

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL REVISION APPLICATION NO.133 OF 2018

Vishwambhar S/o Babasaheb Tarakh,
Age : 60 years, Occu. Agriculture,
R/o Antarwali Sarati, Tq. Ambad,
District Jalna.

... **Applicant**

Versus

1. The State of Maharashtra,
Through Police Station Ambad,
District Jalna.
2. Satish Annasaheb Honde,
Age : 38 years, Occu. Agriculture,
R/o Sadegaon, Tq. Ambad, Dist. Jalna,
At present – “Morya Niwas”, Indani Colony,
Nutan Vasahat Ambad,
Tq. Ambad, Dist. Jalna.
3. Seema Bharat Honde,
Age : 25 years, Occu. Medical Practitioner,
R/o Sadegaon, Tq. Ambad, Dist. Jalna.
At present – “Morya Niwas”, Indani Colony,
Nutan Vasahat Ambad,
Tq. Ambad, Dist. Jalna.
4. Annasaheb Patilba Honde,
Age : 60 years, Occu. Ariculture,
R/o Sadegaon, Tq. Ambad, Dist. Jalna.
At present – “Morya Niwas”, Indani Colony,
Nutan Vasahat Ambad,
Tq. Ambad, Dist. Jalna.
5. Shantabai Annasaheb Honde,
Age : Major, Occu. Housewife,

R/o Sadegaon, Tq. Ambad, Dist. Jalna.
At present – “Morya Niwas”, Indani Colony,
Nutan Vasahat Ambad,
Tq. Ambad, Dist. Jalna.

... **Respondents**

...
Mr. S.J.Salunke, Advocate for Applicant.
Mr. S.D.Ghayal, APP for Respondent-State.
Mr. K.H.Surve, Advocate for Respondent Nos.2 to 5.

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CORAM : MANGESH S. PATIL, J.
DATE : 03.01.2019

JUDGMENT :-

Heard. Rule. Rule is made returnable forthwith.
The learned advocate for the respondent waives service.
With the consent of both the sides the matter is heard finally.

2. In this revision under Section 401 of the Criminal Procedure Code (hereinafter referred to as 'Cr.P.C.') the original informant from FIR No.I-5 of 2017 registered with Ambad Police Station, District Jalna on 02.01.2017 filed by him regarding murder of his daughter Sumitra, has preferred this Revision being aggrieved and dissatisfied by the order passed by the learned Additional Sessions Judge rejecting the petitioner's

application under Section 319 of the Cr.P.C. for adding respondent Nos.2 to 5 herein as the co-accused.

3. Shortly stated the facts leading to the filing of this revision are under :

The deceased Sumitra was the wife of Respondent No.2 and was cohabiting with him in his house. Respondent Nos.4 and 5 are her parents-in-law whereas Respondent No.3 is the sister-in-law. She was found murdered with a bullet injury on the head while she was cohabiting with Respondent Nos.2 to 5. The petitioner lodged the FIR and the criminal law was set into motion. At the conclusion of the investigation, Sumitra's brother-in-law by name Vilas was implicated for committing the murder and accordingly he was charge-sheeted. A charge was framed and the trial proceeded.

The petitioner was examined as the first witness. It is thereafter that he submitted the application (Exh.28) under Section 319 of the Cr.P.C. and prayed to array Respondent Nos.2 to 5 as the co-accused.

According to the allegations in the application, the murder was committed as a result of conspiracy hatched amongst them since the deceased had got to know that there were illicit relations between Respondent No.3 and the accused. The learned Additional Sessions Judge issued notices to the proposed accused / Respondent Nos.2 to 5 and by the impugned order rejected the application (Exh.28). Hence this revision.

4. The learned advocate for the petitioner vehemently submits that the murder was in the nature of a custodial death while the deceased was cohabiting with Respondent Nos.2 to 5. The revolver with which she was murdered belonged to her husband - Respondent No.2 and he was possessing a licence therefor and the murder could not have been possible without his active connivance or participation. The fact stands corroborated since during the investigation a polygraph test was resorted to and it revealed such a conspiracy. The learned advocate for the petitioner also placed reliance on the decision in the case of **S. Mohammed**

***Ispahani Vs. Yogendra Chandak and others ; 2018
Cri.L.J., 1412 (S.C.).***

5. Per contra, the learned advocate for Respondent Nos.2 to 5 vehemently submitted that the petitioner has moved the application under Section 319 of the Cr.P.C. without any basis or material evidence coming forth during the trial. He is seeking to rely upon whatever material that was collected by the Investigating Officer. He ought to have sought indulgence of the Court taking cognizance of the offence at the initial stage. He did not avail of that opportunity and allowed the charge to be framed and trial to proceed. Even during his testimony he has not come out with any additional evidence so as to reveal complicity of Respondent Nos.2 to 5 in commission of the murder. He therefore submitted that the learned Additional Sessions Judge has properly appreciated the facts and law and has rightly rejected the application and the revision may be dismissed.

6. Needless to state that the power under Section 319 of the Cr.P.C. is meant to be invoked under special

circumstances, where during the course of trial some evidence comes on record which reveals involvement of some more persons in commission of the crime. Without resorting to any elaboration it would be sufficient to refer to the observations and the conclusions of the Constitution Bench in the case of ***Hardeep Singh Vs. State of Punjab and others ; (2014) 3 SCC 92*** and particularly the paragraph Nos.95, 105 and 106 which have been reproduced in the case of S. Mohammed Ispahani (*supra*). The observations clearly cull down the scope and ambit of Section 319 of the Cr.P.C. which read as under :

“95. At the time of taking cognizance, the court has to see whether a prima facie case is made out to proceed against the accused. Under Section 319 CrPC, though the test of prima facie case is the same, the degree of satisfaction that is required is much stricter. A two-Judge Bench of this Court in Vikas v. State of Rajasthan, held that on the objective satisfaction of the court a person may be “arrested” or “summoned”, as the circumstances of the case may require, if it appears from the evidence that any such person not being the accused has committed an offence for which such person could be tried together with the already arraigned accused persons.

105. 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.

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 un rebutted, 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.”

It has been clearly laid down in the case of S. Mohammed referring to the observations in the case of Hardeep Singh (supra) that the powers under Section 319 of the Cr.P.C. can be exercised by the Trial Court at any stage during the trial when it finds that there is some evidence against the person to be arrayed and he appears to be guilty of the offence. The word 'evidence' has also been interpreted to mean the material that is brought before the Court during the trial. In so far as the material collected by the Investigating Officer at the stage of inquiry, it can be utilized to corroborate and support such an evidence. It has been ultimately concluded in paragraph No.35 in the case of S. Mohammed as under :

“35. In view of the above, it was not open to the High Court to rely upon the statements recorded under Section 161 Cr.P.C. as independent evidence. It could only be corroborative material. In the first instance, 'evidence' led before the Court had to be taken into consideration. As far as deposition of PW-1 which was given in the Court is concerned, on going through the said statement, it becomes clear that he has not alleged any conspiracy on the part of the

appellants/landlords. In fact, none of the witness has said so. In the absence thereof, along with the important fact that these appellants/landlords were admittedly not present at the site when the alleged incident took place, we do not find any 'evidence' within the meaning of Section 319, Cr.P.C. on the basis of which they could be summoned as accused persons. PW-1 and PW-4 have deposed about the incident that took place at the site and the manner in which the persons who are present allegedly behaved. In the statement of PW-4, he has alleged that "Subsequently I came to know the said people is not police officials the people was sent by landlords of the building...". That statement may not be enough for roping in the appellants/ landlords to face the charge under those provisions of IPC with which others are charged. The standard of evidence mentioned in Hardeep Singh's (AIR 2014 SC 1400) case, namely, 'strong and cogent evidence', is lacking."

7. Bearing in mind these principles if one examines the fact situation in the matter in hand and applies the principles it is abundantly clear that no such additional material or evidence had come on record during the trial inspite of recording of the testimony of the petitioner as prosecution witness No.1 so as to reveal complicity of Respondent Nos.2 to 5. It is not that the petitioner has been seeking to array respondent Nos.2 to 5 at the stage

of taking cognizance but has been taking a recourse to Section 319 of the Cr.P.C. which in the circumstances is not available to him.

8. The learned Additional Sessions judge has clearly borne in mind the fact situation and has applied the law correctly in rejecting the application by the impugned order. The revision is dismissed. The Rule is discharged.

(MANGESH S. PATIL, J.)

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vmk/-