

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

**1. CRR No. 870 of 2017 (O&M)
Date of Decision: 20.09.2018**

Anil Kumar and another

...Petitioners

VERSUS

State of Haryana and others

...Respondent

2. CRR No. 3314 of 2017 (O&M)

Madan Mohan

...Petitioner

VERSUS

State of Haryana and others

...Respondent

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. Ankur Lal, Advocate
for the petitioners in CRR-870-2017.

Mr. R.S. Sihota, Sr. Advocate with
Mr. B.R. Rana, Advocate
for the petitioners in CRR-3314-2017 and
for respondent no. 2 in CRR-870-2017.

Ms. Dimple Jain, AAG, Haryana.

Mr. J.S. Hooda, Advocate
for respondent no. 2 in CRR-3314-2017.

SURINDER GUPTA, J.

During trial in case bearing FIR No. 182 dated 03.04.2016, registered at Police Station Hodal, District Palwal for offence punishable under Sections 148/149/302/323/325/506 of Indian Penal Code (for short 'IPC'), complainant-Madan Mohan moved application for summoning of Anil son of Tejpal, Saurabh son of Harpal and Asha Ram son of Gokal Chand as additional accused in view of statements of complainant-Madan Mohan and injured-Avtar recorded by the Court. Learned trial Court

dismissed the application for summoning of Saurabh as additional accused with observations as follows:-

“10. The perusal of the testimony of PW-14 Madan Mohan shows that he has not uttered even a single word about accused Saurabh son of Harpal. Even he has not stated that Saurabh was present at the spot. PW-18 Avtar in the initial part of his statement has not stated that Saurabh son of Harpal had also come at the spot on the motorcycle alongwith the other accused. He has not described any role to Saurabh son of Harpal. He has just in the end of his examination-in-chief has named Saurabh by stating that he alongwith other accused had caused injuries to Krishan. So, the testimony of PW-18 Avtar does not inspire confidence that Saurabh has also caused injuries to Krishan. Except the above statement of PW-18 Avtar, there is nothing on record to implicate accused Saurabh in the present case.

11. In view of the above discussion, there is no compelling reasons or extra ordinary circumstances to summon Saurabh son of Harpal to face the trial in the present case.”

2. The application to summon Anil Kumar and Asha Ram as additional accused was, however, allowed.

3. Anil Kumar and Asha Ram have filed CRR-870-2017 against order of trial Court challenging their summoning as additional accused while complainant-Madan Mohan has filed CRR-3314-2017 seeking setting

aside of impugned order declining the summoning of Saurabh as additional accused.

4. Before proceedings further, it will be relevant to look into facts relating to occurrence as stated in the FIR, which was registered on the statement of complainant-Madan Mohan, wherein he has stated that on 02.04.2016 on coming to know about a quarrel with Krishan and Avtar he alongwith villagers and family members reached the spot and found that Yudhisther, Anil, Tejpal and Asha Ram alongwith 5-6 persons were beating Krishan and Avtar with *lathies* and *dandas*. Kanhiya, brother of complainant, who has a shop nearby and Tota Ram were trying to rescue Krishan and Avtar. Complainant on reaching the spot got Krishan and Avtar relieved from accused, who went away on their motorcycles giving threats to kill them. When Krishan and Avtar were being shifted to Government Hospital, Palwal, Krishan succumbed to his injuries on the way while Avtar was referred to Nalhad. It is apparent on perusal of file that Saurabh has not been named by complainant-Madan Mohan and no injury has been attributed to him.

5. Learned trial Court has observed that complainant-Madan Mohan has not uttered even a single word about Saurabh. He has not stated that Saurabh was present at the spot. Avtar, who appeared as PW-18 has stated that Saurabh came to the spot on his motorcycle but has not attributed any injury or role to him in the incident. Learned trial Court has observed that presence of other two accused i.e. Anil Kumar and Asha Ram has been stated and role has also been attributed to them in the incident, as such, both were ordered to be summoned as additional accused to face trial.

6. Before proceeding further, it will be relevant to have a look on

the law as laid down by Hon'ble Apex Court on this point. A reference can be made to observations of Hon'ble Apex Court in case of **Brijendera Singh and others vs. State of Rajasthan, 2017 (3) RCR (Criminal) 374**, wherein it has been observed in paras 13 to 15 as follows:-

“13. In order to answer the question, some of the principles enunciated in Hardeep Singh's case may be recapitulated:

Power under Section 319 Cr.P.C. can be exercised by the trial court at any stage during the trial, i.e., before the conclusion of trial, to summon any person as an accused and face the trial in the ongoing case, once the trial court finds that there is some 'evidence' against such a person on the basis of which evidence it can be gathered that he appears to be guilty of offence. The 'evidence' herein means the material that is brought before the Court during trial. Insofar as the material/evidence collected by the IO at the stage of inquiry is concerned, it can be utilized for corroboration and to support the evidence recorded by the Court to invoke the power under Section 319 Cr.P.C. No doubt, such evidence that has surfaced in examination-in-chief, without cross-examination of witnesses, can also be taken into consideration. However, since it is a discretionary power given to the Court under

Section 319 Cr.P.C. and is also an extraordinary one, same has to be exercised sparingly and only in those cases where the circumstances of the case so warrants. The degree of satisfaction is more than the degree which is warranted at the time of framing of the charges against others in respect of whom charge-sheet was filed. Only where strong and cogent evidence occurs against a person from the evidence led before the Court that such power should be exercised. It is not to be exercised in a casual or a cavalier manner. The prima facie opinion which is to be formed requires stronger evidence than mere probability of his complicity.

14. *When we translate the aforesaid principles with their application to the facts of this case, we gather an impression that the trial court acted in a casual and cavalier manner in passing the summoning order against the appellants. The appellants were named in the FIR. Investigation was carried out by the police. On the basis of material collected during investigation, which has been referred to by us above, the IO found that these appellants were in Jaipur city when the incident took place in Kanaur, at a distance of 175 kms. The complainant and others who supported the version in the FIR regarding alleged presence of the appellants at the place of incident had also made statements under*

Section 161 Cr.P.C. to the same effect. Notwithstanding the same, the police investigation revealed that the statements of these persons regarding the presence of the appellants at the place of occurrence was doubtful and did not inspire confidence, in view of the documentary and other evidence collected during the investigation, which depicted another story and clinchingly showed that appellants plea of alibi was correct.

15. *This record was before the trial court. Notwithstanding the same, the trial court went by the deposition of complainant and some other persons in their examination-in-chief, with no other material to support their so-called verbal/ocular version. Thus, the evidence recorded during trial was nothing more than the statements which was already there under Section 161 Cr.P.C. recorded at the time of investigation of the case. No doubt, the trial court would be competent to exercise its power even on the basis of such statements recorded before it in examination-in-chief. However, in a case like the present where plethora of evidence was collected by the IO during investigation which suggested otherwise, the trial court was at least duty bound to look into the same while forming prima facie opinion and to see as to whether much stronger evidence than mere possibility of their (i.e. appellants) complicity has come*

on record. There is no satisfaction of this nature. Even if we presume that the trial court was not apprised of the same at the time when it passed the order (as the appellants were not on the scene at that time), what is more troubling is that even when this material on record was specifically brought to the notice of the High Court in the Revision Petition filed by the appellants, the High Court too blissfully ignored the said material. Except reproducing the discussion contained in the order of the trial court and expressing agreement therewith, nothing more has been done. Such orders cannot stand judicial scrutiny.”

7. The issue regarding scope and extent of power to summon any person as accused during inquiry or trial in exercise of power under Section 319 Cr.P.C. has been set at rest by Constitution Bench of Hon'ble Apex Court in case of **Hardeep Singh vs. State of Punjab and others, 2014 (3) SCC 92**, wherein it has been observed in para 98 and 99 as follows:-

“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.”*

8. Learned trial Court while summoning Anil Kumar and Asha Ram has relied on statements of complainant and injured-Avtar, which were the same as were recorded by the police during investigation, as such, no new fact has come before the trial Court other than the statements of these witnesses, which were looked into by the police during investigation.

Perusal of *zimmies* recorded during investigation shows that besides

recording statements of several witnesses, who have stated that Asha Ram and Anil Kumar were not present at the spot, the police has also obtained their call details. It was found that Asha Ram had left his village Bedram about 15 years back and is residing in Shyam Colony, Palwal. He has his electric shop at *Dussehra* Ground, NIT Faridabad, where he goes daily at 10.00/11.00 a.m. and returns at 07.00 p.m. His call details were not indicating his presence at or near the place of occurrence. He had not even contacted other accused on his phone on that day. It was found that at the time of occurrence, he was at his house in Shyam Colony, Palwal and had also met his neighbours on the day of occurrence at about 09.00/09.30 (a.m.). The police has also obtained call details of mobile number of Anil Kumar bearing no. 9812137375 and found that on 02.04.2016 from 06.20 p.m. to 03.04.2016 upto 12.37 p.m. he was present at Grain Market, Palwal and village Alawalpur. Allegations of his presence at the spot at the time of occurrence was found to be false.

9. So far as the declining of application under Section 319 Cr.P.C. *qua* respondent no. 2-Saurabh in CRR-3314-2017 is concerned, I find that order of learned trial Court is well reasoned and calls for no interference. However, while summoning petitioners, namely, Anil Kumar and Asha Ram on the basis of statements of complainant-Madan Mohan and PW-18 Avtar (injured), I find that trial Court has committed error while relying on those statements and putting the same in the category of strong evidence against petitioners calling for their summoning to face trial as additional accused. Statements of complainant and injured recorded by the trial Court are the same, which were recorded by the police during investigation. The police has collected the evidence including call details while reaching the

conclusion that both the petitioners, namely, Anil Kumar and Asha Ram were not present at the spot. The prosecution has not produced any evidence to rebut the evidence collected by the police during investigation while concluding that presence of Anil Kumar and Asha Ram is not proved at the spot. In the absence of any evidence to rebut the evidence collected by the police, testimonies of Madan Mohan and Avtar cannot be put in the category of strong and cogent evidence calling for summoning of petitioners, Anil Kumar and Asha Ram as additional accused.

10. Applying the ratio of judgment in case of ***Brijendra Singh (supra)***, which squarely covers the present case, I find merit in **CRR No. 870 of 2017** filed by Anil Kumar and Asha Ram and the same is **allowed**. Impugned order dated 15.02.2017 passed by the trial Court is set aside *qua* petitioners. **CRR No. 3314 of 2017** filed by complainant-Madan Mohan is **dismissed** being without merits.

September 20, 2018

jk

(SURINDER GUPTA)
JUDGE

Whether speaking/reasoned:

Yes/No

Whether Reportable:

Yes/No