

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Misc. Petition No.218 of 2016**

1. Kapil Nirmalkar S/o Vishnu Nirmalkar Aged About 45 Years R/o Village Palansari, P.S. Pantdatarai, District Kabirdham Chhattisgarh.
2. Ramkumar Rajak S/o Tijau Rajak Aged About 43 Years R/o Village Janta, P.S. Dadhi, District Bemetara Chhattisgarh.
3. Taran Nirmalkar S/o Salikram Aged About 30 Years R/o Village Jinda, P.S. Pipariya, District Kabirdham Chhattisgarh.
4. Mithun Nirmalkar S/o Late Chhotu Nirmalkar Aged About 26 Years R/o Kodaha, P.S. Pandatarai, District Kabirdham Chhattisgarh.

---- Petitioners**Versus**

1. State of Chhattisgarh Through Station House Officer, Police Station Pipariya, District Kabirdham Chhattisgarh.
2. Pawan S/o Kapil Nirmalkar Aged About 20 Years R/o Palansari, P.S. Pandatarai, District Kabirdham Chhattisgarh.

---- Respondents

For Petitioners	Shri Sudhir Bajpai, Advocate.
For respondent/State	Ms. M.Asha, Panel Lawyer.

Hon'ble Shri Justice P. Sam Koshy**CAV ORDER****Reserved on 01/12/2016****Delivered on 05/12/2016**

1. The instant petition under Section 482 CrPC has been preferred assailing the order dated 06.01.2016 passed by the Additional Sessions Judge (FTC), Kabirdham in Special Sessions Trial No.155 of 2015. Vide the said impugned order, the court below on an application moved by the prosecutrix under Section 319 CrPC has allowed the same and has ordered for impleading the petitioners in the said Sessions Trial as accused persons.
2. The brief facts relevant for adjudication of the present petition is that,

on 25.10.2015 the complainant Manoj Chandrakar had lodged a report at Police outpost Dashrangpur under Police Station, Pipariya, District Kabirdham, alleging that his wife Smt. Jyoti Chandrakar was missing from her home without any intimation or information to any person. It was stated that his wife was aged around 16 years. Accordingly, a case under Section 363 against unknown persons was recorded and the matter was investigated. Subsequently, it was found that on 29.10.2015 at around 18:00 O'clock the said missing girl Jyoti Chandrakar along with main accused Pawan Nirmalkar appeared before the police outpost, Dashrangpur, Police Station, Pipariya and thereafter a recovery Panchnama of missing person was prepared accordingly.

3. After the missing person was recovered, the matter was investigated and on the date of her recovery i.e. 29.10.2015, the victim's statement under Section 161 CrPC was recorded. In the said statement, she had categorically made a statement that while she was studying with the main accused Pawan Nirmalkar, they had developed intimacy and had fallen in love, but later on she got married to a different person i.e. Manoj Chandrakar. After some time of marriage, the main accused Pawan Nirmalkar used to call upon the victim frequently. Thereafter, they decided to elope and accordingly planned for eloping and eloped with main accused Pawan Nirmalkar on 15.10.2015. A missing report was lodged by her Husband Manoj Chandrakar on 25.10.2015. The victim and the main accused Pawan Nirmalkar had travelled to different places and ultimately reached Raipur where they stayed from

15.10.2015 to 29.10.2015 and in between the main accused is said to have had physical relationship with the victim for about 7-8 times. When they came to know about lodging of missing report by Manoj Chandrakar, they decided to appear before the police station and accordingly reached the police station on 29.10.2015 and the recovery Panchnama was prepared.

4. In her 161 statement, she also admitted the fact that she and Pawan Nirmalkar had sent a letter in writing to the police authorities by registered post intimating that they had married together. It was also stated by the victim that while she had gone with Pawan Nirmalkar, there were no person along with them nor anybody else assisted or helped them in eloping. Similar statement was also recorded of the husband Manoj Chandrakar who had made a statement on the basis of what the victim had informed him when he had gone to the police station on 29.10.2015 after the victim was recovered. The father of the victim also while giving statement immediately after the girl was recovered stated that the victim had gone with Pawan Nirmalkar who had enticed her on the pretext of marriage. It was further submitted by him that he too was informed by the victim of having physical relationship with the Pawan Nirmalkar while she was in the company of Pawan Nirmalkar.
5. Based upon the said statements, statement under Section 164 CrPC of prosecutrix was also recorded. But, in her 164 statement, the prosecutrix made many contradictory statements which were not there in the statement under Section 161. The statement under Section 164

did not appear trustworthy. In 164 statement she has made a bald allegation that while on 15.10.2015 the main accused Pawan Nirmalkar had come for eloping, he was accompanied by the present petitioners who had also assisted the main accused in the act of eloping of the victim/prosecutrix with the main accused.

6. Based upon the investigation that was conducted and on the basis of the statement which were recorded during the course of trial, charge sheet was filed on 14.12.2015 against the said Pawan Nirmalkar alone. Later on, charge was also framed on 21.12.2015 against the main accused Pawan Nirmalkar and offence under Sections 363,366 and 376 IPC and also under Section 6 of POCSO was framed. However, subsequently, an application was moved under Section 319 CrPC at the behest of the prosecutrix on 26.12.2015 seeking for impleading the present petitioners also as the accused persons.
7. The said application under Section 319 CrPC was moved by the prosecutrix solely on the contention that in her statement under Section 164 she had discussed about the role played by the present petitioners in the commission of offence, and therefore, they were necessary to be impleaded as accused persons. In spite of opposing the said application, the court below vide impugned order has allowed the same and has ordered for impleading all the petitioners as accused persons on 06.01.2016 for the offence under Sections 363,366 and 376 IPC and Section 6 of the POCSO Act. It is this order which is under challenge in this petition.
8. Learned counsel appearing for the petitioners assailing the impugned

order submits that the court below has not properly appreciated the provisions of Section 319 CrPC before allowing the said application. According to him, the court below ought to have got itself fully satisfied before allowing the application under Section 319 CrPC. The court should not have passed the order in a mechanical manner without verifying the facts as to whether any substance was available in the case diary on the basis of which the petitioners could have been implicated as accused persons. It was also contended that the court below has failed to take into consideration the requirement of law as is required under Section 319 CrPC before allowing the same.

9. According to petitioners, the court below in the course of any inquiry or trial appears from the evidence that any person, not being the accused, to have committed the offence for which such person could be tried together with the accused, the court may proceed to make them as accused persons. Once when during the course of inquiry with the available materials, the investigating agency found that there was no strong materials against the present persons for being impleaded, there was no occasion for the court below to have entertained the application under Section 319 CrPC before the evidence of any of the witness was recorded. During the course of investigation, based upon the materials on record, the investigating agency did not found them to be accused persons and that was the reason why the charge sheet was filed against only one of the accused i.e. Pawan Nirmalkar and even while framing of charge it was only Pawan Nirmalkar against whom the charge was framed.

- 10.** It was next submitted that if at all if there was any occasion for adding of other accused in the case, it could have been only after the evidence was recorded. In the instant case since the stage of evidence has not started, application under Section 319 CrPC should not have been entertained by the trial court and it ought to have rejected the same.
- 11.** It was next submitted that the other persons could be impleaded as accused persons only on two stages i.e. during the stage of investigation if there are sufficient materials found and secondly; during the course of trial i.e. after during the course of recording of evidence if incriminating factors are received from the witnesses, then the application under Section 319 CrPC to add some additional accused, if at all, could have been done and not otherwise. Therefore, the order dated 06.01.2016 is per se illegal as the charge sheet was filed taking into consideration the statement of witness both under Section 161 as well as under Section 164 CrPC and the investigation agency did not find any material for impleading the present petitioners as accused persons at the stage of investigation therefore stands closed.
- 12.** Further, if the prosecution intended to add any new accused persons, it could have been only in the course of recording of evidence by the prosecution witnesses. Which in the instant case has not happened, and therefore, the impugned order is bad in law and deserves to be set aside. Thus, prayed for quashing of the impugned order and for discharging the present petitioners from the said case.

- 13.** Learned counsel for the State however opposing the petition submits that it is a case where the court below had taken into consideration the statement of the prosecutrix under Section 164 CrPC for allowing the application under Section 319 CrPC. According to State counsel, there was sufficient force in the statement of the prosecutrix and therefore the court below has allowed the said application as such no interference is required. Referring to statement of the prosecutrix made under Section 164 CrPC it is submitted that the prosecutrix has named each of the petitioners and have also spelt out the overt act committed by the petitioners which has perhaps forced the court below to allow the application under Section 319 CrPC and thus prayed for rejection of the petition.
- 14.** Having considered the contentions put forth on either side and on perusal of the record, it would trite at this juncture to refer to the impugned order first. A perusal of the impugned order clearly reflects that sole ground for allowing the application was the statement of the prosecutrix recorded under Section 164 CrPC wherein she had named the present petitioners of having forcefully abducted and taken her to Raipur, then to Bemetara and again to Raipur and was confined under their custody.
- 15.** Having considered the impugned order what is necessary to appreciate is whether there was sufficient material firstly for the prosecution or the prosecutrix to have moved the application at this stage under Section 319 CrPC against the present petitioners. The petitioner No.1 is the father of Pawan Nirmalkar, Petitioner No.2 is the

uncle of the main accused Pawan Nirmalkar. Petitioner No.3 is the first cousin of Pawan Nirmalkar. Likewise, petitioner No.4 is the brother in law of the main accused Pawan Nirmalkar inasmuch as petitioner No.4 is the Husband of the sister of main accused. Thus, it appears that, the entire male family members of the accused Pawan Nirmalkar have been implicated by moving an application under Section 319 CrPC.

16. A perusal of FIR only reflects that it was a missing report lodged by the husband Manoj Chandrakar. Later on, on 29.10.2015 the main accused Pawan Nirmalkar along with prosecutrix appeared before the police station for the purpose of recording their statements and it is then, that the prosecutrix was taken by her in laws and other family members i.e. the family members of the lodger of the FIR Manoj Chandrakar. On 29.10.2015 itself 161 statement of the prosecutrix and other family members were recorded where none of these persons/witnesses is said to have named the present petitioners of having played any role in abduction, kidnapping or eloping of the prosecutrix from her matrimonial home. On 29.10.2015 i.e. a date on which the girl was recovered, along with girl, other witnesses were also examined like Husband of the prosecutrix, father of the prosecutrix and in laws of the prosecutrix.
17. The prosecutrix in the instant case was a major lady and as she was already married some time back to one Manoj Chandrakar and as such it cannot be presumed that she was totally innocent or an ignorant person. She had sufficient knowledge of the worldly life. Next, what is also reflected is the fact that after recording of 161 statement

on 29.10.2015, 164 statement was recorded on 06.11.2015 and during these period, there was sufficient time for the prosecutrix to improve upon her version and accordingly she appears to have exaggerated and improved her statement from what she had initially stated.

18. Another aspect which cannot be brushed aside is the fact that in the instant case the charge sheet was filed much after recording of the statement under Section 164 and even at that point of time the investigating agency did not find any material against the petitioners for making them as accused persons in the instant case and even then neither the court nor the prosecution thought it proper for implicating the present petitioners also as accused persons.

19. Having crossed the stage of filing of charge sheet and framing of charge, the only stage on which now the application under Section 319 CrPC could have been moved or entertained was during the course of recording of evidence on behalf of the prosecution if there would have been some incriminating statements made by the prosecution witnesses against the present petitioners, in the absence of which this court is of the opinion that the stage for entertaining application under Section 319 CrPC was not proper.

20. In **Municipal Corporation of Delhi v. Ram Kishan Rohtagi & Others, 1983 (1) SCC 1**, the Supreme Court held as under:

“19. In these circumstances, therefore, if the prosecution can at any stage produce evidence which satisfies the court that the other accused or those who have not been arrayed as accused against whom proceedings have been quashed have also committed the offence the Court can take cognizance against them and try them along with the other accused. But, we would hasten to add that this is really an extraordinary power which is conferred on the Court and

should be used very sparingly and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken. More than this we would not like to say anything further at this stage. We leave the entire matter to the discretion of the court concerned so that it may act according to law. We would, however, make it plain that the mere fact that the proceedings have been quashed against respondent Nos. 2 to 5 will not prevent the court from exercising its discretion if it is fully satisfied that a case for taking cognizance against them has been made out on the additional evidence led before it.”

21. Relying upon the aforesaid principles, the Supreme Court again in the case of **Y. Saraba Reddy vs Puthur Rami Reddy & Another, AIR 2007 SCW 6260**, in paragraph 12 after discussing Section 319 of the Code held as under:

“12. ...The trial court can take such a step to add such persons as accused only on the basis of evidence adduced before it and not on the basis of materials available in the charge-sheet or the in the case diary, because such materials contained in the charge-sheet or the case diary do not constitute evidence...”

Again in paragraph 13 it has been held as under:

“13. ...Power under Section 319 of the Code can be exercised by the Court suo motu or on an application by someone including accused already before it. If it is satisfied that any person other than 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 that evidence of witnesses given in Court...”

22. Again in the matter of **Sarabjit Singh & Another v. State of Punjab & Another, AIR 2009 SC 2792**, in paragraph 17 after discussing the series of legal pronouncements made by the Supreme Court on

Section 319 of CrPC, it was held as under:

“17. ...An order under Section 319 of the Code, therefore, should not be passed only because the first informant or one of the witnesses seeks to implicate other person(s). Sufficient and cogent reasons are required to be assigned by the court so as to satisfy the ingredients of the provisions. Mere ipse dixit would not serve the purpose. Such an evidence must be convincing one at least for the purpose of exercise of the extraordinary jurisdiction.

For the aforementioned purpose, the courts are required to apply stringent tests; one of the tests being whether evidence on record is such which would reasonably lead to conviction of the person sought to be summoned.”

23. To carry forward the same principles the Supreme Court again recently in a Five Judges Bench judgment in the case of **Hardeep Singh v. State of Punjab & Others, AIR 2014 SC 1400**, while deciding the bunch of criminal appeals, discussed the stage of inquiry and the stage of trial. In paragraph 25 while considering the stage of inquiry, it was held as under :

“25. The stage of inquiry commences, insofar as the court is concerned, with the filing of the charge-sheet and the consideration of the material collected by the prosecution, that is mentioned in the charge-sheet for the purpose of trying the accused. This has to be understood in terms of Section 2(g) Cr.P.C., which defines an inquiry as follows:

“2(g) “inquiry” means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court.””

In paragraph 27 dealing with the issue of trial it held as under :

“27. Trial is distinct from an inquiry and must necessarily succeed it. The purpose of the trial is to fasten the responsibility upon a person on the basis of facts presented and evidence led in this behalf. [In Moly & Anr. v. State of Kerala](#), AIR 2004 SC 1890, this Court observed that though the word ‘trial’ is not defined in the Code, it is clearly distinguishable from inquiry. Inquiry must always be a forerunner to the trial. A three-Judge Bench of this Court in [The State of Bihar v. Ram Naresh Pandey & Anr.](#), AIR 1957

SC 389 held:

“The words 'tried' and 'trial' appear to have no fixed or universal meaning. No doubt, in quite a number of sections in the Code to which our attention has been drawn the words 'tried' and 'trial' have been used in the sense of reference to a stage after the inquiry. That meaning attaches to the words in those sections having regard to the context in which they are used. There is no reason why where these words are used in another context in the Code, they should necessarily be limited in their connotation and significance. They are words which must be considered with regard to the particular context in which they are used and with regard to the scheme and purpose of the provision under consideration.” (Emphasis added)”

Again in paragraph 65 referring to a old decision, it has been held as follows :

“65. In Kishun Singh (1993 AIR SCW 771) (supra), this Court held :

“11. On a plain reading of sub-section (1) of Section 319 there can be no doubt that it must appear from the evidence tendered in the course of any inquiry or trial that any person not being the accused has committed any offence for which he could be tried together with the accused. This power (under Section 319(1)), it seems clear to us, can be exercised only if it so appears from the evidence at the trial and not otherwise...”

Further, in paragraphs 71, 72, 79 and 80, the Supreme Court has reiterated, as under:

“71. It is, therefore, clear that the word “evidence” in Section 319 Cr.P.C. 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 power under Section 319 Cr.P.C. is to be exercised and not on the basis of material collected during investigation.

72. The inquiry by the court is neither attributable to the investigation nor the prosecution, but by the court itself for

collecting information to draw back a curtain that hides something material. It is the duty of the court to do so and therefore the power to perform this duty is provided under the Cr.P.C.

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79. The word “evidence” therefore has to be understood in its wider sense both at the stage of trial and, as discussed earlier, even at the stage of inquiry, as used under Section 319 Cr.P.C. The court, therefore, should be understood to have the power to proceed against any person after summoning him on the basis of any such material as brought forth before it. The duty and obligation of the court becomes more onerous to invoke such powers cautiously on such material after evidence has been led during trial.

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.”

- 24.** In view of this aforesaid authoritative decision of the Five Judges Bench of the Supreme Court, nothing further remains to be adjudicated upon. All that is now to be seen in the factual context of the present case is whether the Court below was justified in the instant case in allowing the application under Section 319 of CrPC. As has been stated in the preceding paragraphs while narrating the facts, the statement of the prosecutrix and a whole lot of the witnesses was recorded on 29.10.2015 and none of the witnesses had taken the name of the Petitioners stating them to have played any role in the commission of the alleged offence. The statement of the prosecutrix under Section 164 of CrPC was recorded on 06.11.2015. Charge-sheet was filed after about more than a month's time on 14.12.2015

and the charge was also framed on 21.12.2015 by the Trial Court. However, before the evidence of the prosecution could have started the prosecutrix moved an application under Section 319 of CrPC along with an application under Section 302 seeking permission to assist the prosecution, and both these applications were allowed leading to the filing of the present petition under Section 482 of CrPC.

- 25.** Thus, when the judicial pronouncements referred to in the preceding paragraphs clearly stipulate that the Court could have only allowed an application under Section 319 only if in the course of recording of evidence there would had been some materials or statements being made against the accused and which were also cogent enough sufficient if not rebutted leading to the conviction of that person. What is also clear from the judicial pronouncements is that the power under Section 319 is a discretionary and extraordinary power. It is to be exercised sparingly and only in case if the situation compels or warrants the Court to allow the same. It is to be used only where strong and cogent evidence is produced during the course of evidence led before the Court that such powers has to be used and not in casual and cavalier manner. The Supreme Court has clearly spelt out that the test which 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 unrebutted, would lead to conviction. In the absence of such satisfaction the Courts should refrain from exercising the powers under Section 319 of CrPC. Section 319 of CrPC which stipulates that when “it appears from the

evidence that any person not being the accused has committed any offence” clearly indicates that such powers can be exercised by the Court only in the course of recording of evidence which in the instant case has not commenced.

26. For the foregoing reasons, this Court has no hesitation in reaching to the conclusion that the Court below was not justified at this stage of trial allowing the application under Section 319 of CrPC and the impugned order has been passed in violation to the authoritative judicial pronouncements made in this regard and is therefore not sustainable and the same is accordingly set aside/quashed. The Petitioners stand discharged from the case.

27. Petition allowed.

Sd/-
(P. Sam Koshy)
Judge

inder