

IN THE PUNJAB & HARYANA HIGH COURT AT CHANDIGARH

CRR-2418-2013

Date of decision : 18.12.2015

Razak

... Petitioner

Versus

State of Haryana and others

... Respondents

***CORAM: HON'BLE MR. JUSTICE RAJIVE BHALLA
HON'BLE MRS. JUSTICE REKHA MITTAL***

Present: Mr.Veneet Soni, Advocate
for the petitioner.

Mr. Ravi Dutt Sharma, DAG, Haryana.

Mr. O.P.Goyal, Senior Advocate
with Mr. Randeep Singh, Advocate
for respondents No.2 to 5.

REKHA MITTAL, J.

The present petition lays challenge to order dated 09.07.2013 passed by the Additional Sessions Judge, Special Court (Crime against Woman), Palwal whereby the application filed by the complainant through the Public Prosecutor for summoning Pehlu son of Raokhan, Amardin son of Abdul Majid, Alimuddin son of Noor Mohd. & Sehrun son of Bhopat residents of village Chilli, Police Station Hathin, District Palwal as additional accused under Section 319 of the Code of Criminal Procedure (for brevity 'Cr.P.C.') has been dismissed.

The brief backdrop of this case is that FIR No.141 dated 29.05.2011, for an offence punishable under Sections 363, 366/34 of the

Indian Penal Code (in short 'IPC') in regard to kidnapping of daughter of complainant Rajjak by Anish son of Deenu and Sehju son of Bhopat was registered in Police Station Hathin, District Palwal. On recovery of alleged kidnapped girl, her statement under Section 161 Cr.P.C. was recorded on 27.02.2012 and offence under Section 376(g) was added. One of the accused namely Jafru son of Deenu was tried for commission of offence punishable under Sections 363, 366, 368 and 378 IPC and was acquitted of the offence, vide judgment dated 17.07.2012 passed by the Additional Sessions Judge, Palwal. Four accused namely Sehju, Usman, Anish and Hayyum were sent up for trial for the aforesaid offences and during pendency of trial, the instant application under Section 319 Cr.P.C. was filed for summoning of additional accused (respondents No.2 to 5). The learned Additional Sessions Judge, Special Court dismissed the application vide order impugned in the present petition. However, Sehju and others have been convicted by the said Court for the offence (s) charged against them and their appeal is pending.

Counsel for the petitioner would urge that the learned trial Court has committed a grave error by merely relying upon the statement of the prosecutrix recorded under Section 161 Cr.P.C. and the acquittal of Jafru, one of the accused with whom the prosecutrix performed marriage and later delivered a child. It is further submitted that statement of the prosecutrix under Section 161 Cr.P.C. was recorded on 27.02.2012 and she has clearly stated in her statement recorded during the trial that the police did not record correct facts in the statement on which her thumb impression was obtained. The learned trial Court has neither adverted to the statement

of the prosecutrix recorded under Section 164 Cr.P.C. by the Sub Divisional Judicial Magistrate, Hathin on 28.02.2012 Ex.PA nor her statement recorded in the Court Annexure R-2/4 for the purpose of recording satisfaction as to whether there is sufficient material on record to summon the additional accused. The learned Court has neither examined the provisions of Section 319 Cr.P.C. correctly nor the order can stand judicial scrutiny in view of judgment of the Constitution Bench of Hon'ble the Supreme Court of India ***Hardeep Singh Vs. State of Punjab and others, 2014(1) RCR (Criminal) 623***. It is further submitted that either the additional accused may be summoned by this Court to face trial for the offence committed by them or the matter may be remitted to the trial Court for consideration afresh in the light of enunciation of law laid down in ***Hardeep Singh's case (supra)***.

Counsel representing State of Haryana has echoed the arguments advanced by counsel for the petitioner.

Counsel for the contesting respondents Sh.O.P. Goyal, Senior Advocate while refuting contention of counsel for the petitioner has submitted that power under Section 319 Cr.P.C. is discretionary in nature and is to be exercised sparingly in the event of there being sufficient material on record against the person to be summoned as additional accused which would warrant his conviction. The prosecutrix appeared in the witness box during trial of accused Jafru and she not only did not support the prosecution but completely disowned the statement made by her to the police on 27.02.2012. Jafru was acquitted of the offence vide judgment dated 17.07.2012 passed by the Additional Sessions Judge, Palwal. In her statement recorded by the Magistrate under Section 164 Cr.P.C. as well as

her statement during trial of accused Sehju and others Annexure R2/4, she has not levelled any allegation against respondents No.2 to 5 that they committed rape upon her on any occasion whatsoever. According to learned counsel, in the circumstances of the present case, no interference in exercise of judicial discretion by the trial Court is warranted when otherwise no such finding can possibly be recorded that the learned trial Court has exercised its discretion arbitrarily much less the impugned order is perverse.

Another argument raised by counsel is that as trial against Sehju and others already stands concluded, the persons sought to be summoned as additional accused in no circumstances can be tried with the accused already before the Court, therefore, the provisions of Section 319 Cr.P.C. are not attracted. In support of his contention, he has cited Single Bench judgment of this Court *Rakesh Kumar Vs. State of Haryana and another, CRR No. 188 of 2011 decided on 04.10.2012.*

We have heard counsel for the parties and perused the records.

A bare reading of the impugned order makes it evident that the learned trial Court after referring to the provisions of Section 319 Cr.P.C. in extenso and the judgments passed by Hon'ble the Supreme Court of India in *Mohd. Shafi Vs. Mohd. Rafiq and anr. 2007 (2) RCR (Criminal) 762, Municipal Corporation Delhi Vs. Ram Krishan Rohtagi & Ors, 1983(1) RCR (Criminal) 73, Krishnappa Vs. State of Karnataka, 2004(4) RCR (Criminal) 678*, in para 6 has referred to the conduct of the prosecutrix that she appeared as a witness in the trial against accused Jafru, disowned the statement Ex.PD made to the police and further Jafru being acquitted by Sh.R.K.Dogra, the then Additional Sessions Judge, Palwal. In the

concluding para of the order, the Court held that evidence and material on record is not sufficient to summon the additional accused as from the quality of evidence adduced by the prosecution so far as the accused sought to be summoned is concerned, it is difficult to hold with any amount of certainty that same is in all probability would secure conviction against them.

The learned trial Court has neither adverted to the statement of the prosecutrix recorded by the Judicial Magistrate under Section 164 Cr.P.C. marked as Ex.PA nor to her statement dated 16.05.2013 recorded during trial. There is no dispute about the settled position in law that power under Section 319 Cr.P.C. is extra ordinary in nature and required to be used sparingly but at the same time, discretionary power is to be exercised by the Court judicially and with more care and caution. As the learned trial Court did not appreciate the statement of the prosecutrix recorded by the Judicial Magistrate under Section 164 Cr.P.C. on 28.02.2012 and her statement recorded during trial, we, therefore, find it difficult to sustain the impugned order which is based solely upon the fact that the prosecutrix disowned her statement (Ex.PD) made to the police when she was examined in the trial against Jafu (her husband). In ***Hardeep Singh's case (supra)***, question No.3 formulated by the Court reads as follows:-

“Whether the word “evidence” used in Section 319(1) Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word “evidence” is limited to the evidence recorded during trial.”

In para 80 of the judgment, the Court has held quoted thus:-

“80. 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 Cr.P.C. The 'evidence' is thus, limited to the evidence recorded during trial."

In view of the above, we have no hesitation to hold that the learned trial Court has failed to take into consideration the entire material on record for deciding if respondents No.2 to 5 are required to be summoned as additional accused or not.

The learned trial Court also committed an error in holding that as the material on record is not sufficient to secure conviction against the additional accused in all probabilities, exercise of jurisdiction under Section 319 Cr.P.C. is not warranted. The Hon'ble Apex Court in ***Hardeep Singh's case (supra)*** answered question No.(iv) "whether the power under Section 319(1) Cr.P.C. can be exercised only if the Court is satisfied that the accused summoned will in all likelihood be convicted", in the following terms:-

"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."

Counsel for the contesting respondents has raised a legal issue namely whether an additional accused can be summoned or put to trial even after conclusion of trial of the other accused with whom the additional accused “could be tried together”.

Admittedly, the application for summoning of respondents No.2 to 5 was filed during pendency of the trial rather immediately after examination of the prosecutrix was completed on 16.05.2013. The prosecutrix was the first witness examined in the case. The question that, therefore, arises for consideration is whether the respondents can escape their liability to face criminal proceedings merely because the trial against the accused, already before the Court, stands concluded. As per settled legal position, order allowing an application under Section 319 Cr.P.C. would relate back to the date of application. A serious prejudice is likely to be caused to the interest of justice as well as to the rights of the complainant in case the plea of the respondents is accepted that as the trial against Sehju and others already stands concluded, they can not be subject to criminal proceedings even if the application under Section 319 Cr.P.C. is meritorious. This apart, such a finding can well be exploited by unscrupulous prosecutors or vested interests by keeping the application pending till the trial is concluded. Even otherwise, the question is no longer res intergra. The Hon'ble Supreme Court of India in *Babubhai Bhimabhai Bokhiria and another Vs. State of Gujarat and others*, 2014(1) RCR (Criminal) 542 after referring to the judgment in *Shashikant Singh v. Tarkeshwar Singh and Anr.*, (2002)5 SCC 738, *Rajendra Singh v. State of U.P. & Anr.*, (2007)7 SCC 378 has held in para 15, as follows:-

“15. In the light of the above two decisions rendered by co-ordinate Benches of this Court, we have no hesitation in holding that even if the addition of the petitioner Babubhai Bhimabhai Bokhiria is held to be justified by the Constitution Bench of this Court, the mere fact that the trial of the remaining accused has already concluded, would not prevent the prosecution of the petitioner for the offences for which he has been summoned by the trial Court.”

In this view of the matter, we are of the considered opinion that an additional accused cannot be exonerated on the technical ground that the trial of the remaining accused has already been concluded.

The judgment by a learned Single Judge in ***Rakesh Kumar's case (supra)***, relied by counsel for the respondents in our considered opinion was a decision on its own peculiar facts and does not lay down a general proposition of law that conclusion of trial against the other accused renders the pending application, filed under Section 319 of the Cr.P.C., infructuous. Factually, one person was acquitted and other two were convicted. A perusal of Section 319 of the Cr.P.C. reveals that it uses the expression “could be tried together with the accused” and not “must be tried together with the co-accused”, thereby meaning a possibility of being tried together. The word “could” is used in the past tense in Section 319 of the Cr.P.C. and use of the word “be” after the word “could” fortifies this conclusion.

As has been noticed hereinbefore, the learned trial Court did not consider the entire material for the purpose of deciding the plea for summoning of respondents No.2 to 5 as additional accused. Hence, it would

be expedient in the interest of justice if the matter is remitted to the trial Court for decision afresh in the light of aforesaid observations and enunciation of law laid down in *Hardeep Singh's case (supra)*. The petition is allowed accordingly, the impugned order is set aside and the matter is remanded to the trial Court for decision afresh in accordance with law. However, nothing stated in this order shall be construed as an expression of opinion on merits of the statement of the prosecutrix recorded by the Judicial Magistrate under Section 164 Cr.P.C. and her testimony dated 16.05.2013 recorded during trial of Sehju and others.

(REKHA MITTAL)
JUDGE

(RAJIVE BHALLA)
JUDGE

December 18, 2015.
Davinder Kumar