

Court No. - 90

Case :- APPLICATION U/S 482 No. - 40209 of 2023

Applicant :- Ravendra

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

Counsel for Applicant :- Praveen Kumar Srivastava, Vindeshwari Prasad

Counsel for Opposite Party :- G.A.

Hon'ble Dinesh Pathak, J.

1. Heard learned counsel for the applicant, learned AGA and perused the record.
2. The applicant has invoked the inherent jurisdiction of this court U/S 482 Cr.P.C. assailing the order dated 23.05.2023, passed by Additional Sessions Judge/Special Judge, POCSO Act,, Budaun, in Special Session Trial No. 313 of 2022 (State Vs. Jitendra) under sections 363, 366, 376-D I.P.C., under section 5-G/6 POCSO Act and under Section 3(2)5 S.C.S.T. Act, Police Station- Dataganj, District- Budaun.
3. Opposite party no.2, father of the victim, lodged an F.I.R. against one Jitendra levelling allegation of kidnapping with an averment that on the date of incident i.e. 11/12.2.2022 when his 16 years old daughter went for excretion, she was enticed away by Jitendra. After due investigation, Investigating Officer has arraigned Jitendra alone for the occurrence of offence under Sections 363, 366, 376 I.P.C. and 3/4 POCSO Act and 3(2)5Ka of S.C./S.T. Act. During pendency of trial opposite party no.2 moved an application dated 10.02.2023 under Section 319 Cr.P.C. to call upon Ravindra and Deepak under Sections 363, 366, 376 I.P.C., under Section 3/4 POCSO Act read with under Section 3(2)

(Va) S.C./S.T. Act and also to call upon Manoj, Lalman, Vidyawati and Virpal under Sections 363, 366 I.P.C., under Section 3/4 POCSO Act read with 3(2)(Va) S.C./S.T. Act to be tried together with main accused. The Additional Sessions Judge/Special Judge POCSO Act, Budaun, has partly allowed the application under Section 319 Cr.P.C. (paper no.28 Kha) by issuing process against Deepak son of Mahendra Pal and Ravendra son of Nanhe under Sections 363, 366, 376-D I.P.C., under section 5-G/6 POCSO Act and under Section 3(2)5 S.C.S.T. Act, however, rejected the said application against remaining accused namely, Manoj, Lalman, Vidyawati and Virpal. Having been aggrieved with the order dated 23.06.2023, one of the accused, namely, Ravindra son of Nanhe has invoked the inherent jurisdiction of this court assailing the order impugned dated 23.06.2023.

4. Learned counsel for the applicant submits that learned trial court has summoned the present applicant in a cavalier manner without recording his satisfaction with respect to the involvement of the present applicant in the commission of the crime. It is further submitted that trial judge has simply referred the examination-in-chief deposed by victim (P.W.2), whereas, in her statement under Section 161 and 164 Cr.P.C. no specific allegation has been levelled against the present applicant qua occurrence of offence for which present applicant has been summoned by the order under challenge. It is next submitted that no incriminating material is available on the record to prove the guilt of the present applicant. In support of his submission learned counsel for the applicant has cited cases of Hon'ble Supreme Court in **Hardip Singh Vs. State of Punjab 2014(85) ACC 313** and **Case of Labhuji Amratji Thakor and others Vs. The State of Gujarat and another 2018 (0)SC 1147**.

5. Per contra learned A.G.A. has vehemently opposed the submissions as raised by learned counsel for the applicant and supported the order under challenge dated 23.06.2023 by which present applicant (accused) has been summoned to be tried together with the main accused.

6. Having considered the rival submissions advanced by learned counsel for the applicant as well as learned A.G.A. for the State respondent and perusal of record, it is manifested that name of the present applicant was not mentioned in the FIR, however, at later stage, during investigation name of the present applicant has been taken by victim in her statement under Sections 161 and 164 Cr.P.C. However, learned Investigating Officer, after due investigation, has not arraigned the present applicant in the charge sheet. During trial while the victim was examined being PW-2 she has unequivocally levelled allegation against the present applicant alongwith other co-accused of forceful sexual assault. In her statement under Sections 161 and 164 Cr.P.C. victim has clearly taken the name of the present applicant who has facilitated the main accused in enticing her away. Specific allegation of forceful sexual assault, though, has not been levelled by the victim in her statement under Sections 161 and 164 Cr.P.C., same has precisely been mentioned in her examination-in-chief. Therefore, *prima facie* her deposition is indicative and connected to the complicity of the present applicant in the commission of crime. Case of **Hardip Singh Vs. State of Punjab (supra)** is still a law of the land qua exercise of discretionary jurisdiction under Section 319 Cr.P.C. The constitutional Bench of Hon'ble Apex Court has discussed in detail and contour certain guidelines to exercise the discretionary jurisdiction under Section 319 Cr.P.C. under which Court concerned during trial on the basis of any evidence is fully

empowered to proceed against any person whose name was not even included in the FIR or the charge sheet. In the said cited case Hon'ble Supreme Court in answering the question No. III and IV has expounded that the power under Section 319 Cr.P.C. can be exercised even 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. Only a *prima facie* case has to be established from the evidence led before the court not necessarily tested on the anvil of the cross examination, it requires much stronger evidence than mere probability of his complicity. Relevant paragraph nos. 85 and 99 are quoted hereinbelow :

"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.

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."

7. Applying the ratio decided by Hon'ble Constitutional Bench of the Apex Court in the given circumstances of the present case, I am of the considered view that learned Trial Judge has not committed any illegality, irregularity or infirmity in allowing the application under Section 319 Cr.P.C. to summon the present applicant to be tried together with the main accused. In her

statement under Sections 161 and 164 victim has taken the name of present applicant indicating her connection in the commission of crime. However, no specific allegation of forceful sexual assault has been levelled. At later stage, in her deposition before the court, victim (PW 2) has made unequivocal allegation against the present applicant who has committed forceful sexual assault alongwith two other accused, namely, Jitendra and Deepak. Jitendera has already been arraigned in the charge sheet whereas present applicant, namely, Ravendra and other co-accused Deepak have been summoned by the order under challenge. Allegation made by the victim in her deposition is sufficient to make out a *prima facie* case against the present applicant and, in case, the same is not rebutted by the applicant such allegation will be sufficient to prove the guilt of the present applicant in the occurrence of offence. While passing the order impugned dated 23.05.2023, learned Trial Judge has sparingly considered the facts of the case intending to summon the present applicant to be tried together with the main accused. He has emphasized the deposition of PW-2 wherein she has unequivocally stated that all the three accused persons have committed forceful sexual assault upon the victim taking their turn one by one.

8. Learned Trial Judge has declined to consider the statement of PW-1 (first informant) who is not the ocular witness and had made statement on the basis of the hearsay, therefore, in the light of the observation made by the learned Trial Judge it can not be said that he has passed the order in a cavalier manner without applying his judicial mind or without considering the *prima facie* case qua complicity of the present applicant in the occurrence of offence. Deposition of the victim is *prima facie* sufficient to prove the guilt of the present applicant in the offence for which he has been

summoned. The judgment of **Labhuji Amratji Thakor (supra)** as relied upon by learned counsel for the applicant, does not bolster the submission made by him. Facts and circumstances of the **Labhuji Amratji Thakor (supra)** are quite distinguishable from the facts and circumstances of the present case. In the cited case name of the appellant (Labhuji) was not mentioned in the FIR even during investigation his name did not figure in the statement of victim and he has not been arraigned in the charge sheet. In the cited case victim was appeared as PW 4 and her mother was appeared as PW 3. Her mother has taken the name of the appellant making some allegation, however, her statement was not treated to be credible for the purposes of making out a *prima facie* case against the appellant. Further more, victim PW-3 has simply mentioned in her deposition that the appellant came with the main accused, namely, Natuji and she was taken in jeep to Morbi. She has not alleged any thing qua complicity of the appellant in the commission of offence.

9. In this backdrop of the facts, Hon'ble Supreme Court has upheld the judgment passed by the Trial Judge who has rejected the application under Section 319 Cr.P.C. Whereas, in the instant matter victim has made unequivocal allegation of forceful sexual assault against the present applicant alongwith two other accused who had raped her taking turn one by one. Learned Trial Judge, having considered the statement of PW-1 being hearsay qua allegation of forceful sexual assault has rightly declined to rely upon his statement for the purposes of summoning the present applicant in exercise of discretionary jurisdiction under Section 319 Cr.P.C. Therefore, in the light of the statement made by prosecutrix, it can not be said that the present applicant is not a person whose complicity has not be indicated or connected with

the commission of offence. Having considered the statement of victim during investigation, under Sections 161 and 164 Cr.P.C., and during the trial, while she is deposing being PW-2, it can not be inferred that *prima faice* no case is made out against the present applicant qua his complicity in the occurrence of offence for which he has been summoned by order under challenge. There is no doubt that, in case, deposition of victim is unrebutted it would lead to conviction of the present applicant. Learned Trial Judge has carefully considered the statement of witnesses and rightly came to the conclusion that *prima facie* complicity of the present applicant in the commission of offence, for which he has been summoned, can not be ruled out.

10. In this conspectus as above, I am of the considered view that learned Trial Judge has rightly allowed the application under Section 319 Cr.P.C. I do not find any illegality, irregularity, perversity or infirmity in the order under challenge to be interfered by this Court in exercise of inherent jurisdiction. I found neither any abuse of process of court in passing the order under challenge nor any justifiable ground to pass an order for the purposes of securing the ends of justice. Applicant has rightly been summoned on the basis of examination-in-chief deposed by victim (PW 2) which is *prima facie* more than sufficient to summon the present applicant for trial together with the main accused.

11. Resultantly, the instant application, being misconceived and devoid of merits, is **dismissed** with no order as to the cost.

Order Date :- 1.12.2023/vkg