



IN THE GAUHATI HIGH COURT
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

PRINCIPAL SEAT AT GUWAHATI

Criminal Petition No. 324/2021

Ms. Kakoli Goswami,
W/o Pranjali Goswami,
Ambikagiri Nagar, M.T. Road,
Near Zoo Tiniali, PS-Hatigaon,
Dist.-Kamrup(M), Assam, Pin-781136.

.....*Petitioner.*

-Versus-

1. The State of Assam,
represented by the Public Prosecutor,
Assam.
2. Lalit Borgohain,
S/o Late Isweswar Borgohain,
resident of village Hatbor, Borigaon,
Jakhlabandha, Nagaon,
Assam, Pin-782001.

.....*Respondents.*

BEFORE
HON'BLE MR. JUSTICE ROBIN PHUKAN

For the Petitioner: Mr. S.J. Sarmah. Advocate.

For the Respondents: Ms. B. Bhuyan, Addl. P.P., Assam,
Mr. A.A. Dewan. Advocates.

Date of Hearing : 06.03.2024
Date of Judgment : **11.03.2024**

JUDGMENT & ORDER

Heard Mr. S.J. Sarmah, learned counsel for the petitioner. Also heard Ms. B. Bhuyan, learned Additional Public Prosecutor, Assam, appearing for the State respondent No.1 and Mr. A.A. Dewan, learned counsel appearing for the respondent No.2.

2. Correctness or otherwise of the order dated 28.01.2019, passed by the learned Sub-Divisional Judicial Magistrate, Kaliabor, Nagaon, in PRC Case No.232/2017, registered under Section 420/468/409 of the IPC is challenged in this petition under Section 482 read with Section 397 and 401 of the Code of Criminal Procedure, 1973. It is to be noted here that vide impugned order dated 17.03.2021 the learned Court below has invoked the jurisdiction under Section 319 Cr.P.C. and impleaded the petitioner as one of the accused in the aforementioned case.

3. The background facts leading to filing of the present petition is briefly stated as under:-

"On 08.09.2016 one Lalit Borgohain of Hatbor, Borigaon, Jakhalabandha, lodged one FIR with the Officer-in-Charge, Jakhalabandha P.S. to the effect that his mother Smt. Bimala Gohain availed Government pension in her account which was maintained in the United Bank of India (UBI) located at Jakhalabandha and since 18.06.2016 some culprits have withdrawn a sum of ` 10,00,000/- from the account of his mother through ATM, but no ATM card was issued by the UBI, Jakhalabandha Branch in the name of his mother and his mother never applied for the same. Upon the said FIR, the Officer-in-

Charge, Jakhalabandha P.S. registered Jakhalabandha P.S. Case No.129/2016 under Section 420/468/409 IPC and thereafter, investigation was carried out, which culminated in submission of charge-sheet, being Charge-Sheet No.31, dated 31.03.2017 against three persons, namely, Mantu Hussain, Bipul Saikia and Smt. Ruby Kotoky. Upon the said charge-sheet the learned Court below has taken cognizance and issued process to the accused persons and on appearance of the accused persons, the learned Court below has framed charge against the accused persons under Section 420/468/409 IPC. Thereafter, the learned Court below has examined two witnesses, namely, Shri Lalit Borgohain and Smt. Bimala Gohain and after recording of the examination-in-chief of the aforesaid two witnesses, the learned Additional P.P. of the learned Court below had filed one petition under Section 319 Cr.P.C. for impleading the Branch Manager and the Cashier of the UBI, Jakhalabandha Branch, where the victim has maintained her bank account. Thereafter, hearing the learned Additional P.P., the learned Court below has allowed the petition and issued summon to the Branch Manager, UBI, Jakhalabandha Branch and Cashier of the said bank to appear before the Court below and to face trial. Thereafter, the petitioner, who was the Branch Manager of Jakhalabandha Branch of UBI, has approached this Court by filing the present petition challenging the correctness or otherwise of the impugned order dated 28.01.2019.”

4. Mr. Sarmah, learned counsel for the petitioner submits that the impugned order dated 28.01.2019 suffers from manifest illegalities and that the learned Court below has invoked the jurisdiction under Section 319 Cr.P.C. without there being any materials against the present petitioner. Referring to a decision of Hon'ble Supreme Court in the case of **Hardeep**

Singh & Ors. vs. State of Punjab & Ors.¹, Mr. Sarmah submits that in the aforementioned case, Hon'ble Supreme Court has held that the test that has to be applied while invoking the jurisdiction under Section 319 Cr.P.C. is that more than a prima facie case as exercised at the time of framing of charge is required to be made out and sort of said satisfaction the jurisdiction of Section 319 Cr.P.C. cannot be invoked. Mr. Sarmah, referring to judgment of the learned Court below dated 14.11.2023 submits that the learned Court below has acquitted all the accused persons including the present petitioner from the charge under Section 420/468/409 IPC, though the proceeding against the present petitioner was stayed by this Court vide order dated 27.07.2021. Mr. Sarmah further submits that the impugned order fails to withstand the legal scrutiny and therefore, it is contended to allow the petition.

5. Whereas, Ms. B. Bhuyan, learned Additional Public Prosecutor, Assam, submits that though the name of the present petitioner is specifically mentioned by the PW-1 and PW-2, based upon which the learned Additional P.P. of the learned Court below has filed the petition under Section 319 Cr.P.C. and though the learned Court below has not reflected in the impugned order dated 28.01.2019 about his satisfaction for invoking the jurisdiction under Section 319 Cr.P.C., yet, the fact remains that the present petitioner was the Branch Manager of Jakhalabandha Branch of UBI and during her tenure, a sum of ` 10,00,000/- was withdrawn from the account of the victim and as such, according to Ms. Bhuyan, the impugned order passed by the learned Court below suffers from no infirmity or illegality and therefore, it is contended to maintain the same.

6. On the other hand, Mr. Dewan, learned counsel for the respondent No.2 submits that the learned Court below has not recorded the satisfaction

¹ (2014) 3 SCC 92

upon which it has invoked the jurisdiction under Section 319 Cr.P.C. against the present petitioner. Mr. Dewan further pointed out that while this Court was pleased to stay the proceeding against the present petitioner and that she did not face the trial before the Court below and as such, the judgment passed by the learned Court below acquitting the present petitioner is not at all sustainable in the eye of law.

7. Having heard the submission of learned Advocates of both the parties, I have carefully gone through the petition and the documents placed on record and also perused the impugned order dated 28.01.2019, which reads as under:-

"Accused persons are present.

PW-1 and 2 are present. They are partly examined and their further examination-in-chief is reserved as per suggestion of Ld. Addl. P.P. who submitted one petition u/s 319 Cr.P.C. for impleading the branch manager and the cashier of the UBI, Jakhalabandha Bank, wherein the victim has been maintaining her saving bank account.

Heard. Considering the necessity of impleading the said person as accused. Also perused the materials on record.

Accordingly, the prayer is allowed. Let summon be issued to the Br. Manager UBI, Jakhalabandha and the Cashier of the same bank to appear to answer the charges levelled against them.

Fix 22.02.2019 for app/S.R."

8. A bare perusal of the aforesaid order reveals that the learned Court below has not recorded its satisfaction as to whether there is any necessity of invoking the jurisdiction under Section 319 Cr.P.C. and whether any prima facie case is made out against the present petitioner or not. It appears that merely on filing of the application by the learned Additional P.P. the learned

Court below has invoked the jurisdiction under Section 319 Cr.P.C. against the present petitioner.

9. The law regarding invoking of jurisdiction under Section 319 Cr.P.C. is well-settled by Hon'ble Supreme Court in catena of decisions. In the case of **Hardeep Singh** (supra), the Hon'ble Supreme Court in paragraphs 105 and 106 has observed as under:-

"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."

10. The proposition of law that can be crystallized from the aforementioned discussion is that for invoking the jurisdiction under Section 319 Cr.P.C., more than a 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 is required. And in absence of such satisfaction, the Court should refrain from exercising such power under Section 319 Cr.P.C.

11. In the case in hand, having gone through the impugned order, I find that the learned Court below has not recorded its satisfaction in arriving at a decision to invoke the jurisdiction under Section 319 Cr.P.C. I have also gone through the evidence of the PW-1 and PW-2, based upon which the learned Additional P.P. has filed a petition before the learned Court below for invoking the jurisdiction under Section 319 Cr.P.C. and it appears that nowhere in their examination-in-chief PW-1 and PW-2 have whispered any word against the present petitioner, except stating that bank officials and one Bipul Saikia, Security Guard, Mantu Hussain and Ruby Kataki are involved. In that view of the matter, merely on the basis of filing of a petition by the learned Additional P.P., the learned Court below ought not to have invoked the jurisdiction under Section 319 Cr.P.C. Thus, examining the impugned order dated 28.01.2019 in the light of the principle laid down by Hon'ble Supreme Court in the case of **Hardeep Singh** (supra), this Court is of the considered opinion that the same has failed to withstand the legal scrutiny.

12. Though Mr. Dewan, learned counsel for the respondent No.2 submits that while this Court was pleased to stay the proceeding against the present petitioner and that she did not face the trial before the Court below and as such, the judgment passed by the learned Court below acquitting the present petitioner is not at all sustainable in the eye of law, yet, the said

issue is not agitated in this petition, and therefore, I deemed it appropriate not to direct any discussion on the same. But, the fact remains that this court has stayed the proceeding concerning the present petitioner in this petition vide order dated 27.07.2021.

13. In the result, I find sufficient merit in this petition and accordingly, the same stand allowed. The impugned order, dated 28.01.2019, so far it relates to the present petitioner, stands set aside and quashed.

14. In terms of above, this criminal petition stands disposed of.

Sd/- Robin Phukan
JUDGE

Comparing Assistant