

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

CRM-M-35697-2016 (O&M)

Date of decision : 07.08.2019

Mahmood Hasan and others

...Petitioners

Versus

State of Haryana

...Respondent

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL.

Present: Mr. R.S. Cheema, Sr. Advocate with
Mr. Rajiv Kumar Trikha, Advocate for the petitioners.

Mr. Anmol Malik, AAG, Haryana.

Mr. Osama Suhail, Advocate with
Mr. Samama Suhail, Advocate with
Ms. Bhanti Tyagi, Advocate for the complainant.

ANIL KSHETARPAL, J.

The issue which needs determination is “whether a Magistrate during the trial after having recorded some prosecution evidence and having reached at a conclusion that the case is triable by the Court of Sessions u/s 323 of the Code of Criminal Procedure (hereinafter to be referred as “the Code”) is justified in summoning of additional accused u/s 319 of “the Code”?

This petition has been filed under Section 482 of the Code seeking quashing of order dated 01.03.2016 passed by the learned Chief Judicial Magistrate, Mewat while deciding application under Section 209

read with Section 323 and Section 319 of the Code, affirmed in revision petition by the Court of Sessions.

This case has a long history, however, some facts are required to be noticed. Sh. Mehmood Hasan got lodged an FIR wherein it was stated that he is residing at Village Malab, running a school in the house. On 05.11.2005, he had gone to Delhi. On 06.11.2005, he received a telephonic message from Nijjar that during the intervening night of 05/06.11.2005 at about 3 AM, Mehmood Hasan @ Bara Munna, Masood Hasan @ Chotta Munna, Salman Hasan @ Sattewaj, Yousuf, Nafees, Mansoor, Masroor, Maqbool and 4-5 other persons armed with countrymade pistol and guns etc. entered his house secretly by scaling the wall of the house and broke open the door of the house. Mehmood Hasan @ Bara Munna, Masood Hasan @ Chotta Munna, Yousuf and Nafees armed with countrymade pistols kidnapped his wife-Firdos @ Annu at gun point. All the ornaments and household articles were loaded in a canter (a commercial vehicle). He on receipt of the information immediately rushed to his house and found all the valuable articles including cash missing. The commercial vehicle loaded with the plundered household articles were got stopped by the villagers. In the said incident, Asmina and Taranam were also given beatings and maltreated and remaining girls staying therein were confined in a room. His wife is in the possession of the aforesaid accused and she be got rescued. The aforesaid persons are also giving threats.

On 06.11.2005, his supplementary statement was recorded wherein he disclosed the details of the household articles. On 07.11.2005, his wife Firdos was recovered by the police from the possession of the

accused and got admitted in Civil Hospital wherein she made the statement to the police that accused have committed illegal act with her. She told the police that the accused kidnapped and took her to their house where they tied her legs and hands. The accused were also helped by Smt. Sarifan, Meena, Smt. Basiran and two other ladies. The police after investigation presented final report against some of the accused whereas qua petitioners, discharge report was filed.

From the facts available on the record, it is apparent that the prosecution did not make sincere efforts to examine the prosecution evidence. On 26.11.2011, prosecution evidence was closed without examining Smt. Firdos, the alleged victim from the side of prosecution. An application under Section 311 of the Code was also dismissed by the learned Judicial Magistrate Ist Class, Mewat vide order dated 14.01.2015, which on being challenged, was reversed by the High Court vide order dated 26.11.2015. Thereafter, statement of Firdos was recorded as PW3. Firdos in her examination-in-chief named all the three petitioners as accused. She had also named the petitioners in her statement recorded under Section 161 of the Code.

After recording the statement of Firdos, an application under Section 209 read with Section 323 and Section 319 of the Code was filed for framing additional charges, summoning the petitioners as additional accused and committing the case to the Court of Sessions. After receipt of reply, the application was allowed, offence under Section 397 IPC was prima facie found exclusively triable by the Court of Sessions. Learned Chief Judicial Magistrate simultaneously summoned the petitioners exercising powers u/s

319 of the Code which has been confirmed in revision petition.

Learned Senior Counsel appearing on behalf of the petitioners has submitted that once the Chief Judicial Magistrate had come to a conclusion that the case is triable exclusively by the Court of Sessions, the learned Chief Judicial Magistrate had no jurisdiction to pass order summoning the petitioners (additional accused) under Section 319 of the Code. He submitted that power under Section 319 of the Code could be exercised during the course of trial and since the Court of Chief Judicial Magistrate had found that the case is exclusively triable by the Court of Sessions, the Chief Judicial Magistrate had no jurisdiction to entertain and allow the application filed under Section 319 of the Code. In support of his arguments, he relied upon following judgments passed by Hon'ble the Supreme Court:-

1. ***Raj Kishore Prasad Vs. State of Bihar, 1996(4) SCC 495.***
2. ***Kishori Singh and others Vs. State of Bihar and another, 2000 AIR (SC) 3725.***
3. ***Rajendra Singh Vs. State of UP and another, (2007) 7 SCC 378.***

On the other hand, learned counsel for the respondents has submitted that power under Section 319 of the Code has rightly been exercised by the learned Chief Judicial Magistrate as the trial was pending before the Chief Judicial Magistrate. He submitted that the order passed by the Chief Judicial Magistrate is a common order and it is apparent from the reading thereof that firstly application under Section 319 of the Code was dealt with and decided and thereafter the Court proceeded to commit to the learned Court of Sessions in accordance with Section 323 of the Code.

On careful reading of the judgment passed by Hon'ble the Supreme Court in the case of Raj Kishore Prasad (Supra), it is apparent that exactly the same question was required to be decided in the aforesaid case. No doubt, the aforesaid judgment in the case of Raj Kishore Prasad (Supra) has been partially overruled on the aspect that there is an intermediary stage and the committing Magistrate has power to summon the additional accused. It may be noted here that there are two Constitution Bench Judgments of Hon'ble the Supreme Court on this aspect. First judgment is in the case of **Dharam Pal and others Vs. State of Haryana and another, (2014) 3 SCC 306** in which Hon'ble the Constitution Bench partially overruled the conclusion drawn by Hon'ble the Supreme Court in the case of Raj Kishore Prasad (Supra). However as noted above, the Constitution Bench did not went on to hold that a committing Magistrate can exercise powers under Section 319 of the Code. Second Constitution Bench Judgment is in the case of **Hardeep Singh Vs. State of Punjab and others, (2014) 3 SCC 92**. Both the Constitution Bench judgments have considered the judgment of Hon'ble the Supreme Court in the case of Raj Kishore Prasad (Supra). Only in the case of Dharam Pal and others (Supra), the judgment passed in the case of Raj Kishore Prasad (Supra) was partially overruled to the extent noted above, whereas in the case of Hardeep Singh (Supra), it was held as under:-

“47. Since after the filing of the charge-sheet, the court reaches the stage of inquiry and as soon as the court frames the charges, the trial commences, and therefore, the power under Section 319(1) Cr.P.C. can be exercised at any time after the charge-sheet is filed and before the pronouncement

of judgment, except during the stage of Sections 207/208 Cr.P.C., committal etc., which is only a pre-trial stage, intended to put the process into motion. This stage cannot be said to be a judicial step in the true sense for it only requires an application of mind rather than a judicial application of mind. At this pre-trial stage, the Magistrate is required to perform acts in the nature of administrative work rather than judicial such as ensuring compliance with Sections 207 and 208 Cr.P.C., and committing the matter if it is exclusively triable by Sessions Court. Therefore, it would be legitimate for us to conclude that the Magistrate at the stage of Sections 207 to 209 Cr.P.C. is forbidden, by express provision of Section 319 Cr.P.C., to apply his mind to the merits of the case and determine as to whether any accused needs to be added or subtracted to face trial before the Court of Session.”

In the case of Hardeep Singh (Supra), the questions of law which were referred and answered are as under:-

“(i) What is the stage at which power under Section 319 Cr.P.C. can be exercised?

(ii) Whether the word "evidence" used in Section 319(1) Cr.P.C. could only mean evidence tested by cross-examination or the court can exercise the power under the said provision even on the basis of the statement made in the examination-in-chief of the witness concerned?

(iii) Whether the word "evidence" used in Section 319(1) Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?

(iv) What is the nature of the satisfaction required to invoke the power under Section 319 Cr.P.C. to arraign an accused?

Whether the power under Section 319(1) Cr.P.C. can be exercised only if the court is satisfied that the accused summoned will in all likelihood be convicted?

(v) Does the power under Section 319 Cr.P.C. extend to persons not named in the FIR or named in the FIR but not charged or who have been discharged?”

The Constitution Bench of Hon'ble the Supreme Court in the case of Dharam Pal and others (Supra) had decided 6 questions which are extracted as under:-

“7.1 Does the Committing Magistrate have any other role to play after committing the case to the Court of Session on finding from the police report that the case was triable by the Court of Session?

7.2 If the Magistrate disagrees with the police report and is convinced that a case had also been made out for trial against the persons who had been placed in column 2 of the report, does he have the jurisdiction to issue summons against them also in order to include their names, along with Nafe Singh, to stand trial in connection with the case made out in the police report

7.3 Having decided to issue summons against the appellants, was the Magistrate required to follow the procedure of a complaint case and to take evidence before committing them to the Sessions Court to stand trial or whether he was justified in issuing summons against them without following such procedure?

7.4 Can the Session Judge issue summons under Section 193 Cr.P.C. as a Court of original jurisdiction?

7.5 Upon the case being committed to the Sessions Court, could the Sessions Judge issue summons separately under Section 193 Cr.P.C. or would he have to wait till the stage

under Section 319 Cr.P.C. was reached in order to take recourse thereto?

7.6 Was Ranjit Singh, (1998) 7 SCC 149, which set aside the decision in Kishun Singh, (1993) 2 SCC 16 rightly decided or not?”

While answering these questions, the Constitution Bench held that the committing Magistrate has the power to disagree with the police report and summon the persons who had been placed in column No.2 of the report. Thus, the Magistrate before committing the case to the Court of Sessions has the jurisdiction to summon the additional accused. It was further held that the Court of Sessions also has similar power under Section 193 of the Code.

However, in the present case, the situation is not the same as was before the Constitution Bench in the case of Dharam Pal and others (Supra). In the present case, learned Judicial Magistrate did not choose to summon the petitioners under Section 190 of the Code i.e. when the final report was submitted by the police. The order in question has been passed in exercise of powers under Section 319 of the Code. At this stage, it would be appropriate to extract Section 319 of the Code, which is as under:-

“319. Power to proceed against other persons appearing to be guilty of offence.—(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be

arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under subsection (1), then

(a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced.”

It is apparent that the order summoning the additional accused can be passed in the course of any enquiry into, or trial of, an offence. Such power is available to the Court when it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused.

It may be noted here that the order passed by the committing Magistrate in the present case is also under Section 323 of “the Code” i.e. committing the case to the Court of Sessions but to this extent, the order has challenged. Section 323 of the Code reads as under:-

“323. Procedure when, after commencement of inquiry or trial, Magistrate finds case should be committed.—If, in any inquiry into an offence or a trial before a Magistrate, it appears to him at any stage of the proceedings before signing judgment that the case is one which ought to be tried by the Court of Session, he shall commit it to that Court under the provisions hereinbefore contained [and

thereupon the provisions of Chapter XVIII shall apply to the commitment so made].”

It is apparent that when it appears to the Magistrate in any enquiry into the offence or the trial at any stage of the proceeding that the case is one which ought to have been tried by the Court of Sessions, he shall commit it to that Court under the provisions hereinbefore contained and thereupon provision of Chapter XVIII of “the Code” shall apply. Thus, procedure to be applied after the case has been committed to the Court of Sessions is provided in Chapter XVIII of “the Code”. Chapter XVIII of “the Code” deals with the trial before the Court of Sessions which starts with Section 225 of “the Code” and continue upto Section 237 of “the Code”. Once, the case has been committed to the Court of Session, the procedure as provided in Chapter XVIII of the Code is required to be followed. Section 227 of the Code provides that after hearing submissions of the accused and the prosecution, the Judge, if considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for doing so. Section 228 of the Code provides for framing of charge. Section 230 of the Code provides that if the accused refuses to plead guilty or does not plead or claims to be tried, the Judge shall fix the date for examination of witnesses. Section 231 of the Code provides that the evidence of the prosecution is to be recorded. Section 319 of the Code would be applicable in such case only after some evidence has been led by the prosecution as provided under Section 231 of the Code.

In fact, it was neither appropriate nor proper for the learned Magistrate to pass order under Section 319 of the Code summoning the

petitioners as additional accused, once the Court had reached at a conclusion that the case is one which ought to be tried by the Court of Sessions, it should have committed the case to the Court of Sessions. Before the Court of Sessions, the trial has to start de novo in accordance with the procedure prescribed under Chapter XVIII of “the Code”.

This matter can be examined from another angle. Whatever evidence has been led before the Court of Judicial Magistrate, would not be read as evidence while deciding the case by the Court of Sessions. The Court of Sessions is obligated upon to follow the procedure as provided in Chapter XVIII of “the Code” which requires framing of charge and thereafter proceeding to record evidence of the prosecution in case the accused does not plead guilty. The Court of Sessions also has a power to remit the case back to the Magistrate after finding that the case does not involve the offence which is exclusively triable by the Court of Sessions. If the Court of Sessions agrees with the committing Magistrate, first the charge has to be framed and thereafter the evidence has to be led de-novo. Therefore, once the Magistrate found that the case is exclusively triable by the Court of Sessions, he should have left it to the Court of Sessions to proceed in accordance with law.

Argument of learned counsel for the respondent(s) that the Magistrate had passed the order under Section 319 of “the Code” during the course of trial, does not have substance. Once the Magistrate has found that the case is triable by the Court of Sessions, further proceedings under Chapter XVIII of “the Code” were required to be taken by the Court of Sessions and not by the Magistrate. These observations are only in the

context of powers of the Magistrate u/s 319 of “the Code”.

In view of the aforesaid discussion, the question which has been framed in the initial part of the judgment is answered in favour of the petitioners. Order under challenge passed by the learned Judicial Magistrate confirmed by the Court of revision only to the extent of summoning the petitioners under Section 319 of the Code is set aside. The Court of Sessions would proceed in accordance with Chapter XVIII of the Code.

The present petition to that extent is allowed. Needless to observe that the Court of Sessions would now proceed with the case.

All the pending miscellaneous applications, if any, are disposed of in view of the abovesaid order.

07.08.2019

Pawan

**(ANIL KSHETARPAL)
JUDGE**

Whether speaking/reasoned:- Yes/No

Whether reportable:- Yes/No