeti working in Oriflame, Connaught Place where she met with two male persons about 35 years of age who took her first to the residence at Safdarjung Enclave where he gave her cold drink to drink after which the patient started feeling dizziness and she was taken to Daryaganj where she was sexually assaulted. According to the patient, the names of the persons were Naresh Dahiya and Chetan.

22. On 27th November, 2009, the statement of the prosecutrix was recorded u/s 161 Cr.P.C. wherein similar allegations were narrated as in the FIR.

23. On the same day, her statement u/s 164 Cr.P.C. was recorded by learned Metropolitan Magistrate wherein she stated that the petitioner had only told the prosecutrix to bring the file and not to talk to Naresh Dahiya on the way. In this statement, the prosecutrix wanted legal action only against Naresh Dahiya.

24. Learned counsel for the petitioner referred to the statement u/s 161 Cr.P.C. of one Manjeet Singh @ Bablu to show that the prosecutrix was involved in prostitution business. Reference was also made to the order passed by the Court of Sessions while granting bail to Naresh Dahiya wherein it was observed that the prosecutrix has been taking different versions in her statement u/s 161 and 164 Cr.P.C. regarding offence. It was also observed that in her statement dated 26.11.2009, the prosecutrix nowhere stated that she accompanied the accused on any direction given by the petitioner to the effect that the prosecutrix was to collect some file. Even if the prosecutrix was asked by accused Naresh Dahiya to represent herself to be Rita and wife of accused, there was opportunity for her to refused to do so and not to enter into the guest house. Still she opted to enter into the guest house. Even after commission of alleged heinous crime, the prosecutrix had *golgappa* with the accused near Sablok Clinic instead of raising any hue and cry. In the Medical Report, there was no injury available on any part of the prosecutrix. Counsel further submits that after completion of investigation, the police filed report u/s 173 Cr.P.C. The investigation revealed allegation against Naresh Dahiya only. The petitioner was cited as prosecution witness and was placed

at Sl. No. 2. Prosecutrix was examined on 17th April, 2014 and 8th July, 2014. In her deposition dated 17th April, 2014, she stated that she was introduced to accused Naresh Dahiya by the petitioner, however, when the accused was shown to her she stated that she was not sure if he is the same man or not. She further deposed that it was Khatri uncle who asked her to go with Naresh Dahiya and bring the file. In her deposition, she further stated that Naresh threatened her several times after registration of the case and because of this reason, she shifted to NOIDA. At that time, she stated, "*I also want action to be taken against Preeti and Daya Nand Khatri as they are hand in gloves with accused Naresh*". Merely on the basis of this statement of the prosecutrix, the petitioner was ordered to be summoned. However, as seen above, as observed by Hon'ble Supreme Court in **Hardeep Singh**(supra), power u/s 319 Cr.P.C. is a discretionary and extraordinary power which is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is only where strong and cogent evidence occurs against a person from the evidence led before the Court that such power should be exercised and not in casual and cavalier manner. Except for the fact that the prosecutrix stated that she wanted action against Preeti and Daya Nand Khatri as they were *hand in gloves* with accused Naresh, there was no other clinching and cogent evidence against the petitioner which warranted summoning the petitioner. In Section 319 Cr.P.C. the purpose of providing "if it appears from the evidence that any person not being the accused had committed any offence is clear from the words "for which such person could be tried together with the

accused". The words used are not "for which such person could be convicted". Under the circumstances, there was no sufficient ground for summoning the petitioner who was kept as a witness in the report u/s 173 Cr.P.C.

25. That being so, the impugned orders cannot be sustained and both the revision petitions are accordingly allowed and the impugned orders dated 8th July, 2014 and 13th October, 2014 are set aside.

MAY 04, 2016
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Sunita Gupta
(SUNITA GUPTA)
JUDGE