

CRR-2780-2014 (O&M)

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**CRR-2780-2014 (O&M).
Decided on: January 29, 2015.**

Naresh

..... Petitioner(s)

Versus

State of Haryana

..... Respondent(s)

*** * ***

CORAM: HON'BLE MR. JUSTICE M.M.S. BEDI

**PRESENT Mr.J.S.Bedi, Sr., Advocate, with
Mr.Sunil Sihag, Advocate,
for the petitioner.**

Mr.M.S.Sidhu, Addl. A.G., Haryana.

**Mr.Sanjiv Kumar Panwar, Advocate,
for the complainant.**

M.M.S. BEDI, J (ORAL)

This is a revision petition against the order dated 19.07.2014 summoning the petitioner as additional accused to face trial in exercise of powers under Section 193 Cr.P.C.

Brief facts, relevant for the adjudication of the present petition are that on the complaint made by Kaptan Singh, FIR No.177 dated 22.5.2012, was registered under Sections 148, 149, 323, 324, 307 and 302 IPC read with Section 25 of the Arms Act, at Police Station, Hodal. .

As per the allegations in the said FIR pursuant to an incident of assault on Akash nephew of the complainant by Rahul,

CRR-2780-2014 (O&M)

son of Vikram, the complainant had gone to the house of Vikram to lodge a protest which was not relished by Vikram and he had threatened to teach a lesson to the complainant for making a complaint. While the complainant along with his son Bhisham, nephew Prince and Dheeraj was present in his house at about 6:30 PM, accused persons namely Parhlad, Naresh petitioner, Surrender, Hemraj and Rahul armed with weapons came there and started abusing him. Three young boys Sunil, Rohtash and Sikander also followed them on a motorcycle. Surrender fired a shot from country made pistol with an intention to kill Bhisham which hit him on the forehead. Hemraj fired at Prince. Naresh fired aiming the complainant. Other accused persons also fired at the complainant party besides giving them injuries with other weapons. Certain boys about 4-5 in number, pelted stones and bricks on them. On hearing the sound of fires, Yogesh and Umesh came on the spot and Sunil, Rohtash and Sikander escaped on their motorcycle brandishing and firing from their respective country made pistols. When Yogesh and Umesh were taking the complainant, his son Bhisham, Dheeraj and Prince to Palwal Hospital, Bhisham son of the complainant succumbed to his injuries. He was declared brought dead by the doctors of civil hospital. Thereafter, remaining injured were admitted in Om Sperio Hospital, Palwal.

On completion of investigation report under Section 173 Cr.P.C. was submitted only against accused Parhlad, Hem Raj,

CRR-2780-2014 (O&M)

Vikram, Surender, Rahul, Harender @ Harro, Rohtash and Shamshu @ Rajesh. They all were chargesheeted.

After arrest of accused Sunil on 22.2.2014, a supplementary challan under Section 173 (8) Cr.P.C. was submitted against him but the petitioner and Sikander had been declared innocent by the police.

After commitment of the case to the Court of Sessions, a application was filed by the complainant under Section 193 Cr.P.C., for taking cognizance against Naresh and Sikander claiming that there are specific allegations against petitioner Naresh and Sikander but the police on account of political influence had declared them innocent.

Application under Section 193 Cr.P.C., was filed after framing of charges against the above said accused. The trial Court vide impugned order dated 19.7.2014, has summoned the petitioner and Sikander for trial under Sections 147, 148, 323, 324, 307 & 302 IPC read with Section 25 of the Arms Act.

Mr.J.S.Bedi, learned Senior Advocate, appearing on behalf of the petitioner has vehemently contended that in the present case the charges had been framed and during pendency of the trial, an application was filed by the complainant on 9.10.2013, before DGP, Haryana for further investigation. The matter was marked to ADGP (Crime), Panchkula. During enquiry, Sunil Kumar was prima facie found guilty and he was arrested on 22.2.2014. Supplementary

CRR-2780-2014 (O&M)

challan was presented on 18.4.2014 against Sunil. The petitioner and co-accused Sikander had been found innocent even in the supplementary challan. Application under Section 193 Cr.P.C., moved by the complainant has been allowed to array the petitioner and Sikander as additional accused.

Counsel for the petitioner has further argued that since Sunil has been summoned on the basis of supplementary investigation whereas Naresh and Sikander though named in the original FIR had not been challaned, the complainant had an opportunity to file an application under Section 193 Cr.P.C., when the case was committed against Parhlad, Hemraj, Vikram and others to summon Naresh and Sikander as additional accused.

Counsel for the complainant, on the other hand, has argued that the complainant had got an opportunity to file an application under Section 193 Cr.P.C., when supplementary challan under Section 173 (8) Cr.P.C., was filed against Sunil, finding the petitioner and Sikander as innocent. Learned counsel for the complainant vehemently opposed the revision petition contending that the power under Section 193 Cr.P.C has been exercised in case State Vs. Sunil. Originally the challan had been filed under Section 173 (2) Cr.P.C against accused Prahlad, Hem Raj, Vikram, Surender, Rahul, Harender, Rohtash and Shamshu. He has further argued that accused Sunil was arrested on 22.02.2014 and a supplementary challan under Section 173 (8) Cr.P.C was filed against Sunil while

CRR-2780-2014 (O&M)

Naresh and Sikandar were again found innocent. However by allowing the application under Section 193 Cr.P.C, the Sessions Court has opted to take cognizance against them.

Learned State counsel has argued that the powers vested in the trial Court to summon the petitioner as accused under Section 193 Cr.P.C having been exercised by recording reasons, there is no scope for interference in the present revision petition.

I have heard the learned counsel for the parties and gone through the police record.

It is a fact that the petitioner has been named by the complainant at the first instance alleging that he fired a shot from his country made pistol hitting the complainant on his left leg. It is also a fact on the record that report under Section 173 (2) Cr.P.C., was not filed against Naresh the petitioner besides Sunil and Sikander while charge sheet was presented against Parhlad, Hem Raj, Vikram, Surender, Rahul, Harender, Rohtash and Shamshu. The complainant could have filed an application under Section 193 Cr.P.C., before the Sessions Court for summoning Naresh, Sikander or Sunil as additional accused but the said option was not exercised as a result of which charges were framed against accused Parhlad and others who were charge sheeted. The prosecution agency had examined nine witnesses while trying Parhlad and others.

The short question to be determined in the present case is whether the petitioner could have been summoned as

CRR-2780-2014 (O&M)

additional accused after the cognizance had been taken by the Sessions Court after framing of charges and examination of prosecution witnesses. Whether an application under Section 319 Cr.P.C. or an application under Section 193 Cr.P.C., would be an appropriate legal remedy for the complainant or the State to summon additional accused after framing of charges is also a question to be determined.

The relevant provisions of law required for adjudication of the present proposition may be referred to:-

Section 193 Cr.P.C., provides that Court of Sessions cannot take cognizance of any offence as Court of original jurisdiction unless a case has been committed to it by a Magistrate. Section 193 Cr.P.C., reads as follows: -

“193. Cognizance of offences by Courts of Session

Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code.”

Section 319 Cr.P.C. gives ample power to the Court to proceed against other persons appearing to be guilty of the offence. The provisions of Section 319 Cr.P.C., reads as follow: -

“319. Power to proceed against other persons appearing to be guilty of offence-

CRR-2780-2014 (O&M)

(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.

(2) Where such person is not attending the Court he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub-section (1) then—

(a) the proceedings in respect of such person shall be commenced afresh, and witnesses re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced.”

Under Section 190 of the Criminal Procedure Code, it is Magistrate of the First Class or Magistrate of Second Class specially empowered in this behalf to take cognizance of offence either on complaint or on police report or upon information received.

CRR-2780-2014 (O&M)

The Chief Judicial Magistrate, has got power to delegate to Magistrate of Second Class, the power to take cognizance of said offence as are within his competence to enquire into or try.

Section 190 of the Code of Criminal Procedure empowers a Magistrate to exercise powers of taking cognizance till he frames charges against one or more accused persons.

Similarly in Session trial cases, a Sessions Judge in the exercise of powers under Section 193 Cr.P.C., can take cognizance of offence against a person against whom there is sufficient material prior to framing of charges. In this context reference can be made to Judgment in case **Kishun Singh and others Vs. State of Bihar, 1993, Criminal Law Journal, 1700.** It has been held in the said case that in cases which are exclusively triable by Court of Session, the Magistrate was not competent to take cognizance but it was only Sessions Court which could take cognizance under Section 193 of the Code of Criminal Procedure 1973, after the case is committed to it by the Magistrate. It was further held in the said case that the Court can certainly take cognizance against the offender under Section 319 Cr.P.C., if any evidence is produced during the course of trial, yet this power under Section 319 Cr.P.C did not preclude the Sessions Court to summon a person in exercise of its power under Section 193 of the Code, if there is evidence to show involvement of the persons, not committed, in commission of the offence against whom the cognizance is

sought to be taken.

The decision of **Kishun Singh's** case was overruled by three Judge Bench decision of Supreme Court in **Ranjit Singh Vs. State of Punjab 1998 (7) SCC 149** wherein the Apex Court laid down that once the Sessions Court takes cognizance of the offence pursuant to the committal order, the only other stage when the Court is empowered to add any other person to the array of accused is after recording evidence.

The judgment in **Kishun Singh's** case and **Ranjit Singh's** case came up for consideration before Constitution Bench of Hon'ble the Apex Court in **Dharampal and others Vs. State of Haryana and another 2013 (3) RCR (Criminal) 787.** Upholding the judgment in **Kishun Singh's** case (supra), it was laid down in **Dharampal's** case that in session trial cases, the Sessions Judge after commitment of the case for trial to the Sessions Court, could issue summons under Section 193 Cr.P.C on the basis of the record transmitted to him as a result of committal order passed by the Magistrate. It was held that the Sessions Judge is not required to wait till the stage indicated in Section 319 Cr.P.C., and if satisfied on the basis of the material in report under Section 173 (2) Cr.P.C., it will be within the jurisdiction of the Sessions Court to issue summons to the additional accused.

As regards the stage of taking cognizance against the additional accused the law laid down by Hon'ble the Apex Court

in **Kishun Singh** case (supra) is that after taking cognizance of the offence the Court can take cognizance against other persons under Section 319 Cr.P.C. when the complicity of the persons other than those named as offender in the challan comes to the light from the evidence recorded in the course of trial.

Following the judgment in **Kishun Singh** case (supra), the Madhya Pradesh High Court in **D.R.Maheshwar Vs. State of M.P., 2001 (4) RCR (Crl.), 200**, has held that the Court of Sessions can take cognizance of offence under Section 193 Cr.P.C., prior to the framing of charges. Similarly, Rajasthan High Court in **Mahavir Prasad Vs. State of Rajasthan, 1995 (3) Crimes 103**, following the judgment in **Kishun Singh** case (supra), has held that stage of taking cognizance under Section 193/190 Cr.P.C., comes to an end after the trial Court had framed charges. It was held in paras 9 and 10 of the judgment that power to proceed against other persons could have been exercised only after Section 319 Cr.P.C. Similar view has been taken by the Rajasthan High Court in **Sohan Lal and another Vs. State of Rajasthan, 1999 Crl. L. J. 1261**.

The Delhi High Court also considered the stage at which the Sessions Court could take cognizance of the offence under Section 193 Cr.P.C., pursuant to the committal order. The Delhi High Court in **Rajender Singh Dogar Vs. The Stage of NCT of Delhi, 2013 (2) JCC 1279** following the judgment in **Kishun Singh** case (supra), and **Dharampal and others Vs. State of Haryana and**

another, 2004 (13) SCC 9, held that the Sessions Court was not entitled to take cognizance against additional accused after committal of the case without reaching the stage of Section 319 Cr.P.C. The order of Magistrate taking cognizance against additional accused in the exercise of powers under Section 190 Cr.P.C., was set aside.

In view of above judgments, I am of the considered opinion that a Magistrate in the exercise of powers under Section 190 Cr.P.C., cannot summon any additional accused in Sessions trial case but the said power can be exercised by the Sessions Court after committal of the case under Section 209 Cr.P.C., exercising jurisdiction under Section 193 Cr.P.C., as per judgment in Dharampal case (supra) but the said power can be exercised before framing of charges. After charges are framed cognizance against the additional accused not chargesheeted can be taken only in the exercise of powers under Section 319 Cr.P.C.

It is held that the stage of exercising powers under Section 193 Cr.P.C under **Dharmpal's** case (supra) is before framing of charges and recording of evidence. After charges are framed and the trial Court in Session trial opts to record evidence, in such eventuality, the additional accused can be summoned only in exercise of powers under Section 319 Cr.P.C. The said distinction has been recognised by the Rajasthan High Court, Madhya Pradesh High Court and Delhi High Court following the judgment in **Kishun Singh's** case (supra) which has been followed by the Constitution

CRR-2780-2014 (O&M)

Bench of Hon'ble the Supreme Court in **Dharmpal's** case (supra).

In view of the above, the impugned order dated 19.07.2014, summoning the petitioner as additional accused by allowing the application under Section 193 Cr.P.C is hereby set aside being illegal and improper, without prejudice to the rights of the complainant or the State to invoke provisions under Section 319 Cr.P.C. Expecting that the parameters laid down by Hon'ble the Apex Court in various judgments to exercise powers under Section 319 Cr.P.C would be followed in case any such application is moved, the petition is allowed with the abovesaid liberty.

January 29, 2015.
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(M.M.S. BEDI)
JUDGE