

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Sr. No. 238

CRR-2963-2014 (O&M)

Decided on : 14.03.2017

Muzaffar

..... Petitioner

VERSUS

State of Haryana and others

..... Respondents

CRR-3227-2016(O&M)

Mujaffar

..... Petitioner

VERSUS

State of Haryana and others

..... Respondents

CORAM: HON'BLE MR. JUSTICE DEEPAK SIBAL

Present: Mr. D. S. Matya, Advocate, for the petitioner.

Mr. Manish Bansal, DAG, Haryana.

None for respondents No. 2 to 5.

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DEEPAK SIBAL, J. (ORAL)

This order shall dispose of two petitions being CRR-2963-2014 and CRR-3227-2016.

Two separate applications under Section 319 of the Code of Criminal Procedure, 1973 (for short 'the Code') were moved by the petitioner before the trial court, seeking therein to summon Ayub s/o of Chander, Khurshid s/o Mehmood, Akil s/o Ayub, Rijwan s/o Ayub, Jamshed son of Kalu and Roshni w/o Kalu to face trial. The trial court rejected the applications through separate orders which are impugned through the present petitions.

Learned counsel for the petitioner submits that the petitioner-Muzaffar while appearing before the trial court as PW-2 has stated that Ayub, Kalu, Khurshid and Jamshed inflicted lathi blows on the deceased-Majid as a result of which he fell down and in that state Khurshid gave a lathi blow, thrustwise, in his stomach. The aforesaid Muzaffar further stated that Roshni gave a lathi blow on the hand of Majid. Akil and Rijwan were stated to have given lathi blows on the head and shoulder respectively of the petitioner-Muzaffar.

It is further submitted on behalf of the petitioner that the doctor appearing as PW-3 has specifically stated in his examination-in-chief that the deceased-Majid had suffered three injuries on his head, one on his left arm and one on his knee. The doctor further went on to state that there were two injuries on the petitioner out of which one was on his head and the other on his left shoulder.

In view of the above, learned counsel for the petitioner submits that each of the persons who were sought to be summoned under Section 319 of the Code were attributed specific roles in the statement suffered by the petitioner while appearing as PW-2 before the trial court and such statement of his found corroboration through evidence of the doctor who has appeared as PW-3. That being so, he submits, that the trial court went wrong in not summoning each of the above persons which the petitioner sought to be summoned to face trial.

Per contra, learned State counsel refers to the statement of the petitioner before the trial court to say that in such statement the petitioner has nowhere stated that Ayub, Khurshid or Jamshed have given injuries upon the deceased on his head, arm or knee. It is vaguely stated that they

inflicted lathi blows upon him. It is further submitted that so far as Roshni is concerned, the petitioner, while appearing as PW-2, attributes to her an injury on the hand of the deceased which finds no corroboration from the medical evidence. The cross examination of the doctor is also referred to where the doctor has stated that possibilities of the injuries on the deceased by falling from a height could not be ruled out and that the injuries on the head of the deceased could have been caused by single blow of a weapon which has three edges.

Section 319 of the Code reads as under: -

“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.”

A Constitutional Bench of the Apex Court in “*Hardeep Singh vs. State of Punjab and others*” (2014) 3 SCC 92, has interpreted as to how the trial court should consider and dispose of an application moved before it under Section 319 of the Code. Paragraphs 69, 70, 71, 98 and 99 of the judgment which are relevant, read as under: -

“69. Ordinarily, it is only after the charges are framed that the stage of recording of evidence is reached. A bare perusal of [Section 227](#) Cr.P.C. would show that the legislature has used the terms “record of the case” and the “documents submitted therewith”. It is in this context that the word ‘evidence’ as appearing in [Section 319](#) Cr.P.C. has to be read and understood. The material collected at the stage of investigation can at best be used for a limited purpose as provided under [Section 157](#) of the Evidence Act i.e. to corroborate or contradict the statements of the witnesses recorded before the court. Therefore, for the exercise

of power under [Section 319 Cr.P.C.](#), the use of word 'evidence' means material that has come before the court during an inquiry or trial by it and not otherwise. If from the evidence led in the trial the court is of the opinion that a person not accused before it has also committed the offence, it may summon such person under [Section 319 Cr.P.C.](#)

70. With respect to documentary evidence, it is sufficient, as can be seen from a bare perusal of [Section 3](#) of the Evidence Act as well as the decision of the Constitution Bench, that a document is required to be produced and proved according to law to be called evidence. Whether such evidence is relevant, irrelevant, admissible or inadmissible, is a matter of trial.

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.

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98. Power under [Section 319 Cr.P.C.](#) is a discretionary and an extra- ordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

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 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 Cr.P.C.](#) In [Section 319 Cr.P.C.](#) 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 Cr.P.C.](#) to form any opinion as to the guilt of the accused."

(emphasis supplied)

A perusal of the above quoted portions of the judgment of the Apex Court in *Hardeep Singh's case* (supra) leaves no manner of doubt in my mind that "evidence" in [Section 319](#) of the Code would mean only such evidence as is led before the court in relation to statements; as produced before the court in relation to documents and only such evidence can be taken into account by the Magistrate or the Court to decide while exercising powers under [Section 319](#) of the Code additional accused are required to be summoned. It has further been held by the Apex Court that power under [Section 319](#) of the Code is discretionary and extraordinary. It is to be

exercised sparingly and only where strong and cogent evidence has appeared during the course of the trial against a person, who is not arrayed as an accused by the investigating agency, should he be summoned to face trial.

The statement of the petitioner, who appeared as PW-2 before the trial court reads as under: -

“Stated that on 8.3.2013 we were constructing our plot. 8-9 persons reached there alongwith lathis and dandas and told not to construct the said plot as they have also share in it. Thereafter, Ayub gave lathi blow on my father Majid. Kallu gave a lathi blow. Khurshid also gave a lathi blow. Jamshed gave a lathi blow. My father fell down. Kursaid gave lath blow thrustwise to my father in the stomach. Roshni gave a lathi blow on the hand of my father. I reached there and tried to save my father. Akil and Rizwan gave a lathi blow on my head and shoulder. They raised noise, Mar Diya and I also noise Mar Diya. Whereupon Sumer and Kurdosh reached there and save us. While leaving accused told us that if we do something then they will kill us. We admitted my father in Ferozepur Jhirka. Thereafter, my father was referred to GH Mandikhera and from Mandikhera he was referred to Trauma Centre, Delhi. I remained at GH Mandikhera. My statement was not recorded by police. Later on my statement Ex. PA was recorded by the police at my house. At that time I was in serious condition. Accused Kallu and Kursaid are present in the Court. CXXXXXXX by Shri Sanjeet Vats, counsel for accused.

My father are four brothers. Kallu is the eldest one. After that Sumer, Fateh and thereafter my father Majid. All are residing separately. The house of Kallu is in the middle of the village. The house of Fateh is also in the middle of our village and the house of Fateh is in the said plot. Our house is in the neighbourhood of Kallu. Both the houses are adjacent to each other.

My grandfather was having 7 acres of land. The land has already partitioned. Two acres came in the share of my father and was in his possession upon which he cultivated. All other brothers of my father are also having equal share of the land and they were enjoyed the possession peacefully.

I am a student of BA final year in N.S.S. College, Nagina. On 8.3.2013 I did not attend my college. As I was busy in construction of the plot therefore, I did not visit the college on that day. We dig the foundation and constructed the plot upto DPC level about 2 years ago and again started construction on the date of occurrence.

No civil suit was ever filed from any side of our family members regarding the agricultural land. One civil suit was filed on the land of the uncle of my father namely Jaon Khan. The civil suit was filed by my father, my uncle Kalu, Fateh and Sumer etc. against Jaon Khan. That civil suit is pending in the court at Ferozepur Jhirka.

The house of Prahlad is on the north side of the said plot. On the east there is house of Lallu. On west there is a common road. On southern side of the said plot is also a common road. The road on west side is mettled main road of the village. The said road leads to village Nangal and Bilonda.

My statement was recorded by the police after 2 days again said after 3 days. Police did not visit hospital in my presence. I remained in hospital GH Mandikhera for one night and discharged at about 3-4 pm on next day i.e. 9.3.2013. After discharge I visited my father at Delhi. I returned to my village on 10.3.2013 at about 12-1 pm. Volunteered I was serious at that time. I visited Delhi and again returned to my village alone by bus. I did not visit police station even after my coming to village. I also did not inform the police at Delhi hospital. Volunteered I myself was serious so I do not know whether there was any police post in the hospital at Delhi or not. I came to know about the death of my father at about 4 pm on 11.3.2013. I did not visit Delhi hospital after knowledge of the death of my father. Police did not visit our house or village on

8/9/10/11-3-2013. It is incorrect to suggest that the police visited hospital but intentionally I did not give any statement as we want to give statement after due concoction. It is further incorrect to suggest that even on 10.3.2013 HC Rajiv visited our house but even on that day I refused to give statement. It is further incorrect to suggest that I was not remained admitted at GH Mandihera in the night of 8/9-3-2013. It is incorrect to suggest that I left hospital in the evening of 8.3.2013 and returned to my village. It is further incorrect to suggest that as no such occurrence was ever took place nor any injuries were given by the accused, I did not give any statement to the police and later on gave a false statement.

I was conscious even after sustaining injuries. I was remained conscious throughout when I reached at CHC Ferozepur Jhirka and GH Mandikhera. Sumer is my real uncle (Tau) and Kurdosh is son of my uncle Sumer. Sumer and Kurdosh got admitted us at CHC Ferozepur Jhirka. We were shifted to GH Mandikhera by the same persons. It is incorrect to suggest that Sumer and Kurdosh accompanied us to CHC Ferozepur Jhirka and GH Mandikhera. We were shifted to CHC Ferozepur Jhirka by the above named persons in a Maruti Van of one Sheru @ Sher Mohd. We were four persons in the said Maruti van including us and Sumer and Kurdosh. None else was accompanied us. Again said Ilyas and my mother were also accompanied us in the said Maruti van. It is incorrect to suggest that none was present in the village at the time of alleged occurrence nor such occurrence ever took place nor the persons named above accompanied us to hospital. I did not tell the name of assailants to doctor. Volunteered I was not well but names of assailants were given to doctor by my relatives.

My statement was recorded by the police at about 8-9 pm on 11.3.2013 upon my visit to police station. One police official met me at my house on 10.3.2013. Volunteered at that time I was not feeling well. I told the police official that I was not feeling well. It is incorrect to suggest that I did not tell the police official that I was not feeling well. I told the police official that I will make my statement after consulting with my relatives and my father. On 10.3.2013 when police official visited my house many family members and relatives were present namely Habib, Gariba, brother in law Arshad etc. I did not took the police official anywhere on 10.3.2013 nor showed him the alleged place of occurrence.

Police visited our village on 12.3.2013 at about 4-5 pm. On 12.3.2013 I took the police to the place of occurrence. Blood stained earth was there at that time. Police also witnessed the blood stained earth. After 12.3.2013 police again visited our village on 14.3.2013.

At this stage further cross-examination of this witness is deferred as court time is over.

Recalled for further cross examination.

CXXXXXXX by Sh. Sanjeet Vats, Counsel for accused.

Sumer and Khurdosh are residing separately but adjacent to each other. Both are residing about 5-7 houses away to our house. Our houses are at a distance of about 2 acres from the plot which is situated in the outer of the village. The occurrence took place for about two minutes only. Sumer and Khurdosh reached at the place of occurrence after we sustained injuries.

Ayub was standing in front of my father when he gave injury. He was at a distance of about 2/3 feets from my father. The lathi which was taken by Ayub was of 4 and half feets. Kalu was also standing in front of my father at the time when he gave injury to him. He was standing at a distance of ¾ feets and was having a lathi of about 4/5 feets. Jamshed was also standing in front of my father and was have a lathi of about 4/5 feets. Khurshed was standing on the back of my father. Roshni was also standing on the back of my father. The accused gave lathi blow one by one to my father. I was standing at a distances of about 15 paces from my father.

Accused Ayub, Khurshid, Akeel and Rizwan were found innocent and were not challaned by the police. It is incorrect to suggest that during investigation it was found that the above named four persons were not in village or nearby at the time of alleged occurrence. It is further incorrect to suggest that they were found innocent in the investigation carried out by the SHO and Dy. SP Ferozepur Jhirka. My statement was recorded by the police only once. Ayub and Khurshid are husband of my 'Buas'. Akeel and Rizwan are my cousins and sons of my Bua. My one Bua married to Ayub in village Rithat. Rithat is at a distance of about 30 KM from our village. My second Bua married to Khurshid in village Satakpur which is at a distance of about 35 KM from our village. I do

not know whether the above named persons were having mobile numbers or not. It is incorrect to suggest that no such occurrence as alleged by me ever took place. It is further incorrect to suggest that my father sustained injuries elsewhere. It is further incorrect to suggest that after due deliberations and concoctions and after consultation I gave a false and fictitious complaint/statement against the accused. It is further incorrect to suggest that I gave my wrong statement just to grab the land and to pressurize the accused persons. It is further incorrect to suggest that I am deposing falsely.”

(emphasis supplied)

The doctor, who appeared as PW-3 before the trial court stated before the trial court as under: -

“I Dr. Bhagwan Shai Singhal, M.O. CHC F.P. Jhirka, do hereby solemnly declare and affirm as under: -

That on dated 08/3/13 I was posted as Medical Officer at CHC F.P. Jhirka and medicolegally examined Majid s/o Tundal, age 46 years, male, R/o Pathkhori, P. S. F.P. Jhirka c/o alleged h/o assault and found followings: -

(1) Lacerated wound size 5 cm x 1 cm over Rt. Side Parietal region of scalp, near central of scalp.

Ad. X-Ray, surgical opinion.

Weapon -Blunt, duration-within 6 hrs.

(2) Lacerated wound size 5 cm x 1 cm over mid parietal region of scalp; near ant. frontallar

Ad. X-Ray, surgical opinion

weapon-Blunt, duration within 6 hrs.

(3) Lacerated wound size 3 cm x ½ cm over mid-parietal region, near central of scalp.

Ad-X-ray, surgical opinion.

Weapon-Blunt, duration-within 6 hrs.

(4) Lacerated wound size 2 cm x ½ cm over lateral aspect of left arm. Ad-X-Ray, weapon-Blunt, duration-within 6 hrs.

(5) Abrasion over anterior aspect of Rt. Knee

Ad-X-Ray, Weapon-Blunt, duration-within 6 hrs.

Pt. refer to GH Mandikhera for X-Ray and surgical management.

On the same day I also medicolegally examined Mujaffarali s/o Majid, age 24 yr. R/o Pathkhori, P. S. F.P. Jhirka and found followings: -

(1) Lacerated wound size 3 cm x ½ cm over left side parietal occipital region of scalp

Ad-X-ray, Surgical opinion, Weapon-Blunt, Duration within 6 hrs.

(2) Abrasion over apex of left shoulder and C/o Pain over it.

Ad-X-Ray, Weapon-Blunt, Duration within 6 hrs.

Refer to GH Mandikhera for X-Ray and surgical management.

I tender my affidavit Ex.PW3/A contents of which may be read in evidence Carbon copy of MLR of Majid is Ex.PW3/B while of Muzaffar Ali is Ex.PW3/C which are in my hand and bear my signatures. I sent Ruka Ex.PW3/D to SHO PS Ferozepur Jhirka regarding the arrival of Majid and Muzaffar.

CXXXXXXXXX by Sh. Sanjeet Vats, counsel for accused.

As per record both the injured were brought by Sabbir S/o Jakir. The injury no. 1 to 3 on the person of Majid was on upper parietal region. Possibilities of these injuries by fall from height cannot be ruled out. The injury no. 1 to 3 on the person of Majid can be caused by single blow of a weapon with three edges can be possible. No particulars of assailants were ever stated to me by the injured or the person accompanied them. Volunteered it is not our job. Nor I enquired about the assailants from injured. It is incorrect to suggest that I am deposing falsely.”

(emphasis supplied)

There are six persons who are sought to be summoned at the

instance of the petitioner to face trial. They are Ayub s/o of Chander, Khurshid s/o Mehmood, Akil s/o Ayub, Rijwan s/o Ayub, Jamshed son of Kalu and Roshni w/o Kalu.

Taking the case of Roshni, in the first instance, it is found that in the statement made by the petitioner before the trial court while appearing as PW-2 he has stated that Roshni gave a lathi blow on the hand of the deceased. However, when the statement of the doctor, who appeared as PW-3 is perused, no such injury is found on the hand of the deceased. There is a clear mismatch and going by what has been held by the Apex Court, as above, no infirmity is found in the order of the trial court in rejecting the plea of the petitioner to summon Roshni to face trial.

So far as Ayub, Khurshid and Jamshed are concerned, a perusal of the statement made by the petitioner before the trial court as PW-2 shows that the same is clearly vague. It has simply been stated that Ayub, Khurshid and Jamshed gave lathi blows to the deceased. It has nowhere been stated as to in what manner or sequence as also on which part of the body of the deceased did they inflict the blows. In view of the above vague statement of the petitioner and in line with the law laid down by the Apex Court in *Hardeep Singh's* case (supra) that the power under Section 319 of the Code to summon a person who has been found innocent by the investigating agency is to be exercised sparingly and only in those cases where strong and cogent evidence has come against him, from the evidence led in court, Ayub, Khurshid and Jamshed have rightly not been summoned by the trial court to face trial especially in view of the statement made by the doctor in his cross examination that the injury on the head of the deceased could have been suffered by one blow through a blunt weapon

having three edges.

For allegedly causing the death of Majid, Kalu son of Tundal and Khurshid son of Kalu on having been found guilty by the investigating agency, are already facing trial.

So far as Akil and Rijwan are concerned, the petitioner while appearing as PW-2 before the trial court has specifically stated that they gave lathi blows on his head and shoulder respectively. Such injuries are corroborated in the statement of the doctor who appeared before the trial court as PW-3. No discussion is found in the impugned order as to why in view of the above evidence which had come on record, Akil and Rijwan be not summoned for trial.

In view of the above discussion, the present petitions qua Roshni, Ayub, Khurshid and Jamshed are dismissed but the order of the trial court for having not summoned Akil and Rijwan to face trial is set aside. Accordingly, the trial court is directed to summon Akil and Rijwan to face trial for having caused injuries to the petitioner.

The trial has been pending for the last over 3½ years and, therefore, the trial court is requested, subject to the cooperation by the prosecution, the complainant and the accused, to make every endeavour to expedite the conclusion of the trial within four months from the date of receipt of a certified copy of this order. In case, the trial is not completed within the stipulated period of four months, the trial court would submit a report to this Court detailing therein the reasons for the delay.

14.03.2017
shamsher

[DEEPAK SIBAL]
JUDGE

Whether speaking/reasoned	:	Yes / No
Whether reportable	:	Yes / No