

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRR No.1397 of 2018

Date of Decision:04.02.2020

Mohit Kharab

...Petitioner

versus

State of Haryana and another

...Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present:- Mr. Ashish Aggarwal, Senior Advocate, with
Mr. Parunjeet Singh, Advocate,
for the petitioner.

Mr. Surender Singh, A.A.G., Haryana.

Mr. J.S. Bedi, Senior Advocate, with
Mr. Partap Singh, Advocate,
for respondent no. 2.

Amol Rattan Singh, J.

1. This revision has been filed against the order of the learned Additional Sessions Judge, Panipat, dated 26.03.2018, by which the application filed by the complainant in the FIR in question, (such application having been filed by him through the learned Assistant Public Prosecutor), under the provisions of Section 319 of the Code of Criminal Procedure, 1973, (hereinafter to be referred to as the Cr.PC or the Code), has been allowed by that court, thereby summoning the petitioner to appear before it as an accused, with the offences alleged to have been committed, as per the FIR, being those punishable under Section 307 read with Section 34 of the IPC and under Section 25 of the Arms Act.

2. In the FIR (dated 31.01.2017), the complainant had alleged that after an initial incident of a threat having been meted out to him by two

persons (Rampal and Ved), who had so threatened by asking him to withdraw his appeal, filed under the provisions of the Right to Information Act (RTI), thereafter, about 15 days later, one Ravinder had again called out to him to withdraw his appeal, and when he turned back to answer that person, the petitioner (Mohit) shot at him with a pistol, with an intention to kill him, with the projectile from the weapon having hit him on his left arm. Thereafter, the aforesaid Ravinder is stated to have also shot at him, with the said shot hitting him on the right side of his chest.

Another person (not identified at that stage) is also stated to have attempted to fire upon the complainant but was unable to do so. After that, all three accused are stated to have run away from the spot.

3. Eventually, upon the police having conducted investigation through a Special Investigation Team constituted, a report was submitted to the competent court on 16.05.2017, only arraigning the aforesaid Ravinder as an accused, with the petitioner having been kept in column no.2 of the said report.

However, upon the complainant having testified before the trial court as PW2, he reiterated what he had stated in his original complaint before the police, to the effect that the petitioner had shot at him from a pistol thereby injuring him on the left arm. The trial court held, at that stage, the medical evidence (in the form of the medico legal report) having shown such an injury existent on the arm of the complainant, the petitioner should be summoned to face trial. He was consequently, so summoned, vide the impugned order.

That court also referred to a judgment of the Supreme Court in

Suman v. State of Rajasthan and another 2010 AICLR (SC) 518, in doing

SO.

4. Lengthy arguments were addressed on both sides before this Court, the contention of Mr. Aggarwal, learned senior counsel appearing for the petitioner, essentially being that once the investigating agency had gathered material in the form of statements of various persons who could have been in the knowledge of the case, and thereafter having submitted its report under Section 173 of the Cr.P.C., arraigning only one Ravinder as an accused therein, and thereafter having submitted material on 26.03.2018, to say that the petitioner was not guilty of the offence, the trial court without considering that material, simply summoned the petitioner on a reiteration by the complainant, in his testimony as PW2, of what he had already stated in such complaint leading to the registration of the FIR.

He therefore submitted that the summoning order was not sustainable, in the face of the ratio of judgments of the Supreme Court, specifically one in the case of **Brijendra Singh and others vs. State of Rajasthan** 2017 (3) RCR (Criminal) 374.

5. Mr. Aggarwal then referred to the bare provisions of Section 319 of the Cr.P.C. (to which of course learned counsel for the complainant later also drew attention), which are reproduced as follows:-

“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 sub- section (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.”

6. He next submitted that an inquiry, as is referred to in Section 319, is one that is conducted by a Magistrate even in terms of clause (g) of Section 2 of the Code, which reads as follows:-

“2. Definitions.- *In this Code, unless the context otherwise requires:-*

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(g) “inquiry” means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court.”

7. He contended that thus, with the police never having submitted even a supplementary report in terms of sub-Section (8) of Section 173 of the

Code, the petitioner cannot be held to have been declared innocent and as such, even in terms of sub-section (1) of Section 319, the trial Court at this stage could not have summoned him, with the police still to submit its final report, more so because in the original report under sub section (2), as was submitted arraigning his co-accused (Ravinder) as an accused, it was stated that the investigation against the petitioner, i.e. Mohit Kharb, was still pending.

8. In that context, he relied upon what has been held by the Constitution Bench in Hardeep Singh v. State of Punjab and others 2014 (1) RCR (Criminal), to the following effect:-

“.....The only material that the court has before it is the material find out as to whether a person, who can be an accused, has been erroneously omitted from being arraigned or has been deliberately excluded by the prosecuting agencies. This is all the more necessary in order to ensure that the investigating and the prosecuting agencies have acted fairly in bringing before the court those persons who deserve to be tried and to prevent any person from being deliberately shielded when they ought to have been tried. This is necessary to usher faith in the judicial system whereby the court should be empowered to exercise such powers even at the stage of inquiry and it is for this reason that the legislature has consciously used separate terms, namely, inquiry or trial in Section 319 Cr.P.C.

Accordingly, we hold that the court can exercise the power under Section 319 Cr.P.C. only after the trial proceeds and commences with the recording of the evidence and also in exceptional circumstances as explained herein above.”

(Law Finder Doc Id#514451)

9. From *Brijendra Singhs'* judgment (supra), he referred to paragraphs 11 to 15 (Law Finder Doc Id#851765), wherein their Lordships referred to *Hardeep Singhs'* case and held that when the aforesaid principles are applied to the facts of the case (in *Brijendra Singh*), the trial Court would be found to have acted in a casual and cavalier manner, the investigating officer having found those sought to be arraigned as accused to be in Jaipur City, which was at a distance of 175 kms from the place of occurrence in that case.

It was further observed by their Lordships that record having been presented before the trial Court to that effect, and nothing more than what was recorded in the statements under 161 Cr.P.C. having been the substance of the evidence of the complainant/prosecution, summoning under Section 319 could not have been resorted to.

Learned Senior Counsel submitted that even in that case the police had kept the investigation open and that therefore at the stage that an application under Section 319 was filed, more than just a *prima facie* case was needed to be made out against the persons sought to be summoned, and not simply a reiteration by the complainant of his original statement.

His contention on that, further, was that at a stage that an application under Section 319 is filed, it is more than just a *prima facie* case which must be shown to be made out against the persons sought to be summoned, with the Supreme Court having held in the aforesaid judgment that a simple reiteration by the complainant during his testimony with regard to what he had stated at the time of making the complaint and any statement made by him under Section 161 of the Cr.P.C., not being sufficient ground to

summon any person on such an application made, solely on the basis of such reiteration.

10. Mr. Aggarwal thereafter relied upon a recent judgment of the Supreme Court in **Mani Pushpak Joshi** vs. **State of Uttarakhand and another** (Criminal Appeal No. 1517-2019), dated 17.10.2019. From that judgment, he pointed to a quote by the Supreme Court from an earlier judgment in **Labhuji Amratji Thakor and others** vs. **State of Gujarat and others** AIR 2019 SC 734, which is to the following effect:-

*12. “.....The mere fact that Court has power under **Section 319** Code of Criminal Procedure to proceed against any person who is not named in the F.I.R. or in the Charge Sheet does not mean that whenever in a statement recorded before the Court, name of any person is taken, the Court has to mechanically issue process under **Section 319** Code of Criminal Procedure The Court has to consider substance of the evidence, which has come before it and as laid down by the Constitution Bench in Hardeep Singh (supra) has to apply the test, i.e., 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.....”*

He next pointed to what was held by the Supreme Court in Mani Pushpak Joshi's case itself, to the effect that--

16. “.....The fact, that the prosecution after investigations has found no material to charge the present appellant is also cannot be ignored....”

To the same effect, he relied upon a judgment of a co-ordinate Bench of this Court, in **Narender** vs. **State of Haryana and another** 2019

(1) RCR (Criminal) 712.

11. Mr. Aggarwal next submitted that with the material on behalf of the complainant before the trial Court simply being his testimony reiterating what he had earlier stated, the trial Court was at least bound to have referred to the material submitted by the investigating agency before it, in the form of the report dated 26.03.2018 (i.e. on the same date as on which the impugned order has been passed), before summoning the petitioner.

12. Last, learned senior counsel submitted that the petitioner being an 18 year old studying towards obtaining an MBBS degree from China, he factually has been implicated only because he was at home during the holidays at the relevant time, even though the FSL report is to the effect that the two injuries were caused not by two weapons but by a single weapon.

Hence, his contention was that, at best, both the injuries could only have been attributed to the person already arraigned as an accused by the police, i.e. Ravinder.

13. *Per contra*, Mr. Bedi, learned Senior Counsel appearing for the complainant, submitted that in fact learned counsel for the appellant is wholly misinterpreting the ratio of the judgment of the Constitution Bench in **Hardeep Singhs'** case, inasmuch as the material sought to be relied upon by the petitioner and the investigating agency, to exonerate the petitioner, was not material as could have been relied upon by the trial court in any case.

He pointed to the fact that such material, sought to be relied upon by the investigating agency to exonerate the petitioner, were statements recorded not even under Section 161 of the Code, with in fact the Supreme Court having held that even those statements (recorded under Section 161), could at best be only supporting material to evidence led before the trial court, as regards deciding any application filed under Section 319.

14. In that context, from **Hardeep Singhs'** case, he first pointed to paragraph 110 (Law Finder Doc Id# 514451), wherein it has been stated as follows:-

“.....As a trial commences after framing of charge, an inquiry can only be understood to be a pre-trial inquiry. Inquiries under Sections 200, 201, 202 Cr.P.C.; and under Section 398 Cr.P.C. are species of the inquiry contemplated by Section 319 Cr.P.C. Materials coming before the Court in course of such enquiries can be used for corroboration of the evidence recorded in the court after the trial commences, for the exercise of power under Section 319 Cr.P.C., and also to add an accused whose name has been shown in Column 2 of the chargesheet. In view of the above position the word 'evidence' in Section 319 Cr.P.C. has to be broadly understood and not literally i.e. as evidence brought during a trial.”

His contention therefore was that any report submitted by the police cannot even be looked into by the trial Court, as per the ratio of the aforesaid judgment, for the purpose of deciding an application filed under Section 319, with the only report that can be examined for that purpose, being one submitted in terms of Sections 200, 201 and 202 and 398 of the Code, and no other material, other than evidence led before the trial Court.

Therefore, once the complainant had testified on oath, stating what he had already stated in his complaint, with the allegation specifically against the petitioner being that he had in fact fired the first shot at the complainant, hitting him on his arm, after which the second shot was fired by co-accused Ravinder, with that shot hitting him on his chest, the trial court has not erred in passing the impugned order summoning the petitioner to face

trial as an accused.

15. Thus, Mr. Bedi contended that, in terms of the ratio of the judgment in *Hardeep Singh*, other than such report submitted on an enquiry conducted or ordered to be conducted by the Court, no other material can be looked at for the purpose of accepting or rejecting an application under Section 319.

16. He next contended that it is only evidence led before the trial Court that could have been relied upon, and not any other material simply presented by the investigating agency, as was neither in the form of any documentary evidence led by way of exhibits, nor in the form of any oral evidence, nor in fact was even a report under Section 173 of the Code.

Towards that contention he also relied upon a judgment of the Supreme Court in **Rajendra Singh** vs. **State of U.P. and another** (Law Finder Docid # 131005), from which he specifically pointed to paragraph 10, which reads as follows:-

“10. Having considered the submissions made by learned counsel for the parties, we are of the opinion that the statements of the witnesses under [Section 161 Cr.P.C.](#) being wholly inadmissible in evidence could not at all be taken into consideration. The High Court relied upon wholly inadmissible evidence to set aside the order passed by the learned Sessions Judge.....”

17. On the merits of what is held in *Brijendra Singhs'* case (supra), Mr. Bedi submitted that in that case documentary evidence had been gathered by the police to show that those who had been exonerated in the report submitted under Section 173 of the Cr.P.C. (i.e. those who were later summoned on an application filed under Section 319 of the Code), were

persons who were either in hospitals or at other places in Jaipur, and as such, it was held that the trial court in that case, should not have mechanically summoned them as accused, simply on reiteration by the complainant, by way of his subsequent testimony, of what he had stated in his original complaint.

He therefore submitted that the two situations are in any case not *pari materia* with each other, because the material relied upon by the investigating agency to exonerate the petitioner (in the present case), is simply by way of statements of friends, relatives and neighbours of the petitioner, who would in any case make statements in his favour, and as such, such statements recorded (not even under the provisions of Section 161 of the Cr.P.C., as contended), cannot be placed on the same footing as the material referred to in the judgment of the Supreme Court in *Brijender Singhs'* case.

18. He next submitted that *Brijendra Singhs'* case therefore can only be taken to be one decided by the Supreme Court in the context of that particular case (though he even submitted that the judgment was rendered *per incuriam*), with him further referring to a judgment of the same Bench as had decided *Brijendra Singhs'* case, wherein their Lordships had held differently (as per learned senior counsel). That judgment was one rendered in **S. Mohammad Ispahani** vs. **Yogendera Chandak and others** 2017 (4) RCR (Criminal) 650 (SC), in which it was held as follows:-

“.....However there is no contradiction between the two observations as the Court also clarified that the ‘evidence’, on the basis of which an accused is to be summoned to face the trial in an ongoing case, has to be the material that is brought before the Court during trial. The material/evidence collected by the investigating officer at the stage of inquiry can only be utilised for corroboration and to support the

evidence recorded by the Court to invoke the power under [Section 319](#) Cr.P.C.

34) It needs to be highlighted that when a person is named in the FIR by the complainant, but Police, after investigation, finds no role of that particular person and files the charge sheet without implicating him, the Court is not powerless, and at the stage of summoning, if the trial court finds that a particular person should be summoned as accused, even though not named in the charge sheet, it can do so. At that stage, chance is given to the complainant also to file a protest petition urging upon the trial court to summon other persons as well who were named in the FIR but not implicated in the charge sheet. Once that stage has gone, the Court is still not powerless by virtue of [Section 319](#) of the Cr.P.C. However, this section gets triggered when during the trial some evidence surfaces against the proposed accused.

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."

19. Thus, he submitted that even though in that case, again it was held that no strong and cogent evidence had surfaced against the appellant before the Supreme Court, on the basis of which he could have been summoned, what has been held is that even statements recorded under the provisions of Section 161 of the Code cannot be looked at by the Court, while taking a decision on an application filed under Section 319.

As regards the Supreme Court holding that those summoned in that case could not have been so summoned, he submits that it was on

account of the fact that the prosecutrix, though only a 06 year old girl, was found to have been improving her statement time and again (as had been argued before the Supreme Court), and therefore, it was not a case where the complainant had reiterated his version in the complaint while testifying before the Court.

18. As regards the FSL report (in the present case) opining that both the shots had been fired from a single gun, he submitted that two empty shells/cartridges were recovered from the spot, and consequently, simply because two shells were recovered from the spot, it could not have been held that only one pistol had been used and not two, especially as the injury on the person of the complainant wholly corroborates his statements and his testimony before the Court, that he was actually shot at and injured by the petitioner first and then by Ravinder.

On the issue of empty cartridges being fired from a country-made pistol not being an absolutely determinable factor to prove that the said cartridges were fired from such a pistol, he relied upon a judgment of a Division Bench of this Court, in **Sabbir (son of Nasru) vs. State of Haryana** 2011 (3) RCR (Criminal) 529.

21. Hence, Mr. Bedi submitted that the impugned order does not call for any interference with.

22. Mr. Surender Singh, learned counsel for the State, in his arguments first submitted that as per the investigating agency, the evidence gathered did not point towards the petitioner. However, thereafter he maintained a neutral position, in view of the fact that, undoubtedly, the testimony of the complainant, before the trial Court, is to the effect that the petitioner shot at him.

23. In rebuttal to the aforesaid arguments, Mr. Aggarwal, learned Senior Counsel appearing for the petitioner, again referred to what has been stated in Hardeep Singhs' case as follows:-

“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 Cr.P.C.”

Mr. Aggarwal next submitted that with the Supreme Court having duly referred to *Hardeep Singhs'* case in *Brijendra*, it cannot be stated that the said judgment is applicable only to the facts of that case.

His contention therefore obviously was that the impugned order deserves to be set aside.

24. Having considered the matter, what this court is to see, firstly, is as to whether the material relied upon by the investigating agency, as presented before the trial court on the date that the impugned order was passed, i.e. on 26.03.2018, is material that could have been considered by that court in terms of the ratio of the judgment of the Constitution Bench in *Hardeep Singh*, and if so, whether such material could, or could not have been, ignored by that court before summoning the petitioner.

The other point which needs to be considered, is as to whether the application filed under Section 319 could have been moved at all and decided vide the impugned order at the stage that it has been so decided, keeping in view the argument of Mr. Aggarwal, learned senior counsel for the petitioner, to the effect that with the petitioner not having been 'firmly' declared to be innocent by the investigating agency, no such application

could in fact have been either moved or decided.

25. To consider the first question hereinabove, what has been held in *Hardeep Singh* needs to be referred to again.

As regards the material that can be looked at by a Court before deciding an application under Section 319, the following two questions formulated by the Constitution Bench need to be reproduced:-

(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?

26. In deciding question no. (iii), after referring to a large number of judgments, their Lordships held as follows:-

"50. In our opinion, the stage of inquiry does not contemplate any evidence in its strict legal sense, nor the legislature could have contemplated this inasmuch as the stage for evidence has not yet arrived. The only material that the court has before it is the material collected by the prosecution and the court at this stage prima facie can apply its mind to find out as to whether a person, who can be an accused, has been erroneously omitted from being arraigned or has been deliberately excluded by the prosecuting agencies. This is all the more necessary in order to ensure that the investigating and the prosecuting agencies have acted

fairly in bringing before the court those persons who deserve to be tried and to prevent any person from being deliberately shielded when they ought to have been tried. This is necessary to usher faith in the judicial system whereby the court should be empowered to exercise such powers even at the stage of inquiry and it is for this reason that the legislature has consciously used separate terms, namely, inquiry or trial in [Section 319 Cr.P.C.](#)”

Thereafter, their Lordships referred to the word 'inquiry', as inquiry relevant for the purposes of Section 319, to be an inquiry in terms of the “provisions of Section 200, 201, 202 etc., Cr.P.C., applicable in the case of complaint cases.

However, in the same paragraph (51) as regards what constitutes evidence, it was held that “evidence means evidence adduced before the court.”

It was also held that:-

“.....The material collected at the stage of investigation can at best be used for a limited purpose as provided under [Section 157](#) of the Evidence Act i.e. to corroborate or contradict the statements of the witnesses recorded before the court. Therefore, for the exercise of power under [Section 319 Cr.P.C.](#), the use of word ‘evidence’ means material that has come before the court during an inquiry or trial by it and not otherwise. If from the evidence led in the trial the court is of the opinion that a person not accused before it has also committed the offence, it may summon such person under [Section 319 Cr.P.C.](#)”

Very importantly, paragraph 71 (Law Finder Doc Id# 514451)

thereafter holds as follows:-

“71. It is, therefore, clear that the word “evidence” in [Section 319](#) Cr.P.C. means only such evidence as is made before the court, in relation to statements, and as produced before the court, in relation to documents. It is only such evidence that can be taken into account by the Magistrate or the Court to decide whether power under [Section 319](#) Cr.P.C. is to be exercised and not on the basis of material collected during investigation.”

72. The inquiry by the court is neither attributable to the investigation nor the prosecution, but by the court itself for collecting information to draw back a curtain that hides something material. It is the duty of the court to do so and therefore the power to perform this duty is provided under the [Cr.P.C.](#)”

(All emphasis applied by this court only).

27. Further on what constitutes an inquiry and the material presented before the court, pursuant to such inquiry, as can be used by it to decide an application under Section 319, it was stated as follows:-

“74. An inquiry can be conducted by the magistrate or court at any stage during the proceedings before the court. This power is preserved with the court and has to be read and understood accordingly. The outcome of any such exercise should not be an impediment in the speedy trial of the case.

75. Though the facts so received by the magistrate or the court may not be evidence, yet it is some material that makes things clear and unfolds concealed or deliberately suppressed material that may facilitate the trial. In the context of [Section 319](#) Cr.P.C. it is an information of complicity. Such material therefore, can be used even though not an evidence in

stricto sensuo, but an information on record collected by the court during inquiry itself, as a prima facie satisfaction for exercising the powers as presently involved.

xxxx xxxx xxxx xxxx xxxx

77. It is, therefore, not any material that can be utilised, rather it is that material after cognizance is taken by a court, that is available to it while making an inquiry into or trying an offence, that the court can utilize or take into consideration for supporting reasons to summon any person on the basis of evidence adduced before the Court, who may be on the basis of such material, treated to be an accomplice in the commission of the offence. The inference that can be drawn is that material which is not exactly evidence recorded before the court, but is a material collected by the court, can be utilised to corroborate evidence already recorded for the purpose of summoning any other person, other than the accused.

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79. The word evidence therefore has to be understood in its wider sense both at the stage of trial and, as discussed earlier, even at the stage of inquiry, as used under [Section 319 Cr.P.C.](#) The court, therefore, should be understood to have the power to proceed against any person after summoning him on the basis of any such material as brought forth before it. The duty and obligation of the court becomes more onerous to invoke such powers cautiously on such material after evidence has been led during trial.

80. In view of the discussion made and the conclusion drawn hereinabove, the answer to the aforesaid question posed is that apart from evidence recorded

during trial, any material that has been received by the court after cognizance is taken and before the trial commences, can be utilised only for corroboration and to support the evidence recorded by the court to invoke the power under [Section 319 Cr.P.C.](#) The 'evidence' is thus, limited to the evidence recorded during trial."

(All emphasis applied in the present judgment only).

28. Having held as above, as regards whether evidence in terms of Section 319 means only such evidence as arises in the examination-in-chief or together with cross-examination, it was held that, for that purpose, even evidence coming in the examination-in-chief "not necessarily tested on the anvil of Cross-Examination" can be looked at, though it requires much stronger evidence than mere probability of the complicity of the person sought to be summoned.

29. On the stage at which the power under Section 319 Cr.P.C. can be exercised, that in fact was the first question formulated by their Lordships in the Constitution Bench and though the matter is discussed in detail, it was summed up essentially as follows (reference paragraph 49 Law Finder Doc Id# 514451):-

"It is thus aptly clear that until and unless the case reaches the stage of inquiry or trial by the court, the power under [Section 319 Cr.P.C.](#) cannot be exercised....."

As regards when a trial starts, it has been held (reference paragraph 43) that the trial commences as soon as the court frames the charge (and not at the time of taking cognizance of the offence).

30. Thus, having considered the present case in the light of what has

been held by the Constitution Bench, in my opinion this petition cannot succeed.

That is for the reason that what Mr. Aggarwal, learned senior counsel for the petitioner, wishes to refer to as material that should have been looked at by the trial court before passing the impugned order, is seen to be simply a one page status report (a translated copy being Annexure P-5 with the petition), signed by an Assistant Sub-Inspector of Police, which reads as follows:-

“Sir,

It is hereby requested that as per the Zimni of ASI Dalbir Singh, Assandh, dated 28.10.2017, it is informed that in the investigation conducted by DSP Assandh, Ram Pal, son of Mange Ram, Dharam Singh @ Dharamal son of Nafe Singh, Ved son of Des Raj, Mohit son of Dharam Singh, Caste Jat, residents of Narra have been found to be not involved in the alleged occurrence and no conclusive evidence have been found against them on the file. In the investigation conducted till date, Ram Pal, Dharam Singh @ Dharamal Ved, Mohit and others have been found innocent. The report is submitted for kind perusal.

*Sd/Dharambir
ASI, P.S. Madlauda
Panipat, Dt: 26.03.2018”*

31. Though Mr. Aggarwal wished to point out that since the phrase used therein is “investigation conducted till date”, therefore, the petitioner has not even been declared to be innocent and consequently cannot be summoned on an application filed under Section 319, in my opinion, that argument cannot be accepted, in view of the fact that as per the judgment of the Constitution Bench, the trial Court can exercise its jurisdiction to summon

a person in terms of Section 319, at any stage after the trial has commenced, and obviously in the present case, the trial was already in progress, the complainant having testified as PW-2 before it, after the charge was framed against the co-accused, i.e. Ravinder.

What has also been held by the Constitution Bench, is that evidence before the trial court does not necessarily have to be in the form of cross-examination but can also be based on, for the purpose of Section 319, simply the examination-in-chief.

32. Hence, Mr. Aggarwals' argument, to the effect that the report submitted on the date that the impugned order was passed, i.e. 26.03.2018, simply signed by an Assistant Sub-Inspector, should have been looked into more carefully and the material in the form of statements of the persons who stated that the petitioner was not involved in the commission of the crime, should have been called for by that Court, cannot be accepted, because such material gathered by the investigating agency, in terms of what has been held by the Supreme Court in Hardeep Singhs' case, cannot in fact be looked at by the trial court, such material neither being in the form of evidence presented before that court, nor it being material gathered upon any enquiry ordered by that court or any competent court, nor any material in support of the evidence before that court.

To repeat what has been already reproduced hereinabove from Hardeep Singhs' judgment, it was held therein as follows:-

“71. It is, therefore, clear that the word “evidence” in [Section 319 Cr.P.C.](#) means only such evidence as is made before the court, in relation to statements, and as produced before the court, in relation to documents. It is only such evidence that can be taken

into account by the Magistrate or the Court to decide whether power under [Section 319 Cr.P.C.](#) is to be exercised and not on the basis of material collected during investigation.

72. The inquiry by the court is neither attributable to the investigation nor the prosecution, but by the court itself for collecting information to draw back a curtain that hides something material. It is the duty of the court to do so and therefore the power to perform this duty is provided under the [Cr.P.C.](#)”

Thereafter, in paragraph 73, it has been held as follows, with a question posed by their Lordships:-

“73. The unveiling of facts other than the material collected during investigation before the magistrate or court before trial actually commences is part of the process of inquiry. Such facts when recorded during trial are evidence. It is evidence only on the basis whereof trial can be held, but can the same definition be extended for any other material collected during inquiry by the magistrate or court for the purpose of [Section 319 Cr.P.C.](#)?”

Answering that question, it was held as follows:-

“74. An inquiry can be conducted by the magistrate or court at any stage during the proceedings before the court. This power is preserved with the court and has to be read and understood accordingly. The outcome of any such exercise should not be an impediment in the speedy trial of the case.

75. Though the facts so received by the magistrate or the court may not be evidence, yet it is some material that makes things clear and unfolds concealed or deliberately suppressed material that may facilitate the trial. In the context of [Section 319 Cr.P.C.](#)

it is an information of complicity. Such material therefore, can be used even though not an evidence in stricto sensuo, but an information on record collected by the court during inquiry itself, as a prima facie satisfaction for exercising the powers as presently involved.”

(Emphasis applied in the present judgment only).

33. Hence, if an inquiry had been ordered by a Magistrate, or the court itself, either in the course of accepting or declining any report under Section 173, or otherwise, material gathered by the investigating agency could have been and necessarily should have been referred to by the trial court while accepting or rejecting an application under Section 319.

However, it has not been shown to this court, in any manner, that the material gathered in the form of any statements of any person (even relevant to the matter as per the investigating agency), was so gathered by it on any inquiry ordered by the trial court or formed a part of any report either under sub-section (8) or under sub-section (2) of Section 173 of the Code.

34. At this stage, it needs to be specifically noticed that subsequently a report under sub-section (8) of Section 173 was also presented to the trial Court, even declaring co-accused Ravinder to be innocent (a copy of which has been annexed as Annexure P-4 with the petition). In fact the present petition at one stage had been ordered to be listed along with CRM-M-15324 of 2018 and was also taken up along with CRR No. 2442 of 2018 at a subsequent stage, with that revision (CRR No. 2442 of 2018) being one filed by co-accused Ravinder against the order of the trial Court rejecting the supplementary report submitted. That petition was dismissed by this Court on 26.09.2019.

(As regards CRM-M-15324 of 2018, that was a petition also filed by the said Ravinder, under the provisions of Section 439 of the Code, seeking the concession of bail).

35. Coming back to the supplementary report (Annexure P-4), a perusal thereof shows that other than what is contained in the complaint made by the complainant, the statement of Ravinder in relation to the where the pistol in used had been hidden, has been referred to, but with it further stated that no recovery thereof was made.

Thereafter, the supplementary report states that the initial report under sub-Section (2) of Section 173 was presented on 16.05.2017, arraigning Ravinder as an accused therein, but that subsequently it was found that Ravinder was not found at the spot and that various witnesses had “given their affidavits” in support of his innocence and consequently, the supplementary report under sub-section (8) was being submitted, declaring him to be innocent.

36. The petitioner has been referred to at two places in the said report; first at Sr.no.12 showing that he was not charge sheeted but was a suspect. Thereafter, he has been referred to only in the reproduction of the complaint made by the complainant.

Thus, in the main body of the actual report, he has not been referred to at all, with the 'subject' of the said report being submitted to the court, being only his co-accused, Ravinder.

That being so, the status report filed by an Assistant Sub Inspector of Police dated 26.03.2018, and any material in support thereof, would not, in the opinion of this court, either be material gathered pursuant to any inquiry ordered by the court, or evidence as could be looked at by the

trial Court for the purpose of accepting or rejecting the application under Section 319, in terms of the ratio of the judgment of the Constitution Bench in Hardeep Singh.

37. Consequently, it not being such material, statements as are contended to have been recorded by the investigating agency but not presented in the form of a '*challan*' under Section 173, nor by way of any other formal evidence, (nor it being material gathered pursuant to any inquiry ordered by the Court), the trial Court was not bound to look at it before passing the impugned order, especially in view of the fact that the order has been passed on the testimony, i.e. oral evidence, sworn by the complainant as PW-2, even though such evidence is only a reiteration of what he stated in the complaint that led to the registration of the FIR.

38. Naturally, what this court cannot ignore is that the crime alleged to have been committed is one of attempted murder, with the complainant having received two injuries by fire arm, one in his arm and one in his chest (as per the allegation made and as per the MLR, as could not be denied even by learned counsel for the petitioner) and consequently, if the complainant simply reiterated the version that he had given qua the incident at the time that it occurred (leading to the registration of the FIR), neither the trial court nor this court can ignore such testimony, given by a person who received such injuries; (though obviously that would have to be proved by way of detailed evidence led before the trial court, before any person can be held guilty or not guilty of having committed any such offence).

39. It also needs to be noticed here that at one stage an argument had also been raised (before a co-ordinate Bench at the time when notice of motion was issued in this petition 20.04.2018), to the effect that there was a

delay of 01 day in the FIR being registered, with some of the witnesses (before the investigating agency), having recorded that when they met complainant Ajit Singh, he had told them that the injuries were caused by persons who had covered their faces and therefore he could not identify them but that he would give his statement to the police on the next day, (after which his statement was made to the police, implicating the petitioner).

Though this court would not venture to make any actual comment on the aforesaid contentions, with, naturally, evidence having to be led by both sides before the trial court on the merits of the case as regards the commission of the offence itself (or otherwise), however, what is considered necessary to notice here is that in the supplementary report under Section 173 (copy Annexure P-4), placed on record by the petitioner, it is stated that upon telephonic information having been received on 30.01.2017, that complainant Ajit Singh had been admitted to hospital on account of having received a gun shot injury, an ASI and a Constable had gone to the hospital and had moved an application seeking the doctors' advice, who had stated that the injured was unfit to make a statement and that he would do so after he had regained consciousness.

The doctor is stated to have given the same opinion on a subsequent visit (seemingly on the same date), to the hospital, by the aforesaid police officials.

Thereafter, on the next day, i.e. on 31.01.2017, the complainants' statement was recorded, implicating the petitioner as also the aforesaid Ravinder, and naming one unidentified person, as those who had attacked him.

Thus, keeping in view all that has been discussed hereinabove,

in my opinion, the trial Court did not err in passing the impugned order.

40. Coming then to the judgment in *Brijendras'* case, as has been relied upon by learned senior counsel for the petitioner. Though undoubtedly their Lordships did in fact hold that the trial court in that case had acted in a cavalier manner in not looking at the documentary material presented before it as regards those sought to be summoned as accused, showing them to be at a different place altogether to the place of occurrence at the relevant time; yet, with what has been held by the Constitution Bench of the Supreme Court in *Hardeep Singhs'* case, to the effect that only material gathered upon an inquiry conducted by the trial court (or ordered by that court), or led by way of evidence adduced during the course of trial, can be looked at by the trial court at the stage of deciding an application filed under Section 319 Cr.P.C., the trial court, in the opinion of this court, did not err in discarding the status report presented to it on the same date on which the impugned order was passed, even without discussing the details thereof, or any material in support thereof, (though the report itself has been duly referred to in paragraph 4 of the impugned order), and that court instead having relied upon the evidence in the form of the testimony of the complainant, i.e. the person who was actually shot at and injured (as per his and the prosecutions' case).

Hence, I would agree with Mr. Bedi, learned senior counsel appearing for the complainant, that the judgment in *Brijendra Singhs'* case (supra) has to be held to be operating in the specific circumstances of that case, with the Constitution Bench in *Hardeep Singhs'* case, in the opinion of this court, having held as noticed immediately hereinabove.

This would further need to be seen with the fact that in the judgment rendered in *Rajendra Singhs'* case (supra), it was held that even

statements of witnesses recorded under Section 161 of the Code are not admissible in evidence and could not be taken into consideration and as such the high court (in that case), had relied upon wholly inadmissible evidence to set aside the order passed by the trial court.

Similarly, in *S.Mohammad Ispahanis'* case (supra), again it was held that material evidence collected by the investigating officer at the stage of inquiry can only be used for corroboration and to support the evidence recorded by the court, as regards invoking jurisdiction under Section 319 of the Code.

41. Coming to the judgments referred to by Mr. Aggarwal (counsel for the petitioner), in *Mani Pushpak Joshis'* and *Labhuji Amratji Thakors'* cases (both supra), undoubtedly the trial court has to consider, at the time of deciding an application under Section 319, as to whether more than just a *prima facie* case is made out against the person sought to be arraigned as an accused, but in the opinion of this court with the testimony of the complainant being as it is, to the effect that he was actually shot by the petitioner; as also by Ravinder and another person, at least for the purpose of deciding the application under Section 319 the trial court could not have taken any other view than it has, vide the impugned order.

42. Coming last to the argument of Mr. Aggarwal that without any supplementary report under Section 173(8) of the Code having been submitted to the trial court and therefore the petitioner not having been actually declared to be either innocent or otherwise by the investigating agency and consequently the impugned order being pre-mature, though at first blush it did seem to me to be a good argument, however, what obviously

cannot be ignored by this court, firstly, is that in *Hardeep Singhs'* case it has been held that the trial court can at any time after the trial has commenced, summon an accused under the provisions of Section 319. As regards no supplementary report actually having been submitted by the investigating agency, it had obviously 'given its mind' by way of an "informal report" submitted on 26.03.2018, with the ASI of Police stating therein that the petitioner was innocent. Undoubtedly, subsequently another report under sub-section (8) of Section 173 could have been filed by the investigating agency, but with the complainant already having testified against the petitioner and an application under Section 319 having also been moved, in my opinion, the trial court did not err in summoning the petitioner on the basis of the aforesaid oral evidence led by the complainant, to the effect that he had been shot by the petitioner and Ravinder but with that of course to be still fully proved and considered by the trial court after all evidence has been led on both sides. In fact that court, as already observed earlier, could not have considered that report of the ASI, it not being any report sought by it on any inquiry ordered, and it in any case not being in support of evidence led before that court till that point.

43. Consequently, in the light of the aforesaid discussion, this petition is dismissed, with it however made absolutely clear that all observations made in this order or any previous order passed in this petition, would in no manner reflect the opinion of this court on the actual merits of the case for or against the petitioner, and all observations made are to be taken to be wholly in the context of whether or not the petitioner has been correctly summoned upon an application filed under Section 319 Cr.P.C.

Naturally, it would be for the prosecution to prove the guilt of the petitioner (or otherwise), which would be evaluated by the trial court, equally obviously, wholly on the basis of evidence led before it.

44. It needs however to be specifically observed, that with the petitioner stated to be a student pursuing an MBBS degree in China, the trial Court would ensure that he is summoned only at a time when he has holidays from his institute, though of course that would be so to the extent as is practical, because if any plea is taken that he has no holidays at all, that obviously cannot be used an excuse to avoid his presence before that court when such presence is necessary, and therefore it would be for that court to determine as to when the petitioner needs to be summoned, at a time when it is least likely to affect the studies.

February 4, 2020
dinesh/nitin

(AMOL RATTAN SINGH)
JUDGE

1. Whether speaking/reasoned?	Yes
2. Whether reportable?	Yes