

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

1. Criminal Revision No. 4070 of 2017 (O&M)

Date of decision : November 17, 2017

Sukhpal Singh Khaira Petitioner

VERSUS

State of Punjab Respondent

2. Criminal Revision No. 4113 of 2017 (O&M)

Joga Singh & another Petitioners

VERSUS

State of Punjab Respondent

CORAM : HON'BLE MR. JUSTICE A.B. CHAUDHARI

PRESENT: Mr. R.S. Rai, Sr. Advocate, with
Sarvshri Gautam Dutt and Abhinav Sood, Advocates,
for the petitioner in CRR-4070-2017.
Mr. G.S. Punia, Sr. Advocate, with
Mr. P.S. Punia, Advocate, for the petitioners in CRR-
4113-2017.
Mr. Dhruv Dayal, Senior Deputy Advocate General,
Punjab.

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1. Whether Reporters of local newspapers may be allowed to
see the judgment? **YES**

2. To be referred to the Reporter or not? **YES**

3. Whether the judgment should be reported in the digest?
YES

4. Whether speaking/Reportable ? **Yes.**

Per A.B. Chaudhari, J.

By these two revision petitions, the three petitioners; namely

Sukhpal Singh Khaira, Joga Singh and Manish Kumar, have put to challenge the order dated 31.10.2017 in CRM No.339 of 28.09.2017 in Sessions Case No.289 of 16.09.2015, decided on 31.10.2017.

Facts :-

F.I.R. No.35 dated 05.03.2015 under Sections 21/24/25/27/28/29/30 of the Narcotic Drugs and Psychotropic Substances Act, 1985, Section 25-A of the Arms Act and Section 66 of the Information Technology Act, 2000, was lodged at Police Station Sadar, Jalalabad against eleven accused persons. On 09.03.2015, a Special Investigation Team was constituted, consisting of Deputy Inspector General of Police, Ferozepur, Senior Superintendent of Police, Fazilka and Superintendent of Police, Fazilka, which investigated the FIR and filed a challan on 06.09.2015 against nine persons, since remaining two persons were declared Proclaimed Offenders and finally one of them was never apprehended. Thus, the trial was held against 10 persons. Thereafter, on 18.11.2016, a supplementary charge-sheet came to be filed against the two Proclaimed Offenders. Petitioner-Sukhpal Singh Khaira had filed CWP-8999-2015 in this Court, praying for investigation by the Central Bureau of Investigation in the said FIR. Upon issuance of notice, the said petition was heard on some dates and on 14.07.2016, Additional Advocate General for the State of Punjab made a statement that petitioner-Sukhpal Singh Khaira was not named as an accused in the said FIR and, as such, there was no cause of action for maintaining the petition. As a sequel, petitioner-Sukhpal Singh Khaira withdrew the said petition on 16.03.2017. During this period, PW-4 Ajmer Singh (Superintendent of

Police) and PW-5 Jaswant Singh (Inspector) were examined in the trial against 10 accused persons. The evidence of PW-4 Ajmer Singh and PW-5 Jaswant Singh was completed on 06.07.2017 and the prosecution closed its evidence. On 06.07.2017 itself, a request for recall made by the prosecution was declined by the trial Court. On 31.07.2017, an application was filed by the prosecution under Section 311, Code of Criminal Procedure, for recalling the witnesses and also to produce some record for being proved. On 17.08.2017, the said application was allowed. After the said application was allowed, PW-4 Ajmer Singh, PW-5 Jaswant Singh and PW-13 Ravinder Pal Singh (Constable) were examined between 14.09.2017 to 21.09.2017. On 21.09.2017, the prosecution again closed the evidence. On 21.09.2017 itself, the prosecution filed an application under Section 319, Code of Criminal Procedure, for summoning additional five accused, including the present petitioners, for the reasons stated in the said application. The statements of the 10 accused under Section 313, Code of Criminal Procedure, were recorded on 04.10.2017. In the meanwhile, in a petition (CRM-M-18474-2017, decided on 08.08.2017) for grant of bail by Kala Singh, one of the accused in custody, this Court had directed the trial Court to complete the trial within 3 months from 08.08.2017. The trial Court, looking to the said direction and the fact that the FIR case was of 2015, made an order on 28.09.2017, directing registration of the application under Section 319, Code of Criminal Procedure, filed on 21.09.2017. Thereafter, on 10.10.2017/16.10.2017, defence witnesses were examined by the accused persons. The trial Court, after hearing the arguments, made its judgment

on 31.10.2017 in Sessions Case No.289 of 2015 and convicted all the ten accused and sentenced them. While recording the judgment of conviction, in paragraphs 5 (end of para) the trial Court observed that the application under Section 319, Code of Criminal Procedure, would be dealt with separately. Accordingly, on the same date i.e. 31.10.2017, on which date the judgment was pronounced, simultaneously, the said application under Section 319, Code of Criminal Procedure, was decided by the impugned order summoning five additional accused persons, including the present petitioners. Hence, these two revision petitions against the said order.

Arguments :-

Sarvshri Mr. R.S. Rai and G.S. Punia, Senior Advocates, with Sarvshri Gautam Dutt, Abhinav Sood and P.S. Punia, Advocates, in both these petitions, made the following submissions:-

- i) The entire exercise made by the prosecution qua the present petitioners is out and out mala fide and with a view to cause damage to the reputation of petitioner-Sukhpal Singh Khaira, who is a sitting Member of Legislative Assembly and Leader of Opposition in the Punjab Assembly. Mr. Rai submitted that petitioner-Sukhpal Singh Khaira was apprehending mala fide action against him and that is why he had filed CWP-8999-2015 requesting for investigation by the Central Bureau of Investigation, though ultimately the same was withdrawn by petitioner-Sukhpal Singh Khaira.
- ii) The petitioners were not at all in picture even at the time of registration of FIR No.35 dated 05.03.2015 nor at the stage of filing of challan/supplementary challan as was filed by the Special Investigation

Team. Not only that, when finally PW-4 Ajmer Singh and PW-5 Jaswant Singh were examined on 05.09.2016 and their evidence was completed and closed on 06.07.2017, those witnesses did not even whisper about the petitioners in their substantive evidence before the Court. Not only that, request under Section 311, Code of Criminal Procedure, that was made was also declined by the trial Court. Strangely enough, according to them, a written application was filed on 31.07.2017 by the prosecution for recalling the said two witnesses i.e. PW-4 Ajmer Singh and PW-5 Jaswant Singh, allegedly on the ground that they were required to prove some record and documents, etc. At that stage, the petitioners were not before the Court at all and could not be. The said application under Section 311, Code of Criminal Procedure, was allowed on 17.08.2017 and, thereafter, recalled witnesses PW-4 Ajmer Singh and PW-5 Jaswant Singh and an additional witness PW-13 Ravinder Pal Singh were examined and cross-examined and their evidence was closed on 14.09.2017/21.09.2017. The application under Section 319, Code of Criminal Procedure, for summoning five accused persons additionally, including the present petitioners, was made on 21.09.2017 before the trial Court without any justification whatsoever and without any legally admissible evidence. After examination of defence witnesses, the Sessions Trial was closed for judgment and on 31.10.2017, the trial Court recorded the judgment of conviction of the ten accused persons, who were tried and on the same date additionally, by the impugned order, allowed the application under Section 319, Code of Criminal

Procedure, for summoning five accused persons, including the petitioners. According to him, all these events clearly indicate the mala fides on the part of the prosecution to rope the petitioners somehow in the said Sessions Trial.

iii) Sarvshri R.S. Rai and G.S. Punia, the learned senior counsel, further contended that the provisions of Section 319, Code of Criminal Procedure, continue to apply till the conclusion of the main trial and not at the time when the judgment is delivered against the original accused persons. They submitted that the words in Section 319, Code of Criminal Procedure, are “together with the accused persons”, which means that the trial Court has no jurisdiction to summon additional accused persons, having pronounced the judgment dated 31.10.2017 and convicting the accused as the proposed additional accused could not be tried together with the original accused persons. In other words, according to them, the learned Judge became functus officio qua the application under Section 319, Code of Criminal Procedure, no sooner he recorded the judgment of conviction of the original accused persons on 31.10.2017 and, therefore, the impugned order is illegal.

iv) They, then, submitted that the trial Court, while recording the reasons in support of the impugned order has relied fully on the evidence of the witnesses i.e. PW-4 Ajmer Singh, PW-5 Jaswant Singh and PW-13 Ravinder Pal Singh, which is wholly inadmissible in law and, as such, is no evidence in the eye of law on the basis of which the impugned order could have at all been made by the trial Court. The meaning of the word 'evidence', as propagated by the Apex Court, only means legal and

admissible evidence and not the evidence based on imagination. They took me through the evidence of all these three witnesses and submitted that whatever these witnesses have deposed in their evidence, there was no authenticated record in respect of the call details, evidence in the form of e-mails, etc., which is otherwise a requirement under Section 65-B of the Evidence Act regarding authenticity of evidence. In other words, according to them, until and unless authenticated evidence, as contemplated under Section 65-B of the Evidence Act, is brought on record, the evidence tendered by them was wholly inadmissible and no evidence in the eye of law, on the basis of which the trial Court could not have acted under Section 319, Code of Criminal Procedure.

v) With reference to the argument advanced by the learned State counsel as to Exhibit DX, the alleged affidavit of the petitioner and the documents therewith, they submitted that the Annexures did not form part of the affidavit nor of Exhibit DX, and therefore, the trial Court could not have read Exhibit DX as a piece of legal evidence.

vi) They, then, submitted that the impugned order summoning the accused under Section 319, Code of Criminal Procedure, is in clear violation of the ratio decidendi laid down in the Constitution Bench judgment in the case of Hardeep Singh vs. State of Punjab, 2014(1) RCR (Criminal) 623. Learned senior counsel also took me through all the relevant judgments. They, then, argued that the trial Court has, strangely enough, directed the police to file a supplementary charge-sheet and as is a well settled law, the trial Court does not have any power to direct the police authorities to file a charge-sheet and at the most, the power is

only to order further investigation and nothing more. There is no power even to order reinvestigation.

vii) In reply to the Apex Court judgment in the case of Shashikant Singh vs. Tarkeshwar Singh, 2002(3) RCR (Criminal) 191, they argued that the same is clearly distinguishable and does not have any application in the present case. They, then, submitted that strangely enough, the trial Court has issued non-bailable warrants for arrest of the additional accused persons, including the petitioners, when as a matter of fact, such a practice is condemned by the courts and that only summons could be issued to the accused persons in pursuance to the order made under Section 319, Code of Criminal Procedure.

viii) Finally, they prayed for allowing the present petitions in their entirety.

Per contra, learned State counsel vehemently opposed these petitions. He submitted that decision in the case of Shashikant Singh (supra) and the other decisions rendered by the Rajasthan High Court as well as this Court and one more decision of the Apex Court in the case of Rajendra Singh vs. State of U.P., (2007) 7 SCC 378 show that even after the conclusion of the trial, the power under Section 319, Code of Criminal Procedure, can be exercised and the additional accused can be summoned. He further submitted that in the present case, the trial Court had separated the application under Section 319, Code of Criminal Procedure, for the reasons beyond his control and ordered separate registration of the application as there was an order from this Court directing him to decide the trial itself against the ten accused persons within a period of three months i.e. on or before 07.11.2017. At any rate, he decided the

application under Section 319, Code of Criminal Procedure, simultaneously with the judgment of conviction dated 31.10.2017 and, therefore, it could not be said that he had become functus officio. He, then, submitted that in one case, after judgment of acquittal, High Court confirmed the order summoning additional accused under Section 319, Code of Criminal Procedure, after four months of the judgment of acquittal.

The learned State counsel then submitted that the evidence that has been produced by the prosecution on record on which reliance was placed by the trial Court to summon the accused persons, including the petitioners, cannot be said to be inadmissible, as contended by the learned senior counsel for the petitioners. According to him, the evidence that has been led is good and sufficient. Alternatively, according to him, the evidence on which reliance has been placed by the trial Court, assuming but not admitting of its alleged inadmissible nature, the fact of the matter is that the petitioners have full opportunity during trial to object accordingly. The right of the prosecution to prove its evidence post the proceedings under Section 319, Code of Criminal Procedure, cannot be taken away at such a premature stage. At any rate, according to him, the term evidence has been interpreted by the Apex Court in a judgment and, therefore, the submission made by the learned senior counsel for the petitioners is misconceived.

The learned State counsel, then, submitted that the document Exhibit DX, on which reliance has been placed, is in fact from a complete writ petition that was filed by petitioner-Sukhpal Singh Khaira himself on

affidavit and there are some documents annexed therewith. The said document Exhibit DX has been marked and the State will be entitled to file certified copy of the entire writ petition along with documents before the trial Court as evidence. The petitioners will also have opportunity to oppose the filing of such evidence before the trial Court . The petitioners would have also an opportunity to contest the said evidence, according to law. As to the authenticity of the evidence in terms of Section 65-B of the Evidence Act, he submitted that the same is again a matter which can always be proved according to law but then for the purpose of Section 319, Code of Criminal Procedure, the power thereunder cannot be made nugatory. He pointed out the evidence of the witnesses, including the suggestions given by accused person Gurdev Chand, about the petitioners being in contact with the original accused persons who have been convicted.

As to the order asking the police to file supplementary charge-sheet, he submitted that there is nothing wrong in the present case on the part of the trial Court to direct filing of supplementary charge-sheet as such right was reserved by the police themselves while filing the challan, which is clear from the perusal of the record. The trial Court having found a prima facie case against the petitioners, the said direction is in consonance with the liberty that was reserved by the police at the time of filing challan. Lastly, he submitted that the trial Court issued non-bailable warrants looking to the seriousness of the offences and as it is seen that ten accused who have been convicted have been sentenced to undergo rigorous imprisonment for 20 years. He, then, emphasized that

offences relate to drug trafficking, etc. from the neighbouring country Pakistan. Therefore, the Court has viewed it seriously. Finally, he prayed for dismissal of the revision petitions.

Learned State counsel also filed written submissions on behalf of the State which have been taken on record.

Consideration :

The following dates would be relevant in the present matter:-

<i>Date</i>	<i>Event</i>
05/03/15	F.I.R. No.35 under Sections 21/24/25/27/28/29/30 of the Narcotic Drugs and Psychotropic Substances Act, 1985, Section 25-A of the Arms Act and Section 66 of the Information Technology Act, 2000, was lodged at Police Station Sadar, Jalalabad against 11 accused persons.
09/03/15	Special Investigation Team constituted to investigate the matter
06/09/15	Special Investigation Team filed challan against nine persons. Other two persons were declared proclaimed offenders. Later, out of them, one was apprehended and, thus, trial was held against ten persons.
2015	CWP-8999-2015 filed by petitioner-Sukhpal Singh Khaira for CBI investigation of FIR No.35
06/07/16	(i) PW-4 Ajmer Singh and PW-5 Jaswant Singh were examined and the prosecution evidence was closed. (ii) Request for recall of these witnesses was declined by the Court.
14.07.2016	Additional Advocate General, Punjab, stated that petitioner-Sukhpal Singh Khaira was not named as an accused in the said FIR
18.11.2016	Supplementary charge-sheet filed by the Special Investigation Team against the two proclaimed offenders
16.03.2017	Petitioner-Sukhpal Singh Khaira withdrew CWP-8999-2015
31.07.2017	Application under Section 311, Code of Criminal Procedure, for recall of the said witnesses was filed by the prosecution, which was allowed.

<i>Date</i>	<i>Event</i>
08/08/17	CRM-M-18474-2017 for grant of regular bail by Kala Singh, one of the ten accused, was decided with a direction to the trial Court to complete the trial within three months i.e. by 07.11.2017.
14.09.2017 to 21.09.2017	PW-4 Ajmer Singh and PW-5 Jaswant Singh (recalled witnesses) and PW-13 Ravinder Pal Singh were examined and cross examined.
21.09.2017	The prosecution closed the evidence and the prosecution also filed an application under Section 319, Code of Criminal Procedure for summoning additional five accused, including these three petitioners.
28.09.2017	The trial Court made order directing separate registration of the application under Section 319, Code of Criminal Procedure filed on 21.09.2017.
04/10/17	The statements of ten accused under Section 313, Code of Criminal Procedure recorded.
10.10.2017/ 16.10.2017	Defence witnesses examined
31.10.2017	(i) Sessions Case No.289 of 2015 decided and all ten accused convicted and sentenced to period ranging from 6 years to 20 years. (ii) In the judgment of conviction, in para-5 (end of para), the trial court stated that the application dated 21.09.2017, under Section 319, Code of Criminal Procedure, would be dealt with separately. On the same date, i.e. 31.10.2017, by the impugned order, the trial Court decided the application under Section 319, Code of Criminal Procedure, summoning five additional accused, including these petitioners.
03.11.2017/ 07.11.2017	Hence these petitions.

Apropos the submissions made by the learned senior counsel for the petitioners in these two petitions as to the mala fides, I find that the FIR was registered on 05.03.2015 when the present Government was not ruling in the State of Punjab. The entire action which has been assailed and the allegations relate to the period during earlier Government. That apart, there are no specific allegations about mala fides against any particular person nor any such person has been made a party to the

petition in order that the plea regarding mala fides could be properly examined. It is a well settled legal position that adequate pleadings and proofs qua the party against whom mala fides are alleged is sine qua non for consideration of the question of malice in fact. The same is conspicuously absent and, therefore, I am not prepared to accept the submission that the actions taken by the prosecution are actuated with malice. Apart from that, petitioner-Sukhpal Singh Khaira himself had filed CWP-8999-2015 asking for investigation by the Central Bureau of Investigation but, then, he withdrew the said petition. Had he been really serious about the malice in fact, he would not have withdrawn the said petition. Merely because he was not the accused in FIR No.35, the said petition was for investigation by the Central Bureau of Investigation and, therefore, this fact that his name was not in the FIR was not germane when he was sure about the mala fide action against him. It is not possible for this Court to accept the submission in that behalf.

The submission made by the learned senior counsel for the petitioners that none of the petitioners were in picture right from the registration of the offence on 05.03.2015 till filing of challan, supplementary challan and closure of evidence of the prosecution at the first blush, would not be relevant qua the power of the Court under Section 319, Code of Criminal Procedure. At any rate, the power is to be exercised if the trial Court finds sufficient evidence to proceed against additional accused persons. Therefore, it is no gainsaying that since the closure of trial at the first instance, their names did not crop up, therefore, the additional accused could not be summoned even if after recall of the

witnesses there is evidence on record.

The next submission that was made was that it was only upon recall of the witnesses; namely, PW-4 Ajmer Singh and PW-5 Jaswant Singh, that they deliberately named the additional accused persons in their evidence. At this stage, unless they are cross-examined to that effect, it would not be possible to jump to such a conclusion.

The learned senior counsel for the petitioners, then, contended that the power under Section 319, Code of Criminal Procedure, can be exercised only till the conclusion of the main trial and not at the time when the judgment is delivered against the original accused in that trial. In the present case, the judgment of conviction was delivered on 31.10.2017 and simultaneously the order under Section 319, Code of Criminal Procedure, was also passed. They submitted that Section 319, Code of Criminal Procedure, contemplates summoning the accused persons only if they could be tried together with accused persons (original accused persons). Since the original accused persons were already convicted, there was no question of additional accused being tried together with the original accused persons and hence the trial Court erred in law in making the impugned order. The trial Court becomes functus officio once the stage to try the proposed additional accused together with the original accused persons, gets finished. The learned senior counsel for the petitioners relied on the decision rendered by a Single Bench of this Court (A.B. Chaudhari, J.) in CRR-4068-2014 decided on 24.03.2017.

I have carefully perused the said decision. It would be appropriate to find out the ratio decidendi laid down in that decision. For

that purpose, the question of law that was framed therein is quoted hereinbelow, which reads, thus :-

“Whether in terms of Section 319 of Code of Criminal Procedure, 1973 (for short 'Cr. P.C.'), the complainant in the subject FIR could be summoned as an accused based on the deposition of the defence witnesses before the trial Court during trial when the basic ingredients of Section 319 Cr. P.C. is that such a proposed accused is required to be tried together with the accused already on trial?”

The above question framed clearly shows that what was considered by this Court was as to whether the complainant in the FIR case himself can be summoned as an accused, based on the deposition of defence witnesses before the trial Court as the proposed accused is required to be tried together with the accused already on trial. In the present case, the above said position on the basis of the aforesaid question is not relevant and, therefore, the said decision has no application in the present case. The petitioners are not the complainants in the present case who have been summoned but they are additional proposed accused.

The next submission of the learned senior counsel for the petitioners is that the trial Court became functus officio on the date of judgment i.e. 31.10.2017. In that connection, they cited paragraphs 37 to 39 from the Constitution Bench judgment of the Supreme Court in Hardeep Singh's case (supra). They also relied upon paragraphs 13 and 14 from the judgment in the case of Tarsem Singh vs. State of Punjab, 2013 (3) RCR (Criminal) 585 and the decision in the case of Ramadhar Singh @ Ramadhar Yadav vs. State of Bihar (Patna), 2015(24) RCR (Criminal) 548 and, in particular, paragraphs 13 to 15 thereof, to buttress their point.

In my opinion, the judgments relied upon by the respondent in the case of Shashikant Singh (supra) has the apt application in the present case and the following paragraphs from the said judgment clearly answer the argument advanced by the learned counsel for the petitioners. I quote paragraphs 5, 6, 8, 10 and 13, which read as under:-

“5. During the pendency of the aforesaid revision petition, the learned Sessions Judge concluded the trial against Chandra Shekhar Singh and believing the ocular testimony, by judgment dated 16th July, 2001, Chandra Shekhar Singh was convicted for the offence under Section 302 Indian Penal Code and Section 27 of the Arms Act. In the revision petition, it was contended on behalf of respondent No. 1 that since the trial in respect of Chandra Shekhar Singh has already been concluded and no session trial is pending before the trial court, Section 319 would not be applicable as the said provision is applicable only when the trial against another accused is pending and in the absence of pendency of such a trial, the court is not competent to proceed against respondent No. 1. The High Court by the impugned judgment accepted the aforesaid contention and held that the order dated 7th April, 2001 is without jurisdiction. The order dated 7th April, 2001 was quashed without issue of notice to the petitioner but on hearing the counsel for the State of Bihar. The other contentions urged during the hearing of the revision petition that (i) the investigation against respondent No. 1 was kept pending and on that score, the Court had no power to summon the said respondent under Section 319 of the Code; (ii) the order dated 7th April, 2001 is illegal as no reasons have been assigned for proceeding against respondent No. 1 and; (iii) the order was too cryptic, were

not gone into by the High Court.

6. The trial against Chandra Shekhar Singh was pending on 7th April, 2001 when the order under Section 319(1) of the Code was passed by the Court of Sessions. Thus, the order when passed cannot be said to be without jurisdiction on the stated ground since at that stage, the trial against Chandra Shekhar Singh was pending and respondent No. 1 summoned under Section 319 could be tried together with him. However, the trial against Chandra Shekhar Singh concluded before respondent No. 1 could be brought before the Sessions Court. Therefore, the question is, can respondent No. 1, after being summoned under Section 319 of the Code, be tried in the absence of trial pending against Chandra Shekhar Singh. In other words, the aspect to be determined is as to whether the order dated 7th April, 2001 would become ineffective and inoperative as a result of the conclusion of trial against Chandra Shekhar Singh before respondent No. 1 could be proceeded with for the offence for which warrants were issued against him by the Sessions Court pursuant to an order passed under Section 319 of the Code. That section 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, not being 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 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."

8. The effect of the conclusion of the trial against the accused who was being proceeded with when the order was passed under Section 319(1) for proceeding against the newly added person, is to be examined in the light of sub-section (4) of Section 319 which stipulates a de novo trial in respect of the newly added persons and certain well settled principles of interpretation.

10. 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.

13. On facts, the court could not have intended while concluding the trial against Chandra Shekhar Singh, to nullify its earlier order directing issue of warrants against respondent No. 1. The construction to be placed on a provision like this has to commend to justice and reason. It has to be reasonable construction to promote

the ends of justice. The words 'could be' tried together with the accused, in Section 319(1) cannot be said to be capable of only one construction. If it was so approach to be adopted would be different since the intention of the Parliament is to be respected despite the consequences of interpretation. There is, however, a scope for two possible constructions. That being the position, a reasonable and common sense approach deserves to be adopted and preferred rather than a construction that would lead to absurd results of respondent No. 1 escaping the trial despite passing of all order against him on Court's satisfaction under Section 319(1) and despite the fact that the proceedings against him have to commence afresh. In this view, the fact that trial against Chandra Shekhar Singh has already concluded is of no consequence insofar as respondent No. 1 is concerned."

The decision in the case of Shashikant Singh (supra) was not cited before the Constitution Bench in the case of Hardeep Singh (supra). To my mind, the decision in the case of Shashikant Singh (supra) is directly on the point involved as against the decision in the case of Hardeep Singh (supra) and, therefore, in terms of the decision in the case of Shashikant Singh (supra), the submission will have to be repelled, which I hereby do. Even otherwise, paragraph-39 from Hardeep Singh's case (supra) would also throw the light and I quote the same, which reads, thus :-

"39. To say that powers under Section 319 Cr.P.C. can be exercised only during trial would be reducing the impact of the word 'inquiry' by the court. It is a settled principle of law that an interpretation which leads to the conclusion that a

word used by the legislature is redundant, should be avoided as the presumption is that the legislature has deliberately and consciously used the words for carrying out the purpose of the Act. The legal maxim "A Verbis Legis Non Est Recedendum" which means, "from the words of law, there must be no departure" has to be kept in mind. "

Apart from that, a Coordinate Bench of this Court in Amar Nath vs. State of Haryana, 2003(1) RCR (Criminal) 220, held that the power under Section 319, Code of Criminal Procedure, can be exercised even after the judgment is concluded. In that case, the accused persons were acquitted by the trial Court and after four months of the conclusion of the trial, the trial Court exercised the power under Section 319, Code of Criminal Procedure, for summoning the additional accused. This Court relied upon the judgment in the case of Shashikant Singh (supra) for that purpose. The present case stands on a better footing inasmuch as the order was passed under Section 319, Code of Criminal Procedure, simultaneously with the judgment and order of conviction of the original accused persons. The contention raised by the learned counsel for the petitioners, thus, stands disposed of.

Learned senior counsel for the petitioners having taken this Court through the entire evidence of PW-4 Ajmer Singh, PW-5 Jaswant Singh and PW-13 Ravinder Pal Singh submitted that a bare reading of the evidence of these witnesses shows that the evidence taken into consideration by the trial Court for making the order under Section 319, Code of Criminal Procedure, is not legal evidence as against the requirement of legal evidence for exercise of power under Section 319,

Code of Criminal Procedure. Whatever evidence had been relied upon by the trial Court is wholly inadmissible. The counsel, then, submitted that the affidavit, Exhibit DX with the writ petition that was filed by petitioner-Sukhpal Singh Khaira was also not a legal piece of evidence to prove according to law nor the entire petition is on the record of the Court. Therefore, marking Exhibit DX, a part of the whole document, would not form the legal evidence. He relied on paragraphs 55 and 69 to 71 of the judgment in Hardeep Singh's case (supra) and contended that those paragraphs clearly show requirement of legal evidence before exercising the power under Section 319, Code of Criminal Procedure. I have carefully considered the submission made by the learned senior counsel for the petitioners with reference to the judgment in the case of Hardeep Singh (supra). But I quote paragraphs 70 and 71 from the said judgment, which read thus:-

“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.”

A reading of the above paragraphs shows that whether evidence is relevant, irrelevant, admissible or inadmissible are matters to be seen at the trial and in this case in the retrial/denovo trial due to the order passed under Section 319, Code of Criminal Procedure. The decision in the case of Shashikant Singh (supra), in para-10 thereof, would again be relevant with reference to the interpretation of Section 319(4), Code of Criminal Procedure, as there is a full opportunity to the additional accused persons to object to the evidence as relevant or irrelevant and admissible or inadmissible. At the same time, the prosecution cannot be forbidden from bringing to the Court such other evidence against the additional accused persons which can be proved as legally admissible evidence as a denovo trial is required to be held in the light of Sub-section (4) of Section 319, Code of Criminal Procedure. The provisions of Section 319, Code of Criminal Procedure, therefore, cannot be interpreted to impede the production of whatever evidence by the denovo trial against the additional accused persons.

At any rate, a look at the evidence of PW-4 Ajmer Singh, PW-5 Jaswant Singh and PW-13 Ravinder Pal Singh, which has been relied upon by the trial Court, for exercising power under Section 319, Code of Criminal Procedure, shows that some part of the evidence is admissible while some part of the evidence is inadmissible. But then, as earlier stated, the same can be subject matter of objection in denovo trial. But on that ground, the interest of justice cannot be buried if really the additional accused persons are involved in the crime. As to the document,

Exhibit DX, I find that Exhibit DX was part and parcel of the writ petition that was filed by petitioner-Sukhpal Singh Khaira along with some documents. In my opinion, upon filing of certified copy of the writ petition along with documents, the prosecution would be entitled to prove the said document in the denovo trial and the prosecution cannot be prohibited from doing so as the trial itself would be held de-novo. The meaning of the word 'de-novo' cannot be stretched to mean that whatever evidence was led earlier in the earlier trial could only be read by the prosecution and any additional evidence cannot be led and proved. I think that the term 'denovo' itself suggests that both the parties will be entitled to advance such evidence as they deem fit, the trial being denovo. Therefore, whether Exhibit DX and its documents, and the call records, filed along with the writ petition are admissible or not is a matter of proof before the trial Court and certainly the petitioners are entitled to object to the admissibility of the documents for want of legal proof in the denovo trial. To say that Exhibit DX or the certified copy of the writ petition could not be looked into by the trial Court would be to prohibit the prosecution from effectively participating in the denovo trial. That would not serve the interest of justice.

Learned senior counsel for the petitioners then contended that in the Constitution Bench decision in the case of Hardeep Singh (supra), it has been held in paragraphs 98 and 99 thereof, that the power under Section 319, Code of Criminal Procedure cannot be exercised in a casual and cavalier manner and the requirement is the existence of stronger evidence more than a prima facie case. There can be no dispute about the

said proposition laid down in the case of Hardeep Singh (supra). But then, I find that the evidence pointed out by the Public Prosecutor and the reasons given by the trial Court in that behalf, which are quoted hereunder, cannot be said to be leading to merely a prima facie case. The details of calls between the additional accused persons and the convicted accused persons are a matter which cannot be taken lightly in the wake of drug smuggling across Pakistan border. I quote the following portion from the impugned judgment :-

“Learned Addl. P.P. further argued that call details of numbers of mobile phones used by accused from 05.03.2015 to 23.04.2015 proved on the file. PW-13 Ravinderpal Singh proved the meeting of mind of accused when he proved that mobile number 98144-00050 used by Gurdev Singh Chairman, mobile number 97803-14956, 99880-15339, 94654-14956 used by Harbans Singh accused, mobile number 95018-62815, 99150-82156 used by Subash chander accused, mobile number 70875-57854, 70875-91854 used by Manjeet Singh son of Boota Singh, mobile No.81468-03304 used by Manjeet Singh son of Satnam Singh driver of Gurdev Singh, mobile No.98141-93771 used by Gurdev Chand, mobile No.95925-95237 used by Anil Kumar, mobile No.98884-28723 used by Sonia, mobile No.98783- 66557 used by accused Nirmal Singh alias Nimma, mobile No.99158- 01906, 88726-80281 used by accused Shunty, mobile No.98153-33333 used by Sukhpal Singh Khehra, mobile No.94647-78839 used by accused HC Joga Singh PSO Sukhpal Singh Khehra, mobile No.98786-23933 used by Manish PA of Sukhpal Singh Khehra. Learned Addl.P.P. further argued that accordingly, Interconnectivity of calls between the

accused is proved on the file.

Learned Addl. P.P. further argued that during investigation, it is transpired that kingpin behind whole of the sequence was Sukhpal Singh Khaira who through his personal security Officers PSO Joga Singh, PA Manish and Charanjit Kaur sister of accused Gurdev Singh were behind the curtain. Learned Addl.P.P further argued that as far as this fact that these accused are behind the curtain is proved on the file when PW-4 Ajmer Singh S.P. specifically deposed that accused Gurdev Singh used to contribute money in the elections of Sukhpal Singh Khaira and he also provided his vehicle for campaigning. Learned Addl.P.P further argued that it is prima facie also proved on the file that Charanjit Kaur who is residing in U.K. and is the sister of accused Gurdev Singh assured accused Gurdev Singh that if there is any problem while doing smuggling of Heroin then he can call PSO Joga Singh, PSO of Sukhpal Singh Khaira. Learned Addl.P.P further argued that these facts were mentioned by Ajmer Singh, S.P. PW-4 in his case diary in the Zimni No.5 dated 09.03.2015. Ajmer Singh S.P. further brought these facts to the notice of Sh. Swapan Sharma, the then S.S.P. Fazilka and SSP Fazilka further informed these facts to I.G. Bathinda Zone, who further constituted a SIT. The SIT consists of Sh. Amar Singh Chahal, DIG Ferozepur, Sh. Swapan Sharma, the then SSP, Fazilka and Sh. Amarjit Singh S.P.(D), Ferozepur.

Learned Addl.P.P further argued that PW-5 Inspector Jaswant Singh also deposed on the same lines as deposed by PW-4 S.P. Ajmer Singh.

Learned Addl. P.P further argued that the narcotic trade is a big challenge not only to the health and prosperity of citizens, but to the security of the nation

also.

As the things stand out, this FIR No. 35 was registered and Challan against 10 accused was presented by mentioning that after investigation the challan against the remaining accused will also be filed but till date no challan is presented against other accused whose names are mentioned in the application under section 319 Cr.P.C. Vide my separate Judgment, all the accused against whom the challan was presented except one are convicted today. The proceedings of this application was separated from the main challan because Hon'ble High Court in the main challan has directed this court to decide the case up to 08.11.2017. During the trial PW-13 proved Call details of numbers of mobile phones used by accused from 05.03.2015 to 23.04.2015. Interconnectivity of calls between the accused is also proved on the file. Further PW-4 & PW-5 specifically deposed regarding the involvement of these accused in this crime. PW-4 S.P. Ajmer Singh specifically deposed that he mentioned these facts in his case diary in the Zimni No.5 dated 09.03.2015 and he further brought these facts to the notice of Sh. Swapan Sharma, the then SSP, Fazilka. PW-4 S.P. Ajmer Singh also deposed that S.S.P. Fazilka further brought this to the notice of I.G. Bathinda Zone, who constituted a SIT.

As discussed above, I am satisfied that there is every likelihood that accused Sukhpal Singh Khaira, Joga Singh PSO of Sukhpal Singh Khaira, Manish PA of Sukhpal Singh Khaira, Charanjit Kaur sister of accused Gurdev Singh and Major Singh Bajwa are likely to be convicted if allegations are not rebutted, further while filing the challan it was mentioned that after completing the investigation challan against these accused will be filed

but the same is not filed by the police. So to my mind accused must be summoned to face the Trial and to rebut the allegations.”

The view taken by the trial Court as above, as per the requirement of paragraphs 98 and 99 of the Constitution Bench judgment in the case of Hardeep Singh (supra), need not be substituted by me as there is no perversity in what has been held by the trial Court. It is not that the order is without jurisdiction, considering the scope of revisional jurisdiction of this Court. I, therefore, hold that even the said requirement of paragraph-99 has been met with by the trial Court.

The next submission made by the learned senior counsel for the petitioners is that the trial Court could not have directed filing of supplementary charge-sheet as the trial Court does not have such power, as held by the Apex Court in some decisions. I have no doubt in my mind that the law is trite that the Court does not have power to order filing of supplementary charge-sheet. But then, there are peculiar facts in the present case. When the challan was filed before the trial Court by the Special Investigation Team, it was specifically stated as under regarding reserving its right to file supplementary charge-sheet:-

“In connection to absconding persons and suspected persons, investigation is going on. Permission under the Arms Act has been sought from worthy DM and is annexed with this Challan. Upon completion of investigation against absconding and suspected persons, supplementary challan report shall be submitted under Section 173(8) of Cr.PC”

It is a settled legal position that filing of supplementary

challan, one or in multiples, is permissible under Section 173, Code of Criminal Procedure. To contend that first supplementary challan was filed and in that the petitioners were not named would be no answer because the authority to file one more supplementary charge-sheet of the investigating machinery has not been taken away. Therefore, the investigating agency is entitled to file supplementary charge-sheet. As stated by me earlier, the direction to file supplementary charge-sheet will have to be read down in the order impugned as the liberty to the investigating agency to file supplementary charge-sheet, if they want. Accordingly, the said part of the order will have to be modified to bring it in consonance with the settled legal position, which I will do hereinafter.

The next submission made by the learned senior counsel for the petitioners that the trial Court should not have issued non-bailable warrants against the accused, must be upheld. It is a well settled legal position that such a course of action should not be pressed into service. The trial Court has not recorded a single reason as to why instead of issuing summons, straightway warrants have been issued. I think the trial Court has overdone it. The trial Court was not at all justified in doing so. Hence, the said part of the order issuing non-bailable warrants for securing the presence of the petitioners, must be set aside. Consequently, liberty will have to be granted to the petitioners to apply for anticipatory/regular bail, as advised, before the trial Court first.

The upshot of the above discussion is that the impugned order under Section 319, Code of Criminal Procedure, will have to be upheld.

In the result, the following order is inevitable:-

ORDER :

i) Criminal Revision No. 4070 of 2017 and Criminal Revision No. 4113 of 2017 are dismissed.

ii) The order directing filing of supplementary charge-sheet is modified and shall be read as under:-

“Liberty is reserved in favour of the Investigating Agency to file supplementary charge-sheet against the additional accused persons, if so advised.”

iii) The order issuing non-bailable warrants for securing presence of the petitioners in both these petitions is quashed and set aside. Liberty is reserved in favour of the petitioners to apply to the trial Court for anticipatory/regular bail, which shall be considered by the trial Court on its own merits without being influenced by the observations in the order made by it under Section 319, Code of Criminal Procedure.

November 17, 2017
Kang

(A.B. CHAUDHARI)
JUDGE