

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO. 4070 OF 2016

Dr. Suryaprakash J. Karande and anr.

.....Petitioners

V/s.

The State of Maharashtra and Anr.

.....Respondents

* * * * *

Mr. Ashish Chavan a/w. Mr. Amit Kharkhanis and Ms. Suparna Holamagi i/by. Kay Legal & Associates LLP, Advocate for the petitioners.

Ms. Anamika Malhotra, APP for respondent no.1, State.

Mr. D.G. Dhanure, Advocate for respondent no.2.

CORAM :- SMT. R.P. SONDURBALDOTA, J.

DATED :- 24TH JANUARY, 2017.

P.C. :-

1). The petitioners are the gynecologists practising in the city of Solapur. They have been added under Section 319 Criminal Procedure Code as accused to Regular Criminal Case No. 277 of 2012 for the offences punishable under Sections 4(3), 5(1)(b), 5(1)(c), 29(1) of the Pre Conception and Pre Natal Diagnostic Techniques Act, 1994 ("the PCPNDT Act" for short). On 27th July,

2016 the trial Court issued process against the petitioners and they were served with the summons. The petitioners challenged the order of issuance of process before the District Court by filing Revision Application No. 114 of 2016. The Revision Application was rejected on 4th October, 2016. In the meantime, the trial Court, on 6th September, 2016 had framed charge against the petitioners and called upon them to cross-examine the prosecution witnesses on their depositions already recorded. The petitioners then once again approached the Sessions Court with Criminal Revision Application No. 126 of 2016 alleging non-compliance with Section 319(4) Criminal Procedure Code ("Cr.P.C." for short).

2) It was contended by them before the Sessions Court relying upon the decision of the Apex Court in **Shashikant Singh Versus. Tarkeshwar Singh and another reported in (2002) 5 Supreme Court Cases page 738**, that the requirement of Section 319(4) of Cr.P.C. regarding *de-novo* trial of a person added to the criminal proceedings under Section 319 (1) Cr.P.C. is mandatory. The Sessions Court, noted from the perusal of the record that charge had been framed against the original accused on 3rd April, 2013 after recording evidence before charge. Five witnesses were examined on behalf of the original complainant and thereafter on 21st June, 2016, the application vide Exhibit-299 for adding the petitioners as accused was filed. The trial Court allowed the application on 27th July, 2016 and issued process against the petitioners. The Sessions Court, referred to the decision in *Shashikant Singh's* case (supra) and held that the trial Court had

failed to follow the mandatory provision under Section 319(4) Cr.P.C. It observed that the proceedings are a private complaint which is tried as warrant triable case. In that, the evidence before the charge may be same as was available to the original accused but even at that stage, opportunity to cross-examine the complainant's witness before charge is a vital right given to the accused which must be made available to the petitioners and before giving that right to the accused further step of framing the charge could not have been undertaken by the trial Court. It therefore allowed the Revision Application and set aside the charge framed against the petitioners. The order further directed the trial Court to follow the mandatory provisions of Section 319(4) Cr.P.C. before further proceeding in the matter.

3). In view of the directions of the Sessions Court, the trial Court passed the following order :-

“to adduced evidence refresh or adopt the previous one as per sec 319(4) of Cr.P.C. & proceeding is hereby denovo against the newly added accused no.2 & 3.”

Thereafter, the prosecution filed a purshish stating that, it would be relying upon the examination-in-chief of P.W.2 as the evidence against the petitioner.

4). The petitioners then once again approached the Sessions Court by way of Criminal Revision Application No. 139 of 2016 contending that the earlier evidence of examination-in-chief

recorded in the absence of the petitioners cannot be read against them and the entire evidence had to be recorded afresh against them. The Sessions Court, by the order dated 21st November, 2016 dismissed the revision. It noted that, the stage at which the petitioners were added to the proceedings was relevant for considering the complaint of the petitioners. They were added at the stage when even the cross-examination of about four witnesses was over. As such, their evidence could not have been recorded in the presence of the petitioners. Therefore, in that respect, the provision of Section 319(4) cannot be said to be mandatory. It expressed an opinion that the Revision Application filed by the petitioners was nothing but another attempt by them to protract the matter. It further observed that the impugned order being an interlocutory order and the learned Magistrate having adopted the proper procedure stating that the proceedings are being held *de-novo*. It observed all that the prosecution had done was to adopt the previous examination-in-chief and that there was no need for the examination-in-chief to be recorded *de-novo* or afresh. Particularly when the examination-in-chief already recorded cannot be said to be different from the same, no prejudice is going to be caused to the petitioners. Since the rights of the petitioners are not affected and the matter has not culminated finally, the Revision filed was not maintainable. Being aggrieved by this order, the petitioners have filed the present petition.

5). Mr. Chavan, the learned Advocate appearing for the petitioners once again relies upon the decision of the Apex Court in

Shashikant Singh's case and para-9 in particular to submit that it is incumbent upon the prosecution to record the entire evidence against the petitioner *de-novo* including the examination-in-chief. He refers to the following observations from the decision of the Apex Court to support his submission :-

“ . The safeguard provided in respect of such person is that, the proceedings right from the beginning have mandatorily to be commenced afresh and the witnesses re-heard. In short, there has to be a de novo trial against him. The provision of de novo trial is mandatory. It vitally affects the rights of a person so brought before the Court. It would not be sufficient to only tender the witnesses for the cross-examination of such a person. They have to be examined afresh. Fresh examination in chief and not only their presentation for the purpose of the cross-examination of the newly added accused is the mandate of [Section 319\(4\)](#). The words 'could be tried together with the accused' in [Section 319\(1\)](#), appear to be only directory. 'Could be' cannot under these circumstances be held to be 'must be'.”

6). His second submission is that, the main concern of the petitioners is that some of the relevant documents produced by the prosecution have not been properly proved. Relying upon unreported decision of a Single Judge of this Court dated 19th and 22nd September, 2008 passed in the case of **Geeta Marine Services**

Pvt. Ltd and Another Vs. The State and Another (Criminal Application No. 2633 of 2008 and other connected petitions) he argues that, the objection regarding proof of a document has to be raised as and when the document is tendered in examination-in-chief and the same has to be decided there and then and cannot be postponed to any future date. According to Mr. Chavan, unless the examination-in-chief of the witness of the prosecution is examined separately, the petitioners will not be able to raise objection as regards the insufficiency of proof of the documents. Consequently, the opportunity of challenging the deficiency of evidence or insufficiency of proof or incorrect mode of proof of a document would be denied to them.

7). Since heavy reliance is placed by Mr. Chavan upon the decision of the Apex Court in *Shashikant's* case (supra), the decision needs deeper consideration. The first aspect that must be noted of the decision cited is, the question of law that arose for the consideration of the Apex Court. The question of law stated at the first para of the decision and its answer at para-14, thereof read as under :

“1. Can a person summoned pursuant to an order passed by a court in exercise of power conferred by [Section 319](#) of the Code of Criminal Procedure, 1973 (the Code) be tried for the offence for which he is summoned after the conclusion of the trial wherein such an order of summoning was passed, is the question that falls for determination in this appeal. Such a question regarding the interpretation of [Section 319](#) of the Code has arisen for the first time. The answer would depend upon the interpretation

of the words 'could be tried together with the accused' in [Section 319](#) of the Code.”

“9. The intention of the provision here is that where in the course of any enquiry into, or trial of, an offence, it appears to the court from the evidence that any person not being the accused has committed any offence, the court may proceed against him for the offence which he appears to have committed. At that stage, the court would consider that such a person could be tried together with the accused who is already before the Court facing the trial. The safeguard provided in respect of such person is that, the proceedings right from the beginning have mandatorily to be commenced afresh and the witnesses re-heard. In short, there has to be a de novo trial against him. The provision of de novo trial is mandatory. It vitally affects the rights of a person so brought before the Court. It would not be sufficient to only tender the witnesses for the cross-examination of such a person. They have to be examined afresh. Fresh examination in chief and not only their presentation for the purpose of the cross-examination of the newly added accused is the mandate of [Section 319\(4\)](#). The words 'could be tried together with the accused' in [Section 319\(1\)](#), appear to be only directory. 'Could be' cannot under these circumstances be held to be 'must be'. The provision cannot be interpreted to mean that since the trial in respect of a person who was before the Court has concluded with the result that the newly added person cannot be tried together with the accused who was before the

Court when order under [Section 319\(1\)](#) was passed, the order would become ineffective and inoperative, nullifying the opinion earlier formed by the Court on the basis of evidence before it that the newly added person appears to have committed the offence resulting in an order for his being brought before the Court.”

From the very first para of the decision cited, it becomes clear that the question framed by the Apex Court for its consideration was entirely different from that arising in the present proceedings. The most crucial fact in the decision cited was, conclusion of the trial in which the order of summoning a person under Section 319 Cr.P.C. was passed and the consequence of the fact. Therefore, the question of interpretation of words “could be tried together with the accused” in Section 319 (1) Cr.P.C. was considered. While answering the question framed by it, the Apex Court at para-14 quoted above made certain general observations as regards the provision of Section 319 Cr.P.C., the intention behind it and the safeguards provided therein to being tried in exercise of the power of the Court thereunder. The Apex Court, thus was not required to consider interpretation of the terms used in Section 319(4) Cr.P.C.

8). The provision of Section 319(4) Cr.P.C. reads as under :-

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

(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 the 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.”

9). According to Mr. Chavan, plain reading of the provision would mean recording of the entire evidence of each witness afresh including his examination-in-chief. The argument in the first flush of things may appear correct but on further consideration needs to be rejected. Firstly, the evidence of examination-in-chief of the witnesses already examined may not be different for the person summoned under Section 319 Cr.P.C. If any additional evidence of the witnesses already examined is required that would be the prerogative of the prosecution. Secondly, if the same witness is asked to depose again for the entire matter for the person summoned there would be a possibility of some omission or inconsistency creeping in knowing the limitations of human memory. Thirdly, it would be an avoidable exercise consuming time and delaying the trial. Therefore, it is not possible to accept the argument that the entire evidence has to be recorded *de-novo*.

10). But at the same time, there is merit in the second argument of Mr. Chavan on the availability of an opportunity to

raise objections to the documents that have been taken on record and marked as exhibits in evidence during the course of examination-in-chief. This is a valuable right that cannot be denied to a party to the proceedings. This objection i.e the objection to sufficiency of evidence on record to admit a document in evidence and mark it as an exhibit has to be necessarily taken at the time, the document is tendered for admission in evidence so as to enable the party producing the document to bring in additional evidence in it's proof at a later stage, if the evidence is held to be insufficient. As regards the party raising objection, the decision on the objection makes the scope of cross-examination on the document clear.

11). In the situation, as in the present case, where a person is summoned in, mid-trial under Section 319 Cr.P.C. the opportunity can be made available, by permitting him to raise objection to the document, where objection has not been taken earlier and decided, before he proceeds to cross-examine the witnesses already examined. On such objection being taken, the Court shall decide the same. If the objection is upheld, the Court would permit the party producing the document to lead additional evidence to prove the document if it so desires. Such additional evidence may be by recall of a witness. If the objection is not upheld, the party raising objection would have usual recourse to law.

12). In the circumstances, the petition is disposed off with following directions :-

. Before the petitioner proceeds with cross-examination of the witnesses examined, the trial Court shall permit the petitioner to raise objection of sufficiency of proof or of incorrect mode of proof of the documents already taken on record and marked as exhibits. On the objection being raised, it shall decide the same after hearing the parties.

(SMT. R.P. SONDURBALDOTA, J)