

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

CRR No.3563 of 2016 (O&M)

Date of Decision: 21.02.2017

Dharampal and another Petitioners

Vs

State of Punjab and another Respondents

CORAM: *HON'BLE MR. JUSTICE RAJ MOHAN SINGH*

Present:Mr. K.S. Derabassi, Advocate
for the petitioners.

Mr. Neeraj Sharma, A.A.G., Punjab.

Mr. Sandeep Panwar, Advocate
for respondent No.2.

RAJ MOHAN SINGH, J.

CRM No.4714 of 2017

For the reasons mentioned in the application, the same is allowed. Affidavit of petitioner and Annexure P-1 are taken on record, subject to all just exceptions.

CRR No.3563 of 2016

[1]. Petitioners have assailed order dated 05.09.2016 passed by Additional Sessions Judge, SAS Nagar, Mohali whereby application under Section 319 Cr.P.C., filed by the complainant was allowed and petitioners were ordered to be summoned as accused to face trial in offence under Section 304 IPC.

[2]. Brief facts are that the FIR was registered on the statement of Karanbir Singh with the allegations that one month back, the complainant got his house repaired. Electric wire was rolled in order to enable the mason to carry out the work safely as the same was touching the boundary wall. Due to this, family members of Rakesh Kumar @ Rommy were got annoyed and a scuffle took place. On 03.06.2015, in the evening Rakesh Kumar @ Rommy started abusing the complainant and gave threats. At about 7.30 p.m., when the complainant informed father of Rakesh Kumar namely Dharampal near the gate that his son has abused him and also gave threats, then Rakesh Kumar @ Rommy who appeared there and thrown the complainant on the ground by catching hold of his arms and his brother Kamal and his father Dharampal started beating him. Wife of the complainant reached there and raised alarm. On hearing alarm, mother of the complainant Sumitra Devi reached at the spot and tried to rescue the complainant and then Rakesh Kumar @ Rommy gave a push to the mother of the complainant and she fell in the water course and suffered head injuries. With these allegations, the FIR in question came to be registered.

[3]. During the course of treatment in Government Medical Hospital, Sector 32 Chandigarh, mother of the complainant died on 05.06.2015. Offence under Section 304 IPC was added vide

DDR No.18 dated 05.06.2015. Postmortem of deceased was conducted by the Board of Doctors.

[4]. During the course of investigation, accused Kamal and Dharampal were found innocent. After receipt of report of Chemical Examiner, the cause of death was found to be cerebral damage as a result of force/surface impact on the head. Challan was submitted against Rakesh Kumar @ Rommy only.

[5]. After framing of charge and deposition of complainant as PW-1, an application under Section 319 Cr.P.C., was filed by the complainant for summoning of Kamal and Dharampal as co-accused to face trial along with Rakesh Kumar @ Rommy.

[6]. Petitioners contested the application on the ground that in the earlier statement of the complainant recorded under Section 156(3) Cr.P.C., the complainant never deposed that the petitioners were responsible for causing death of his mother. Enquiry was held wherein the petitioners were found innocent. There was no material on record which could have been considered sufficient or created reasonable prospects of conviction of the petitioners. The powers under Section 319 Cr.P.C., cannot be exercised in routine, rather the Court is required to record its satisfaction that in all probabilities, there are reasonable prospects of conviction of the petitioner on the

basis of material on record. The degree of satisfaction must be above that *prima facie* case is just short of ultimate conviction.

[7]. In **Hardeep Singh v. State of Punjab and others, 2014(1) RCR (Crl.) 623**, the Hon'ble Supreme Court summed up the conclusions and scope arising out of Section 319 Cr.P.C. The relevant conclusions summed up in para No.110, is as under:-

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

Question Nos.I & III

Q.1 What is the stage at which power under Section 319 Cr.P.C. can be exercised?

AND

Q.III Whether the word “evidence” used in Section 319(1) Cr.P.C. 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 Cr.P.C., and the Sessions Judge need not wait till 'evidence' under Section 319 Cr.P.C. becomes available for summoning an additional accused.

Section 319 Cr.P.C., 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 Cr.P.C.; and under Section 398 Cr.P.C. are species of the inquiry contemplated by Section 319 Cr.P.C. 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 Cr.P.C., and also to add an accused whose name has been shown in Column 2 of the charge-sheet. In view of the above position the word 'evidence' in Section 319 Cr.P.C. 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) Cr.P.C. 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 Cr.P.C. a person against whom material is disclosed is only summoned to face the trial and in such an event under Section 319(4) Cr.P.C. 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 Cr.P.C. to arraign an accused? Whether the power under Section 319(1) Cr.P.C. 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) Cr.P.C. 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 Cr.P.C. 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 Cr.P.C. 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 Cr.P.C. 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 Cr.P.C. 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.”

[8]. Degree of satisfaction required under Section 319 Cr.P.C., is much more higher than the *prima facie* satisfaction at the time of summoning. The test that has to be applied is one which is more than *prima facie* case as required at the time of framing of charge and just short of final conclusion. The scope of extent of powers of Court to summon any person as an accused during course of inquiry or trial in exercise of powers under Section 319 Cr.P.C., has been set at rest by the aforesaid **Hardeep Singh's** case (supra). The legal position has been summarised in para Nos.98 and 99 of the aforesaid judgment. For ready reference para Nos.98 and 99 of the said judgment are reproduced hereunder:-

“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 unrebutted, 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."*

[9]. The powers by the trial Court under Section 319 Cr.P.C, are to be exercised on the basis of satisfaction that has to be arrived at on the basis of evidence led before it. Degree of satisfaction for invoking powers under Section 319 Cr.P.C., is the test of *prima facie* case having more degree of satisfaction

than the one required for summoning the accused when cognizance is taken and process is issued. Though the test of *prima facie* case remains the same, but degree of satisfaction under Section 319 of Cr.P.C., is much higher than the degree of satisfaction required for summoning at the stage of taking cognizance and issuance of process. It is only the degree of satisfaction that distinguishes the concept of *prima facie* case in both the eventualities i.e. how the judgment of **Hardeep Singh's** case (supra) has been further highlighted in aforesaid context in **2014(5) SCC 568, Babubhai Bhimabhai Bokhiria and anothers v. State of Gujarat and others**. Para No.8 of the said judgment reads as under:-

“8. Section 319 of the Code confers power on the trial Court to find out whether a person who ought to have been added as an accused has erroneously been omitted or has deliberately been excluded by the Investigating agency and that satisfaction has to be arrived at on the basis of the evidence so led during the trial. On the degree of satisfaction for invoking power under Section 319 of the Code, this Court observed that though the test of *prima facie* case being made out is same as that when the cognizance of the offence is taken and process issued, the degree of satisfaction under Section 319 of the Code is much higher.”

[10]. In view of above, for invoking power under Section 319 Cr.P.C., though the test of *prima facie* case is the same, but the

degree of satisfaction under the said Section is of higher degree, that is why the Courts have formulated the concept of requiring degree of satisfaction above the test of *prima facie* case and just short of ultimate conviction. Each case has to be decided on the basis of its individual merits.

[11]. In the instant case, the petitioners were declared as innocent persons in the inquiry conducted by the SP(D), SAS Nagar, Mohali and their names were placed in column No.2 of the challan. Thereafter, respondent No.2 complainant improved and gave exaggerated version in his examination-in-chief on 30.07.2016. In earlier statement as well as in the application moved by the complainant under Section 156(3) Cr.P.C., he never held the petitioners to be responsible for causing death of his mother.

[12]. On the basis of application under Section 156(3) Cr.P.C., filed by the complainant before the *Ilalaqa* Magistrate, an inquiry was held wherein petitioners were found innocent as no incriminating material was found against them. The deposition made by PW-1 complainant gave a version in consonance with the original complaint wherein it was recorded that he got his house repaired and put the wires on one side. Accused Rakesh Kumar @ Rommy who came to the spot and scuffled with the complainant and prevented him not to alter the position of the

electric wires. On 03.06.2015, father of the accused Rakesh Kumar namely Dharampal and his brother Kamal came and pushed him down on the ground and started beating him. They also instigated each other and gave beatings to the complainant. Mother of the complainant was given a push on such instigation of the petitioners.

[13]. Apparently, there is a substantial change in the statement of complainant while appearing as PW-1 inasmuch as that in the original version got recorded by the complainant, the allegation was that on hearing the alarm, mother of the complainant attracted to the spot and tried to rescue the complainant. At that time Rakesh Kumar @ Rommy gave a push to his mother and she fell down in the water course, due to which internal injuries were received by her on the head. The deposition in the Court was somewhat intermingling to show that the petitioners appeared at the side and pushed him down on the ground and started beating. They allegedly instigated each other and the pushing of mother of the complainant was the result of such instigation.

[14]. The aforesaid statement, if tested on the touchstone of guidelines framed in **Hardeep Singh's** case (supra) would show that the complainant has tried to improve his case by alleging push of his mother on account of instigation of the petitioners. In

a detailed inquiry conducted by SP(D) SAS Nagar, Mohali the involvement of the petitioners was not proved. In his statement, the complainant Karanbir Singh has specifically deposed that the petitioners instigated each other and the accused beat him. The accused present in Court pushed his mother on the instigation of Dharampal and Kamal. The witness pointed out that push was made by accused Rakesh Kumar @ Rommy though on the instigation of Dharampal and Kamal. In his cross-examination, the witness stated that though he got recorded the factum of instigation done by the petitioners in his statement Ex.PA, but the same was not so recorded as he was a illiterate person. The signatures of the complainant appearing on Ex.PA were in Punjabi. In the application under Section 156(3) Cr.P.C., filed by the complainant in Court, the factum of instigation done by the petitioners and thereafter pushing of his mother by Rakesh Kumar @ Rommy were specifically told to his Advocate and the witness was ignorant as to whether such incorporation was made by his Advocate or not? The witness further admitted that he was associated in the inquiry conducted by the Police on his complaint. The application under Section 156(3) Cr.P.C., was dismissed by the Judicial Magistrate Ist Class, Derabassi.

[15]. In view of above, it can be observed that the complainant has made an attempt to project a case which was

neither pleaded by him in the original complaint leading to registration of FIR, nor in the application filed under Section 156(3) Cr.P.C. The inquiry conducted by the Police as well as under Section 156(3) Cr.P.C. would reveal that the petitioners were innocent. At the stage of filing of application under Section 319 Cr.P.C., only the statement of PW-1 was in existence. On the basis of such statement, particularly the cross-examination, no such opinion can be drawn whether the prosecution is *prima facie* more than framing of charge and just short of ultimate conclusion of the petitioners.

[16]. In view of aforesaid, while applying the guidelines laid down in **Hardeep Singh's case** (supra) and **Babubhai Bhimabhai Bokhiria and anothers v. State of Gujarat and others, 2014(5) SCC 568**, I am of the view that the impugned order deserves to be set aside. However, liberty is given to the complainant to rake up the issue, if sufficient material comes on record calling for summoning of the accused under Section 319 Cr.P.C. Petition stands disposed of accordingly.

February 21, 2017

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Whether speaking/reasoned

Whether reportable

(RAJ MOHAN SINGH)
JUDGE

Yes/No

Yes/No