

Reserved on 25th September, 2023

Delivered on 16th October, 2023

Court No. - 82

Case :- CRIMINAL REVISION No. - 3577 of 2023

Revisionist :- Smt. Khairunnisha

Opposite Party :- State of U.P. and Another

Counsel for Revisionist :- Bhuvnesh Kumar Singh

Counsel for Opposite Party :- G.A.,Mahipal Singh

Hon'ble Shiv Shanker Prasad,J.

Challenge to this revision

1. This criminal revision has been preferred against order dated 19.05.2023 passed by learned Additional Sessions Judge, Court No.2, Bijnor in Session Trial No. 825 of 2020 (State Government Vs. Mazid and others), arising out of Case Crime No.71 of 2020, Police Station Kiratpur, District Bijnor, whereby revisionist has been summoned under section 319 Cr.P.C. to face trial in the above stated case for offences under sections 323, 504, 506, 302 I.P.C.

Genesis of the present case

2. Brief facts of the case as cropped up from the records of the present criminal revision are that on 18.4.2020, opposite party no.2 namely, Musabbar lodged an F.I.R. against the revisionist, her husband and her son stating therein that rivalry of her family was going on with the family of one Mazid son of Jahid. Two days ago Mazid and Jahid had threatened to kill Danish. On 17.4.2020 at 5.30 P.M. when Danish was going to Bhojpur to get medicines, Mazid took Danish to his house where his mother and father also came and surrounded him. With the intention to kill Danish, Mazid hit Danish with Tabal on his head. Jahid had beaten Danish with a stick and his wife Khairunnisha (present revisionist) pushed Danish due to which he fell on the ground unconsciously. Majid, Jahid and Khairunnish (revisionist) were abusing, beating and

threatening to kill Danish. After some time Danish was done to death due to the injuries sustained by him by the accused persons.

The case of the revisionist

3. The revisionist and opposite party no.2 are resident of same village and a strong political rivalry is going on between their families since long. The first informant has malafide intention against the revisionist and her family. Due to the aforesaid reason, the first informant lodged a first information report on 18.4.2020 against the revisionist, her husband and her son under Section 323, 504, 506, 308 I.P.C. Initially the first information report was lodged under section 323, 308, 504, 506 I.P.C. but during the treatment when the injured Danish has done to death, after that Section 302 I.P.C. was added in the present offence. Though the revisionist was named in the F.I.R. but during investigation her involvement was not found and thus, no charge-sheet was filed against her.

4. Further it is the case of the revisionist that PW 1 and PW 2 are interested witnesses in the present offence and are real brothers, therefore, they have given totally false statement before the court below only for making false case against the revisionist and other accused persons. The statements made by the witnesses that revisionist had pushed Danish are false and baseless and that revisionist is being falsely implicated just to create undue pressure and that no prima facie case for summoning the revisionist is made out and therefore, the order impugned is liable to be quashed by this Court.

5. Submission of the learned counsel for the revisionist

(I) The learned Additional Session Judge has mechanically summoned to the revisionist only on the basis of prima facie case while the settled law clearly provides that for exercising the powers under section 319 Cr.P.C., the additional accused can be summoned on the basis of strong evidence more than prima facie

case but in the present matter, the Additional Sessions Judge did not follow the settled principle of law, therefore, the impugned order is absolutely illegal.

(II) The Hon'ble Apex court as well as this Court have categorically held in the series of judicial precedents that the categorical conclusion of investigating agency should not be disbelieved by the trial court at the time of exercising powers under section 319 Cr.P.C. out in the present matter the learned Additional Session Judge has not considered the view of the Hon'ble Apex Court and mechanically summoned to the revisionist without appreciating conclusion of investigating agency and by doing so, the learned Additional Session Judge has committed manifest error of law.

(III) The revisionist is innocent and she has neither committed any offence under section 302, 323, 504, 506 L.P.C. nor any offence under section 302, 323, 504, 506 I.P.C. is made out against the revisionist.

(IV) The revisionist has neither assaulted to the deceased in any manner nor she was involved in the alleged offence, therefore, no offence under section 302, 323, 504, 506 I.P.C. is made out against the revisionist.

(V) The revisionist is old lady and she is suffering from abdominal and kidney disease. A photocopy of medical prescription report of the revisionist is being annexed herewith and marked as Annexure No.10 to this affidavit.

(VI) The learned trial judge has passed the impugned order clearly against the provisions of law and without application of his judicial mind.

On the cumulative strength of the aforesaid, learned counsel for the revisionist submits that the order impugned cannot be legally sustained and is liable to be dismissed.

6. Per contra, learned counsel for opposite party no.2 and the learned A.G.A. for the State have disputed the submissions made by the learned counsel for the revisionists by contending that there is no illegality or infirmity in the order passed by the trial judge summoning the revisionist under Section 319 Cr.P.C. for facing trial in the case in hand.

7. Learned A.G.A. further submits that the proposition of exercising the power under Section 319 Cr.P.C. before conclusion of trial or before pronouncing the sentence has been justified and upheld by the Constitutional Bench of the Hon'ble Supreme Court in the case of **Sukhpal Singh Khaira Vs State of Punjab** reported in *2023 (1) SCC 289*.

8. Learned A.G.A. then submits that the material/evidence on record against the revisionist was found to be more than prima facie to show that the revisionist indulged actively in the murder of the deceased Danish along with other co-accused persons, namely Majid and Zahir.

9. Learned A.G.A. then submits that the trial judge, while passing the impugned order, has taken all the precautions and did not hurriedly summon the revisionist exercising its powers under Section 319 Cr.P.C. While summoning the revisionist the trial Judge has followed all the precautions and guidelines as framed by the Apex Court in the case of **Hardeep Singh Vs. State of Punjab**, reported in *(2014) 3 SCC 92*.

10. The learned A.G.A. contends that there is ample material on record collected during the investigation as well as during the trial against the revisionist which goes to show that she was actively involved in the commission of the alleged offence i.e. murder of the deceased Danish. The trial Judge has rightly considered the entire material collected during the course of investigation as well as the material brought on record during the trial and thereafter finding that there was more than prima facie case against the revisionist, summoned her by exercising the power under section 319 Cr.P.C.

11. This Court has considered the submissions made by the learned counsel for the parties and gone through the records of the present criminal revision specifically the order impugned.

LEGAL ISSUES

12. **The legal issue, which is cropped up for consideration before this Court :**

“Whether the trial judge has recorded his prima facie satisfaction for summoning the revisionist to face trial while passing the impugned order under Section 319 Cr.P.C.?”

13. Before considering the first issue, it is necessary for this Court to reproduce Section 319 Cr.P.C., which is being quoted herein below:

“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 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 the witnesses reheard;

(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.”

EXPLANATION OF SECTION 319 CR.P.C.

14. From bare reading of Section 319 Cr.P.C. this Court is of the view that the language used in Sec. 319 Cr.P.C. is plain, simple

and unambiguous. However, there are some grey areas which sometimes deviate the Court from the established principles of law.

15. Before going to analyze Section 319 Cr.P.C., it would be necessary to understand the principles highlighting the Section and the nature of power vested with the Court including the court of sessions. Section 319 Cr.P.C. springs out of the doctrine "Judges condemned when guilty is acquitted". This doctrine must be used as beacon light while explaining the ambit and spirit underlying the enactment of Section 319 Cr.P.C. It is also based on the principle that innocent should not be punished, at the same time, real culprit should not be allowed to escape.

16. The power under Section 319 Cr.P.C. is the really an extraordinary power which is conferred upon the court and it should be used sparingly only if compelling reasons/circumstances exist for taking cognizance against other person against whom action has not been taken. Section 319 Cr.P.C. is a special provision and it seeks to meet an extraordinary situation. It although confers of wide amplitude but is required to be exercised sparingly.

17. Power under Section 319 Cr.P.C.. is a discretionary and an extra ordinary power which 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 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 the person from the evidence led before the court that such power should be exercised and not in a casual or cavalier manner.

18. A scrutiny of Section 319 Cr.P.C.. would show the Section has four parts from sub-Sections (1) to (4). The first part deals about when and how the power under the section can be exercised. The second part speaks about how to secure the presence of the newly added accused, if he is not attending the court. The third part depicts how the presence of the newly added accused can be secured if he is not attending the court.

The fourth part speaks about how the court should proceed and try against the said accused.

19. Section 319 Cr.P.C. empowers only to the 'court' proceeds against such person. The word court includes court of Sessions (Sec.9 Cr.P.C.), Court of Judicial Magistrate (11 Cr.P.C.) and Court of Metropolitan Magistrate (16 Cr.P.C.). [Ref.: **Hardeep Singh (Supra)**].

20. Power under section 319 of the code can be exercised by the court suo moto or on an application by someone including accused already before it, if it is satisfied that any person other than an accused has committed an offence and he is to be tried together with the accused.

21. 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 necessarily not to be an accused already facing trial. The very purpose invoking Section 319(1) Cr.P.C. clearly shows that even persons who have been dropped by police during investigation, but against whom evidence showing their involvement of the offence comes before the court are included in the expression 'any person not being accused'.

22. If a person had not been charge- sheeted he may come within the purview of the description of such a person has contained in Section 319 Cr.P.C. of the Court. Although, he is not named in the charge sheet or he has been discharged from the case, which would warrant in prosecution thereafter with a good chance of his conviction. However, concerning a person who has been discharged no proceedings can be commenced against him directly under Section 319 Cr.P.C. without recourse to provision of Section 300(5) read with Section 398 Cr.P.C. A person not named in FIR and not charge sheeted can be summoned under Section 319 Cr.P.C. Even though, any person initially be named in the FIR as an accused, but not charge sheeted can also be added to face trial. Where a person was not summoned by the Magistrate

under Section 204 Cr.P.C. but his name surfaced in the statement recorded under Section 244 Cr.P.C. a person can be summoned as accused under Section 319 Cr.P.C. Power under Section 319 Cr.P.C. can be exercised against the person not subjected to investigation or a person placed in column 2 of charge sheet against whom cognizance had not been taken or a person who has been discharged. The accused against whom proceeding has been quashed can also be added under Section 319 Cr.P.C.

FINDINGS RECORDED BY THE TRIAL COURT

23. This Court now comes to the legality or otherwise of the order impugned. The court below by means of the order impugned has recorded relevant facts for coming to the conclusion to summon the revisionist to face trial under Section 319 Cr.P.C. that heard and examined the records in light of Section 319 Cr.P.C. on the application given by the informant. As per the First Information Report dated 18-04-2020, the prosecution story is that the informant and the informant's family were having a rivalry with the family of Majid, son of Zahir. Two days ago, Majid and his father Zaheer had threatened to kill Danish. On 17-04-2020 at 5:30 pm, when Danish was going to Bhojpur to get medicines, Majid surrounded Danish in front of his house, his parents also came, Majid threatened to kill Danish. With intention to kill, Zahir beat Danish with a stick and the revisionist pushed Danish, then Danish became unconscious and fell on the ground. Majid and Zahir and the revisionist were beating and abusing and threatening to kill Danish. The incident was witnessed by the informant, Afzal and Qayyum. Thereafter the informant went to the police station along with injured Danish. Danish was referred from Kiratpur Hospital to Bijnor and after that he was referred from Bijnor to Meerut. The condition of Danish was serious and he was admitted in Meerut. On the basis of the above written complaint, the said FIR was registered on 18-04-2020 at 14:05 p.m. against Majid, Zaheer and the revisionist under Sections 323, 504, 506, 308 I.P.C. Thereafter, on behalf of the informant, another complaint was given alleging therein that

on 17-04-2020 at around 5:30 pm, Majid, Zahir and revisionist Khairunisha had beaten Danish brutally by Tabal, sticks and lathi with the intention to kill him due to which he seriously sustained injuries and in connection with which a case was registered at the police station and for his proper treatment he got treated by the Doctor of District Hospital Bijnor, who referred him to Meerut and during treatment he has been done to death on 20th April, 2020 at 09:15 a.m. After conclusion of the investigation in the present case, the charge sheet under Sections 323, 504, 506, 302 of the Indian Penal Code has been submitted before the concerned Court on 08.06.2020 by the investigating Officer against the accused Majid and Zaheer.

24. The trial judge has further recorded that the witness PW-1 Musabbar (plaintiff) has stated in his examination-in-chief that at the corner of the east of the house of Majid, he, Zahir and the revisionist intercepted Danish and Majid hit Danish by Tabal on his head with intention to kill him and due to push of the revisionist, Danish fell down from the motorcycle and he became unconscious. P.W.-1 has further stated that Danish died during treatment. Witness PW-2 Muzaffar has stated in his examination-in-chief that "Majid hit Danish on his head by Tabal with an intention to kill him and the accused Zahir and the revisionist hit Danish by sticks and also the revisionist pushed Danish due to which he fell down and became unconscious. It was further stated that he died during treatment.

25. The trial judge has further recorded that in the same context, the case diary was also observed by the court and from the perusal of the First Information Report, the name of the proposed accused Kherunisha is being shown. In this perspective, the statements of witnesses recorded under Section 161 CrPC were examined. The informant Musabbar has supported the prosecution's case under Section 161 CrPC in his statement. Apart from the above, the statements of independent witnesses, namely, Kallu Singh and Yakub recorded under Section 161

Cr.P.C. were examined. Independent witness, namely, Kallu Singh has stated in his statement that after hearing the noise/scream, he along with other people reached the spot of fight to intervene and saw that blood was flowing from the head of Danish and father of Majid, namely, Zahir was standing there with a stick and the Majid had a Tabal.

26. On the basis of statements of independent witnesses and eye-witnesses and other collected evidence, the Investigating Officer has found that the implication of the revisionist in the present case is wrong and he has not submitted the charge-sheet against her, whereas she was named in the First Information Report. On the basis of the aforesaid fact, the trial judge was of the view that from perusal of the statements of prosecution witnesses, namely, P.W. 1 Musabbar (informant) and P.W. 2 Muzaffar) and from the overall observation of the above case, the presence of the proposed accused-revisionist at the place of incident and her prima facie involvement in the crime are being shown.

27. The trial judge has also considered and highlighted the law settled by the Apex Court qua applicability of Section 319 Cr.P.C. The trial judge has referred the Constitution Bench judgment of the Apex Court in the case of Hardeep Singh (Supra), other judgment in the case of Mohammad Espini Banan Yogendra Chandak and others Supreme Court reported in AIR 2017 SC 4804. The trial judge has also referred the judgements of the Apex Court in the case of Brijendra Singh & Ors vs. State of Rajasthan reported in (2017) 7 SCC 706 and in the case of Sugreev Kumar v. State of Punjab. & Ant, (reported in 2020) 14 SCC 472.

28. After referred the aforesaid law settled by the Apex Court, the trial judge has opined that from the evidence produced by the prosecution and perusal of the First Information Report, it is found from the application filed by by the informant being paper

no. Kha-5 and the entire evidence available on record that the presence of accused-revisionist at the spot and her involvement along with the main accused Majid and Zaheer in causing injury to the deceased Danish by pushing him from motorcycle is prima facie visible. No such oral or documentary evidence has been brought on record by the investigator to prove that the accused revisionist was not present at the spot when the incident took place but was present somewhere else. Because it is clear from the entire evidence that she was present at the spot and was helping in committing the incident. It has not been explained by the investigator why her name was exonerated while filing the charge-sheet.

29. On the basis of aforesaid finding, the trial judge has come to the conclusion that the evidence produced by the prosecution at this stage does not support the case of the proposed accused i.e. revisionist and in the present case there appears to be involvement beyond the prima facie level. In such a situation, in the opinion of the court, it would be justified to summon the proposed accused revisionist Khairunisha for trial. The application of the prosecution under Section 319 Code of Criminal Procedure being paper No. 5-B is acceptable in the interest of justice. It is against this order that the present criminal revision has been filed.

CASE LAWS ON THE SUBJECT

30. For arriving at a conclusion to question framed by this Court herein above, it is important for this Court to refer certain case laws as settled by the Apex Court. The Apex Court in the case of **Bholu Ram Vs. State of Punjab & Another** reported in (2008) 9 SCC 340 has opined as follows:

“58. In our considered opinion, the Revisional Court was not justified in entering into correctness or otherwise of the evidence at the stage of issuance of summons to respondent No.2. Admittedly, the Judicial Magistrate had considered a limited question whether on the basis of evidence of prosecution witnesses, prima facie offence had been made

out against respondent No.2. He was, on the basis of such evidence, was satisfied that the case was required to be gone into and issued a summons. To us, the Revisional Court was not right in interfering with that order. Hence, even on that ground, the order was not in accordance with law.”

31. In the case of **S. Mohammed Ispahani Vs. Yogendra Chandak & Others** reported in (2017) 16 SCC 226 the Apex Court has held as follows:

“33) As against the above, the High Court, in the impugned judgment, has been influenced by the fact that names of the appellants were mentioned in the FIR and even in the statement of witnesses recorded under Section 161 of the Cr.P.C. these appellants were named and such statements under Section 161 Cr.P.C. would constitute ‘documents’. In this context, the High Court has observed that ‘evidence’ within the meaning of Section 319 Cr.P.C. would include the aforesaid statements and, therefore, the appellants could be summoned.

34) The aforesaid reasons given by the High Court do not stand the judicial scrutiny. The High Court has not dealt with the subject matter properly and even in the absence of strong and cogent evidence against the appellant, it has set aside the order of the Chief Metropolitan Magistrate and exercised its discretion in summoning the appellants as accused persons. No doubt, at one place the Constitution Bench observed in Hardeep Singh’s case that the word ‘evidence’ has to be understood in its wider sense, both at the stage of trial and even at the stage of inquiry. In paragraph 105 of the judgment, Criminal Appeal No. 1720 of 2017 & Ors.

however, it is observed that ‘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. This sentence gives an impression that only that evidence which has been led before the Court is to be seen and not the evidence which was collected at the stage of inquiry. However there is no contradiction between the two observations as the Court also clarified that the ‘evidence’, on the basis of which an accused is to be summoned to face the trial in an ongoing case, has to be the material that is brought before the Court during trial. The material/evidence collected by the investigating officer at the stage of inquiry can only be utilised for corroboration and

to support the evidence recorded by the Court to invoke the power under Section 319 Cr.P.C.

35) It needs to be highlighted that when a person is named in the FIR by the complainant, but Police, after investigation, finds no role of that particular person and files the charge sheet without implicating him, the Court is not powerless, and at the stage of summoning, if the trial court finds that a particular person should be summoned as accused, even though not named in the charge sheet, it can do so. At that stage, chance is given to the Criminal Appeal No. 1720 of 2017 & Ors.

complainant also to file a protest petition urging upon the trial court to summon other persons as well who were named in the FIR but not implicated in the charge sheet. Once that stage has gone, the Court is still not powerless by virtue of Section 319 of the Cr.P.C. However, this section gets triggered when during the trial some evidence surfaces against the proposed accused.”

32. Again the Apex Court in the case of **Sandeep Kumar Vs. The State of Haryana & Another** reported in 2023 SCC OnLine SC 888 has opined as follows:

“12. The entire purpose of criminal trial is to go to the truth of the matter. Once there is satisfaction of the Court that there is evidence before it that an accused has committed an offence, the court can proceed against such a person. At the stage of summoning an accused, there has to be a prima facie satisfaction of the Court. The evidence which was there before the Court was of an eye witness who has clearly stated before the Court that a crime has been committed, inter alia, by the revisionist. The Court need not cross-examine this witness. It can stop the trial at that stage itself if such application had been moved under Section 319. The detail examination of the witness and other witnesses is a subject matter of the trial which has to begin afresh. The scope and ambit of Section 319 CrPC has been discussed and dealt with in detail in the Constitution Bench judgment of Hardeep Singh Vs. State of Punjab & Others reported in (2014) 3 SCC 92 where it said:

“13. Section 319 CrPC 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. PC.

14. 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.”

33. In the case of **Manjeet Singh Vs. State of Haryana & Others** reported in 2021 SCC OnLine SC 632 the Apex Court has observed as follows:

“13. The ratio of the aforesaid decisions on the scope and ambit of the powers of the Court under Section 319 CrPC can be summarized as under:

“(i) That while exercising the powers under Section 319 CrPC and to summon the persons not charge-sheeted, the entire effort is not to allow the real perpetrator of an offence to get away unpunished;

(ii) for the empowerment of the courts to ensure that the criminal administration of justice works properly;

(iii) the law has been properly codified and modified by the legislature under the CrPC indicating as to how the courts should proceed to ultimately find out the truth so that the innocent does not get punished but at the same time, the guilty are brought to book under the law;

(iv) to discharge duty of the court to find out the real truth and to ensure that the guilty does not go unpunished;

(v) 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;

(vi) Section 319 CrPC allows the court to proceed against any person who is not an accused in a case before it;

(vii) the court is the sole repository of justice and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency;

(viii) Section 319 CrPC is an enabling provision empowering the court to take appropriate steps for proceeding against any person not being an accused for also having committed the offence under trial;

(ix) the power under Section 319 (1) CrPC can be exercised at any stage after the charge-sheet is filed and before the

pronouncement of judgment, except during the stage of Sections 207/208 CrPC, committal, etc. which is only a pre-trial stage intended to put the process into motion;

(x) the court can exercise the power under Section 319 CrPC only after the trial proceeds and commences with the recording of the evidence;

(xi) the word “evidence” in Section 319 CrPC means only such evidence as is made before the court, in relation to statements, and as produced before the court, in relation to documents;

(xii) it is only such evidence that can be taken into account by the Magistrate or the court to decide whether the power under Section 319 CrPC is to be exercised and not on the basis of material collected during the investigation;

(xiii) if the Magistrate/court is convinced even on the basis of evidence appearing in examination-in-chief, it can exercise the power under Section 319 CrPC and can proceed against such other person(s);

(xiv) that the Magistrate/court is convinced even on the basis of evidence appearing in examination-in-chief, powers under Section 319 CrPC can be exercised;

(xv) that power under Section 319 CrPC can be exercised even at the stage of completion of examination-in-chief and the court need not wait till the said evidence is tested on cross-examination;

(xvi) even in a case where the stage of giving opportunity to the complainant to file a protest petition urging upon the trial court to summon other persons as well who were named in FIR but not implicated in the charge-sheet has gone, in that case also, the Court is still not powerless by virtue of Section 319 CrPC and even those persons named in FIR but not implicated in the charge-sheet can be summoned to face the trial, provided during the trial some evidence surfaces against the proposed accused (may be in the form of examination-in-chief of the prosecution witnesses);

(xvii) while exercising the powers under Section 319 CrPC the Court is not required and/or justified in appreciating the deposition/evidence of the prosecution witnesses on merits which is required to be done during the trial.”

34. The Constitution Bench of Five Judges’ of this Court in the case of **Hardeep Singh (Supra)**, has observed as follows:

“93 Section 319 Cr.P.C. empowers the court to proceed against other persons who appear to be guilty of offence, though not an accused before the court.

The word “appear” means “clear to the comprehension”, or a phrase near to, if not synonymous with “proved”. It imparts a lesser degree of probability than proof.

94. In Pyare Lal Bhargava Vs. The State of Rajasthan, AIR 1963 SC 1094, a four-Judge Bench of this Court was concerned with the meaning of the word ‘appear’. The court held that the appropriate meaning of the word ‘appears’ is ‘seems’. It imports a lesser degree of probability than proof. In Ram Singh & Ors. Vs. Ram Niwas & Anr., (2009) 14 SCC 25, a two-Judge Bench of this Court was again required to examine the importance of the word ‘appear’ as appearing in the Section. The Court held that for the fulfillment of the condition that it appears to the court that a person had committed an offence, the court must satisfy itself about the existence of an exceptional circumstance enabling it to exercise an extraordinary jurisdiction. What is, therefore, necessary for the court is to arrive at a satisfaction that the evidence adduced on behalf of the prosecution, if unrebutted, may lead to conviction of the persons sought to be added as an accused in the case.

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 Cr.P.C., 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 Vs. State of Rajasthan, 2013 (11) SCALE 23, 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.

96. In Rajendra Singh (Supra), the Court observed:

“Be it noted, the court need not be satisfied that he has committed an offence. It need only appear to it that he has committed an offence. In other words, from the evidence it need only appear to it that someone else has committed an offence, to exercise jurisdiction under Section 319 of the Code. Even then, it has a discretion not to proceed, since the expression used is “may” and not “shall”. The legislature apparently wanted to leave that discretion to the trial court so as to enable it to exercise its jurisdiction under this section.

The expression “appears” indicates an application of mind by the court to the evidence that has come before it and then taking a decision to proceed under Section 319 of the Code or not.”

97. In Mohd. Shafi (Supra), this Court held that it is evident that before a court exercises its discretionary jurisdiction in terms of Section 319 Cr.P.C., it must arrive at a satisfaction that there exists a possibility that the accused so summoned in all likelihood would be convicted.

98. In Sarabjit Singh & Anr. Vs. State of Punjab & Anr. , AIR 2009 SC 2792, while explaining the scope of Section 319 Cr.P.C., a two-Judge Bench of this Court observed:

“....For the aforementioned purpose, the courts are required to apply stringent tests; one of the tests being whether evidence on record is such which would reasonably lead to conviction of the person sought to be summoned.....Whereas the test of prima facie case may be sufficient for taking cognizance of an offence at the stage of framing of charge, the court must be satisfied that there exists a strong suspicion. While framing charge in terms of Section 227 of the Code, the court must consider the entire materials on record to form an opinion that the evidence if unrebutted would lead to a judgment of conviction. Whether a higher standard be set up for the purpose of invoking the jurisdiction under Section 319 of the Code is the question. The answer to these questions should be rendered in the affirmative. 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. (i) an extraordinary case, and (ii) a case for sparingly (sic sparing) exercise of jurisdiction, would not be satisfied.” (Emphasis added)

99. In Brindaban Das & Ors. Vs. State of West Bengal, AIR 2009 SC 1248, a two-Judge Bench of this Court took a similar view observing that the court is required to consider whether such evidence would be sufficient to convict the person being summoned. Since issuance of summons under Section 319 Cr.P.C. entails a de novo trial and a large number of witnesses may have been examined and their re-examination could prejudice the prosecution and delay the trial, the trial court has to exercise such discretion with great care and perspicacity.

A similar view has been re-iterated by this Court in Michel Machado & Anr. Vs. Central Bureau of Investigation & Ors. , AIR 2000 SC 1127.

100. However, there is a series of cases wherein this Court while dealing with the provisions of Sections 227, 228, 239, 240, 241, 242 and 245 Cr.P.C., has consistently held that the

court at the stage of framing of the charge has to apply its mind to the question whether or not there is any ground for presuming the commission of an offence by the accused. The court has to see as to whether the material brought on record reasonably connect the accused with the offence. Nothing more is required to be enquired into. While dealing with the aforesaid provisions, the test of prima facie case is to be applied. The Court has to find out whether the materials offered by the prosecution to be adduced as evidence are sufficient for the court to proceed against the accused further. (Vide State of Karnataka Vs. L. Munishwamy & Ors., AIR 1977 SC 1489; All India Bank Officers' Confederation etc. v. Union of India & Ors., AIR 1989 SC 2045; Stree Atyachar Virodhi Parishad Vs. Dilip Nathumal Chordia, (1989) 1 SCC 715; State of M.P. Vs. Dr. Krishna Chandra Saksena, (1996) 11 SCC 439; and State of M.P. Vs. Mohan Lal Soni, AIR 2000 SC 2583).

101. In Dilawar Babu Kurane Vs. State of Maharashtra, AIR 2002 SC 564, this Court while dealing with the provisions of Sections 227 and 228 Cr.P.C., placed a very heavy reliance on the earlier judgment of this Court in Union of India Vs. Prafulla Kumar Samal & Anr., AIR 1979 SC 366 and held that while considering the question of framing the charges, the court may weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out and whether the materials placed before this Court disclose grave suspicion against the accused which has not been properly explained. In such an eventuality, the court is justified in framing the charges and proceeding with the trial. The court has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court but court should not make a roving enquiry into the pros and cons of the matter and weigh evidence as if it is conducting a trial.

102 In Suresh Vs. State of Maharashtra, AIR 2001 SC 1375, this Court after taking note of the earlier judgments in Niranjan Singh Karam Singh Punjabi Vs. Jitendra Bhimraj Bijaya, AIR 1990 SC 1962 and State of Maharashtra Vs. Priya Sharan Maharaj, AIR 1997 SC 2041, held as under:

“9.....at the stage of Sections 227 and 228 the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The Court may, for this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as

gospel truth even if it is opposed to common sense or the broad probabilities of the case. Therefore, at the stage of framing of the charge the Court has to consider the material with a view to find out if there is ground for presuming that the accused has committed the offence or that there is not sufficient ground for proceeding against him and not for the purpose of arriving at the conclusion that it is not likely to lead to a conviction.” (Emphasis supplied)

103. Similarly in State of Bihar Vs. Ramesh Singh, AIR 1977 SC 2018, while dealing with the issue, this Court held:

“.....If the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial.....”

104. In Palanisamy Gounder & Anr. Vs. State, represented by Inspector of Police, (2005) 12 SCC 327, this Court deprecated the practice of invoking the power under Section 319 Cr.P.C. just to conduct a fishing inquiry, as in that case, the trial court exercised that power just to find out the real truth, though there was no valid ground to proceed against the person summoned by the court.

105. Power under Section 319 Cr.P.C. is a discretionary and an extra- ordinary 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.

106. 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.”

35. The another Constitution Bench of the Five Judges’ of the Apex Court in the case of **Sukhpal Singh Khaira Vs. State of Punjab** reported in (2023) 1 SCC 289 has observed as follows:

“22. Thus, to put the matter in perspective, a perusal of the recommendation of the Law Commission would indicate the intention that an accused who is not charge sheeted but if is found to be involved should not go scot-free. Hence Section 319 of CrPC was incorporated which provides for the Court to exercise the power to ensure the same before the conclusion of trial so as to try such accused by summoning and being proceeded along with the other accused. In Shashikant Singh (supra), a Bench of two Hon’ble Judges, on holding that the joint trial is not a must has held the requirement as contained in Section 319 (1) of CrPC as only directory, and as such the judgment of conviction dated 16.07.2001 against the charge-sheeted accused was considered not to be an impediment for the court to proceed against the accused who was added by the summoning order dated 07.04.2001, which in any case was prior to the conclusion of the trial which in our view satisfies the requirement since the summoning order was before the judgment. In the case of Hardeep Singh (supra) also the power of the Court under Section 319 of CrPC has been upheld, reiterated, and it has been held that such power is available to be exercised at any time before the pronouncement of judgment. Therefore, there is no conflict or diverse view in the said decisions insofar as the exercise of power, the manner and the stage at which power is to be exercised. However, a certain amount of ironing the crease is required to explain the connotation of the phrase “could be tried together with the accused” appearing in sub-section (1) read with the requirement in sub-section 4 (a) to Section 319 of CrPC and to understand the true purport of exercising the power as per the phrase “before the pronouncement of judgment”.

23. A close perusal of Section 319 of CrPC indicates that the power bestowed on the court to summon any person who is not an accused in the case is, when in the course of the trial it appears from the evidence that such person has a role in committing the offence. Therefore, it would be open for the

Court to summon such a person so that he could be tried together with the accused and such power is exclusively of the Court. Obviously, when such power is to summon the additional accused and try such a person with the already charged accused against whom the trial is proceeding, it will have to be exercised before the conclusion of trial. The connotation 'conclusion of trial' in the present case cannot be reckoned as the stage till the evidence is recorded, but, is to be understood as the stage before pronouncement of the judgment as already held in Hardeep Singh (supra) since on judgment being pronounced the trial comes to a conclusion since until such time the accused is being tried by the Court."

36. On overall evaluation and deeper scrutiny of the law settled by the Apex Court, this Court finds that while passing the impugned order the trial judge has not committed any illegality in examining the law laid down by Five Judges of Constitution Bench of the Apex Court in the case of **Hardeep Singh (Supra)**, which has been followed in the recent judgment of Five Judges' of Constitution Bench of the Apex Court in the case of **Sukh Pal Singh Khaira (Supra)**, wherein the Apex Court has framed certain guidelines for invoking and exercising power under Section 319 Cr.P.C. for summoning any person to face trial against whom final report has been submitted by the Investigating Agency. The trial judge has correctly read the law that the power under Section 319 Cr.P.C. is a discretionary and an extra ordinary 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 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 the person from the evidence led before the court that such power should be exercised and not in a casual or cavalier manner [(**Ref.:Hardeep Singh, Sukhpal Singh Khaira (Supras)** and **Mohd. Shafi Vs. Mohd. Rafiq & Anr. passed Appeal (Crl.) No. 530 of 2007 dated 9th April, 2007**)]. The trial judge has also correctly read that the test it has to be applied under Section 319 Cr.P.C. is one which is more than

prima facie case as exercised at the time of framing of the charge but short of satisfaction to an extent that the evidence if goes un rebutted would lead to conviction [**Hardeep Singh (Supra), Sukhpal Singh Khaira (Supra) & Brijendra Singh (Supra)**].

37. The trial judge while passing the impugned order has recorded categorical finding of fact that on the examination of the first information report, the statements of the witnesses, namely, Musabbar, Muzaffar and Tasleema recorded under Sections 161 Cr.P.C., the statements of P.W.-1 and P.W.2 in dock and other evidence, it is clear that the presence of the revisionist at the time and place of incident is prima facie visible. On the basis of such categorical finding, the trial judge has rightly passed the order impugned for summoning the revisionist under Section 319 Cr.P.C. on an application made by the informant to face trial along with other two co-accused.

38. Consequently, the present revision devoid of merits and is accordingly dismissed, as there is no illegality or infirmity in the order impugned passed by the trial judge for summoning the revisionist to face trial under Section 319 Cr.P.C. so as to warrant any interference by this revisional Court under Section 397/401 Cr.P.C.

39. There shall be no order as to costs.

(Justice Shiv Shanker Prasad)

Date:-16.10.2023
Abhishek Singh/Sushil