

**THE HON'BLE SRI JUSTICE A.SHANKAR NARAYANA**

**CRIMINAL PETITION No.3017 OF 2017**

**ORDER:**

The present Criminal Petition, under Section 482 of the Code of Criminal Procedure, 1973 (for short, 'the Code'), is filed requesting to set aside the order, dated 22.11.2016, passed in CrI.M.P.No.6741 of 2016 in C.C.No.353 of 2011 on the file of Additional Judicial Magistrate of First Class, Giddalur.

2. Petitioners herein are arraigned as accused Nos.6 to 9 in the aforesaid Calendar Case, by virtue of the order now under challenge. They, along with accused Nos.1 to 5, alleged to have committed the offence punishable under Section 498A read with 34 I.P.C.

3. Heard Sri S. Madhava Rao, learned counsel for the petitioners, and learned Additional Public Prosecutor for the State of Andhra Pradesh.

4. Learned counsel for the petitioners would submit that the learned Magistrate was not right in adding the petitioners herein as accused Nos.6 to 9, just basing on a portion of chief examination of PW.1, and allowing the petition in CrI.M.P.No.6741 of 2016 filed by the prosecution, as it is against the law laid down by the Honourable Supreme Court. It is his further submission that the learned Magistrate ought to have examined all the witnesses and then only ought to have arrived at, that a case is made out against the petitioners. In support of

his submissions, learned counsel, has placed reliance on the decision of the Karnataka High Court in **Sannarevanappa Bharamajappa v. State of Karnataka**<sup>1</sup>, wherein it was held in paragraph No.4 thus:

“... It thus follows from the decision of the Calcutta High Court as well as two other decisions referred to by the High Court that unless the witness is cross-examined, it cannot be said that there is complete “evidence” as contemplated under Section 319, Cr.P.C. The reasons given in the decisions referred to above are sound enough to be accepted by this Court as well inasmuch as examination-in-chief alone cannot be considered as evidence. By analogy it may be stated that if the witness does not submit to cross-examination after he is examined-in-chief, the Court would be precluded from acting on such incomplete evidence as it cannot be said that there is “evidence” against the accused person only from the examination-in-chief. The reasons assigned by the Court-below are wholly erroneous inasmuch as the trial Court observed that the accused could have opportunity to cross-examine the witnesses only after other persons against whom cognizance was sought to be taken were before the Court. If the provisions of Section 319, Cr.P.C. are closely perused, it follows that the trial Court committed serious error in acting only on the evidence-in-chief and taking cognizance of the offence against the petitioners as well. The order, therefore, is unsustainable and the same has to be set aside with liberty to the prosecution to move the trial Court when there is evidence as required under law before the trial Court to act under section 319, Cr.P.C.”

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<sup>1</sup> 1991 CrI.L.J. 21

He has also placed reliance on the decision of the Honourable Supreme Court in **Mohd. Shafi v. Mohd. Rafiq and another**<sup>2</sup>, wherein it was held in paragraph No.13 thus:

“13. From the decisions of this Court, as noticed above, it is evident that before a court exercises its discretionary jurisdiction in terms of Section 319 of the Code of Criminal Procedure, it must arrive at the satisfaction that there exists a possibility that the accused so summoned is in all likelihood would be convicted. Such satisfaction can be arrived at inter alia upon completion of the cross-examination of the said witness. For the said purpose, the court concerned may also like to consider other evidence. We are, therefore, of the view that the High Court has committed an error in passing the impugned judgment. It is accordingly set aside. The appeal is allowed.”

He further placed reliance on the decision of the Honourable Supreme Court in **Municipal Corporation of Delhi v. Ram Kishan Rohtagi and others**<sup>3</sup>, wherein the Honourable Supreme Court, in the context of interpreting Section 319 (1) occurring in Chapter XXIV of the Code, held thus:

“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,

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<sup>2</sup> AIR 2007 SC 1899

<sup>3</sup> 1983 AIR 67

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.”

5. Learned Additional Public Prosecutor, on the other hand, while contending that it is not must that the witnesses should be cross-examined initially and then only an application of the nature now filed by the prosecution has to be filed, has placed reliance on the decision of the Honourable Supreme Court in **Hardeep Singh v. State of Punjab and others**<sup>4</sup> and points out observations in paragraph Nos.99 and 110 thus:

“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

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<sup>4</sup> AIR 2014 SC 1400

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 Code of Criminal Procedure. In Section 319 Code of Criminal Procedure the purpose of providing if 'it appears from the evidence that any person not being the accused has committed any offence' is clear from the words **“for which such person could be tried together with the accused.”** The words used are not 'for which such person could be convicted'. There is, therefore, no scope for the Court acting under Section 319 Code of Criminal Procedure to form any opinion as to the guilt of the accused.”

“110. We accordingly sum up our conclusions as follows:

**Question Nos.1 & III**

Q.1 What is the stage at which power under Section 319 Code of Criminal Procedure can be exercised?

AND

Q.III Whether the word "evidence" used in Section 319(1) Code of Criminal Procedure 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?

A. In **Dharam Pal's** case, the Constitution Bench has already held that after committal, cognizance of an offence can be taken against a person not named as an accused but against whom materials are available from the papers filed by the police after completion of investigation. Such cognizance can be taken under Section 193 Code of Criminal Procedure and the

Sessions Judge need not wait till 'evidence' under Section 319 Code of Criminal Procedure becomes available for summoning an additional accused.

Section 319 Code of Criminal Procedure, significantly, uses two expressions that have to be taken note of i.e. (1) Inquiry (2) Trial. As a trial commences after framing of charge, an inquiry can only be understood to be a pre-trial inquiry. Inquiries under Sections 200, 201, 202 Code of Criminal Procedure; and under Section 398 Code of Criminal Procedure are species of the inquiry contemplated by Section 319 Code of Criminal Procedure. Materials coming before the Court in course of such enquiries can be used for corroboration of the evidence recorded in the court after the trial commences, for the exercise of power under Section 319 Code of Criminal Procedure, and also to add an accused whose name has been shown in Column 2 of the chargesheet.

In view of the above position the word 'evidence' in Section 319 Code of Criminal Procedure has to be broadly understood and not literally i.e. as evidence brought during a trial.

### **Question No. II**

Q.II Whether the word "evidence" used in Section 319(1) Code of Criminal Procedure could only mean evidence tested by cross-examination or the court can exercise the power under the said provision even on the basis of the statement made in the examination-in-chief of the witness concerned?

A. Considering the fact that under Section 319 Code of Criminal Procedure a person against whom

material is disclosed is only summoned to face the trial and in such an event under Section 319(4) Code of Criminal Procedure the proceeding against such person is to commence from the stage of taking of cognizance, the Court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination.

#### **Question No. IV**

Q.IV What is the nature of the satisfaction required to invoke the power under Section 319 Code of Criminal Procedure to arraign an accused? Whether the power under Section 319 (1) Code of Criminal Procedure can be exercised only if the court is satisfied that the accused summoned will in all likelihood be convicted?

A. Though under Section 319(4)(b) Code of Criminal Procedure the accused subsequently impleaded is to be treated as if he had been an accused when the Court initially took cognizance of the offence, the degree of satisfaction that will be required for summoning a person under Section 319 Code of Criminal Procedure would be the same as for framing a charge. The difference in the degree of satisfaction for summoning the original accused and a subsequent accused is on account of the fact that the trial may have already commenced against the original accused and it is in the course of such trial that materials are disclosed against the newly summoned accused. Fresh summoning of an accused will result in delay of the trial-therefore the degree of satisfaction for summoning the accused (original and subsequent) has to be different.

**Question No.V**

Q.V Does the power under Section 319 Code of Criminal Procedure extend to persons not named in the FIR or named in the FIR but not charge-sheeted or who have been discharged?

A. A person not named in the FIR or a person though named in the FIR but has not been charge-sheeted or a person who has been discharged can be summoned under Section 319 Code of Criminal Procedure provided from the evidence it appears that such person can be tried along with the accused already facing trial. However, in so far as an accused who has been discharged is concerned the requirement of Sections 300 and 398 Code of Criminal Procedure has to be complied with before he can be summoned afresh.

The matters be placed before the appropriate Bench for final disposal in accordance with law explained hereinabove.”

6. Though, the learned counsel for petitioners, would vehemently contend that the chief examination of PW.1 is not completed in the present case and, therefore, would not satisfy the requirement of the law laid down by the Honourable Supreme Court in **Hardeep Singh's case (supra 4)**. A perusal of PW.1's examination-in-chief would clearly show that it is completed, as she even marked the complaint as Ex.A1, and at that stage, the present request was made by the learned Additional Public Prosecutor. Had the request was not made, the learned Magistrate would have

recorded the next step mentioning 'cross-examination' and proceeded with cross-examination.

7. Now, the short point that arises for consideration is whether the order under challenge is liable to be set aside?

8. One thing is certain. When the law declared by the Honourable Supreme Court in **Hardeep Singh's case (supra 4)**, at paragraph No.99, is applied, the order under challenge, running thus,

“This petition is filed by the learned Assistant Public Prosecutor under Section 319 of Code of Criminal Procedure praying the Court to summon the proposed accused as A6 to A9, since prima-facie case is made out against them along with A1 to A5 about their involvement in the offence.

As seen from Ex.P1, overt acts were attributed against these alleged accused and the same is stated by PW.1 when examined by the police, but the investigating officer, basing on the statements of other witnesses, deleted the name of these alleged accused and filed charge sheet against only A1 to A5.

The involvement or otherwise of these alleged accused will be made out only after proper adjudication of the case and at the stage basing on the material available on record, a prima-facie case is made out against them as to their involvement in the offence along with A1 to A5 and hence this Court is inclined to summon these alleged accused as A6 to A9 under Section 319 of Code of Criminal Procedure.

Accordingly petition is allowed. The prosecution shall take steps to implead the names of these alleged accused on the record as A6 to A9.”

would not satisfy the requirement and, therefore, it is a case where the matter is to be relegated to the learned Magistrate to reconsider the same afresh following the law declared by the Honourable Supreme Court in **Hardeep Singh's case (supra 4)**, at paragraph No.99.

9. Accordingly, the Criminal Petition is allowed setting aside the order, dated 22.11.2016, passed in Crl.M.P.No.6741 of 2016 in C.C.No.353 of 2011 on the file of Additional Judicial Magistrate of First Class, Giddalur. Consequently, Crl.M.P.No.6741 of 2016 is restored to file. The learned Magistrate is directed to reconsider Crl.M.P.No.6741 of 2016 by applying the law laid down by the Honourable Supreme Court in **Hardeep Singh's case (supra 4)**, as mentioned in the above, by affording an opportunity to both parties once again.

10. Miscellaneous Petitions, if any, pending in this Criminal Petition, shall stand closed.

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**A.SHANKAR NARAYANA, J**

April 24, 2017.  
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