

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

**CRR-3160-2017 (O&M)
Date of Decision: 21.09.2018**

Rachhpal Singh @ Gai and others

...Appellant(s)

Versus

State of Punjab and another

...Respondent(s)

CORAM: HON'BLE MRS. JUSTICE ANITA CHAUDHRY

Present: Mr. Nakul Sharma, Advocate
for the petitioners.

Ms. Jaspreet Kaur, AAG, Punjab.

Mr. S.K. Arora, Advocate
for respondent no.2.

ANITA CHAUDHRY, J.

Delay condoned.

The petitioners have assailed the order vide which they have been summoned to face trial in FIR No.189 dated 19.07.2015, registered under Sections 363, 366-A, 376 IPC read with Sections 3/4 of SC & ST Act and Section 4 of the POCSO Act.

An FIR was registered on the statement of Ramandeep Kaur who alleged that she was standing at the gate of her house to see off her brother on 16.07.2015 at 8:00 P.M. when a Bollero vehicle stopped near her house and two persons namely Rachhpal Singh and Jagga Singh alighted from it and tied her mouth and threw her in the

car. She had further averred that two persons namely Jaskaran Singh was driving the car and Samma Singh armed with a rifle was also sitting in the car. They took her to chari crop near the house where she was raped by Jagga and Jaskaran and she was kept there forcibly till 11:00 PM. Thereafter, they took her to Samma's house and Racchpal and Jaskaran went back while Jagga and Samma confined her in a room till 3:00 A.M. Racchpal and Jaskaran reached Samma's house in a vehicle dropped her at her house.

The police investigated the case and filed the challan only against Jagjir Singh @ Jagga. The case was committed and the trial had commenced. The prosecutrix was examined and she named all the three petitioners reiterating the stand taken by her before the police. An application was thereafter moved for summoning the additional accused, which was allowed on 06.05.2017.

I have heard counsel of both the sides.

Counsel for the petitioners submits that after the FIR was registered the matter was investigated by the Investigating Officer and during investigation it was found that the petitioners were not involved and it was also found that the complainant was in a relationship with Jagjit Singh @ Jagga a co-accused and she herself had gone to meet him at his house and only he had relations with her and the rest of the petitioners were found innocent and Jagjeet Singh @ Jagga was challaned as the complainant was a minor and the inquiry report further reads that having come out of the house at night and she was in the fields for the whole night, the girl did not want to return back and

therefore Jagga called his family members and they also informed the Granthi of the Gurudwara and effort was made to make her understand so that she could go back to her house and in the end the complainant agreed to only call her brother and that she was ready to go with him, upon which Sukhjit Singh and Samma went on a motorcycle and apprised Sahib Singh – brother of the complainant and Sahib Singh then returned on the same motorcycle to the Dhhani and took his sister away on the motorcycle and thereafter he returned on the motorcycle and these facts were verified by the police from the neighbours. It was urged that two days after the occurrence, the medical was got done and the case was registered and the petitioners were also named. It was urged that police had also mentioned in their report that no Bollero vehicle was around the complainant's house that night and it has come out in the statement of the respectable persons of the village and they confirmed that there was a relationship between the victim and Jagga Singh and no reason has come out as to why the medical was got done after a delay of 48 hours. It was urged that thereafter the police had challaned only Jagjeet @ Jagga and the complainant has merely repeated what was stated in the FIR and the Court has mechanically ordered their summoning. The counsel submits that petitioner no.1 and 3 are over 50 years of age and all the three were related to the family and have been named out of spite and the MLR does not suggest history of rape by three persons or a gang rape. It was urged that the girl was missing since 8:00 P.M. but no missing report was lodged by the family which also points towards the falsity of the allegations.

The submission on the other hand on behalf of the complainant was that the Court below had rightly exercised the power under Section 319 Cr.P.C. and it is for the trial Court to examine the defence of the petitioners and the deposition of the witnesses before the Court below was in the form of evidence and the exercise of power by the trial Court cannot be treated as unwarranted.

Powers of the Court to proceed under [Section 319](#) Cr.P.C. even against those persons who are not arraigned as accused, cannot be disputed. This provision is meant to achieve the objective that real culprit should not get away unpunished. A Constitution Bench of this Court in *Hardeep Singh v. State of Punjab & Ors.*, (2014) 3 SCC 92, explained the aforesaid purpose behind this provision in the following manner:

“8. The constitutional mandate under Articles 20 and 21 of the Constitution of India provides a protective umbrella for the smooth administration of justice making adequate provisions to ensure a fair and efficacious trial so that the accused does not get prejudiced after the law has been put into motion to try him for the offence but at the same time also gives equal protection to victims and to society at large to ensure that the guilty does not get away from the clutches of law. For the empowerment of the courts to ensure that the criminal administration of justice works properly, the law was appropriately codified and modified by the legislature under [Cr.P.C.](#) indicating as to how the courts should proceed in order to ultimately find out the truth so that an innocent does not get punished but at the same time, the guilty are brought to book under the law. It is these ideals as enshrined under the Constitution and our laws that have led to several decisions, whereby innovating methods and progressive tools have been forged to find out the real truth and to ensure that the guilty does not go unpunished.

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12. [Section 319](#) Cr.P.C. springs out of the doctrine *judex damnatur cum nocens absoluitur* (Judge is condemned when guilty is acquitted) and this doctrine must be used as a beacon light while explaining the ambit and the spirit underlying the enactment of [Section 319](#) CrPC.

13. It is the duty of the court to do justice by punishing the real culprit. Where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial. The question remains under what circumstances and at what stage should the court exercise its power as contemplated in [Section 319](#) CrPC?

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19. The court is the sole repository of justice and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency. The desire to avoid trial is so strong that an accused makes efforts at times to get himself absolved even at the stage of investigation or inquiry even though he may be connected with the commission of the offence.”

The moot question is the decree of satisfaction that is required for invoking the power under [Section 319](#) Cr.P.C. and this aspect has been specifically dealt with by the Constitution Bench in Hardeep Singh's case (supra). At the time of taking cognizance the Court has to see whether a *prima facie* case is made out to proceed against the accused. Though the test of *prima facie* case is the same but

the decree of satisfaction that is required is much stricter and para 105 and 106 of **Hardeep Singh's** case (supra) needs to be reproduced and it reads as under:-

105. Power under Section 319 CrPC 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. 106. 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 CrPC. In Section 319 CrPC 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 CrPC to form any opinion as to the guilt of the accused.

After going through the principles that have been enunciated in **Hardeep Singh's** case (supra) and if we translate the

aforesaid principles and applying them to the facts of the case, it needs to be said that the trial Court acted in a casual and cavalier manner in passing the summoning orders against the petitioners. The petitioners were named in the FIR and investigation was carried out on the basis of the material collected during investigation and the statement of the neighbours. The Investigating Officer found that the petitioners were not involved and they have given their reasons in the inquiry report. The complainant however, supported the version of the FIR in the statement made in the Court. The record was before the trial Court notwithstanding the same the trial Court went by the deposition made by the complainant with no other material to support the so called verbal/ocular version. Thus the evidence recorded during trial was nothing more than the statement which was given earlier to the police and the statement made under Section 161 Cr.P.C. No doubt the trial Court is competent to exercise its power even on the basis of the statement recorded before it in examination in chief. However, with the plethora of evidence collected by the Investigating Officer during investigation which suggested otherwise, the trial Court was at least duty bound to look into the same and ask for much stronger evidence than mere possibility. There is no satisfaction of this nature recorded. The trial Court failed to note that the family had not lodged a missing report and that the medical was got done after 48 hours. The MLR does not refer to gang rape. All these things have been ignored. Except reproducing the statement, the trial Court failed to refer to the inquiry report. Such an order cannot stand judicial scrutiny. As a consequence,

the petition is allowed. The order of summoning the petitioners under

Section 319 Cr.P.C. is set aside.

(ANITA CHAUDHRY)
JUDGE

21.09.2018
sunil

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No