

Court No. - 13

Case :- APPLICATION U/S 482 No. - 7269 of 2024

Applicant :- Chandan Alias Dhananjay

Opposite Party :- State Of U.P. Thru. Prin. Secy. Home , Lko. And Another

Counsel for Applicant :- Shailendra Singh Chauhan, Hanumant Lal Yadav

Counsel for Opposite Party :- G.A.

Hon'ble Saurabh Lavania, J.

1. Supplementary affidavit filed in the Court today is taken on record.
2. Heard Sri Shailendra Singh Chauhan, Advocate alongwith Sri Hanumant Lal Yadav, Advocate, learned counsel appearing for the applicant and Sri S.P. Tiwari, learned AGA for the State of U.P. and also perused the record.
3. By means of this application, the applicant has assailed the order dated 24.07.2024 passed by Sessions Judge, Pratapgarh (hereinafter referred to as the "trial court") in Sessions Trial No. 250 of 2023 (State vs. Subedar Yadav s/o Ramsumer Yadav) arising out of Case Crime No. 61/2019, under Sections- 302, 323, 504, 506 IPC, Police Station- Aspur Deosara, District- Pratapgarh.
4. Brief facts of the case in hand are to the effect that in an altercation, which took place on 13.04.2019, the informant/Kasim Khan sustained injuries and he was examined on the same day i.e. 13.04.2019 and according to the opinion of doctor concerned, he sustained four injuries, which are as under:-

"1- Contusion size 8cm x 2 cm present over Rt. shoulder.

2- Contusion size 12 cm x 1.5 cm present over mid of Rt. side of back region of body.

3- Contusion size 6 cm x 3 cm present over Lt. side of mid of back region of body.

4- T/M swelling size 3 cm x 1 cm present over dorsal aspect of Rt. palm."

5. In the alleged incident on account of blow of lathi made by accused Subedar on the skull of Gulzar Khan, father of informant/injured, he died on the same day i.e. 13.04.2019. The autopsy surgeon also opined head injury as cause of death.

6. After the incident, in which, the informant/Kasim Khan and deceased/Gulzar Khan, both sustained injuries, indicated above, the informant/Kasim Khan lodged the FIR on 13.04.2019 at about 17.56 hours registered as Case Crime No. 0061/2019 making allegations therein so as to attract the offences as indicated under Sections 302, 323, 504, 506 IPC. This FIR was lodged against Subedar, Suresh, Chandan @ Dhananjay (applicant) and Mulayam. This FIR also indicates that the alleged incident took place on 13.04.2019 at about 10.00 A.M. and medical opinion related to the informant/injured indicates that he was medically examined at about 6.20 P.M. on 13.04.2019.

7. After lodging of FIR aforesaid, the investigation was carried out and upon completion of investigation, the Investigating Officer concerned (in short "I.O.") filed the charge sheet against the accused Subedar. Thus, other accused named in the FIR were exonerated including the applicant. Thereafter, the cognizance was taken in the matter by the concerned competent court of jurisdiction and upon committal before the court of sessions, the trial was registered as Sessions Trial No. 250 of 2023 (State vs. Subedar Yadav s/o Ramsumer Yadav).

8. Before the trial court, the statement of informant/injured witness namely Kasim Khna was recorded as PW-1, who, before the trial court indicated the names of all accused against whom the FIR was lodged namely Subedar, Suresh, Chandan @ Dhananjay (applicant) and Mulayam. As per PW-1/injured witness before the trial court, all accused were present at the place/situs of crime and some altercation took place between the applicant and accused named in the FIR and it further appears therefrom that accused/Subedar Yadav caused fatal injury to the deceased over his head. In this view of the matter, PW-1 attributed specific role to accused/Subedar Yadav of causing fatal injury to the deceased.

9. PW-1 thereafter was cross-examined by the defence and thereafter PW-2/Jubeda (daughter-in-law of deceased) w/o Gulsher Khan was also examined and she also indicated the name of all accused named in the FIR. As per statement of PW-2 before the trial court, all accused named in the FIR were present at the place/situs of crime.

10. After the aforesaid, an application i.e. Paper No. 16-Kha dated 17.05.2024 was preferred by the informant/Kasim Khan under Section 319 Cr.P.C. to summon the accused persons namely Subedar Yadav, Suresh Yadav, Chandan @ Dhananjay (applicant) and Mulayam, who were named in the FIR and against whom the charge sheet was not filed. This application was submitted by D.G.C. (Criminal).

11. The trial court thereafter passed the order impugned dated 24.07.2024, whereby, directed the accused persons named hereinabove to face the trial under Sections 302, 323, 504 and 506 IPC in Case Crime No. 61 of 2019, P.S.- Aspur Deosara, District- Pratapgarh. The relevant portion of the order impugned dated 24.07.2024 on reproduction reads as under:-

"8. The genesis of the present crime has been initiated on the basis of the written complaint dated 13.04.2019/Exhibit Ka-1. The written complaint was provided to S.H.O., P.S. Aspur Deosara, Pratapgarh by Qasim Khan on the same day of the incident i.e. on 13.04.2019. It is mentioned in the said complaint that on 13.04.2019, at about 10.00 a.m., due to animosity of land and old fight (maarpeet), the complainant's villagers namely, Subedar, Suresh, Chandan alias Dhananjay and Mulayam, with common intention, having lathi and danda in their hands, came to his door and started hurling filthy abuses. When complainant raised objection, they started beating him. Thereafter, his father Gulzar came there to save him, his father was beaten by Subedar with lathi, due to which his father became unconscious. On hue & cry of the complainant, villagers and his family members gathered there. After intervention, aforesaid persons went away from there threatening to kill. Thereafter, complainant's father was taken to District Hospital, Pratapgarh for treatment, where doctor declared him dead. In this incident, the complainant had also suffered injuries.

9. It is held by the Hon'ble Supreme Court in Hardeep Singh V State of Punjab, 2014 (85) ACC 313, that 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 Cr. P.C. provided from the

evidence, it appears that such person can be tried along with the accused already facing trial.

The difference is the degree of satisfaction for summoning the original accused and a subsequent accused is on account of the fact that the trial may have already commenced against the original accused and it is in the course of such trial that materials are disclosed against the newly summoned accused. Fresh summoning of an accused will result in delay of trial. Therefore, the degree of satisfaction for summoning the accused (original and subsequent) has to be different for summoning u/s 319 Cr.P.C. to wait till cross-examination is not necessary, that appellants were named in the F.I.R., P.W. 1 & P.W. 2 specifically stated against the appellants and specific role is attributed to the appellants. Statement of P.W. 1 & P.W. 2 can be said to be evidence during the trial.

10. It is held by Hon'ble Supreme Court in *Rajesh & others Vs. State of Haryana* 2019 (108) ACC 978 (SC), that person against whom no charge sheet is filed can be summoned to face the trial under Section 319 Cr.P.C.

11. It is held by Hon'ble Supreme Court in *Rajesh & others Vs. State of Haryana* 2019 (108) ACC 978 (SC), it is also based on *Hardeep Singh Vs. State of Punjab* 2014 (85) ACC 313 (SC), that Cr.P.C., 1973- Section 319 Cr.P.C.- Court can exercise power under Section 319 Cr.P.C., and summon the person, even on basis of statement made in examination in chief of the witness. Court need not wait till cross-examination of such witness. The person, who had not named in the FIR or a person though named in the FIR but not charge sheeted or a person who has been discharged, he could be summoned under Section 319 Cr.P.C., provided, if it appears that on basis of material on record such person can be tried along with the accused already facing trial.

12. In the present case, the First Information Report was lodged on the same day of the incident i.e. on 13.04.2019 against four named accused persons namely, Subedar S/o Ramsumer Yadav, Suresh S/o Ram Sumer Yadav, Chandan alias Dhananjay S/o Kamlesh and Mulayam S/o Suresh. It is specifically alleged in the written complaint that all the persons were present at the spot and with common intention they came to door of the plainant having lathi and danda in their hands and started hurling abuses & beating.

After investigation, the charge-sheet was filed against the sole accused Subedar Yadav. The trial was commenced and during the trial it was found that Mohd. Qasim Khan/P.W.1/complainant was also injured. He has deposed as P.W. 1 in his examination-in-chief and his detail cross examination has been conducted in 10 pages. P.W.2 Jubeda W/o Gulsher Khan has deposed and named all the accused in the said incident. The said witness was duly cross-examined. There are specific allegations against the proposed accused under Section 319 Cr.P.C.. They were named in the First Information Report and the written complaint/Tehrir.

Their role has been specifically deposed by the injured witness P.W. 1 Qasim Khan as well as P.W.2 Jubeda before the Court. Both these witnesses are duly cross-examined by the learned counsel for the accused.

13. In view thereof, the application 16-Kha under Section 319 Cr.P.C. is entitled to be allowed and the accused persons i.e. Suresh S/o Ram Sumer Yadav, Chandan alias Dhananjay S/o Kamlesh and Mulayam S/o Suresh are liable to be summoned for facing trial.

ORDER

(i) The application 16-Kha under Section 319 Cr.P.C. is hereby allowed.

(ii) Accused Suresh S/o Ram Sumer Yadav, Chandan alias Dhananjay S/o Kamlesh and Mulayam S/o Suresh are hereby summoned to face the present trial in Case Crime No. 61/2019, under Sections 302, 323, 504 & 506 IPC, P.S. Aaspur Deosara, District Pratapgarh.

(iii) The prosecution shall take necessary steps to summon the said accused persons.

(iv) Put up on 16.08.2024 for their appearance."

12. Paragraph 3 of the impugned order dated 24.07.2024, quoted hereinunder, indicates that the names of the applicant and others were exonerated on the basis of plea of 'Alibi'. The plea of 'Alibi' is a plea of defence and can be considered by the trial court during trial.

"3. The grounds taken in the application under Section 319 Cr.P.C. are that the complainant Qasim Khan had named Subedar Yadav, Suresh Yadav, Chandan alias Dhananjay and Mulayam as accused in the First Information Report. Thereafter, complainant appeared before the court for evidence as P.W.1. On 22.08.2023, in his examination-in-chief, he has revealed the facts regarding involvement of the above accused persons in the said offence. On 21.03.2024, P.W. 2 Jubeda W/o Gulsher Khan, in her examination-in-chief, has also revealed the facts with regard to involvement of the above accused persons in the said offence. During investigation, the Investigating Officer recorded the statements of the witnesses under Section 161 Cr.P.C. The other witnesses have also revealed the name of above said accused in the said offence. On relying the affidavit of the relatives of the accused and the community of the accused, the Investigating Officer has not shown the names of Suresh, Chandan alias Dhananjay and Mulayam in the charge sheet. The names of the accused persons have been expunged on the basis of Alibi affidavit, which is ex parte and has no cogent basis in the law. On the basis of the post-mortem report/injuries suffered by the complainant, the involvement of the accused in the said crime is proved."

13. In the aforesaid background of the case, the present application has been filed before this Court challenging the order dated 24.07.2024.

14. Learned counsel for the applicant while impeaching the order impugned dated 24.07.2024 stated that the trial court has not exercised its jurisdiction in terms of law laid down by the Hon'ble Apex Court. In this regard, he placed reliance on the following judgments:-

(i) Criminal Appeal No. 397 of 2022 (Sagar vs. The State of U.P. & Another);

(ii) Criminal Appeal No. 549 of 2023 (Juhru & Ors. vs. Karim & Anr.); and

(iii) Criminal Appeal No(S). of 2024 [arising out of Special Leave Petition (Crl.) No(s). 8696 of 2021] (N. Manogar & Anr. vs. The Inspector of Police & Ors.).

15. Learned AGA based upon the averments made in the instant application says that the impugned order dated 24.07.2024 is just and proper and no interference in the matter is required particularly in view of the fact that the order impugned dated 24.07.2024 is basically based upon the testimony of injured witness.

16. Considered the aforesaid and perused the record.

17. The law related to summoning the accused in exercise of power under section 319 Cr.P.C. has already been settled by various pronouncement of Hon'ble Apex Court. In view of the observations made by the Hon'ble Apex Court in the judgment passed in the case of *Hardeep Singh Vs. State of Punjab* (2014) 3 SCC 92, *Brijendra Singh and Others Vs. State of Rajasthan*, (2017) 7 SCC 706, *Rajesh and Others Vs. State of Haryana*, (2019) 6 SCC 368, *Manjeet Singh Vs. State of Haryana & Ors.*, (2021) 18 SCC 321, *Sukhpal Singh Khaira Vs. State of Punjab*, (2023) 1 SCC 289, *Yashodhan Singh and Others Vs. State of U. P. and Others*, (2023) *LiveLaw (SC) 576 : 2023 INSC 652*, the trial Court while exercising the power under Section 319 Cr.P.C. is under obligation to consider the evidence recorded before it during trial as also the evidence received by it after cognizance is taken and before commencement of trial.

18. In the case of ***Manjeet Singh Vs. State of Haryana & Ors.***, reported in ***(2021) 18 SCC 321***, after considering the various pronouncements on issues related to exercising the powers under Section 319 Cr.P.C. including the judgments passed in the case of ***Hardeep Singh (supra)*** and ***Brijendra Singh (supra)***, the Hon'ble Apex Court concluded as under:-

"15. The ratio of the aforesaid decisions on the scope and ambit of the powers of the court under Section 319CrPC can be summarised as under:

15.1. That while exercising the powers under Section 319CrPC 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.

15.2. For the empowerment of the courts to ensure that the criminal administration of justice works properly.

15.3. The law has been properly codified and modified by the legislature under 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.

15.4. To discharge duty of the court to find out the real truth and to ensure that the guilty does not go unpunished.

15.5. 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.

15.6. Section 319CrPC allows the court to proceed against any person who is not an accused in a case before it.

15.7. 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.

15.8. Section 319CrPC 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.

15.9. 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 207/208CrPC, committal, etc. which is only a pre-trial stage intended to put the process into motion.

15.10. The court can exercise the power under Section 319CrPC only after the trial proceeds and commences with the recording of the evidence.

15.11. The word “evidence” in Section 319CrPC means only such evidence as is made before the court, in relation to statements, and as produced before the court, in relation to documents.

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

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

15.14. That if the Magistrate/court is convinced even on the basis of evidence appearing in examination-in-chief, powers under Section 319CrPC can be exercised.

15.15. That power under Section 319CrPC can be exercised even at the stage of completion of examination-in-chief and the court need not to wait till the said evidence is tested on cross-examination.

15.16. 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 319CrPC 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).

15.17. While exercising the powers under Section 319CrPC 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.

16. Applying the law laid down in the aforesaid decisions to the facts of the case on hand we are of the opinion that the learned trial court as well as the High Court have materially erred in dismissing the application under Section 319CrPC and refusing to summon the private respondents herein to face the trial in exercising the powers under Section 319CrPC. It is required to be noted that in FIR No. 477 all the private respondents herein who are sought to be arraigned as additional accused were specifically named with specific role attributed to them. It is specifically mentioned that while they were returning back, Mahindra XUV bearing no. HR 40A 4352 was standing on the road which belongs to Sartaj Singh and Sukhpal. Tejpal, Parab Saran Singh, Preet Samrat and Sartaj were standing. Parab Sharan was having lathi in his hand, Tejpal was having a gandasi, Sukhpal was having a danda, Sartaj was having a revolver and Preet Singh was sitting in the jeep. It is specifically

mentioned in the FIR that all the aforesaid persons with common intention parked the Mahindra XUV HR 40A 4352 in a manner which blocks the entire road and they were armed with the weapons.

17. Despite the above specific allegations, when the charge-sheet/final report came to be filed only two persons came to be charge-sheeted and the private respondents herein, though named in the FIR, were put/kept in Column 2. It is the case on behalf of the private respondents herein that four different DSPs inquired into the matter and thereafter when no evidence was found against them the private respondents herein were put in Column 2 and therefore the same is to be given much weightage rather than considering/believing the examination-in-chief of the appellant herein. Heavy reliance is placed on Brijendra Singh [Brijendra Singh v. State of Rajasthan, (2017) 7 SCC 706 : (2017) 4 SCC (Cri) 144].

18. However none of DSPs and/or their reports, if any, are part of the charge-sheet. None of the DSPs are shown as witnesses. None of the DSPs are investigating officer. Even on considering the final report/charge-sheet as a whole there does not appear to be any consideration on the specific allegations qua the accused, the private respondents herein, who are kept in Column 2. Entire discussion in the charge-sheet/final report is against Sartaj Singh only.

19. So far as the private respondents are concerned only thing which is stated is: "During the investigation of the present case, Shri Baljinder Singh, HPS, DSP Assandh and Shri Kushalpal, HPS, DSP Indri found accused Tejpal Singh, Sukhpal Singh, sons of Gurdev Singh, Parab Sharan Singh and Preet Samrat Singh sons of Mohan Sarup Singh caste Jat Sikh, residents of Bandrala innocent and accordingly Sections 148, 149 and 341IPC were deleted in the case and they were kept in Column 2, whereas challan against accused Sartaj has been presented in the Court."

20. Now thereafter when in the examination-in-chief the appellant herein — victim — injured eyewitness has specifically named the private respondents herein with specific role attributed to them, the learned trial court as well as the High Court ought to have summoned the private respondents herein to face the trial. At this stage it is required to be noted that so far as the appellant herein is concerned he is an injured eyewitness. As observed by this Court in State of M.P. v. Mansingh [State of M.P. v. Mansingh, (2003) 10 SCC 414 : (2007) 2 SCC (Cri) 390] (para 9); Abdul Sayeed v. State of M.P. [Abdul Sayeed v. State of M.P., (2010) 10 SCC 259 : (2010) 3 SCC (Cri) 1262] ; State of U.P. v. Naresh [State of U.P. v. Naresh, (2011) 4 SCC 324 : (2011) 2 SCC (Cri) 216], the evidence of an injured eyewitness has greater evidential value and unless compelling reasons exist, their statements are not to be discarded lightly. As observed hereinabove while exercising the powers under Section 319CrPC the court has not to wait till the cross-examination and on the basis of the examination-in-chief of a witness if a case is made

out, a person can be summoned to face the trial under Section 319CrPC.

21. Now so far as the reasoning given by the High Court while dismissing the revision application and confirming the order passed by the learned trial court dismissing the application under Section 319CrPC is concerned, the High Court itself has observed that PW 1 Manjeet Singh is the injured witness and therefore his presence cannot be doubted as he has received firearm injuries along with the deceased. However, thereafter the High Court has observed that the statement of Manjeet Singh indicates over implication and that no injury has been attributed to either of the respondents except that they were armed with weapons and the injuries concerned are attributed only to Sartaj Singh, even for the sake of arguments if someone was present with Sartaj Singh it cannot be said that they had any common intention or there was meeting of mind or knew that Sartaj would be firing. The aforesaid reasonings are not sustainable at all.

22. At the stage of exercising the powers under Section 319CrPC, the court is not required to appreciate and/or enter on the merits of the allegations of the case. The High Court has lost sight of the fact that the allegations against all the accused persons right from the very beginning were for the offences under Sections 302, 307, 341, 148 & 149IPC. The High Court has failed to appreciate the fact that for attracting the offence under Section 149IPC only forming part of unlawful assembly is sufficient and the individual role and/or overt act is immaterial. Therefore, the reasoning given by the High Court that no injury has been attributed to either of the respondents except that they were armed with weapons and therefore, they cannot be added as accused is unsustainable. The learned trial court and the High Court have failed to exercise the jurisdiction and/or powers while exercising the powers under Section 319CrPC.

23. Now so far as the submission on behalf of the private respondents that though a common judgment and order was passed by the High Court in Satkar Singh v. State of Haryana [CRR No. 3238 of 2018 reported as Manjeet Singh v. State of Haryana, 2020 SCC OnLine P&H 2782 sub nom Satkar Singh v. State of Haryana] at that stage the appellant herein did not prefer appeal against the impugned judgment and order passed by the High Court in Manjeet Singh v. State of Haryana [Manjeet Singh v. State of Haryana, 2020 SCC OnLine P&H 2782 [Ed. : This also disposed of CRR No. 3238 of 2018 by a common judgment and order]] and therefore this Court may not exercise the powers under Article 136 of the Constitution is concerned the aforesaid has no substance. Once it is found that the learned trial court as well as the High Court ought to have summoned the private respondents herein as additional accused, belated filing of the appeal or not filing the appeal at a relevant time when this Court considered the very judgment and order in Satkar Singh v. State of Haryana [CRR No. 3238 of 2018 reported as Manjeet

Singh v. State of Haryana, 2020 SCC OnLine P&H 2782 sub nom Satkar Singh v. State of Haryana] cannot be a ground not to direct to summon the private respondents herein when this Court has found that a prima facie case is made out against the private respondents herein and they are to be summoned to face the trial.

24. Now so far as the submission on behalf of the private respondents that though in the charge-sheet the private respondents herein were put in Column 2 at that stage the complainant side did not file any protest application is concerned, the same has been specifically dealt with by this Court in *Rajesh [Rajesh v. State of Haryana, (2019) 6 SCC 368 : (2019) 2 SCC (Cri) 801]*. This Court in the aforesaid decision has specifically observed that 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 as who were named in the FIR but not implicated in the charge-sheet has gone, in that case also, the court is still not powerless by virtue of Section 319CrPC.

25. Similarly, the submission on behalf of the private respondents herein that after the impugned judgment and order passed by the High Court there is much progress in the trial and therefore at this stage power under Section 319CrPC may not be exercised is concerned, the aforesaid has no substance and cannot be accepted. As per the settled proposition of law and as observed by this Court in *Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86]*, the powers under Section 319CrPC can be exercised at any stage before the final conclusion of the trial. Even otherwise it is required to be noted that at the time when the application under Section 319CrPC was given only one witness was examined and examination-in-chief of PW 1 was recorded and while the cross-examination of PW 1 was going on, application under Section 319CrPC was given which came to be rejected by the learned trial court. The order passed by the learned trial court is held to be unsustainable. If the learned trial court would have summoned the private respondents herein at that stage such a situation would not have arisen. Be that as it may, as observed herein powers under Section 319CrPC can be exercised at any stage from commencing of the trial and recording of evidence/deposition and before the conclusion of the trial at any stage.

26. In view of the above and for the reasons stated above, the impugned judgment and order [*Manjeet Singh v. State of Haryana, 2020 SCC OnLine P&H 2782 [Ed. : This also disposed of CRR No. 3238 of 2018 by a common judgment and order]*] passed by the High Court and that of the learned trial court dismissing the application under Section 319CrPC submitted on behalf of the complainant to summon the private respondents herein as additional accused are unsustainable and deserve to be quashed and set aside and are accordingly quashed

and set aside. Consequently the application submitted on behalf of the complainant to summon the private respondents herein is hereby allowed and the learned trial court is directed to summon the private respondents herein to face the trial arising out of FIR No. 477 dated 27-7-2016 in Sessions Case No. 362 of 2016 for the offences punishable under Sections 302, 307, 341, 148 & 149IPC."

19. Reverting to the present case. Upon due consideration of the facts of the case indicated in earlier part of this judgment and the observations made in the judgments of the Hon'ble Apex Court, referred above, this Court is of the view that the applicants have no case and no interference by this Court in the order dated 24.07.2024 passed by the trial Court in exercise of power under Section 319 Cr.P.C. is required. It is for the following reasons:

(A) The case of the applicants is based upon the 'evidence' collected by the I.O. during investigation, which relates to plea of 'Alibi'.

(B) On the plea of 'Alibi', reference can be made to the judgment(s) passed in the following cases:-

(i) In the case of ***Binay Kumar Singh v. State of Bihar [(1997) 1 SCC 283]***, the Hon'ble Apex Court observed as under:-

"23. The Latin word alibi means "elsewhere" and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime. It is a basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person;

(i) the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime.

(ii) The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi.

(iii) The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily.

(iv) But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence.

(v) *When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened.*

(vi) *But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi. This Court has observed so on earlier occasions (vide *Dudh Nath Pandey v. State of U.P.* [(1981) 2 SCC 166 : 1981 SCC (Cri) 379]; *State of Maharashtra v. Narsingrao Gangaram Pimple* [(1984) 1 SCC 446 : 1984 SCC (Cri) 109 : AIR 1984 SC 63]).*

(ii) Further in the case of ***Rajendra Singh v. State of U.P., (2007) 7 SCC 378***, the Hon'ble Apex Court has held as under:-

"8. That apart, the plea taken by the respondent Kapil Dev Singh in his petition under Section 482 CrPC was that of alibi. Section 103 of the Evidence Act says that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is proved by any law that the proof of that fact lie on any particular person. The second illustration to Section 103 reads as under:

"B wishes the Court to believe that at the time in question, he was elsewhere. He must prove it."

*This provision makes it obvious that the burden of establishing the plea of alibi set up by Respondent 2 in the petition filed by him under Section 482 CrPC before the High Court lay squarely upon him. There is hardly any doubt regarding this legal proposition. (See *Gurcharan Singh v. State of Punjab* [AIR 1956 SC 460 : 1956 Cri LJ 827], *Chandrika Prasad Singh v. State of Bihar* [(1972) 4 SCC 140 : AIR 1972 SC 109] and *State of Haryana v. Sher Singh* [(1981) 2 SCC 300 : 1981 SCC (Cri) 421 : AIR 1981 SC 1021].) This could be done by leading evidence in the trial and not by filing some affidavits before the High Court. In such a case the prosecution would have got an opportunity to cross-examine those witnesses and demonstrate that their testimony was not correct. Learned counsel for the appellant has submitted that in fact no affidavits were filed in the High Court but what was filed were copies of two or three affidavits which were given by some persons before the Superintendent of Police, Allahabad. Thus, there was absolutely no legal evidence in support of the plea of alibi of Kapil Dev Singh, which the High Court chose to rely upon and accept for*

the purpose of quashing the order passed by the learned Sessions Judge.

13. Having considered the submissions made by learned counsel for the parties, we are of the opinion that the statements of the witnesses under Section 161 CrPC being wholly inadmissible in evidence could not at all be taken into consideration. The High Court relied upon wholly inadmissible evidence to set aside the order passed by the learned Sessions Judge. That apart, no finding on a plea of alibi can be recorded by the High Court for the first time in a petition under Section 482 CrPC. As mentioned above, the burden to prove the plea of alibi lay upon the accused which he could do by leading evidence in the trial and not by filing some affidavits or statements purported to have been recorded under Section 161 CrPC. The whole procedure adopted by the High Court is clearly illegal and cannot be sustained."

(iii) Further in the case of ***Shaikh Sattar v. State of Maharashtra [(2010) 8 SCC 430]***, the Hon'ble Apex court has observed as under:-

"35. Undoubtedly, the burden of establishing the plea of alibi lay upon the appellant. The appellant herein has miserably failed to bring on record any facts or circumstances which would make the plea of his absence even probable, let alone, being proved beyond reasonable doubt. The plea of alibi had to be proved with absolute certainty so as to completely exclude the possibility of the presence of the appellant in the rented premises at the relevant time. When a plea of alibi is raised by an accused it is for the accused to establish the said plea by positive evidence which has not been led in the present case. We may also notice here at this stage the proposition of law laid down in Gurpreet Singh v. State of Haryana [(2002) 8 SCC 18 : 2003 SCC (Cri) 186] as follows : (SCC p. 27, para 20)

"20. ... This plea of alibi stands disbelieved by both the courts and since the plea of alibi is a question of fact and since both the courts concurrently found that fact against the appellant, the accused, this Court in our view, cannot on an appeal by special leave go behind the abovenoted concurrent finding of fact."

13. It is the prosecution to prove its case by adducing evidence. The petitioner is at liberty to take the plea of alibi as his defence and to establish the same with positive evidence. Before prosecution adduce evidence to establish the incident, and to prove participation of the accused, there is no scope for entertaining a defence plea of alibi."

(C) From the observations made by the Hon'ble Apex Court in the judgments, referred above, the position which emerges out is as under:-

- (a) The prosecution has to prove its case including the role of the accused in that incident.
- (b) Only when prosecution succeeds in discharging the burden by establishing its case including participation of the accused in the crime/incident, the plea of 'Alibi' put up by the accused needs to be considered.
- (c) The burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime.
- (d) The burden would not be lessened by the mere fact that the accused has adopted the defence of 'Alibi'.
- (e) The plea of 'Alibi' of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily.
- (f) It is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence.
- (g) When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened.
- (h) If the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy.
- (i) Strict proof is required for establishing the plea of 'Alibi'. [vide: ***Dudh Nath Pandey v. State of U.P. (1981) 2 SCC 166 : 1981 SCC (Cri) 379; State of Maharashtra v. Narsingrao Gangaram Pimple (1984) 1 SCC 446 : 1984 SCC (Cri) 109 : AIR 1984 SC 63***].

(D) Thus, at this stage, the plea of 'Alibi' cannot be considered.

(E) The Hon'ble Apex Court in the case of **Hardeep Singh (supra)** in para 78 observed that *"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. 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".* and thereafter in para 85 it has been observed that *"in view of the discussion made and the conclusion drawn hereinabove, the answer to the aforesaid question posed is that apart from evidence recorded during trial, any material that has been received by the court after cognizance is taken and before the trial commences, can be utilised only for corroboration and to support the evidence recorded by the court to invoke the power under Section 319 CrPC. The "evidence" is thus, limited to the evidence recorded during trial."* and subsequently, in the case of **Rajesh and Others (supra)** in para 6.8 held that *"Considering the law laid down by this Court in Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] and the observations and findings referred to and reproduced hereinabove, it emerges that (i) the Court can exercise the power under Section 319 CrPC even on the basis of the statement made in the examination-in-chief of the witness concerned and the Court need not wait till the cross-examination of such a witness and the Court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination; and (ii) 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 (may be on the basis of the evidence collected in the form of statement made in the examination-in-chief of the witness concerned), it appears that such person can be tried along with the accused already facing trial."* and thereafter, in the case of **Manjeet Singh (supra)** observed as under:

"15.11. 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.

15.12. 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."

(F) In the instant case, PW-1/Kasim Khan, an injured eye-witness and informant, indicated the name of applicant and his testimony has been taken note by the trial court besides the testimony of PW-2/Jubeda (daughter-in-law of deceased), who was present at the place/situs of crime, and it is trite law that the evidence of an injured eye-witness has greater evidential value and unless compelling reasons exist, their statements are not to be discarded lightly, as observed by the Hon'ble Apex Court in the case of *State of M.P. v. Mansingh*, (2003) 10 SCC 414 : (2007) 2 SCC (Cri) 390] (para 9); *Abdul Sayeed v. State of M.P.*, (2010) 10 SCC 259 : (2010) 3 SCC (Cri) 1262]; *State of U.P. v. Naresh*, (2011) 4 SCC 324 : (2011) 2 SCC (Cri) 216].

(G) In view of above, the judgments relied upon by the counsel for the applicant are distinguishable on facts.

20. In view of the aforesaid, the present application is ***dismissed***. No order as to costs.

Order Date :- 10.9.2024

Arun/-