

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

Crl. Revision No. 2696 of 2017(O&M)

Date of Decision: 19.02.2018

Sakir

.. Petitioner

Vs.

State of Haryana

.. Respondent

with

Crl. Revision No. 3111 of 2017

Irshad

.. Petitioner

Vs.

State of Haryana

.. Respondent

and

Crl. Revision No. 3112 of 2017

Irshad

.. Petitioner

Vs.

State of Haryana

.. Respondent

CORAM: HON'BLE MRS. JUSTICE ANITA CHAUDHRY

Present:-

**Mr. R.K. Sharma, Advocate
for the petitioners.**

Mr. Arun Kumar, AAG Haryana.

ANITA CHAUDHRY, J.

By way of aforesaid revision petitions, a challenge has been
laid to the order dated 21.04.2017 passed by the trial Court vide which the
petitioners have been summoned as an additional accused to face trial

under Sections 363 and 366-A and Section 6 of the Protection of Children from Sexual Offences Act (for brevity, POCSO Act).

FIR No. 262 dated 16.04.2015 was lodged under Sections 363 and 366-A IPC on the statement of Jamil. He disclosed that on 15.04.2015 her daughter and niece had gone to make dung cakes and they were kidnapped by Irshad son of Ali Mohammad, Saleem son of Mehardeen and Irshad son of Aasi on two motor cycles. Firstly, the girls were taken to a room at Triveni, then to Chharoda and then to Roopdaka. They also reached that place and took the girls back.

The girls were also produced by the complainant in the police station. Both of them were produced before the Magistrate and their statements under Section 164 Cr.P.C. were recorded. Both of them were medically examined. Later Sections 6 and 12 of the POCSO Act were added. Statements of witnesses were recorded.

The police filed the final report under Section 173 Cr.P.C. against accused Saleem while Irshad son of Ali Mohammad and Irshad son of Assi were found not involved in the offence and were kept in column No.2 of the challan.

After charge, both the prosecutrix stepped into the witness box as PW3 and PW9. Thereafter an application under Section 319 Cr.P.C. was moved and the prosecution wanted the summoning of the petitioners, namely Sakir, Irshad son of Ali Mohammad and Irshad son of Assi. The application was allowed vide impugned order dated 21.04.2017. Learned trial Court discussed the law laid down by the Apex Court in **Hardeep Singh Vs. State of Punjab, 2014(1) RCR(C) 623 (SC)** and concluded that in their statements under Section 164 Cr.P.C. and deposition made in Court,

the prosecutrix have specifically named the petitioners to have kidnapped and raped them and there are reasonable prospect of their conviction and summoned them to face trial. Dis-satisfied with the same, instant revision petitions have been filed, which shall be disposed of by this common order.

I have heard learned counsel for the parties and have gone through the paper book very carefully.

It has been urged by learned counsel that petitioner Sakir was neither named in the FIR nor was named by the prosecutrix in their statements under Section 164 Cr.P.C. According to him, when the prosecutrix stepped in the witness-box, they concocted a new story and named the petitioner Sakir for the first time in the Court to widen the net.

Learned counsel further contends that the petitioners Irshad son of Ali Mohammad and Irshad son of Assi were found innocent by the police and rightly were not challaned and the trial Court has committed error in summoning the petitioners and no specific role had been attributed to the petitioners in the FIR. It has been contended that provisions under Section 319 Cr.P.C. could not have been invoked.

On the other hand, learned State counsel does not dispute that the petitioners were found innocent during investigation, but has supported the order. It has been urged that the complainant has deposed specifically about their involvement and were rightly summoned to face trial.

In **Hardeep Singh's case (supra)**, the Hon'ble Apex Court deliberated on the issue regarding the powers under Section 319 Cr.P.C. Dealing with the question regarding degree of satisfaction required for invoking the power under Section 319 Cr.P.C., numerous judgments were

taken into account and it was observed:-

98. Power under Section 319 Cr.P.C. is a discretionary and an extraordinary 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."

In ***Krishnappa v. State of Karnataka, 2004 (4) RCR (Criminal) 678***, the Court ruled that the power to summon an accused is an extraordinary power conferred on the Court and it should be used very sparingly and only if compelling reasons exist for taking cognizance against

the person other than the accused.

The Apex Court in *Sarabjit Singh and another v. State of Punjab and another* reported as 2009(3) RCR (Criminal) 388 observed as follows:-

“17. The provision of Section 319 of the Code, on a plain reading, provides that such an extraordinary case has been made out must appear to the court. Has the criterion laid down by this Court in *Municipal Corporation of Delhi (supra)* been satisfied is the question? Indisputably, before an additional accused can be summoned for standing trial, the nature of the evidence should be such which would make out grounds for exercise of extraordinary power. The materials brought before the court must also be such which would satisfy the court that it is one of those cases where its jurisdiction should be exercised sparingly. We may notice that in *Y. Saraba Reddy v. Puthur Rami Reddy and Anr.* [JT 2007 (6) SC 460], this Court opined:

"...Undisputedly, it is an extraordinary power which is conferred on the Court and should be used very sparingly and only if compelling reasons exist for taking action against a person against whom action had not been taken earlier. The word "evidence" in Section 319 contemplates that evidence of witnesses given in Court..."

Similar view has been reiterated in the cases of *Asha Rani Vs. State of Punjab* 2014(7) RCR(Crl.) 238, *Suman Ashok Kumar Vs. State of Punjab* 2012(4) CCR 115, *Dalpreet Singh & Ors. Vs. State of Punjab & Ors.* 2012(6) RCR(Crl.) 2315 and *Sukkh Raldas & Ors. Vs. State of U.P. & Anr.* 2011(6) RCR(Crl.) 2582.

It is apparent that for the purpose of forming an opinion to summon an additional accused, the Court must be satisfied that there exists

an extra ordinary case for exercise of jurisdiction. The case in hands needs to be analyzed in view of the law laid down referred to above.

Record shows that at the time of lodging the FIR, both the prosecutrix had accompanied the complainant to the police station. It is abundantly clear from a perusal of the FIR that there was reference that the girls had been kidnapped by Saleem, Irshad son of Ali Mohammad and Irshad son of Assi. There was no reference about the presence of petitioner Sakir nor any overt act had been attributed to them. The statements of prosecutrix were recorded under Section 164 Cr.P.C., which are Annexures P-3 and P-4. The prosecutrix did not level any allegation against Sakir and only three persons namely Saleem, Irshad son of Ali Mohammad and Irshad son of Assi were named by the daughter of the complainant. His niece had stated that they had gone out of sweet will. Had the petitioner Sakir been involved in the offence, his name would have figured either in the FIR or in the statements under Section 164 Cr.P.C., but his name was conspicuously missing. The prosecutrix named him for the first time in their deposition before the Court. The trial Court over-looked the FIR and the statements under Section 164 Cr.P.C. while observing that Sakir had been specifically named by the prosecutrix, whereas Sakir was not named anywhere. The prosecutrix named him for the first time in the Court. It appears that the prosecutrix had levelled allegations against Sakir just to widen the net. The impugned order to the extent of summoning petitioner Sakir is not sustainable and is set aside.

So far as petitioners, both named Irshad, are concerned, they were not challaned by the investigating agency. A perusal of record reveals that both were specifically named by the complainant while lodging the

FIR. His daughter i.e. the prosecutrix also named them while her statement under Section 164 Cr.P.C. was recorded. Their names figure since the inception. Specific role was assigned to them in their deposition before the Court also, by the prosecutrix. The veracity of the statements made by the prosecutrix would be tested at the trial and at this juncture there was no reason to disbelieve them, so far as allegations against petitioners Irshad are concerned. No fault could be found with the order passed by the trial Court so far as summoning of Irshad son of Ali Mohammad and Irshad son of Assi is concerned.

In view of the above, revision petition No. 2696 of 2017 filed by petitioner Sakir is allowed, order dated 21.04.2017 passed by learned Addl. Sessions Judge, Nuh, summoning him as additional accused is set aside. Revision petitions No. 3111 and 3112 of 2017 filed by petitioner Irshad son of Assi and Irshad son of Ali Mohammad respectively are dismissed.

It is made clear that the observations made are without prejudice to the merits of the case.

February 19, 2018
Jiten

(ANITA CHAUDHRY)
JUDGE

Whether speaking/ reasoned

Yes/ No

Whether reportable

Yes/ No