

A.F.R.

Neutral Citation No. - 2024:AHC:118306

Court No. - 86

Case :- CRIMINAL REVISION No. - 969 of 2024

Revisionist :- Arif Ali And 2 Others

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

Counsel for Revisionist :- Umesh Chandra Tiwari

Counsel for Opposite Party :- G.A.

Hon'ble Nalin Kumar Srivastava,J.

1. Heard learned counsel for the revisionist, learned A.G.A. for the State and perused the record.
2. Under challenge in the instant criminal revision is the order dated 14.12.2023 whereby the learned Additional Sessions Judge/ Special Judge (DAA) Court No. 8, Budaun allowed the application 17-Ka of the prosecution moved under section 319 Cr.P.C. and the revisionists Arif Ali, Ashif Ali and Nanhe were summoned to face trial under Section 302 I.P.C. in S.T. no. 29 of 2017 arising out of case crime no. 734 of 2016, P.S.- Alapur, District- Budaun.
3. It is submitted by the learned counsel for the revisionists that the impugned order is wholly perverse and against the established legal principles. It is also submitted that from the perusal of the FIR as well as entire evidence on record it transpires that no offence is made out against the revisionists under Section 302 I.P.C. Even the investigating officer of the case during entire investigation could not find any evidence against the revisionists and that was the reason no charge sheet was submitted against them. The site plan and investigation note which were prepared by the I.O. wherein no presence of the revisionists has been shown on spot at the time of the alleged incident has not been considered by the learned trial court whereas that was the significant reason they were exonerated by the I.O. and the same is a conclusive proof to certify the innocence of the revisionists.

4. It is further urged that in the autopsy report of the deceased only one fire arm injury was found by the doctor but in the FIR four accused persons were alleged to have made indiscriminate firing upon him. It is also submitted that the alleged recovery of murder weapon has been made by the I.O. on the pointing out of the co-accused Aasi @ Aas Mohd. The informant in his statement under Section 161 Cr.P.C. implicated the present revisionists only due to previous animosity whereas undisputedly the revisionists were not present on the place of occurrence at the time of alleged incident. Other witnesses of the fact verified the presence of named co-accused Aasi @ Aas Mohd only on spot as the sole assailant at the time of occurrence.

5. The attention of this Court was further invited to the fact that even the co-accused Aasi @ Aas Mohd. confessed his guilt before the I.O. and also admitted that he was the person who opened fire upon the deceased and even a whisper can not be found in his statement under section 161 Cr.P.C. in respect of the presence of the revisionists or any role played by them in the commission of the alleged crime.

6. Another submission made by the learned counsel for the revisionists is that earlier the father of the revisionists, who are the real brothers, had filed a criminal complaint against the deceased and his family members on 11.11.2013 and they were summoned to face trial under Section 452, 406 and 427 I.P.C. on 2.7.2015 and besides it one other complaint case was filed by the father of the revisionists against the brother and mother of the deceased on 7.11.2013 and due to the animosity of the aforesaid cases, as a counter blast, the present revisionists have been falsely roped in this case by the informant whereas at the time of occurrence revisionist nos. 1 and 2 were living in Ahmadabad and revisionist no.3 was residing in Delhi.

7. The validity of the impugned order is also questioned on the ground that while passing impugned order, the learned trial Court paid no attention over the legal principles prevailing in the matter and only on the basis of evidence of P.W.1 and 2 the revisionists were summoned in haste for the

offence of murder, hence the impugned order is not sustainable in law and deserves to be set aside by allowing the present revision.

8. Per contra, the learned A.G.A. vehemently opposed the present revision and submitted that the revisionists of this case were named accused persons in the FIR lodged by the informant Rafiuddin, the brother of the deceased Anis Ahmad. The FIR consists of a specific version that all the named accused persons including the present revisionists opened indiscriminate firing upon the deceased with a common intention to kill him and the incident was witnessed by Niyaz Ahmad, the brother of the deceased, Rehana wife of the deceased, and by several other independent persons of the village as well and when the deceased was being taken to the hospital in injured condition, he passed away on the way. It is further submitted that the I.O. of this case for unknown reasons did not submit the charge sheet against the revisionists, whereas in their statements under Section 161 Cr.P.C. the informant Rafi Uddin, witness Niyaz Ahmad and Smt. Rehana have assigned role of firing to all the named accused persons including the present revisionists.

9. It is further urged that P.W.1 Rafi Uddin, the informant and P.W.2 Niyaz Ahmad the eye witnesses corroborate the prosecution version in all material terms in their deposition recorded before the trial Court. On the basis thereof application under Section 319 Cr.P.C. to summon the present revisionists as accused in this case was moved by the prosecution. It is also submitted that the learned trial Court committed no error in passing the impugned order and summoning the present revisionists to face the trial for an offence under Section 302 I.P.C. by invoking its power granted to it by virtue of section 319 Cr.P.C.

10. Heard the learned counsel for both the sides and sifted the record.

11. Before this Court enters into examining the correctness and legality of the order in question it is desirable to have a glance upon the legal position as to whether after taking cognizance of an offence the power which may be

exercised by the Magistrate includes to summon any person as an accused to face trial in case whose name is not found in the charge sheet submitted by the I.O.. Taking cognizance of an offence, is a very initial stage where the issue to the extent of power of Magistrate to summon any person as an accused to face trial whose name is missing in the charge sheet arises. The legal position with regard to the powers of the Magistrate as to whether at the time of taking cognizance of the offence, the person not named as an offender in the charge sheet but whose complicity in the crime comes to light from the material available on record may be proceeded against as an accused to face trial by the court and he has not to wait till the stage of Section 319 Cr.P.C. reaches, is now well established.

12. In SWIL Ltd. Vs. State of Delhi and Ars. (2001) 6 SCC 670 the Hon'ble Apex court held as quoted herein under:

“At the stage of taking cognizance of the offence, provisions of Section 190 CrPC would be applicable. As per this provision, the Magistrate takes cognizance of an offence and not the offender. After taking cognizance of the offence, the Magistrate under Section 204 CrPC is empowered to issue process to the accused. At the stage of issuing process, it is for the Magistrate to decide whether process should be issued against particular person/persons named in the charge-sheet and also not named therein. For that purpose, he is required to consider the FIR and the statements recorded by the police officer and other documents tendered along with charge-sheet. Further, upon receipt of police report under Section 173(2) CrPC, the Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) even if the police report is to the effect that no case is made out against the accused by ignoring the conclusion arrived at by the investigating officer and independently applying his mind to the facts emerging from the investigation by taking into account the statement of the witnesses examined by the police. At this stage, there is no question of application of Section 319 CrPC. That provision would come into operation in the course of any enquiry into or trial of an offence”.

13. Earlier the issue was discussed by the Hon'ble Apex Court in Raghubans Debey Vs. State of Bihar 1967 SCC Online SC 3 and it was held as under:

“In our opinion, once cognizance has been taken by the Magistrate, he takes cognizance of an offence and not the offenders; once he takes cognizance of an offence it is his duty to find out who the offenders really are and once he comes to the conclusion that apart from the persons sent up by the police some other persons are involved, it is his duty to proceed against those persons. The summoning of the additional accused is part of the proceeding initiated by his taking cognizance of an offence”.

14. In the instant matter the trial is pending before the Sessions Court leaving behind the stage of cognizance and committal proceedings exhausted by the Magistrate. The question arises as to what course of procedure should be adopted by a Sessions Court if the cognizance is taken by the Magistrate in a Sessions triable case and the record is received by the Sessions on committal; whether the Sessions Court enjoys the power to summon any person as an accused to face trial even if he was not arraigned in the charge sheet but the complicity of whom in the commission of the crime appears from the perusal of the record and the Magistrate also failed to proceed against him.

15. In the case of **Ranjit Singh Vs. State of Punjab (1998) 7 SCC 149** the Hon’ble Apex Court expressed the view that from the stage of committal till the Sessions Court reaches the stage indicated in Section 230 of the Code of Criminal Procedure that Court is empowered to deal with only the accused referred to in Section 209 of the Code and there is no intermediary stage till then enabling the Sessions Court to add any other person to array of the accused.

Later on, in view of divergence of opinions expressed in **Kishun Singh and others versus State of Bihar (1993) 2 SCC 16** and **Ranjit Singh (supra)** over the subject in **Dharampal and others versus State of Haryana and anothers (2004) 13 SCC 9** the matter was referred to the larger Bench and that drove the controversy to be settled to the Constitution Bench and in **Dharam Pal and Ors. Vs. State of Haryana and Anr. (2014) 3 SCC 306**, the Hon’ble Apex Court discussing the rationale of law promulgated in **Kishun Singh (supra)** wherein the power of the Sessions Court under

Section 193 of the Code of Criminal Procedure to take cognizance of the offence and summon other persons whose complicity in the commission of the crime would be evident from the materials available on record and Ranjit Singh's (supra) case standing upon a different analogy, held that the law promulgated in Ranjit Singh (supra) cannot be termed as correct law rather the law was correctly inunited in Kishun Singh (supra) case.

16. In the leading case on the subject **Hardip Singh Vs. State of Punjab and Ors. (2014) 3 SCC 92** (five judges bench) relating to the powers of the Court to be invoked under Section 319 Cr.P.C. which was a referred matter from **Hardip Singh versus State of Punjab and others (2009) 16 SCC 785** discussing the power of Sessions Court to add a person as accused under section 193 Cr.P.C., it was reiterated by the Hon'ble Apex Court that the Sessions Court need not necessarily wait till the stage of section 319 is reached to direct a person, not facing trial, to appear and face trial as an accused because section 193 confers power of original jurisdiction upon the Sessions Court to add an accused once the case is committed to it.

17. Now the issue in hand is that whether the order passed by the learned Sessions Court to summon the present revisionist as additional accused to face the trial in the pending case was a legally correct order or not and this issue on its face has two aspects. Firstly, it relates to the jurisdiction of the Sessions Court for addition of other persons as accused whose names are not included in the charge sheet but subsequently the Court finds some discernible materials which lead the Court to make a view that some other persons may also be tried together with the accused already being tried before the Sessions Court and secondly, the factual aspect of the matter has to be examined as to whether there was sufficient evidence to show complicity of the proposed accused persons in the commission of the alleged crime of murder.

18. To answer the first question it would be apt to put a glance over the relevant provisions of Section 319 Cr.P.C.

Section 319(1) of The Code of Criminal Procedure, 1973

“(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.”

19. The language of Section 319 Cr.P.C. does not leave even an iota of doubt that the power of the Court under the said provision can be invoked in the course of any inquiry or trial both. In the case in hand the trial was going on when the application under Section 319 Cr.P.C. was moved hence, so far as the exercise of power under Section 319 Cr.P.C. is concerned the said power was never exceeded and it was well within the jurisdiction of the Sessions Court to invoke its power under Section 319 Cr.P.C. and to pass order there under.

20. There had been several debatable issues concerning the power of the Court which might be invoked under Section 319 Cr.P.C. but all the controversies are set at rest after the judgement of **Hardip Singh case (supra)** (five Judges Bench) wherein the Hon’ble Apex Court found an occasion to deal with the matter thoroughly on reference made in **Hardip Singh case (supra)** and framed five questions to answer in the matter, which, in short relate to the stage to exercise the power under section 319 Cr.P.C., the meaning and sense of the word ‘evidence’ used under section 319 (1) Cr.P.C. and further whether test of the evidence by way of cross examination is required or only examination in chief is sufficient to invoke the power, the extension of the word ‘evidence’ as to whether it is limited to the evidence recorded during trial or includes the evidence collected during investigation, the nature of the satisfaction of court and the scope of power under section 319 Cr.P.C. against different persons. Umpteen of authorities were discussed in the aforesaid judgement by the Hon’ble Apex Court such as **Dharam Pal and others (2014) 3 SCC 306** which was followed, **Vikas versus State Of Rajasthan, (2014) 3 SCC 321**, **Rajendra Singh versus State Of U.P. (2007) 7 SCC 378**, **Hardeep Singh versus State Of U.P. (2009) 16**

SCC 785, *Molly versus State Of Kerela* (2004) 4 SCC 584; *SWIL Ltd. Versus State Of Delhi* (2001) 6 SCC 670; *Ranjit Singh versus State Of Punjab* (1998) 7 SCC 149; *Kishun Singh versus State of Bihar* (1993) 2 SCC 16; *Joginder Singh versus State of Punjab* (1979) 1 SCC 345 and so on.

21. After discussing the various aspects of the matter the Hon'ble Apex Court in agreement with the Constitution Bench judgement in *Dharam pal and others* (supra) expounded that after committal cognizance of an offence taken against a person not named as an accused but against whom materials are available from the evidence filed by the police after completion of the investigation is permissible under Section 193 Cr.P.C. and the Sessions Judge need not wait till evidence under Section 319 Cr.P.C. becomes available for summoning an additional accused. Further, it was held that since the trial commences after framing of charge the material coming before the Court in the course of such inquiries such as Section 200, 201, 202 and 398 Cr.P.C. etc. may be used for corroboration of the evidence recorded in the Court after the commencement of trial for the sake of exercise of power under Section 319 Cr.P.C. and also to add an accused whose name has been shown in column II of the charge sheet. The consequences which flow from the aforesaid observations of the Hon'ble Apex Court ensue that the Sessions Court has jurisdiction on committal of a case to it to take cognizance of the offences committed by the persons not named as offender but whose complicity in the case would be evident from the materials available on record, hence, even without recording evidence upon committal under Section 209 Cr.P.C. the Sessions Judge may summon those persons shown in column 2 of the police report to stand trial along with those already named therein.

22. However, when the Sessions Court chooses to invoke its power under section 319 Cr.P.C. during trial after some evidence is recorded before it, it is to be remembered that the power under Section 319 (1) Cr.P.C. can be exercised only if it is so obvious from the evidence at trial and not otherwise.

In fact sub Section (1) of Section 319 Cr.P.C. contemplates existence of some evidence appearing in the course of trial wherefrom the Court can prima facie conclude that the person not arraigned as an accused before it is also involved in the commission of the crime for which he can be tried together with those already named by the police and are being tried by the court. Even a person who has earlier been discharged would fall within the sweep of the power conferred by the Section 319 of the Code and needless to say that the power under Section 319 of the Code cannot be invoked in a case where no evidence has been led at a trial to connect the proposed accused with the crime along with the co-accused persons who have already been sent up for trial by the prosecution.

23. Coming back to the findings recorded by the Hon'ble Apex Court in Hardip Singh (supra) case in response to all the five questions formulated therein it was summed up in the manner that under Section 319 Cr.P.C. a person against whom it appears from the evidence that he, though not an accused in the case so far, could be tried together with the accused already facing the trial and in such event by virtue of Section 319 (4) Cr.P.C. the proceedings against such person shall be commenced afresh and it shall be presumed as if he had been an accused person when the court took cognizance of the offence upon which the trial was commenced and the Court need not wait for the evidence against the accused proposed to be summoned to be tested by the cross examination. The degree of satisfaction that will be required for summoning a person under Section 319 Cr.P.C. is in fact much stronger evidence than mere probability of his complicity. Thus, 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. The difference in the degree of satisfaction for summoning the original accused and the subsequent accused is on account of the fact that the trial may have already been commenced against the original accused and it is in the course of such trial that materials are discussed against the newly summoned

accused, fresh summoning of the accused will result in delay of the trial, therefore, the decree of satisfaction for summoning the accused (original and subsequent) has to be different. It was further clarified by the Hon'ble Apex Court that:

“117.6 A person not named in the FIR or a person though named in the FIR but has not been charge-sheeted or a person who has been discharged can be summoned under Section 319 CrPC provided from the evidence it appears that such person can be tried along with the accused already facing trial. However, insofar as an accused who has been discharged is concerned the requirement of Sections 300 and 398 CrPC has to be complied with before he can be summoned afresh.”

24. The Hon'ble Apex Court in **Y. Saraba Reddy Vs. Puthur Rami Reddy and Anr. (2007) 4 Supreme Court Cases 773** has put a caution over the power of the Court with reference to Section 319 Cr.P.C. by making an observation as extracted herein below-

“11. Power under Section 319 of the Code can be exercised by the court suo motu or on an application by someone including the accused already before it. If it is satisfied that any person other than the accused has committed an offence he is to be tried together with the accused. The power is discretionary and such discretion must be exercised judicially having regard to the facts and circumstances of the case. Undisputedly, it is an extraordinary power which is conferred on the court and should be used very sparingly and only if compelling reasons exist for taking action against a person against whom action had not been taken earlier. The word 'evidence' in Section 319 contemplates the evidence of witnesses given in court. Under sub-section (4)(b) of the aforesaid provision, it is specifically made clear that it will be presumed that newly added person

had been an accused person when the court took cognizance of the offence upon which the inquiry or trial was commenced That would show that by virtue of sub-section (4)(b) a legal fiction is created that cognizance would be presumed to have been taken so far as newly added accused is concerned "

25. The said principle of law later on echoed in **Shishupal Singh Vs. State of U.P. and Anr. (2019) 8 Supreme Court Cases 682** as well by holding that the power under Section 319 Cr.P.C. when invoked on the basis of some evidence adduced before the Court during course of trial and such evidence that has surfaced in the examination-in-chief without cross-examination of the witnesses, can also be taken into consideration. However, since it is a discretionary power given to the court under Section 319 Cr.P.C. and is also an extraordinary one, same has to be exercised sparingly and only in those cases where the circumstances of the case so warrant. The degree of satisfaction is more than the degree which is warranted at the time of framing of the charges against others in respect of whom charge-sheet was filed. Only where strong and cogent evidence occurs against a person from the evidence led before the court, such power should be exercised. It is not to be exercised in a casual or a cavalier manner. The prima facie opinion which is to be formed requires stronger evidence than mere probability of his complicity.

26. Recently, in **Nahar Singh Vs. State of U.P., Criminal Appeal No. 443 of 2022 decided on 16.3.2022** the legal proposition with regard to the scope of power exercisable by the Magistrate and Sessions Court under Section 319 Cr.P.C. has been reiterated by the Hon'ble Apex Court as extracted below-

“ 20.The uniform view on this point, irrespective of the fact as to whether cognizance is taken by the Magistrate under Section 190 of the Code or jurisdiction exercised by the Court of Session under Section 193 thereof is that the aforesaid judicial authorities would not have to wait

till the case reaches the stage when jurisdiction under Section 319 of the Code is capable of being exercised for summoning a person as accused but not named as such in police report. We have already expressed our opinion that such jurisdiction to issue summons can be exercised even in respect of a person whose name may not feature at all in the police report, whether as accused or in column (2) thereof if the Magistrate is satisfied that there are materials on record which would reveal prima facie his involvement in the offence. None of the authorities limit or restrict the power or jurisdiction of the Magistrate or Court of Session in summoning an accused upon taking cognizance, whose name may not feature in the FIR or police report.”

27. The aforesaid settled propositions of law reveal no shadow of doubt that on the basis of the evidence before it during trial the sessions court was fully empowered and armed with competent jurisdiction over the issue of summoning the additional accused persons to face trial along with accused persons who were already been tried by it and it was under the exercise of the same power, the present revisionists were summoned by the Sessions Court as an additional accused to face trial under Section 302 I.P.C. alongwith one accused already facing trial before the said court by the impugned order and so far as the power of the Sessions Court is concerned the impugned order inherits no lacuna of law or absence of jurisdiction.

28. Now considering the factual aspect of the matter, it is to be borne in mind that in the initial FIR of this case the revisionists were named and it was alleged therein in specific terms that accused Arif Ali, Asif Ali, Nanhe and Ashii having illegal country made pistols in their hands on account of some land dispute opened indiscriminate firing upon Amir, the brother of the informant. The fire-arm injuries sustained by him were proved fatal to him. The incident was witnessed by the informant Rafiuddin, Rehana, Niyaz Ahmad and other villagers. The said FIR was lodged under Section 302 I.P.C. against four named accused persons but however, after investigation the Investigating Officer submitted his charge sheet only against the accused

Aashi and the present revisionists were exonerated and their names do not find place in the police report.

29. After committal the Sessions Court proceeded with the trial and subsequent to the framing of charge the evidence started.

30. The evidence of P.W.1 Rafiuddin, the informant, and P.W.2 Niyaz Ahmad, the eye-witnesses were recorded which included examination-in-chief and cross-examination of both the witnesses. It was only after recording of the aforesaid evidence an application under Section 319 Cr.P.C. was moved by the prosecution to summon Arif, Asif and Nanhe as additional accused in the matter to face the trial alongwith accused Aas Mohammad, who was already facing the trial. P.W.1 and P.W.2 both have corroborated the evidence mentioned in the FIR of this case and the role of indiscriminate firing upon the deceased was assigned to the present revisionists as well along with the charge sheeted accused Aashi @ Aas Mohd and on this issue the evidence of both the witnesses was found consistent and reliable by the learned Sessions Court.

31. It was vehemently submitted by the learned counsel for the revisionists that in the post mortem report of the deceased only one gun shot injury has been found by the doctor which is an entry and exit wound of the same fire and no other fire arm injury was found on the body of the deceased in the autopsy report. It is vehemently submitted by the learned counsel for the revisionists that the prosecution case and evidence recorded before the court as well are under the shadow of doubt as the prosecution claims that at the time of occurrence an indiscriminate firing was made by four named accused persons simultaneously and the fire made by them inflicted upon the body of the deceased and in such a situation if only one fire arm injury is found over the body of the deceased, the complicity of all the accused persons in this case becomes highly suspicious and the prosecution story appears to be not a natural and genuine one.

32. Expostulating the impugned order it is further submitted that the recovery of alleged fire arm which was used in the commission of crime has been shown from the pointing of accused Aasi @ Aas Mohd by the police on police custody remand. It is further submittd that no desi pistol has been retrieved from the present revisionists during course of investigation, which further denotes that the present revisionists had absolutely no role in the commission of the alleged crime.

33. This Court has an occasion to peruse the case diary of the case, the relevant parts of which have been appended to the affidavit and finds that the witnesses of fact Rafiuddin and Niyaz Ahmad as well as Smt. Rehana, wife of the deceased have also stated in favour of the prosecution on one side, at the same time witnesses Irshad, Mohd. Ishan who have also been interrogated by the I.O. claim themselves not to be the witness of the incident as reveals from their statement under Section 161 Cr.P.C. The I.O. also collected the evidence to the effect that the present revisionists have falsely been implicated in this case and that was the reason no charge sheet was submitted against them although they were named in the FIR. However, this is the statement made before the Court by a witness which can be taken into account while dealing with an application under Section 319 Cr.P.C. The established legal principle which emerges out from the findings of a catena of decisions is that in this situation when the witnesses are deposing before the Court naming some other persons as accused of the case who have not been charge sheeted, the statement and evidence recorded and collected by the I.O. during investigation may always be taken as a corroborative piece of evidence by the Courts. If this legal principle is translated into the facts and circumstances of the case in hand it is crystal clear that the presence and active participation of the present revisionists along with charge sheeted accused person Aashi @ Aas Mohd on the pointing out of whom the murder weapon was recovered is proved prima facie in the commission of crime as alleged. This Court is cautious to the fact that the fire as alleged by the prosecution has been made by the four

accused persons whereas only one gun shot injury which is in the form of entry and exit wound on the lower part of the chest was found in the autopsy report and the doctor has opined in his statement under section 161 Cr.P.C. that the injury was about one day old and the death was caused due to shock and haemorrhage as a result of gun shot injury. The main accused Aashi @ Aas Mohd. confessed before the I.O. that it was he whose fire inflicted injury to the deceased and he has denied the presence of any one else as assailant along with him at the time of the incident.

34. Prima facie view which can be gathered from the facts and evidence on record particularly the deposition of witnesses of fact P.W.1 and P.W.2 and also taking the facts collected by the I.O. during investigation as a corroborative piece of evidence that the present revisionists were very well present at the place of occurrence with the main accused Aashi @ Aas Mohd and they participated in the commission of the crime although it was the main accused Aashi @ Aas Mohd. by whose fire the deceased sustained gun shot injury. In view of that I am of the considered view that the present revisionists were definitely the persons who could be tried along with already charge sheeted accused Aashi @ Aas Mohd and the learned trial Court committed no error in summoning them to face the trial for murder invoking its powers under Section 319 Cr.P.C. however, the impugned order requires a little modification that the present revisionists ought to have been summoned not under Section 302 I.P.C. simplicitor but under Section 302/34 I.P.C. on the basis of the evidence on record recorded before the trial Court in evidence. Hence, the presence of the revisionists on the place of occurrence having country made pistols in their hands alongwith the main accused Aashi @ Aas Mohd. where they had ambushed upon the deceased is prima facie established on the basis of evidence recorded before the trial court, The evidence of eye witnesses P.W.1 and P.W.2 is also corroborative to the fact that they also opened fire upon the deceased which might be missing as argued by the learned State counsel. P.W.1, the eye witness saw some empty cartridges on spot which is prima facie connotative to the fact

that more than one fire was made on the place of occurrence. The non-recovery of the fire arm from them prima facie has nothing to do with their guilt. The criminal act was committed indubitably in furtherance of common intention of all and this common intention was to get rid of the deceased. In fact the evidence before the trial Court corroborated by the materials/ evidence collected by the I.O. of the case is in itself a prima facie proof not only of the participation of the present revisionists in the crime but also their common intention to do away with the deceased followed by their overt act of firing upon him. The present revisionists came on spot with the main accused Aashi @ Aas Mohd and cooperated him in the commission of the crime for their animosity with the informant side on account of an old litigation. Their active participation and overt act in the commission of the crime of murder may easily be gathered from the evidence on record.

35. On the basis of aforesaid discussion and taking the cumulative effect of the evidence on record I am of the view that the learned trial Court has committed no illegality in passing the impugned order and the Court finds no perversity or illegality in the impugned order. The learned trial Court being satisfied with the role of the present revisionists in the commission of the crime of murder passed the impugned order under Section 319 Cr.P.C. whereby the present revisionists have been summoned to face trial under Section 302 Cr.P.C. and the satisfaction of the court is well founded. The impugned order deserves to be confirmed but only with a modification that the order to summon the present revisionists under Section 302 I.P.C. is modified to be under Section 302/34 I.P.C.

36. With these observations, the present revision is **dismissed**. The impugned order dated 14.12.2023 is hereby confirmed subject to the modification as indicated in the body of this judgement.

Order Date :- 18.7.2024//Fhd