

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

CRM-M-46981-2018 (O&M)

Date of Decision: 5.12.2018

Bimla and others

.....PETITIONER(s).

VERSUS

State of Haryana

.....RESPONDENT(s).

CORAM:- HON'BLE MR. JUSTICE RAJ SHEKHAR ATTRI

Present: Mr. Gaurav Aggarwal, Advocate
for the petitioner.

RAJ SHEKHAR ATTRI, J.(Oral)

By filing this petition under Section 482 of Code of Criminal Procedure, the petitioner has challenged order dated 10.11.2017 (Annexure P-2) passed by learned Additional Chief Judicial Magistrate, Sirsa vide which the petitioner was summoned as additional accused for offence punishable under Sections 323, 324, 326, 506, 149, 148 of Indian Penal Code and order of the learned revisional Court i.e. Additional Sessions Judge, Sirsa dated 29.9.2018 (Annexure P-3) vide which the revision filed by the petitioner against the order dated 10.11.2017 was dismissed.

The facts of the case lies in a narrow compass. The petitioner as well as the complainant party are having adjoining fields. On 29.7.2014 in the evening, both the parties were planting paddy in their

respective fields. The complainant party alleged that the accused party had been lifting the soil from their land and created hinderance in the flow of water. On this ground, altercation took place. Then main accused Sandeep called his family members. On hearing the voice, Mahender armed with a iron *Kappa*, Lilu Ram armed with an iron spade and Bhaga Ram armed with iron spade came there. Sandeep was already having a spade in his hand. However, petitioners-Smt. Krishna, Pari and Smt. Bimla also came running to that spot. The male members of their family inflicted injuries and all the three petitioners also gave fist and kick blows.

After investigation, they were found innocent and, therefore, they had not been charge sheeted along with the remaining accused. Rather their names were mentioned in column No.2 of the charge sheet.

During the trial, PW1-Krishan Kumar was examined. After examination, an application was filed which was allowed vide order dated 11.10.2017. Said order was challenged before the learned Additional Sessions Judge by way of filing revision petition and the same was upheld vide order dated 29.9.2018.

I have heard the learned counsel for the petitioner and gone through the record.

First of all, this court would like to deal with the scope of Section 319 Cr.P.C. However, the issue is no more intact res-integra.

Lakhbir Kaur alias Jyoti v. State of Punjab and another;

2016 (1) RCR (Criminal) 147, it was observed as under : -

“17. The Hon'ble Supreme Court, in para 49 to 53 of its judgment in Hardeep Singh's case (supra), after a detailed discussion on the issue and referring to all the earlier important judgments on Section 319 Cr.P.C., with a particular reference to its earlier Constitution Bench Judgment in Dharampal v. State of Haryana, observed as under:-

"It is thus aptly clear that until and unless the case reaches the stage of inquiry or trial by the court, the power under Section 319 Cr.P.C. cannot be exercised. In fact, this proposition does not seem to have been disturbed by the Constitution Bench in Dharam Pal (CB). The dispute therein was resolved visualising a situation wherein the court was concerned with procedural delay and was of the opinion that the Sessions Court should not necessarily wait till the stage of Section 319 Cr.P.C. is reached to direct a person, not facing trial, to appear and face trial as an accused. We are in full agreement with the interpretation given by the Constitution Bench that Section 193 Cr.P.C. confers power of original jurisdiction upon the Sessions Court to add an accused once the case has been committed to it.

In our opinion, the stage of inquiry does not contemplate any evidence in its strict legal sense, nor the legislature could have contemplated this inasmuch as the stage for evidence has not yet arrived. The only material that the court has before it is the material collected by the prosecution and the court at this stage prima facie can apply its mind to find out as to whether a person, who can be an accused, has been erroneously omitted from being arraigned or has been deliberately excluded by the prosecuting agencies. This is all the more necessary in order to ensure that the investigating and the prosecuting agencies have acted fairly in bringing

before the court those persons who deserve to be tried and to prevent any person from being deliberately shielded when they ought to have been tried. This is necessary to usher faith in the judicial system whereby the court should be empowered to exercise such powers even at the stage of inquiry and it is for this reason that the legislature has consciously used separate terms, namely, inquiry or trial in Section 319 Cr.P.C.

Accordingly, we hold that the court can exercise the power under Section 319 Cr.P.C. only after the trial proceeds and commences with the recording of the evidence and also in exceptional circumstances as explained herein above.

There is yet another set of provisions which form part of inquiry relevant for the purposes of Section 319 Cr.P.C. i.e. provisions of Sections 200, 201, 202, etc. Cr.P.C. applicable in the case of Complaint Cases. As has been discussed herein, evidence means evidence adduced before the court. Complaint Cases is a distinct category of criminal trial where some sort of evidence in the strict legal sense of Section 3 of the Evidence Act 1872, (hereinafter referred to as the 'Evidence Act') comes before the court. There does not seem to be any restriction in the provisions of Section 319 Cr.P.C. so as to preclude such evidence as coming before the court in Complaint Cases even before charges have been framed or the process has been issued. But at that stage as there is no accused before the Court, such evidence can be used only to corroborate the evidence recorded during the trial for the purpose of Section 319 Cr.P.C., if so required.

What is essential for the purpose of the section is that there should appear some evidence against a person not proceeded against and the stage of the proceedings is irrelevant. Where the complainant is circumspect in proceeding against several

persons, but the court is of the opinion that there appears to be some evidence pointing to the complicity of some other persons as well, Section 319 Cr.P.C. acts as an empowering provision enabling the court/Magistrate to initiate proceedings against such other persons. The purpose of Section 319 Cr.P.C. is to do complete justice and to ensure that persons who ought to have been tried as well are also tried. Therefore, there does not appear to be any difficulty in invoking powers of Section 319 Cr.P.C. at the stage of trial in a complaint case when the evidence of the complainant as well as his witnesses is being recorded.

Thus, the application of the provisions of Section 319 Cr.P.C., at the stage of inquiry is to be understood in its correct perspective. The power under Section 319 Cr.P.C. can be exercised only on the basis of the evidence adduced before the court during a trial. So far as its application during the course of inquiry is concerned, it remains limited as referred to herein above, adding a person as an accused, whose name has been mentioned in Column 2 of the charge sheet or any other person who might be an accomplice."

18. The conclusions arrived at, while laying down the law on the true import of Section 319 Cr.P.C. in para 98 and 99 of its judgment in Hardeep Singh's case (supra), came to be reiterated by the Hon'ble Supreme Court in its recent judgment in **Babubhai Bhimabhai Bokhiria and another v. State of Gujarat and others**, 2014(2) R.C.R.(Criminal) 915 : 2014 (5) SCC 568. To avoid repetition and for the sake of brevity, the relevant observations made by the Hon'ble Supreme Court in para 1, 7 and 8 of its judgment in Babubhai Bhimabhai Bokhiria's case (supra), which can be gainfully followed in the present case, read as under :-

"Before we proceed to consider the case, we must remind

ourselves the maxim "judex damnatur cum nocens absolvitur" which means that a Judge is condemned when guilty person escapes punishment. But, at the same time, we cannot forget that credibility of the justice delivery system comes under severe strain when a person is put on trial only for acquittal.

xx xx xx xx

Before we proceed to deal with the evidence against the appellant and address whether in light of the evidence available, power under Section 319 of the Code was validly exercised, it would be expedient to understand the position of law in this regard. The issue regarding the scope and extent of powers of the court to arraign any person as an accused during the course of inquiry or trial in exercise of power under Section 319 of the Code has been set at rest by a Constitution Bench of this court in the case of **Hardeep Singh v. State of Punjab**, 2014(1) R.C.R.(Criminal) 623 : 2014(1) Recent Apex Judgments (R.A.J.) 384 : 2014 (1) SCALE 241. On a review of the authorities, this Court summarised the legal position in the following words:

- "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...."

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."

However, no benefit will be given to the petitioners on the basis of acquittal passed by Juvenile Justice Board by which the juvenile has been acquitted.

On bare perusal of the record, it transpires that the petitioners had arrived at the spot and they had caused simple hurt by giving kick and fist blows. But there is no evidence if they had common intention or formed an unlawful assembly. There was no prior enmity between the parties. The altercation took place on trivial issue of lifting of soil from one field to another. At that time, the petitioners were not present at the spot, rather when Sandeep raised alarm, they rushed to the spot and the

occurrence took place all of a sudden. The liability of the petitioners qua offences under Sections 148 and 149 IPC is not made out. Even there is no evidence if they had common intention with the remaining accused. In this view of the matter, liability is only qua offence punishable under Section 323 IPC.

Consequently, this petition is partly accepted and impugned order dated 29.9.2018 is modified to the extent that the petitioners be summoned for offence punishable under Section 323 IPC only for causing simple hurt by giving fist and kick blows to the victim/injured.

December 5, 2018
Paritosh Kumar

(RAJ SHEKHAR ATTRI)
JUDGE

<i>Whether speaking/reasoned:</i>	<i>Yes/No</i>
<i>Whether Reportable:</i>	<i>Yes/No</i>