

*** THE HON'BLE DR. JUSTICE B.SIVA SANKARA RAO**

+CRIMINAL REVISION CASE No.2949 OF 2018.

%19-03-2019

N.Jyotsna & another

...Petitioners/A-2 & A-3

Vs.

\$ The State through S.H.O., P.S. IV Town Nizamabad,
Rep. by Public Prosecutor,
High Court for the State of Telangana,
Hyderabad.

....1st Respondent

\$ Sri Boga Anil Kumar

....2nd Respondent/De facto
complainant

!Counsel for the Petitioners : Mr.K.Venumadhav

^Counsel for the 1st respondent : Learned Public Prosecutor

<Gist :

>Head Note:

? Cases referred:

1. AIR 2002 SUPREME COURT 483
2. AIR 1968 SC 117
3. (1982) 3 SCC 510
4. AIR 2001 SUPREME COURT 3524
5. (1967) 2 SCR 423
6. 2001 AIR SCW 3017
7. 2015 (9) SCC 244
8. 2014 (3) SCC 92
9. 2017 (7) SCC 706
10. 2019 LawSuit (SC) 790
11. 2019 LawSuit (SC) 818
12. CrI.A.Nos.395 of 2019 & 396 of 2019, dated 27.02.2019.
13. AIR 2013 SC 3018
14. 2017 (4) SCC 177
15. 2018 LawSuit (SC) 1163
16. (2014) 3 SCC 321

MAIN CASE NO: Cr1.R.C.No.2949 OF 2018

Between:

N.Jyotsna & another

.. Petitioners/A-2 & A-3

And

\$ The State through S.H.O., P.S. IV Town Nizamabad,
Rep. by Public Prosecutor,
High Court for the State of Telangana,
Hyderabad & another

.. Respondents

DATE OF JUDGMENT PRONOUNCED: 19.03.2019

SUBMITTED FOR APPROVAL:

THE HON'BLE DR. JUSTICE B.SIVA SANKARA RAO

1. Whether Reporters of Local news papers may be allowed to see the Judgments? Yes/No
2. Whether the copies of judgment may be marked to Law Reporters/Journals Yes/No
3. Whether Their Ladyship/Lordship wish to see the fair copy of the Judgment? Yes/No

HON'BLE Dr. JUSTICE B. SIVA SANKARA RAO**CRIMINAL REVISION CASE No.2949 of 2018****ORDER :**

The petitioners are A-2 & A-3, by names N.Jyotsna and Dr.Krishna Kamal, wife and son of A-1 – Dr.Chinthala Kishan. The 2nd respondent is the *de facto* complainant by name Sri Boga Anil Kumar, impleaded by virtue of orders of this Court, dated 02.01.2019.

2. Notice even sent to the 2nd respondent, there is a refusal to take. Hence, returned as per the Postal endorsement, dated 04.02.2019, filed in USR.No.6949 of 2019 is a sufficient service.

3. The petitioners are impugning the cognizance order of the learned Magistrate during trial invoking Section 319 of Code of Criminal Procedure, 1973 (for short, 'Cr.P.C.') against them though they were not originally the accused either from the FIR or from the police final report taken cognizance by the learned Magistrate, the then, under Sections 190 read with 173 Cr.P.C. It is during trial from the evidence of P.W.1, L.W.1-*de facto* complainant supra, they were impleaded by impugned order, dated 14.08.2018, in Crl.M.P.No.252 of 2017 in C.C.No.287 of 2014, filed by the State representing through Station House Officer, IV Town Police Station, Nizamabad.

4. Heard learned counsel for the petitioners and learned Public Prosecutor representing the 1st respondent State and taken as heard the 2nd respondent/*de facto* complainant for reasons supra. Perused the material on record.

5. The contentions raised in the present revision petition impugning the said impleadment and cognizance order of the learned Magistrate supra from the cognizance taken for the offences

punishable under Sections 337 and 323 of Indian Penal Code, 1860 (for short, 'IPC'), against sole accused Dr.Chintala Kishan, now A-1, which is outcome of report of the 2nd respondent/*de facto* complainant-Boga Anil Kumar, dated 03.11.2013, covered by FIR.No.314 of 2013 of IV Town Police Station, Nizamabad District, are that after examination of P.W.1 on 04.08.2016, the learned Assistant Public Prosecutor filed the present application on 21.02.2017 invoking Section 319 Cr.P.C requesting the learned trial Magistrate (Special Mobile Court, Nizamabad District), to array wife and son of Dr.Ch.Kishan (A-1) as A-2 and A-3 and for the said petition, A-1-Dr.Ch.Kishan filed a detailed counter in opposing the same and without even looking into it and beyond the scope of Section 319 Cr.P.C. simply for sake of asking, even charge sheet has no whisper against them with any role arrayed as accused by the impugned order of the learned Magistrate thereby unsustainable and liable to be set aside, for there is no any *prima facie* and sustainable accusation to the standard required to invoke Section 319 Cr.P.C. to array them and to summon them and thereby the impugned order is liable to be set aside. It is also the contention that the learned Magistrate even ignored the fundamental requirement of ordering notice before taking cognizance including under Section 319 Cr.P.C. against the additional accused/revision petitioners as A-2 & A-3 and that is also a ground to set aside the order.

6. Learned Public Prosecutor submits that there is nothing to interfere with the impugned order; from a close reading of FIR shows more than one accused involved and statement of L.W.1 also refers the petitioners and merely because police final report did not specifically mention or the original cognizance, said learned

Magistrate did not take cognizance; that is not a ground even after evidence came on record to take cognizance within the judicial discretion of the learned Magistrate under Section 319 Cr.P.C. and there is no notice contemplated, from the very wording of Section 319 Cr.P.C., for the additional accused pre-cognizance stage proposed accused summoning and enquiring into the matter and thereby the revision is liable to be dismissed for no impropriety or illegality to interfere with the impugned order.

7. The impugned order reads to the core of relevancy for the purpose of answering the present revision that the learned Assistant Public Prosecutor filed the petition to invoke Section 319 Cr.P.C. to add Smt. N.Jyotsna and Dr.Krishna Kamal as additional accused (A-2 & A-3) that was opposed by the sole accused Dr.Ch.Kishan and cognizance already taken for the offences punishable under Sections 323 & 337 IPC by then from the police final report against said Dr.Ch.Kishan and in the course of trial, out of the investigation witnesses, *de facto* complainant-L.W.1 was examined as P.W.1. In his evidence, he deposed that on 02.11.2013 at the evening hours, his family went to the house of L.W.3 (Miryala Srimannarayana) to celebrate Deepavali festival and all family members came outside to light the crackers, which is between 6.30 P.M. to 7.00 P.M., houses of Miryala Srimannarayana and accused (A-1) are side by side and at that time, the accused (A-1) in a rash and negligent manner, came out from his house in car and after 1 or 1 ½ hours, returned back to his house in same speed and hit him (*de facto* complainant-P.W.1), then L.W.2-Miryala Shravan Kumar questioned the accused (A-1) about his rash and negligent driving, then accused (A-1) abused said Miryala Shravan Kumar in filthy and caught hold of his collar and beat him

with hands and at that time, wife and son of accused (A-1) also came outside from their house and started beating him and teared his shirt. It is observed from their saying, the evidence of P.W.1 *prima facie* points out involvement of wife and son of accused Dr.Ch.Kishan (A-1) also. It is also observed that perusal of the statements given by L.Ws.2 to 5 before the police show the allegations attracting for the offences even against the wife and son of Dr.Ch.Kishan, the proposed accused as A-2 & A-3 to be added, besides P.W.1 deposed about their role supra and there is no limitation prescribed for filing application and thereby they are impleaded.

8. No doubt Sections 468 to 473 Cr.P.C. deal with the limitation for taking of cognizance of the offence. The FIR setting the law in motion in registration of the crime speaks that the report was given on the intervening night of 02/03.11.2013 (mid night) for the alleged occurrence on the evening between 6.30 P.M. to 7.00 P.M. or 7.30 P.M., which reads *de facto* complainant came to the house of L.W.3-Miryala Srimannarayana, who is his brother-in-law for spending on the eve of Deepavali for firing of crackers and A-1's house is abutting to the house of Miryala Sriminnarayana (L.W.3) and A-1 along with his force came with car, dashed and they attacked and they sustained injuries. Hence, to take action. It no way speaks who are the force of A-1 came along with A-1, not named A-2 & A-3, wife and son of A-1.

9. In the statement of L.W.1-*de facto* complainant recorded during investigation by the Investigation Officer, in saying it is between 6.30 P.M. to 7.00 P.M. when spending in firing crackers by *de facto* complainant and other family members, opposite to the house of L.W.3-Miryala Srimannarayana supra, the side-by house owner Dr.Ch.Kishan (A-1), at that time started his car parked at his house

and speedily went out and returned by 8.00 P.M. and while coming into the house speedily driven the car and hit *de facto* complainant, he sustained a small injury and when Miryala Shravan Kumar (L.W.2) questioned A-1 about his speed driving, A-1 get down from the car and attacked and his wife and son also came there and pushed *de facto* complainant (L.W.1-Boga Anil Kumar) and A-3-Dr.Krishna Kamal, not named, but for mentioning as doctor's son (A-1's son) caught hold of the collar and beat and L.W.3-Miryala Srimannarayana tried to pacify, however, Dr.Ch.Kishan (A-1) abused him even saying going to implicate in a false case. Hence, to take action.

10. L.W.2-Miryala Shravan Kumar stated about A-1 driven the car and that hit *de facto* complainant herein and when questioned about his speed driving by L.W.2-Miryala Shravan Kumar, A-1-Dr.Ch.Kishan came to attack and also attacked Boga Anil Kumar and there was pushing. They fell down. In the meantime, A-1-Dr.Ch.Kishan's son and wife came there and son caught hold of the collar of Miryala Shravan Kumar and Dr.Ch.Kishan's wife abused.

11. L.W.3-Miryala Srimannarayana in his statement says for questioning about the rash driving and hit the *de facto* complainant by A-1 and L.W.2-Miryala Shravan Kumar and L.W.3-Miryala Srimannarayana when questioned, Dr.Ch.Kishan (A-1) attacked them and the *de facto* complainant-L.W.1 sustained injuries and he did not refer about the role of wife and son of A-1-Dr.Ch.Kishan.

12. However, L.W.4-Boga Sapthagiri stated the son and wife of Dr.Ch.Kishan (A-1) also there at the time of altercation and there is no role specifically mentioned.

13. As per the statement of L.W.5-Shaik Saleem, it is a free fight both sides one against the other and Boga Anil Kumar (L.W.1) and Miryala Shravan Kumar (L.W.2) also beat Dr.Ch.Kishan (A-1) with sticks.

14. Coming to the evidence of P.W.1, he deposed that when L.W.2 asked accused (A-1) about his rash and negligent driving, accused (A-1) abused L.W.2 in filthy and caught hold of his collar and beat with hands and at that time, wife and son of accused (A-1) also came outside from their house and started beating him and also teared his shirt and accused (A-1) while beating, he fell down. At that time, L.W.3 came and when questioned accused (A-1) about his attack, he also abused in filthy and threatened to file false cases against them and L.W.4 also came there. He was also abused by accused (A-1) and beaten and he admitted in hospital in ICU and went to Police Station and lodged report thereafter.

15. Even taken from the face value of said deposition of P.W.1 in the chief examination, whether it satisfied with the requirement to invoke jurisdiction discretionary under Section 319 Cr.P.C. is the moot question here to answer with reference to the facts. Before coming to that, now coming to the contention of no prior notice before impleadment of A-2 & A-3 invoking Section 319 Cr.P.C. by the learned Magistrate given concerned, it is the fundamental principle that at pre-cognizance stage, no notice is contemplated to the proposed accused in any of the provisions of the entire Code of Criminal Procedure, 1973. It is only if at all to impugn any cognizance order in revision, what is contemplated from the very wording of Section 401(2) Cr.P.C. is 'no order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of

being heard either personally or by pleader in his own defence.’ Thus, only to sit against the order, if at all revision maintained, in the revision no order against adverse party to the revision (respondent to the revision) to the prejudice of that respondent can be passed. Same is different from the power of trial Court to take cognizance or not from the material and neither Section 190 Cr.P.C. nor Sections 200 to 202 Cr.P.C. either from private complaint or even from police final report under Section 173 Cr.P.C. or even *suo moto* power of the learned Magistrate to take cognizance as one of the three limbs in Section 190 Cr.P.C., provided for notice to the proposed accused to be heard on the material to take cognizance for any offence showing his involvement. It is the fundamental principle that it is only taking of cognizance of the offence and not cognizance of the accused, but for in certain offences, the difference is to take cognizance against the accused. Once offence taken cognizance for any penal provision, it is to consider from the cognizance of the offence who are the persons involved in commission of the offence to consider and add. Section 319 Cr.P.C. speaks one of such enabling provision to add additional accused for the offence taken cognizance already. It is during trial and from the evidence on record placed during trial. Once such is the case, whether FIR made a mention or not and even statements contain a mention or not during investigation including from final report makes no difference. It is only from the evidence during trial any involvement of the other accused other than those are facing trial at post-cognizance and post-charge stage or post-examination stage, that is the criteria for consideration. Even from the very wording of Section 319 Cr.P.C., there is nothing provided of pre-cognizance hearing of the proposed additional accused in exercise of the

discretion even from the material during evidence brought and available on record.

16. The Three-Judge Bench of the Apex Court in **Kishore Kumar Gyanchandani v. G.D.Mehrotra and another**¹ observed referring to **Abhinandan Jha v. Dinesh Mishra**² and following **Gopal Vijay Verma v. Bhuneshwar Prasad Sinha**³ observed that either from the police final report to take cognizance under Sections 173 read with 190 Cr.P.C. or otherwise no notice and hearing of the accused contemplated where Magistrate accepts the final form of the report submitted by police, right of the complainant to file a regular complaint is not even taken away and in fact on such a complaint being filed, the Magistrate has to follow the procedure contemplated by Sections 200 to 202 Cr.P.C. that what is laid down in **Gopal Vijay Verma's case (3 supra)** and what is laid down in **Abhinandan Jha's case (2 supra)** is that Magistrate on receipt of final form of police report cannot direct the Investigating Agency to file charge sheet, but for if at all chooses can direct further investigation, as filing of final report or not is the prerogative of the Investigating Agency from material available on record.

17. In **Rajinder Prasad v. Bashir and others**⁴, it was observed that no enquiry can be held under Section 203(2) Cr.P.C. by Committal Magistrate for deciding inclusion of offence or impleadment of accused, as Magistrate can take recourse to provisions of Sections 190 to 199 Cr.P.C. for addition of offence or addition of accused. In this context, on the concept of inclusion of offence or impleadment of additional accused not even included in the charge sheet from the

¹ AIR 2002 SUPREME COURT 483

² AIR 1968 SC 117

³ (1982) 3 SCC 510

⁴ AIR 2001 SUPREME COURT 3524

investigation, what was observed is by referring to **Raghubans Dubey v. State of Bihar**⁵ that cognizance taken by the Magistrate was of the offence and not of the offenders. Having taken cognizance of the offence, the Magistrate can find out who the real offenders were and if he comes to the conclusion that apart from the persons sent by the police some other persons were also involved, it is his duty to proceed against those persons as well. The distinction between from the police report or private complaint taking of cognizance initially either from Section 173 Cr.P.C. or Sections 200 to 204 Cr.P.C. for invoking Section 190 Cr.P.C. and addition of accused during trial under Section 319 Cr.P.C. also considered by referring to **Raghubans Dubey's case (5 supra)** placed reliance by subsequent expression of the Apex Court in **M/s.SWIL Ltd. v. State of Delhi**⁶ para 7 that there is no question of referring to the provisions of Section 319 Cr.P.C. for the pre-cognizance consideration of material by the Magistrate, as Section 319 Cr.P.C. comes into operation in the course of enquiry into or trial of an offence and in the present case, neither Magistrate is holding enquiry as contemplated under Section 2(g) Cr.P.C. nor trial started, he was exercising jurisdiction under Section 190 Cr.P.C. of taking cognizance on offence and issuing of process and there is no bar under Section 190 Cr.P.C. Once process issued against some of the accused, on the next date Magistrate cannot issue process to the other accused against whom there is some material, but his name not included as accused in the charge sheet. Thus, it is also laid down herein that even after taking of initial cognizance for the offence by array of some accused mentioned in the charge sheet, the Magistrate is not powerless to add some other accused also, however that will not

⁵ (1967) 2 SCR 423

⁶ 2001 AIR SCW 3017

come under the stage of Section 319 Cr.P.C., but for the discretion to be noted of sofar as invoking of Section 319 Cr.P.C. is after the post-charges and pending trial from the evidence during trial brought on record only for appreciation. Here from the above expressions including from the wording of Sections 173 read with 190 Cr.P.C. or Sections 200 to 204 Cr.P.C. or from the very wording of Section 319 Cr.P.C. to be read with Section 190 Cr.P.C. from at their close reading, there is no even little whisper contemplating even remotely any pre-cognizance hearing of the additional accused against whom for the offence taken cognizance to be arrayed or including for adding of any section of law, but for after array, the procedure contemplated is to recall of the witnesses already examined, if at all the additional accused want to further examine them about their role. Thus, the contention that there is no notice before taking cognizance or invoking Section 319 Cr.P.C. for addition of the petitioners as A-2 & A-3 by the learned Magistrate and same is mandatory, is untenable, for not contemplated by any of the provisions of the Court. However, that is not the end of the matter to answer here because the learned counsel for the revision petitioners placed reliance on the expression of a recent Two-Judge Bench of the Apex Court in **Jogendra Yadav & others v. State of Bihar & another**⁷, where it is observed that in order to avail the remedies of discharge under Section 227 Cr.P.C., as urged by the learned counsel for the appellants, only qualification necessary is that person should be accused and there is no difference between an accused since inception and accused who has been added as such under Section 319 Cr.P.C. It is, however, not possible to accept the submission since there is a material difference between the two. An accused since inception is not necessarily heard before he is

⁷ 2015 (9) SCC 244

added as an accused. However, a person, who is added as an accused under Section 319 Cr.P.C., is necessarily be heard before being so added. Often he gets a further hearing, if he challenges the summoning order before the High Court and further. It is the only observation therein. In fact, it is further observed on the scope of Section 319 Cr.P.C. that the extraordinary power can be exercised only if very strong and cogent evidence occurs against a person from the evidence lead before the Court and for that referred the Constitution Bench expression of the Apex Court in **Hardeep Singh v. State of Punjab and others**⁸ on the standard of material employed for summoning a person as additional accused under Section 319 Cr.P.C. is higher than the standard employed for framing a charge against original accused and what is necessary for the Court to arrive is satisfaction that the evidence adduced on behalf of the prosecution, if unrebutted, may lead to the conviction of a person sought to be added as accused. It is only a stray observation of the Apex Court though otherwise even it can be said as binding, the said observation is not even by referring to the wording of Section 190 Cr.P.C. or Section 319 Cr.P.C. An observation without referring to the provision when the two provisions referred by this Court no way contemplated any notice for array of additional accused under Section 319 Cr.P.C. The said contention of notice mandatory for hearing of the proposed accused before invoking Section 319 Cr.P.C. is untenable.

18. Further, there are three more judgments including the subsequent expressions to the above expression of **Jogendra Yadav's case (7 supra) viz., Brijendra Singh & others v. State of**

⁸ 2014 (3) SCC 92

Rajasthan⁹, Periyasami and others v. S.Nallasamy¹⁰ (judgment, dated 14.03.2019), and Sugreev Kumar v. State of Punjab & others¹¹ (judgment, dated 15.03.2019) and few days prior to it in **Sunil Kumar Gupta and others v. State of Uttar Pradesh and others decided with Khusbu Gupta v. State of Uttar Pradesh and others¹² in Crl.A.Nos.395 of 2019 & 396 of 2019, dated 27.02.2019.**

19. In fact, in **Hardeep Singh's case (8 supra)**, the Constitution Bench of the Apex Court by explaining the earlier Constitution Bench of the Apex Court in **Dharam Pal & others v. State of Haryana & another¹³** in its discussion observed of the Magistrate got the discretionary power to exercise and what is the standard of the material from the evidence brought on record during trial to invoke Section 319 Cr.P.C. mentioned and not even mentioned nor in any of the decisions referred therein of any notice and opportunity to the accused before array of accused required to be given.

20. In **Brijendra Singh's case (9 supra)**, having placed reliance on **Hardeep Singh's case (8 supra)**, it is observed with reference to paras 9 to 15 therein that power of Court to proceed under Section 319 Cr.P.C. even against persons not arraigned as accused cannot be disputed and there is no limitation for the power that can be exercised at any time and the evidence on record for appreciation to invoke Section 319 Cr.P.C. must be understood in a wider sense, both at the stage of trial and even at the stage of enquiry, and the power is though discretionary is extraordinary not to be exercised in a casual

⁹ 2017 (7) SCC 706

¹⁰ 2019 LawSuit (SC) 790

¹¹ 2019 LawSuit (SC) 818

¹² Crl.A.Nos.395 of 2019 & 396 of 2019, dated 27.02.2019.

¹³ AIR 2013 SC 3018

or cavalier manner without formation of *prima facie* opinion by Court and for that, it requires stronger evidence than mere probability of the persons complicity to frame a charge. In this context also observed, particularly at para 12 that at the stage of taking cognizance under Section 319 Cr.P.C., the degree of satisfaction that is required is much stricter only where strong and cogent evidence occurs against a person from the evidence laid before the Court that such power should be exercised and not in a casual or cavalier manner. The test that 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. The power under Section 319 Cr.P.C. can be exercised by the trial Court at any stage during trial before conclusion of trial to summon any person as an additional accused to face trial on the ongoing case. Once the trial Court finds that there is some evidence against such 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 and such evidence that has to be surfaced is from examination-in-chief without cross-examination of witnesses that can be taken into consideration also. However, the power is to be exercised as extraordinary one and sparingly only in those cases where circumstances of the case so warrants. Thereby degree of satisfaction is more than material required to frame a charge. Even from the expression or from the Constitution Bench expression in **Hardeep Singh's case (8 supra)**, that was also placed reliance in **Jogendra Yadav's case (7 supra)**, there is no contemplation of giving of notice from the evidence during trial of the proposed accused to be added as additional accused by invoking Section 319 Cr.P.C.

21. Coming to the expression in **Sunil Kumar Gupta's case (12 supra)**, **Crl.A.Nos.395 of 2019 & 396 of 2019, dated 27.02.2019**, on the scope of Section 319 Cr.P.C., it is observed that a person can be added as an accused invoking the provision not only for the same offence for which the accused is tried, but for any offence, but that offence shall be such that in respective of which all the accused could be tried together. As held in **Hardeep Singh's case (8 supra)** by the Constitution Bench of the Court, the summoning of an accused under Section 319 Cr.P.C. requires more than mere probability of his complicity, to say much stronger evidence and on facts of the case, observed same is lacking to invoke by trial Court to confirm by High Court from the well settled principle on the scope of law. There also, it is not stated of any giving of notice and opportunity to the proposed accused to be added as additional accused.

22. In **Periyasami's case (10 supra)**, by placing reliance on the Constitution Bench expression in **Hardeep Singh's case (8 supra)** and same followed subsequently in two more expressions in **Amrutbhai Shambhubhai Patel v. Sumanbhai Kantibhai Patel and others¹⁴** and **Labhuji Amratji Thakor & others v. The State of Gujarat & another¹⁵** observed that in **Amrutbhai's case (13 supra)**, there the learned Magistrate considered from four witnesses P.Ws.1 to 4 evidence available on record in adding some more accused in addition to the 11 accused facing trial in CC.No.123 of 2011 in contra distinction to the facts of the present case and what is laid down in **Hardeep Singh's case (8 supra)** is to array an accused under Section 319 Cr.P.C., which power is discretionary to be exercised sparingly in

¹⁴ 2017 (4) SCC 177

¹⁵ 2018 LawSuit (SC) 1163

those cases where circumstances of the case so warrant where there is strong and cogent evidence across against a person from the evidence laid before the Court and not in a casual or cavalier manner and for that the Court has to consider the substance of the evidence, which has come before it as laid down in **Hardeep Singh's case (8 supra)**, as observed in **Labhuji Amratji Thakor's case (14 supra)** and on facts observed complainant sought to cast net wide so as to include numerous other persons while moving an application under Section 319 Cr.P.C. without there being *prima facie* evidence about their role in commission of the offence in setting aside the order of the Magistrate confirmed by the High Court in revision with observation of the summoning of additional accused under Section 319 Cr.P.C. is only if there is more than *prima facie* case required at the time of framing charge though less than satisfaction required at the time of conclusion of trial convicting the accused. Here also from any of the expressions even referred therein nothing stated of contemplation of notice and opportunity of hearing to the proposed accused to invoke Section 319 Cr.P.C., but for the standard of appreciation of the evidence on record as to availability of material required is considered.

23. Even coming to **Sugreev Kumar's case (11 supra)**, by placing reliance on **Hardeep Singh's case (8 supra)** that was also followed in **Brijendra Singh's case (9 supra)**, observed that Section 319 Cr.P.C., as per **Hardeep Singh's case (8 supra)** observations at para 12, springs out of the doctrine *judex damnatur cum nocens absolvitur* (a 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 Cr.P.C., where it is the duty

of the Court to do justice by punishing the real culprit and 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 and the question then remains under what circumstances and at what stage the power to be exercised and it is observed in **Vikas v. State of Rajasthan**¹⁶ of objective satisfaction of the Court and the same can be exercised as observed in **Brijendra Singh's case (9 supra)** at any stage before conclusion of trial in so concluding observed that Section 319 Cr.P.C. sanctions the summoning of any person on the basis of any relevant evidence available on record, however, it being discretionary power and extraordinary one to be exercised sparingly and only when cogent evidence is available and where *prima facie* opinion to be formed for exercise of the power, as it requires stronger evidence than mere probability of complicity of a person and the test to be applied is more than a *prima facie* case as examined at the time of framing charge, but not of satisfaction to that extent, that evidence if goes uncontroverted would lead to conviction of the accused. Even from this expression, no notice or prior hearing of the proposed accused to take cognizance against additional accused for the offences or additional offences, if any, contemplated from the wording of Section 319 Cr.P.C. or from the expressions supra.

24. Thus, the contention of notice before taking cognizance and opportunity of hearing contemplated is untenable and the expression in **Jogendra Yadav's case (7 supra)** is confined to the facts for the observations in the factual scenario and not as a principle to made applicable to all cases, that too not by interpretation by referring to

¹⁶ (2014) 3 SCC 321

the wording of Section 319 Cr.P.C. and leave about the earlier expressions including the Constitution Bench on that aspect not brought to consider.

25. Now coming to the facts from the principle laid down as to sufficient material to array as additional accused concerned from perusal of the chief examination of P.W.1 and the observations in the impugned order of the learned Magistrate, there is only one sentence saying at that time, wife and son of accused also came outside from their house and started beating him and teared his shirt. This stray sentence is not sufficient to say strong material to invoke Section 319 Cr.P.C. to array the petitioners in the revision as A-2 & A-3 under Section 319 Cr.P.C.

26. Having regard to the above, the impugned order of the learned Magistrate is set aside, however, made clear that it is not a bar in course of trial at any stage before conclusion of trial, if there is strong material more than sufficient to the framing of charge though less than required to the proof of finding of guilty from the uncontroverted evidence placed on record to invoke the power.

27. With these observations, the Criminal Revision Case is allowed.

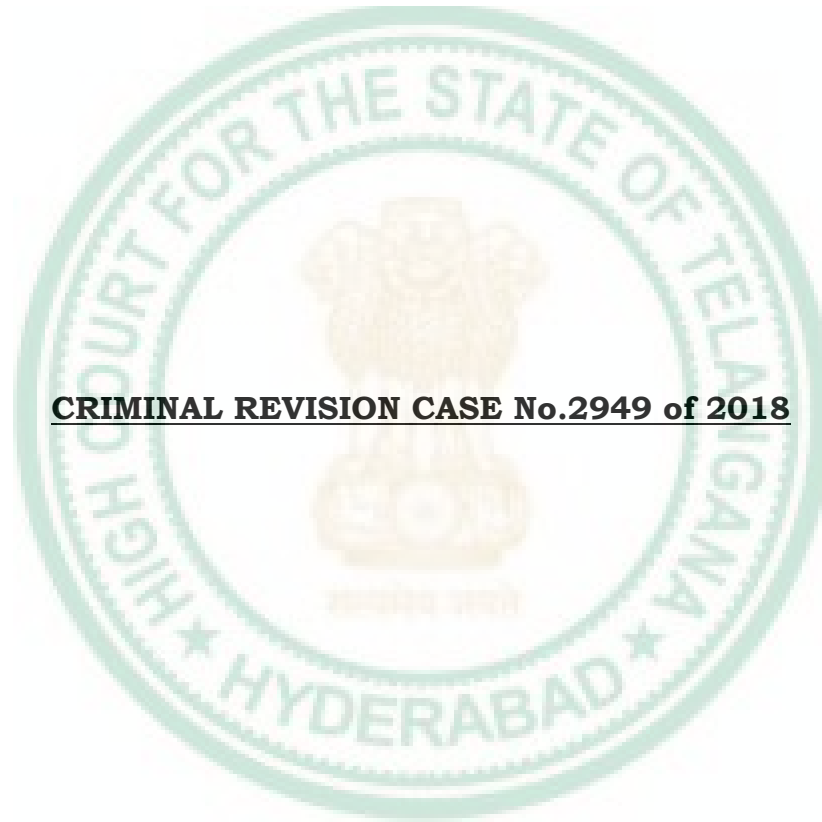
Miscellaneous petitions pending, if any, shall stand closed.

Dr. B. SIVA SANKARA RAO, J

Date: 19th March, 2019

Note: L.R. Copy to be marked.

(B/o.)
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146**HON'BLE Dr. JUSTICE B. SIVA SANKARA RAO****CRIMINAL REVISION CASE No.2949 of 2018**Date: 19th March, 2019

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