

Neutral Citation No. - 2023:AHC:231188

Reserved On: 28.10.2023

Delivered On: 06.12.2023

In Chamber

Case :- CRIMINAL REVISION No. - 3419 of 2023

Revisionist :- Usha Devi

Opposite Party :- State Of U.P. And 2 Others

Counsel for Revisionist :- Arvind Kumar

Counsel for Opposite Party :- G.A.

Hon'ble Ram Manohar Narayan Mishra,J.

1. Heard learned counsel for the revisionist, learned AGA for the State and perused the material placed on record.
2. Notice has been served on respondent Nos.2 and 3 but none appeared on their behalf to contest the criminal revision.
3. Instant criminal revision has been preferred against the judgement and order dated 20.5.2023, passed by learned Special Judge (POCSO Act)/Additional District and Sessions Judge, Kannauj, in Sessions Trial No.793 of 2022 (State vs. Indrapal and others), arising out of Case Crime NO.305 of 2022, under Sections 363, 366, 376-D(A), 323, 506 IPC and Section 5G/6 of POCSO Act, Police Station Saurikh, District Kannauj, whereby the application 26-A moved by the informant/revisionist under Section 319 Cr.P.C. has been dismissed.
4. Factual matrix of the case in brief are that the revisionist lodged an FIR at police station Saurikh, Kannauj on 19.7.2022, on the basis of written report, stating therein that in the night of 18.7.2022, at around 9:00 PM, her daughter aged around 15 years was sleeping on the cot beside her in the house. The informant awoke in the night and found her daughter missing. She laid a search for her but could not find her. She believes that her daughter has been enticed away by her neighbour Rajan and in this incident, Bobby Yadav, the brother of Rajan is also involved. She visited the place of Rajan Yadav and Bobby Yadav and asked their father and family members that if her daughter is not restored to her, she

would lodge a complaint at police station. At around 10:40 PM, she found that Rajan Yadav was standing while grabbing hand of her daughter near Rishibhumi Crossing and when he saw her, he escaped from the place leaving her daughter behind. She did not lodge FIR in the night but when her daughter narrated the incident to her, she came to lodge the FIR. The FIR was lodged against named accused persons namely, Rajan, Bobby Yadav, son of Suresh Singh. The statement of victim was recorded under Section 161 Cr.P.C. by Investigating Officer, in which she stated that she is aged around 16 years and has studied up to Class VI. She was lying on the cot beside her mother in the night of 18.7.2022, Indrapal Yadav called her around 9:00 PM by way of gestures. She went with him around 9:00 PM. He took her by getting her sit on motorcycle at a place where Rajan and Kallu were present in a vehicle. They were trying to take her to somewhere else by forcefully getting her sit in the vehicle. She got frightened and cried. Her family members reached there in the meanwhile alongwith police. Three persons namely, Indrapal, Kallu Rajan left her at Rishibhumi Crossing noticing the police and her family members. However, in her statement under Section 164 Cr.P.C. recorded before Magistrate, the victim stated that she is of 15 years of age. She is able to read and write in Hindi. Bobby Yadav is her neighbour, who would often tease her and threatened her that if she would not come to him, he would finish her brother prior to 15 days of this incident, Bobby Yadav was teasing and speaking filthy things to her alongwith his friends whereupon she had removed her *chappal* and rebuked him. He threatened her that he would get her kidnapped from her home. In the night of 18.7.2022, her family members were sleeping. She was also sleeping beside her mother in the house. Cooler was on. Some person appeared and pressed some cloth on her mouth due to which she got unconscious. She could not see his face. She was removed from destination in unconscious position. When she gained consciousness, she found that she was locked in a room and Rajan Yadav, Indrapal and Kallu were present there. Indrapal

committed rape on her. Kallu and Rajan had caught her lets and subsequently Rajan and Kallu also committed rape on her one by one. They slapped her. A phone call was received on the mobile phone of Rajan during that time. Rajan placed his mobile on speaker mode Bobby was speaking from the other side that police has come, leave the girl. They administered her some intoxicating liquid and started escaping from the place by getting her sit on motorcycle. Indrapal was driving the motorcycle and Rajan was riding thereon while catching her on the motorcycle. These persons escaped from the place while seeing the police vehicle. They also threatened her not to speak anything to police regarding the incident. The police investigated the case and filed charge sheet against accused Indrapal Yadav and Kallu @ Ajay Kumar with a prayer to prosecute them for charge under Sections 363, 366, 376-D(A), 323, 506 IPC and Section 5G/6 of POCSO Act, on 12.12.2022. However, complicity of Rajan and Bobby Yadav @ Abhishek Kumar was not found during investigation and they were exonerated from investigation by the S.H.O./Investigating Officer on police station concerned. Learned court below framed charge against chargesheeted accused persons and trial commenced against them. After evidence of PW-1 victim and PW-2 first informant, an application under Section 319 Cr.P.C. was moved by the informant, who is mother of the victim, with a prayer to summon named accused persons namely Rajan Yadav and Bobby Yadav for charge under Section 120-B IPC on the ground that the witnesses have deposed against them during trial and their complicity established on the basis of evidence recorded during trial.

5. Learned trial court dismissed the application after perusing the material on record and considering the relevant facts of the case as well as the statements of the witnesses namely PW-1 victim and PW-2 informant Usha Devi, who is mother of the victim. Learned court below has observed that Investigating Officer is an important witness in the case, who has not been examined as of now, only on the basis of his evidence

before the court, this fact would be established that under what circumstances their name was separated from the case after investigation. Learned court below also cited dictum of Hon'ble Apex Court in **Hardeep Singh and others vs. State of Punjab and others; 2014 (3) SCC, 92**. Learned court below finally observed that the evidence required for an accused under Section 319 Cr.P.C. to face trial together with the accused who are already facing trial, the evidence must be of nature that if such evidence remains unrebutted, it would be sufficient for conviction of such summoned accused. There are substantial contradictions in the statements of the victim at different stages. There is substantial inconsistency in the statements of first informant/PW-2 also at different stages. The Investigating Officer has not been examined as yet. No such evidence has appeared on record, after framing of charge in the case by which it is prima facie proved that the evidence of higher standard which is requisite for framing of charge is available on record. The evidence appeared on the record in the case is of not higher standard than that is required for framing of charge. Therefore, the application 26-A moved by the revisionist under Section 319 Cr.P.C. is liable to be dismissed.

6. Feeling aggrieved by the impugned order, the revisionist has filed present criminal revision before this Court under Section 397/401 Cr.P.C.

7. Learned counsel for the revisionist submitted that the police wrongly dropped the name of named accused Bobby Yadav and Rajan Yadav, who are siblings, after investigation and did not chargesheeted them due to political influence. These persons are influential people and only with a view to save them from this serious offence, a tainted investigation was carried out. The statement of victim under Section 161 Cr.P.C. was recorded by the Investigating Officer only with a view to save these persons, in fact, no such statement has recorded under Section 161 Cr.P.C. was given by the PW-1 victim before the Investigating Officer. She has stated in her evidence before the Court that police had not recorded her statement and when she was confronted with her statement

under Section 161 Cr.P.C., she categorically stated that she had not given any statement like this. The police got her signature on some papers. Rajan was arrested on the spot by police but he rescued himself from the police. The statement of the victim before the court is in consonance with her version under Section 164 Cr.P.C. recorded by the Magistrate and there is ample material on record to justify summoning of these two persons as accused in the case to face trial with the persons, who are already facing trial. The first informant, who has been examined as PW-2 before the trial court has supported her version in first information report, in which these two persons are named as accused. This FIR was lodged just after the recovery of the victim in the fateful night. Learned trial court has wrongly dismissed the application under Section 319 Cr.P.C. moved by the revisionist while neglecting the evidence of victim and her mother recorded during trial, in which active role has been assigned to them in the offence. The respondent Nos.2 and 3 are roaming freely in the locality and have become a risk to the victim and her mother, in view of being given clean chit by the police during investigation as well as after dismissal of the application under Section 319 Cr.P.C. by the police.

8. Per contra, learned AGA submitted that there is no illegality or irregularity in the impugned order passed by the court below. The complicity of respondent Nos.2 and 3 was not found during investigation and their name was dropped after investigation from the list of accused persons and two accused Indrapal and Kallu @ Ajay Kumar were chargesheeted, who are facing trial. There is no consistency between FIR version and version of the victim in her statement recorded under Section 164 Cr.P.C. as well as her testimony before the court below. It is stated in FIR itself that the FIR was lodged after the recovery of the victim and taking the feedback from her as to what has happened in the fateful night with her. There is small gap between the alleged kidnapping and recovery of the victim amount 2 to 3 hours and there is no explanation from the side of victim as to why the fact narrated by victim in her statement under

Section 164 Cr.P.C. as well as in her sworn testimony before the court could not find place in the FIR.

9. Learned further submitted that the Investigating Officer has clearly stated in final report, submitted in favour of them, that mobile number of Rajan Yadav and Bobby Yadav @ Abhishek were kept on surveillance and call records of their mobile phones were examined, which reveals that the location of Rajan was found at Village Bhogaon, District Mainpuri, at 18:48:44 hours on 18.7.2022 and on same place at 20:34:02 hours, his location was found in Kasba Saurikh. The Investigating Officer has stated that this makes it obvious that the accused Rajan Yadav had gone to Mainpuri on the date of incident at 18:00 hours. The CDR of Rajan Yadav and his brother Bobby Yadav reveals that no phone of Bobby Yadav was received on mobile phone of Rajan Yadav, thus, this fact falsifies the version of prosecutrix that a mobile telephone call was received on mobile of Rajan Yadav at around 21:00 hours.

10 From perusal of record, it appears that the victim was examined as PW-1 during trial before trial court on 2.2.2023, in which she has stated that her date of birth is recorded as 1.1.2007 and accordingly her age appears around 15 and half years at the time of alleged incident. She has supported her statement under Section 164 Cr.P.C. in her sworn testimony before the trial court. However, she has disowned her statement under Section 161 Cr.P.C. recorded by the Investigating Officer. She has stated that after her statement under section 164 Cr.P.C., police took her before Child Welfare Committee from where she was given to custody of her mother. She has also stated that she studied up to Class VI in Veeda Vadini Higher Secondary School, Sakrawan Road, Saurikh. She has levelled allegations of commission of rape against accused Indrapal Yadav, Kallu @ Ajay Kumar and Rajan Yadav in her testimony before the court and attributed the role of conspiracy to accused Bobby Yadav, who had misbehaved with her and threatened her prior to the incident. She has also stated that the house of Rajan and Bobby is in the close vicinity of her

house. When she brandished her *chappal* to Bobby and Rajan prior to the incident on being teased by Bobby Yadav, Bobby and Rajan threatened her to get her kidnapped. She went back to home in the very night of the incident. Thereafter, woman police came to her place and took her to police station alongwith her parents. She came back to her home at around quarter to 11 in the night. Her mother lodged an FIR on the next date. She had not read the written report given by her mother to police. Her mother gave two applications at police station, first of her missing and other after her recovery. "It is true that Rajan was standing at Rishibhumi crossing grabbing her hand in the night at around 10:40 PM, her parents reached there accompanied by police and cried; Rajan left her hand and escaped" She further stated that Indrapal had already escaped from the crossing. She was acquainted with the accused persons prior to the incident. Her statement under Section 164 Cr.P.C. was recorded before the court on 28.7.2022. She has not given her cloths worn at the time of incident to police or Doctor.

11. The scope and ambit of exercise of powers of trial court to summon a person as accused under Section 319 Cr.P.C. are elaborately discussed by Hon'ble Apex Court in **Hardeep Singh and others vs. State of Punjab and others; 2014 (3) SCC, 92**, wherein the Hon'ble Apex Court by Constitutional Bench in above case settled the law with regard to exercise of powers under Section 319 Cr.P.C. and observed as under:-

11. 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.”

12. 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 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.?

The submissions that were raised before us covered a very wide canvas and the learned counsel have taken us through various provisions of Cr.P.C. and the judgments that have been relied on for the said purpose. The controversy centers around the stage at which such powers can be invoked by the court and the material on the basis whereof such powers can be exercised.

15. Section 319 Cr.P.C. allows the court to proceed against any person who is not an accused in a case before it. Thus, the person against whom summons are issued in exercise of such powers, has to necessarily not be an accused already facing trial. He can either be a person named in Column 2 of the chargesheet filed under Section 173 Cr.P.C. or a person whose name has been disclosed in any material

before the court that is to be considered for the purpose of trying the offence, but not investigated. He has to be a person whose complicity may be indicated and connected with the commission of the offence.

71. It is, therefore, clear that the word “evidence” in Section 319 Cr.P.C. means only such evidence as is made before the court, in relation to statements, and as produced before the court, in relation to documents. It is only such evidence that can be taken into account by the Magistrate or the Court to decide whether power under Section 319 Cr.P.C. is to be exercised and not on the basis of material collected during investigation.

79. The word “evidence” therefore has to be understood in its wider sense both at the stage of trial and, as discussed earlier, even at the stage of inquiry, as used under Section 319 Cr.P.C. The court, therefore, should be understood to have the power to proceed against any person after summoning him on the basis of any such material as brought forth before it. The duty and obligation of the court becomes more onerous to invoke such powers cautiously on such material after evidence has been led during trial.

80. In view of the discussion made and the conclusion drawn hereinabove, the answer to the aforesaid question posed is that apart from evidence recorded during trial, any material that has been received by the court after cognizance is taken and before the trial commences, can be utilised only for corroboration and to support the evidence recorded by the court to invoke the power under Section 319 Cr.P.C. The ‘evidence’ is thus, limited to the evidence recorded during trial.

84. Further, in our opinion, there does not seem to be any logic behind waiting till the cross-examination of the witness is over. It is to be kept in mind that at the time of exercise of power under Section 319 Cr.P.C., the person sought to be arraigned as an accused, is in no way participating in the trial. Even if the cross-examination is to be taken into consideration, the person sought to be arraigned as an accused cannot cross examine the witness(s) prior to passing of an order under Section 319 Cr.P.C., as such a procedure is not contemplated by the Cr.P.C. Secondly, invariably the State would not oppose or object to naming of more persons as an accused as it would only help the

prosecution in completing the chain of evidence, unless the witness(s) is obliterating the role of persons already facing trial. More so, Section 299 Cr.P.C. enables the court to record evidence in absence of the accused in the circumstances mentioned therein.

85. Thus, in view of the above, we hold that power under Section 319 Cr.P.C. can be exercised at the stage of completion of examination in chief and court does not need to wait till the said evidence is tested on cross-examination for it is the satisfaction of the court which can be gathered from the reasons recorded by the court, in respect of complicity of some other person(s), not facing the trial in the offence.

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.

12. In Sandeep Kumar Vs. State of Haryana 2023 law suits SC 722,
Hon’ble Supreme Court while considering the scope of Section 319

Cr.P.C. set aside the order of High Court passed in Criminal revision against summoning order passed by learned trial court in exercise of powers under Section 319 Cr.P.C. and affirmed the summoning order passed by learned trial court with regard to 3 named accused-persons in F.I.R. whose name was dropped in charge-sheet. Hon'ble Apex Court in para 5 of the judgment in Sandeep Kumar observed as under:

5. In Hardeep Singh (supra), this court further said that the Court only has to see at the state of Section 319, whether a prima facie case is made out although the degree of satisfaction has to be much higher.

“95. At the time of taking cognizance, the court has to see whether a prima facie case is made out to proceed against the accused. Under Section 319 CrPC, though the test of prima facie case is the same, the degree of satisfaction that is required is much stricter. A two-Judge Bench of this Court in Vikas v. State of Rajasthan, held that on the objective satisfaction of the court a person may be “arrested” or “summoned”, as the circumstances of the case may require, if it appears from the evidence that any such person not being the accused has committed an offence for which such person could be tried together with the already arraigned accused persons.

In Para 106 it stated as under:

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 CrPC. In Section 319 CrPC the purpose of providing if “it appears from the evidence that any person not being the accused has committed any offence” it 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 CrPC to form any opinion as to the guilt of the accused.” In our considered opinion, the prosecution had fully made out

its case for summoning the three as accused under Section 319, Cr.PC, so that they may also face trial.

13. In the present case, the victim has taken a consistent stand in her statement under Section 164 Cr.P.C as well as in her statement before the Court that accused Rajan, Indrapal and Kallu @ Ajay Kumar committed rape on her in the fateful night and prior to incident, accused Bobby, who is real brother of Rajan, had teased and threatened her to get her kidnapped. Although, this is admitted case of prosecution that Bobby was neither present on the spot from where the victim was allegedly kidnapped or at the place where she was subjected to rape by co-accused. The role of Bobby is attributed to that of hatching conspiracy of kidnapping the victim, however, the documentary evidence collected by the police is not supportive of fact that the accused Bobby had communicated with his brother Rajan during the incident of commission of rape and confinement of the victim on his mobile phone, as the call records of both the brothers were not corroborating the statement of victim on this point. She has also stated that she was being taken to some unknown place by getting her sit on a motorcycle in between Indrapal and Rajan. Kallu stayed in the room but Rajan had caught her during travel by motorcycle after commission of rape on her. Therefore, there is substantive evidence on record with regard to complicity of accused Rajan in the offence. He is named in the FIR. His complicity in the offence is narrated by the victim in her statement under Section 164 Cr.P.C. as well as in her sworn testimony before the court. Therefore, the finding of learned trial court that “no finding regarding complicity of proposed accused persons namely, Bobby Yadav and Rajan Yadav can be given without examination of Investigating Officer and in view of lack of consistency in the statements of victim and her mother at the different stages, no cogent and reliable evidence is placed on record by which the satisfaction can be

recorded that a, prima facie, case more than that exercised at the time of framing of charge is made out against proposed accused persons cannot be countenanced. The observation of learned trial judge in impugned order that “the evidence adduced during trial with regard to complicity of proposed accused persons in the offence is not of such standard that the evidence, if goes un rebutted, would lead to conviction”, is rather misconceived because in Hardeep Singh’s Case (supra), Hon’ble Apex Court specifically stated that there is no scope for the court acting under Section 319 Cr.P.C. to form an opinion as to the guilt of the accused. The evidence must be of nature for which such person could be tried together with the accused.

14. In the light of foregoing discussion and binding precedents cited as above, in my considered opinion the court below has committed legal error while dismissing application under Section 319 Cr.P.C. by impugned judgement and the same is not sustainable. The impugned order is liable to be set aside.

15. Accordingly, present criminal revision stands **allowed** and the impugned order dated 20.5.2023, passed by learned Special Judge (POCSO Act)/Additional District and Sessions Judge, Kannauj, in Sessions Trial No.793 of 2022 (State vs. Indrapal and others), is hereby, set aside and the matter is remanded back to trial court to hear and decide the application under Section 319 Cr.P.C. moved by the informant for summoning respondent Nos.2 and 3 as additional accused, in the light of observations made herein above and in accordance with law, after giving opportunity of hearing to the revisionist and public prosecutor.

Order Date :- 6.12.2023

Kamarjahan