

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

**Criminal Revision No.2911 of 2015
Date of decision: 02.06.2016**

Guddi @ Kalo @ Munesh and another

..Petitioners

Versus

State of Haryana and another

..Respondents

CORAM: HON'BLE MRS. JUSTICE DAYA CHAUDHARY

- 1. Whether reporters of local newspapers may be allowed to see judgment? Yes/No**
- 2. To be referred to reporters or not? Yes/No**
- 3. Whether the judgment should be reported in the Digest? Yes/No**

Present: Mr. Balraj Gujjar, Advocate
for the petitioners.

Mr. Sanjay K. Saini, AAG, Haryana
for respondent No.1 – State.

Mr. Vinod S. Bhardwaj, Advocate
for respondent No.2.

Daya Chaudhary, J.

The present revision petition has been filed to challenge impugned order dated 14.07.2015 passed by the Additional Sessions Judge, Bhiwani, whereby, the application moved by the prosecution under Section 319 Cr.P.C for summoning the petitioners and two other persons, namely, Rakesh and Hemraj, has been partly allowed. The petitioners have been summoned to face trial as an additional accused and qua two others, it was dismissed.

Briefly, the facts of the case are that respondent No.2 made a complaint dated 20.09.2014 to Police levelling allegations of commission of

rape upon her, on the basis of which, FIR No.317 dated 20.09.2014 was

registered under Sections 376(2), 506, 385, 328 and 120-B of Indian Penal Code and Section 6 of the Protection of Children from Sexual Offences Act, 2012 against Nitin, Rekha, Guddi, Hemraj and Rakesh. During the course of investigation, the petitioners were found innocent and report under Section 173 Cr.P.C. was filed only against main accused, namely, Nitin. After filing final report under Section 173 Cr.P.C., the statement of the prosecutrix was recorded before the trial Court as PW2. She reiterated the same version as stated in the complaint. Thereafter, an application was moved under Section 319 Cr.P.C. for summoning four persons, namely, Rekha, Guddi @ Kalo, Hemraj and Rakesh as additional accused to face trial. Said application was allowed qua the present petitioners vide order dated 14.07.2015, which is subject matter of challenge.

Learned counsel for the petitioners submits that the order of summoning has been passed without considering the fact that the prosecutrix did not approach the Court with clean hands as at the time of lodging of FIR, she claimed herself to be minor whereas this fact was found to be false. Merely, the statement of the prosecutrix was not sufficient to summon the petitioners as an additional accused. Learned counsel also submits that the provisions of Section 376 IPC are not applicable against a women. The allegations levelled against the petitioners were found to be false at the initial stage but subsequently, only on the basis of statement of the prosecutrix but without having any fresh evidence, the petitioners have been summoned. Simply by alleging that the petitioners were involved in conspiracy to facilitate the main accused to commit rape they have been summoned. Learned counsel also submits that the petitioners never

in the complaint as well as in her statement. There was delay of two years in lodging of the FIR and the version of the prosecution is highly doubtful. No evidence was collected with regard to mixing the tablets in the tea of the prosecutrix and as such, the impugned order is liable to be set aside.

Learned State counsel submits that not only in the complaint but in the statement recorded under Section 164 Cr.P.C. as well, the complainant has levelled specific allegations against the petitioners and other persons that she was blackmailed by them after commission of rape and obtaining nude photographs by main accused, namely, Nitin.

Learned counsel for respondent No.2 submits that the complainant has challenged the impugned order of non-summoning of Hemraj and Rakesh by way of filing Criminal Revision No.2870 of 2015 and while dismissing the same on 26.08.2015, it was specifically observed that the trial Court has rightly passed order dated 14.07.2015 and no interference is required. In said order dated 14.07.2015, the application was partly allowed as accused-Guddi and Rekha were ordered to be summoned to face trial along with other accused, who are already facing trial but by stating that there was only passing reference regarding the involvement of Rakesh and no evidence was there to prove any meeting of mind at any point of time to commit the offence or to facilitate the same, the application qua others was dismissed.

Heard arguments of learned counsel for the parties and have also perused the impugned order as well as other documents available on the file.

Admittedly, FIR No.317 dated 20.09.2014 was registered at the

instance of complainant-Lalita wherein certain allegations with regard to

commission of rape were levelled against four persons. It is also not disputed that the application under Section 319 Cr.P.C. was moved by the prosecution for summoning four persons, namely, Rekha, Guddi, Hemraj and Rakesh as these persons were found innocent during investigation and challan was presented only against main accused, namely, Nitin. Vide order dated 14.07.2015, the aforesaid application was dismissed qua two persons, namely, Hemraj and Rakesh as no prima facie case was made out to prove their involvement whereas application qua the present petitioners was allowed and the petitioners were summoned vide order dated 14.07.2015 to face trial as additional accused along with main accused, namely, Nitin, which has been challenged in the present revision petition.

It is the argument of learned counsel for the petitioners that the allegations levelled by the complainant cannot be relied upon as at the time of lodging of FIR, she claimed herself to be minor but during course of investigation, her stand was found to be false. The provisions of Section 376 IPC are not applicable qua the petitioners being females and even no evidence was collected to prove their involvement in the conspiracy to facilitate the incident for the main accused, namely, Nitin for commission of offence of rape. Moreover, there was no fresh evidence available before the Summoning Court to summon the petitioners as additional accused to face trial. The allegations of blackmailing the prosecutrix for extracting money were levelled but the petitioners never blackmailed her and no evidence was available for proving the same. It is also the argument of learned counsel for the petitioners that there was a delay of two years in lodging of the FIR and the version of the prosecution is highly doubtful. Even no evidence with

Investigating Agency.

The main emphasis of learned counsel for respondent No.2 is on the fact that the impugned order was also challenged by the complainant by way of filing Criminal Revision No.2870 of 2015 for non summoning of the accused, namely, Hemraj and Rakesh but the same was dismissed by observing that the order of summoning only qua the present petitioners was justified.

Section 319 Cr.P.C is reproduced as under for resolving the present controversy, :-

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

As per provisions of Section 319 Cr.P.C., in case, it appears to the Summoning Court that any other person, who has not been challaned, is also involved in the commission of offence, can be summoned and tried together with the accused, who are facing trial. This remedy can be availed when the Court comes to the conclusion that during an inquiry or trial, it appears to the Court that the persons sought to be summoned are also involved in the commission of offence.

While exercising powers under Section 319 Cr.P.C., it is to be seen by the Summoning Court as to what role has been played by the person, who is sought to be summoned, whether said person is also involved but has not been challaned. Power under Section 319 Cr.P.C is an extraordinary power, which is to be exercised if, compelling reasons are there or more than *prima facie* case is made out. Only on the basis of vague and general allegations or on recording casual statement of the witnesses, such person can't be summoned. The Court is to arrive at a conclusion/satisfaction that the evidence adduced on behalf of the prosecution, if goes un-rebutted, would lead to conviction of persons sought to be summoned. This extraordinary power can be exercised by the Court *suo-moto* or on an application moved by the complainant/prosecution, in case, it appears to the Court that there is an evidence, which shows the involvement of such person in commission of offence. The Summoning Court must be satisfied that there exists a possibility that the person sought to be summoned can be convicted.

The controversy, in hand, is squarely covered by the decision rendered in *Sarojben Ashwinkumar Shah etc. vs State of Gujarat and others 2011(3) RCR (Criminal) 852*, wherein, it was held that the Court while exercising the powers under Section 319 of the Code, must keep in view full conspectus of the case including the stage at which the trial has proceeded already and the quantum of evidence collected till then. It was further held that power to summon accused under Section 319 of the Code is an extraordinary power and should be used very sparingly and only if compelling reasons exist. This power cannot be exercised only on the basis of conducting a fishing inquiry.

This Court in case *Hasin and another vs State of Haryana 2011(2) RCR (Criminal) 429*, has held that vague and ambiguous or casual statement made by witnesses cannot be made the basis to summon the person to face trial under Section 319 of Code of Criminal Procedure.

Hon'ble the Apex Court in case *Ram Singh and others vs Ram Niwas and another 2009(3) RCR (Criminal) 501* has held that power under Section 319 Cr.P.C must be exercised very sparingly and not as a matter of course. It is further held that it is error to summon a person as additional accused on the ground that a prima-facie case was made out. The court is to arrive at a satisfaction that evidence adduced on behalf of the prosecution, if un-rebutted, would lead to conviction of the persons sought to be added as accused in this case.

Hon'ble the Apex Court in case *Mohd. Shafi vs Mohd. Rafiq and another 2007(2) RCR (Criminal) 762* has held that before the court exercises its discretionary jurisdiction in terms of Section 319 of the Code

possibility that the accused so summoned in all likelihood would be convicted.

In judgment of Hon'ble the Apex Court in ***Hardeep Singh and another vs State of Punjab and others 2014(1) RCR (Criminal) 623***, it has been held that the degree of satisfaction for summoning a person under Section 319 Cr.P.C would be the same as for framing of charge but satisfaction of the Court is to be relevant in case and only when, the Summoning Court is of the opinion that some other persons are also involved in the commission of the offence. Not only *prima facie* case is to be established from the evidence led before the Court but that material, which has come in the form of statement, is sufficient for framing of charge.

In the present case, the allegations levelled against the present petitioners are that they called the prosecutrix in their home and offered her tea. Petitioner No.1-Guddi prepared the intoxicant laden tea and served the same to the complainant, Thereafter, they left the room and accused-Nitin committed rape upon the prosecutrix. The allegations levelled against the present petitioners were found to be false and they were found innocent during investigation. Thereafter, the prosecutrix reiterated her version while appearing in the Court as PW2, subsequent whereupon an application was moved under Section 319 Cr.P.C. for summoning four persons. The Summoning Court dismissed the application qua two persons, namely, Hemraj and Rakesh as no evidence was there to prove their involvement and the application was partly allowed qua the petitioners and they were ordered to be summoned as additional accused to face trial along with main accused, namely, Nitin, who was already facing trial. Complainant also filed revision

Hemraj and Rakesh and the same was dismissed on 26.08.2015. Simply by relying on the fact that it has been held therein that the order of summoning is justified, it cannot be considered that the order of summoning qua the present petitioners was upheld as the petitioners were not even a party in that case and the complainant has challenged only the non-summoning of Hemraj and Rakesh.

On perusal of statement of the complainant, the allegations levelled in the FIR and the final report, it appears that no evidence of conspiracy or facilitation by the petitioners in commission of offence by main accused has been proved. Moreover, the petitioners are females and they cannot be involved in commission of offence of rape. The alleged occurrence has taken place in the house of Hemraj and the prosecutrix was shown to be taken to upper part (*Chobara*) of the house where the tea was offered to her by the petitioners. Thereafter, the petitioners left the place of occurrence. The allegations of blackmailing and preparation of nude photographs of the prosecutrix are levelled against main accused, namely, Nitin, who is already facing trial.

The investigation of the case was conducted by the Officer of rank of Deputy Superintendent of Police and the petitioners were found innocent. No evidence has come on record in the statement of the prosecutrix as she has reiterated the same allegations as have been levelled in the FIR. The Summoning Court while allowing the application moved under Section 319 Cr.P.C. has not given any specific finding as to how the petitioners were involved in commission of offence and how their involvement in facilitation of the main accused to commit offence was

there. The Investigating Agency could not even collect any evidence with

regard to mixing of the tables in the tea of the prosecutrix.

It has been held in **Hardeep Singh's case (supra)** that the satisfaction for summoning a person under Section 319 Cr.P.C. should be the same as for framing of charge and said satisfaction is to be recorded in case, the Summoning Court is of the opinion that some other persons, who have been sought to be summoned are also involved in commission of offence. Not only prima facie case is to be seen from the evidence led before the trial Court but it is also to be seen as to whether the persons sought to be summoned can be convicted on the basis of said evidence available on record.

In view of the facts and law position as discussed above, the allegations levelled against the present petitioners were not proved and they were found innocent during investigation but subsequently, they have been summoned by the Summoning Court, simply by stating that the petitioners were also involved in commission of offence as they facilitated the main accused to commit the offence. Neither any involvement has been shown nor any activity of facilitation has been proved on record. Even nothing has been collected by the Investigating Agency as to whether there was some intoxicant substance in the tea or not. Moreover, the present FIR was registered after a delay of two years and the same has not been explained.

Accordingly, the present revision petition is allowed and impugned order dated 14.07.2015 passed by the Additional Sessions Judge, Bhiwani is set-aside.

02.06.2016
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(DAYA CHAUDHARY)
JUDGE