

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.1361 OF 2018

MRS.HARJINDER KAUR KAPOOR)...APPLICANT

V/s.

**1) THE STATE OF MAHARASHTRA)
2) SADANAND RAO)...RESPONDENTS**

Mr.A.H.H.Ponda a/w. Mr.Karan Jain, Advocate for the Applicant.

Mr.S.V.Gavand, APP for the Respondent – State.

Ms.Tejas Kapre i/b. Mr.J.S.Kapre, Advocate for Respondent No.2.

CORAM : A. M. BADAR, J.

DATE : 7th FEBRUARY 2020

ORAL JUDGMENT :

1 Heard. Rule. Rule made returnable forthwith. Heard finally by consent of parties.

2 By this petition, the petitioner, who by the impugned order is sought to be summoned under Section 319 of the Code of

Criminal Procedure (hereinafter referred to as Cr.P.C. for the sake of brevity) passed by the learned trial Magistrate for facing the Charge for offences punishable under Sections 419, 420, 465, 468, 471, 511 read with 34 of the Indian Penal Code is challenging the said order dated 27th June 2018 passed on an application below Exhibit 30 under Section 319, which was filed by the State.

3 The offence vide Crime No.57 of 2003 came to be registered under Sections 419, 420, 465, 468, 471, 511 read with 34 of the Indian Penal Code with Santacruz Police Station, Mumbai, against Vishal Kapoor, who happens to be husband of the applicant herein – Mrs.Harjinder Kaur Kapoor and other accused persons. Initially, the applicant herein was also arraigned as an accused in the said crime. However, ultimately, the police filed Closure Report under Section 169 of the Cr.P.C., so far as the applicant herein is concerned, and the said report came to be accepted by the learned Metropolitan Magistrate on 15th November 2007.

4 With passage of time, the Charge was framed and accused persons were put to trial. The case was fixed for evidence and PW1 Sadanand Guru Rao entered in the witness box as PW1. He seems to be the First Informant.

5 PW1 Sadanand Guru Rao deposed before the learned Metropolitan Magistrate that he came to be cheated by the accused persons. As per his version, he is in the business of supplying manpower to the Shipping Industry. He stated that as per the demand of a person named Captain John Philips, he sent ten workers to Kaula Lumper. As per demand of said Captain John Philips, on 18th November 2002, he paid an amount of Rs.8,37,500/- to a person named Sanjay deputed by said Captain John Philips at his office at Mumbai. This witness further deposed that, ultimately, it was found that men sent by him were not recruited and he was, infact, cheated by some imposter. Such type of instances repeated in the industry and ultimately, one Sunil Sharma from Virein Marine Services contacted him to inform him that Virein Marine Services is being cheated with some modus

operandi by some impostor stating himself to be the Fleet Manager of Sea Pacific Shipping Company, Hongkong. Evidence of PW1 Sadanand Guru Rao indicates that he, then, lodged report on 2nd January 2002 with Joint Commissioner of Police. During the course of the trial, the said report came to be exhibited as Exhibit P-5. Evidence of the First Informant/ PW1 Sadanand Guru Rao further reveals that as with same modus operandi, money was sought to be extracted from his colleague in the trade, two Constables were provided to them by the Police Department. Then a trap was laid below Sujata Chamber. A person named Farooq deputed by Captain Yan Bo came for collecting money. That trap has resulted in apprehending the said person named Farooq, who happens to be the very same person, who had approached PW1 Sadanand Guru Rao in the name of Sanjay for collecting money. At the same time, Vishal Kapoor, who happens to be the husband of the present applicant, also came to be arrested from the spot itself. Then, as per version of PW1 Sadanand Guru Rao, police asked the person named Farooq @ Sanjay as to where the money collected from PW1 Sadanand Guru

Rao is kept. Upon that, said Farooq @ Sanjay told that the said amount of Rs.8,37,500/- is delivered to Harjinder Kapoor – wife of Vishal Kapoor, who happens to be the present applicant, who is then summoned to face the Charge vide impugned order passed by the learned Metropolitan Magistrate.

6 After deferring the chief-examination of PW1 Sadanand Guru Rao, the State then preferred an application under Section 319 of the Cr.P.C. for summoning Harjinder Kapoor – wife of Vishal Kapoor and by the impugned order below Exhibit 30 passed on 27th June 2018, the said application came to be allowed and summons was directed to be issued to the present applicant.

7 I have heard Mr.Ponda, the learned counsel appearing for the applicant. He submitted that an application under Section 482 of the Cr.P.C. can be validly maintained instead of preferring a revision petition in the light of judgment of the Hon'ble Apex Court in the matter of **Prabhu Chawla vs. State of Rajasthan**¹. It is further argued that powers conferred by Section 319 of the Cr.P.C.

1 (2016) 16 Supreme Court Cases 30

are required to be exercised only when strong and cogent evidence appears against a person, who is not arraigned as an accused. Mere probability or complicity of such person is not sufficient to summon him. What is required to be established is a stronger case than a prima facie case. To buttress this submission, reliance is placed on judgment of the Hon'ble Apex Court in the matter of Shiv Prakash Mishra vs. State of Uttar Pradesh and Another², Arun Gulab Gawli vs. State of Maharashtra³ so also on Labhuji Amratji Thakor and Others vs. The State of Gujarat and Another⁴.

8 The learned counsel for the applicant drew my attention to the Closure Report moved by the police under Section 169 of the Cr.P.C. and submitted that two points were urged by the police for getting the order of discharge of the present applicant under Section 169 of the Cr.P.C. By pointing out the said order, it is submitted that the learned Metropolitan Magistrate has accepted the contention of the Investigating Officer that though

2 (2019) 7 SCC 806

3 (2007) 4 AIR Bom R 625

4 AIR 2019 SC 734

the co-accused had named the present applicant as the person involved in the crime in question, statement of the co-accused cannot be relied upon as no bank transaction is reflected either in the account of accused Walter Almeida or Mrs.Harjinder Kaur Kapoor. It is further pointed out that the police had demonstrated before the learned Metropolitan Magistrate vide this report under Section 169 of the Cr.P.C. that it is averred that the applicant is having two mobile phones in her name but those mobile phones were used by accused Vishal Kapoor, who happens to be the husband of the applicant. She could deny her husband against usage of these phones.

9 After pointing out the report under Section 169 of the Cr.P.C., my attention is drawn to evidence of PW1 Sadanand Guru Rao and it is urged by the learned counsel for the applicant that statement of the co-accused is deposed by PW1 Sadanand Guru Rao and that statement has not resulted in any recovery so as to make it admissible under Section 27 of the Evidence Act. It is further argued that evidence in the form of co-accused is not

admissible as it had not yielded any recovery under Section 27 of the Evidence Act. With this, it is argued that the very same material was pointed out by the Investigator to the learned Metropolitan Magistrate in the report under Section 169 of the Cr.P.C. which was accepted way back in the year 2007, and as such, the applicant ought not to have been summoned again by the learned Metropolitan Magistrate.

10 I have also heard the learned APP appearing for the State as well as the learned counsel appearing for respondent no.2/ PW1 Sadanand Guru Rao. They both unanimously argued that statement of the co-accused reveals that the applicant herein is the beneficiary of the subject crime. She had received money from the co-accused and it was utilised by her during the course of getting anticipatory bail. The learned counsel for respondent no.2 / PW1 Sadanand Guru Rao placed reliance on the judgment of the Hon'ble Apex Court in the matter of **Hardeep Singh vs. State of Punjab and Others**⁵ on the point that exercise of powers under Section 319 of the Cr.P.C. by the learned trial Magistrate is just and

5 (2014) 3 Supreme Court Cases 92

legal in the circumstances of the case. She argued that even a person, who is not named in the First Information Report (FIR) or a person who is not charge-sheeted can be arraigned as an accused during the course of the trial. In her submission, the cognizance is taken not of an accused but that of an offence. After taking cognizance, it becomes the duty of the trial court to find out who has committed the offence and in this view of the matter, the trial court can summon any person against whom even no FIR is filed. It is further argued that sufficiency of evidence against the person sought to be arraigned as an accused is not required to be assessed or adjudicated at the time of summing such accused under Section 319 of the Cr.P.C. Such newly added accused gets an opportunity to represent him during the course of the trial and by cross-examining the prosecution witnesses, such accused can establish his innocence. To buttress this submission, reliance is placed on judgment of the Hon'ble Apex Court in the matter of Lok Ram vs. Nihal Singh and Another⁶ Guriya alias Tabassum Tauquir and Others vs. State of Bihar and Another⁷ Dharam Pal &

6 (2006) 10 Supreme Court Cases 192

7 (2007) 8 Supreme Court Cases 224

Others vs. State of Haryana and Another⁸ Suman vs. State of Rajasthan⁹ and Raghubans Dubey vs. State of Bihar¹⁰. With this, it is argued by the learned counsel appearing for respondent no.2/PW1 Sadanand Guru Rao that the application deserves to be rejected.

11 I have carefully considered the submissions so advanced and also perused the judgments cited at bar by both parties, so also the material placed on record.

12 Evidence of PW1 Sadanand Guru Rao indicates that information of commission of cognizable offence, for the first time, was given by him to the Joint Commissioner of Police vide complaint dated 2nd January 2002 which is marked as Exhibit P-5 during the course of recording of evidence of this witness by the learned Metropolitan Magistrate, Mumbai. After registration of Crime No.57 of 2003 and on investigation thereof, as seen from the record had submitted a Closure Report by resorting to

8 2013 AIR (SC) 3018

9 2010 AIR (SC) 518

10 AIR 1967 Supreme Court 1167

provisions of Section 169 of the Cr.P.C., so far as present applicant is concerned. That Closure Report (page 11a) shows that the Investigating Officer could not collect any evidence as regards to involvement of the present applicant in the subject crime. The Investigating Officer in that report had mentioned that co-accused Walter Almeda has admitted that an amount of Rs.8,37,500/- collected from PW1 Sadanand Guru Rao was handed over to the present applicant on 18th November 2002. The Investigating Officer further added that this statement of the accused cannot be relied upon as no bank transaction is reflected either in the account of the co-accused or that of the present applicant. It was also pointed out to the learned Metropolitan Magistrate by the Investigating Officer that the applicant is having two mobile phones in her name. The Investigating Officer has informed to the learned Metropolitan Magistrate that those mobile phones were used by husband of the present applicant named as Vishal Kapoor and in no way this accused Mrs.Harjinder Kaur Kapoor (applicant herein) could deny her husband against use of these phones. It is further reported to the learned Metropolitan Magistrate that there

is no evidence which could show that the applicant herein herself spoke on these mobile phones or took active part in commission of the crime. On this Closure Report, the following order came to be passed by the learned Metropolitan Magistrate, so as to accept the same :

“The charge-sheet is not filed against Smt. Harjinder Kaur. The prosecution prayed that the accused be discharged as no sufficient evidence is on record to charge-sheet her. I accept the request of the prosecution and then discharge her. Bail Bonds Cancelled.”

13 During the course of the trial, as stated in the foregoing paragraphs, PW1 Sadanand Guru Rao, so far as the applicant herein is concerned, has only deposed that in his presence, co-accused named Sanjay told police that he had delivered the amount of Rs.8,37,500/- collected from PW1 Sadanand Guru Rao to present applicant Harjinder Kaur Kapoor – wife of Vishal Kapoor.

14 It is, thus, clear that evidence, which came on record of the learned trial court through version of PW1 Sadanand Guru Rao, is only to the effect that co-accused has disclosed in his presence to police that the amount collected from PW1 Sadanand Guru Rao came to be delivered to the present applicant. This is the statement of the co-accused which was heard by PW1 Sadanand Guru Rao and that statement, as seen from evidence of PW1 Sadanand Guru Rao, was undisputedly made in presence of the police. It is, thus, confession made by the co-accused before the police. Sections 25 and 26 of the Evidence Act deal with relevancy of confession made by the accused to police. It is clear from perusal of these sections that such confession shall not be proved as against the accused. However, Section 27 of the Evidence Act is an exception to this rule. It is a rather proviso to these sections in the Evidence Act. As per Section 27 of the Evidence Act, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such

information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. Thus, for making a confession relevant, it must yield in some recovery. Statement of the accused incriminating him in the crime in question is not admissible in evidence, if it is made in the presence of the police. However, the fact discovered by such statement can be considered. In the case in hand, evidence of PW1 Sadanand Rao is conspicuously silent about recovery or discovery pursuant to the statement of the co-accused. Moreover, it is not the case of the prosecution that statement of the co-accused has resulted in recovery, at the instance of the present applicant. In the matter of Arun Gulab Gawli (supra) this court has specifically held that statement of the co-accused cannot constitute a legally admissible evidence and on the basis of statement of the co-accused, even Charge cannot be framed. Be that as it may, the present applicant came to be summoned in the light of evidence of PW1 Sadanand Rao. The learned trial court, by the impugned order, has held that evidence of PW1 Sadanand Rao reflected that one of the accused had disclosed that handsome amount in the crime

was handed over to Mrs.Harjinder Kaur Kapoor i.e. the applicant herein. This observation of the learned trial Magistrate formed the basis for summoning the applicant herein to answer the Charge. As stated above, statement of the co-accused cannot form legally admissible evidence against an accused and as such, it ought not to have formed the basis for summoning the accused.

15 At this juncture, it is apposite to quote paragraph nos.9, 10 and 11 from a recent judgment of the Hon'ble Apex Court in the matter of Shiv Prakash Mishra (supra) wherein judgment in the matter of Hardeep Singh (supra) was quoted with approval. Law regarding summoning of the accused by resorting to powers under Section 319 of the Cr.P.C. is crystallized in this judgment. Relevant paragraphs read thus :

“9 The standard of proof employed for summoning a person as an accused person under Section 319 Cr.P.C. is higher than the standard of proof employed for framing a charge against the accused person. The power under Section 319 Cr.P.C. should be exercised sparingly. As held in Kailash v. State of Rajasthan and another (2008) 14

SCC 51, “the power of summoning an additional accused under Section 319 Cr.P.C. should be exercised sparingly. The key words in Section are “it appears from the evidence”....”any person”....”has committed any offence”. It is not, therefore, that merely because some witnesses have mentioned the name of such person or that there is some material against that person, the discretion under Section 319 Cr.P.C. would be used by the court.”

“10 As held by the Constitution Bench in para (105) in Hardeep Singh, the power under Section 319 Cr.P.C. is discretionary and is to be exercised sparingly which 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.”

“11 The above view was followed in Brijendra Singh as under:-

“13. In order to answer the question, some of the principles enunciated in Hardeep Singh case (2014) 3 SCC 92 may be recapitulated: However, since it is a discretionary power given to the court under Section 319 CrPC and is also an extraordinary one, same has to be exercised sparingly and only in those cases where the circumstances of the case so warrant. 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.”

16 Considered in the light of observations of the Hon'ble Supreme Court quoted supra, the impugned order summoning the applicant cannot be sustained. The same is illegal as well as perverse. The earlier order of the learned trial Magistrate accepting report under Section 169 of the Cr.P.C. was not construed in proper sense by the learned trial Magistrate while summoning the applicant. The learned trial court has failed to appreciate the fact that exercise of powers under Section 319 of the Cr.P.C. requires higher standard of proof and stronger evidence than mere probability of his complicity. However, material came on record from evidence of PW1 Sadanand Guru Rao cannot constitute legally admissible evidence against the applicant herein, and as such, the impugned order deserves to be quashed and set aside.

17 In the light of observations and finding given by this court, other judgments cited by the learned counsel for respondent no.2/ PW1 Sadanand Guru Rao are of no assistance to the case of respondent no.2. In the result, the following order :

ORDER

- i) The application is allowed in terms of Prayer Clause (a).
- ii) Rule is made absolute in above terms.

(A. M. BADAR, J.)

Arti V.
Khatate

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