

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO. 2456 OF 2019

Yogesh Balu Shendge

...Petitioner

Versus

1. Tai Sunil Shendge

2. The State of Maharashtra

...Respondents

....

Mr. Anant Vadgaonkar, Advocate for the Petitioner.

Mr. Gauri Velankar i/by Adv. S. S. Aradhye, Advocate for Respondent No.1.

Mr. A. R. Patil, APP for the Respondent – State.

....

CORAM : PRAKASH D. NAIK, J.

DATE : 29th AUGUST 2022

PC :

1. The Petitioner is aggrieved by order dated 10th April 2019 passed by 2nd Judicial Magistrate, First Class, Pandharpur in RCC No. 188 of 2015. This Petition is moved by Petitioner and Balu Shankar Shendge. Name of Balu Shendge was subsequently deleted since he has expired during pendency of this Petition.

2. First Information Report (for short “FIR”) was registered at the instance of Respondent No.1 on 17th March 2015 for offences punishable under Sections 324, 323, 504, 506 read with 34 of the Indian Penal Code (for short “IPC”) vide C.R. No. 60 of 2015 with

Pandharpur Taluka Police Station. It is alleged that, on 15th March 2015, her husband Sunil Shendge abused and assaulted her with wooden plank. Complainant's mother-in-law Smt. Rukhmini B. Shendge pulled her hair and abused her. On the next day at about 08:00 am, the complainant's husband and mother-in-law again assaulted her with fist and kick blows. She was abused and threatened. On hearing commotion, Atmaram Shendge came running and separated them. FIR was registered against Sunil Balasaheb Shendge and Rukhmini Balasaheb Shendge. On completing investigation, charge-sheet was filed before the Court of learned JMFC, Pandharpur on 18th June 2015 against Sunil Shendge and Rukhmini Shendge.

3. On commencement of trial, evidence of complainant was recorded. Other witnesses were examined. The complainant/ Respondent No.1 preferred an application on 14th November 2016 under Section 319 of Cr.PC and prayed for adding Balu Shankar Shendge, Yogesh Balu Shendge and Ganesh Balasaheb Shendge as accused in the proceedings.

4. Accused filed their say and contended that informant has not stated that proposed accused are involved in the offence in her complaint. Charge-sheet was not filed against proposed accused. Informant in her evidence made improvement in order to pressurise

the accused. Learned Special APP filed his say and prayed that necessary order be passed.

5. Learned JMFC, Pandharpur vide order dated 31st October 2018 allowed the said application and directed that, the case shall proceed against proposed accused Nos.1 and 2 along with original accused. Summon was issued to proposed accused No. 1 and 2.

6. Pursuant to execution of summons, the petitioner appeared before the trial Court and executed bail bonds.

7. The newly added accused filed pursis on 27th November 2018 stating that, they are adopting cross-examination of all prosecution witnesses conducted by original accused Nos. 1 and 2 and they do not desire to conduct the cross-examination of the said witnesses afresh.

8. The respondent No.1 preferred application below exhibit-52 on 11th February 2019 and contended that, in view of addition of the accused, the original complainant gets the right to conduct the trial *de-novo*. The application was purportedly preferred under Section 319 (4) (a) of Cr.PC.. Hence, the original complainant be given opportunity to conduct the case *de-novo*. In the application it was stated that it has been filed through public prosecutor. However there is no endorsement by prosecution on the application. The

learned Magistrate passed order on 11th February 2019, directing accused and APP to file say.

9. The accused contested the said application vide say dated 16th February 2018 and urged that the original complainant has no *locus standi* to file such application. Pursuant to evidence of complainant additional accused were impleaded in the case. The newly added accused have appeared before the Court and accepted the cross examination of witnesses conducted by Advocate for original accused by filing pursis in that regard. The right to cross-examine the witnesses, who are already examined is vested with newly added accused. The original complainant has filed the application to delay the proceedings. The original complainant has contended that opportunity be given to complainant to conduct *denovo* trial and recording fresh evidence against newly added accused. However, it is a state prosecution and the original complainant has limited role of assisting public prosecutor and not to conduct prosecution or examine witnesses.

10. The prosecution filed say to application by complainant contending that, the application moved before the Court is tenable according to section 319(4) (a) of Cr.P.C. as these accused were added while trial conducted before the Court. From Section 319(1) the word “it appears from the evidence” means after ample evidence

on record court has ordered to proceed against the accused. Considering the factual position of case and for the sake of interest of Justice, necessary order may be passed.

11. Learned JMFC allowed the application preferred by original complainant vide order dated 10th April 2019 and directed that, the proceedings in respect of accused Balu Shendge and Yogesh Shendge shall be commenced afresh and witnesses be reheard and accordingly be recalled. While allowing the said application the trial Court has observed that, the application exhibit-52 is filed by original complainant under Section 319(4)(a) of the Code of Criminal Procedure. According to original complainant, accused Balu Shendge and Yogesh Shendge came to be added in the proceedings. Therefore original complainant want to conduct the trial against these newly added accused and wants to adduce evidence. The accused does not want to conduct cross-examination of the witnesses, who were already examined and ready to accept the evidence adduced on record by the prosecution side. The court made reference to decision of Andhra Pradesh High Court in the case of *Kantipudi Jayaseela Vs. State and Ors.*¹ relied upon by accused and decision of Supreme Court in the case of *Shashikant Singh Vs. Tarkeshwar Singh and Ors.*² and it was observed that though facts of

1 2000 CrLJ 2048

2 AIR 2002 SC 2031

present case differ from the decision of Supreme Court, the observations though *obiter dicta* is in binding nature. Therefore it is the duty of the Court to rehear the case against Balu Shendge and Yogesh Shendge. The prosecution has not contended that they want to examine witnesses, who are already examined on record. The application is filed by original complainant but section 319(4)(a) cast duty on court to conduct the examination of witnesses, who were already examined afresh. The Court directed to recall of witnesses.

12. Learned Advocate for Petitioner submitted that the impugned order is bad in law. Petitioner was added as accused. The involvement of added accused appears to have designated from the testimony of original complainant. The trial Court ought to have considered pursis filed by added accused adopting the cross conducted by the accused Nos. 1 and 2. Section 319(4) provides right to the accused in order to cross examine the witnesses. The provision takes care of criminal jurisprudence that, the accusation be heard and started before the accused persons. Petitioner apprehends that, the original complainant would improvise the prosecution case and would try to implicate petitioner causing miscarriage of justice. The aforesaid provision cannot be mechanically followed. The Court has to see whether there is any incriminating material against the

newly added accused in the evidence of any of the prosecution witnesses examined earlier. Right of cross-examination under Section 319 is intact and added accused would get an opportunity to test the veracity of the claim of the witnesses. However, same cannot be said converse in order to grant further opportunity to the witnesses to produce evidence. The impugned order would grant additional benefit to the original complainant to improve her case. It is also necessary to consider whether the original complainant would get right to take over trial from the prosecution as the right to conduct trial lies with the prosecution. The complainant has no locus to prefer such application for *de-novo* trial. The prosecution has not filed application for re-examining witnesses, who were already examined. The trial Court has failed to understand scope of section 319(4)(a) of the Code.

13. Learned Advocate for Petitioner has relied upon the following decisions:-

- (i) Hardeep Singh Vs. State of Punjab and Ors.³
- (ii) Rekha Murarka Vs. The State of West Bengal and Anr. delivered by Supreme Court in Criminal Appeal No. 1727 of 2019 dated 20th November 2019.
- (iii) Sukhpal Singh Khaira Vs. State of Punjab⁴.

14. Learned Advocate for Respondent No.1 submitted that, the impugned order does not suffer from any legal infirmity. The

³ (2014) 3 SCC 92

⁴ (2019) 6 SCC 638

application preferred by Respondent No.1 is maintainable in law. The learned JMFC has passed the impugned order in consonance with section 319 (4)(a) of Cr.P.C. The learned Magistrate had assigned reasons for allowing the application. Section 319 (4)(a) provides for *de-novo* trial. The petitioner had not contested the order passed by learned Judge under Section 319 of Cr.P.C. Act impleading him as accused in the proceeding. While allowing the application preferred by respondent No.1 the trial Court has taken into consideration the scope of section 319 of Cr.P.C. and it was observed that, it is the duty of the Court to re-hear the case against newly added accused. The learned Magistrate had rightly directed that, the proceedings in respect of accused Balu Shendge and Yogesh Shendge shall commence afresh and witnesses be re-heard and accordingly recalled.

15. Learned Advocate for Respondent No.1 has relied upon following decisions:-

- (i) Sukhpal Singh Khaira Vs. State of Punjab⁵;
- (ii) Manjeet Singh Vs. State of Haryana and Ors.⁶
- (iii) Kishan Govind Patil Vs. State of Maharashtra and Ors.⁷

16. Learned APP supported the impugned order. It is submitted that, in view of section 319(4) (a) of the Code, trial has to

⁵ (2019) 6 SCC 638

⁶ AIR 2021 SC 4274

⁷ 2016 SCC OnLine Bom 10702

commence *de-novo*.

17. Section 319 of Cr.P.C. reads as follows:-

“Section - 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.”

18. Sub-section 4 of Section 319 of Cr.P.C. provides that, where the Court proceeds against any person under Sub-Section (1), then the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard; and subject to the provisions of clause- (a), the case may proceed as if such person had been an accused when the court took cognizance of the offence upon which the inquiry or trial shall commence.

19. It is pertinent to note that, sub-section (4) has been incorporated under Section 319 for the benefit of the accused. Sub-section (4) would operate, when the Court is of the opinion that, any person not being an accused has committed any offence for which he could be tried together with the original accused. In the present case, it is not an accused but the complainant for obvious reason has insisted upon re-hearing of the trial pursuant to order dated 31st October 2018. It was not the grievance of the accused that the trial be re-heard or all the witnesses be recalled for fresh examination. On the contrary the newly added accused felt that their right to defend would be protected in the event, the cross-examination conducted by Advocate representing the original accused Nos. 1 and 2 is adopted. However, the complainant had made it clear that, the trial be conducted against newly added accused *de-novo*. First of all, it was not an application preferred by the prosecution. On the basis of evidence of the complainant, the trial Court has directed that, the petitioner and the other accused be tried along with original accused. The question of again allowing the complainant to examine the same witnesses to improvise her evidence, does not arise. From the tenor of application Exhibit-52 preferred by original complainant it is apparent that complainant contends that in view of order impleading new accused, right is created to re-examine original complainant and

other witnesses afresh. It is necessary to give such opportunity to the complainant. The original complainant has indicated complete control over the proceedings and made it clear that complainant would examine witnesses. The intentions of complainant are writ large. The apprehension expressed by the accused that the complainant and other witnesses would improvise the evidence is justified. The original complainant cannot claim that right is created in her favour to rehear the trial and such right should be afforded to her. The prosecution did not make such application. The newly added accused did not plead for *de-novo* trial by re-examining witnesses and adopted the cross-examination of witnesses already examined by prosecution. It is the accused, who will be an aggrieved person if witnesses are not examined again. It is the right of newly added accused to cross-examine the witnesses whose evidence is already recorded and not the right of complainant to recall the witnesses for *de-novo* trial. The prosecution has already examined witnesses. Section 319(4)(a) cannot be read to the extent that prosecution or complainant occupies right to conduct the *de-novo* trial. The provision is for the benefit of newly added accused so that they would not be deprived of their right to defend.

20. In Section 319(4)(a) the sentence proceedings “in respect of such person” is important. The legislature could have indicated that

the proceedings should be commenced '*de-novo*'. The purpose is clear. Re-examination and re-hearing shall be in respect of 'such person' only. If any such application is filed it is 'such person' and not every person, who is party to the proceedings. The object of provision is to give fair opportunity to the newly added accused. The Andhra Pradesh High Court has dealt with similar issue in the case of *Smt. Kantipudi Jayseela Vs. The State, Inspector of Police, Vijaywada and Ors.*⁸ The wife of deceased in a case under Section 302 of IPC filed the petition under Section 319 of Cr.P.C. to implead new accused. New accused was added. The Advocate for accused preferred an application to cross-examine some witnesses. At that stage, the petitioner therein filed petition under Section 319(1)(4) (a) of Cr.P.C. It was contended that by virtue of section 319 of Cr.P.C., the proceedings in respect of new accused shall be commenced afresh and the witnesses are to be re-heard. The accused submitted that the petitioner cannot compel the court to conduct retrial under the guise of section 319 (4)(a) of Cr.P.C. It is the privilege of the prosecutor to examine such of the witnesses required to prove the case of the prosecution. It is the case of prosecution that the evidence of some of the witnesses is not helpful to anybody. Therefore the prosecution cannot be compelled to examine all the witnesses *de-novo*. The trial Court directed that it is

8 2000 CrLJ 2048

not necessary to examine all the witnesses and court preferred to examine few witnesses as prayed by newly added accused. The High Court held that, the person aggrieved for not examining all the witnesses is newly added accused. The object of the Section is to give opportunity to the newly added accused to meet the incriminating material against him. In paragraph 8 of the said decision it is observed as follows:-

“8. It is true that the sub-section (4) of Section 319, Cr.PC. in letter may sound like contemplating ‘de novo’ trial. But this cannot be mechanically followed. The Court has to see whether there is any incriminating material against the newly added accused in the evidence of anyone of the prosecution witnesses examined earlier. If any such material is there, certainly an opportunity should be given to the newly added accused to cross-examine that witnesses. I do not agree with the submission that even though there is no incriminating material, witnesses should be examined de novo in respect of all the accused. According to me, that is not the purport of sub-section (4) of Section 319, Cr.PC..”

21. Apart from the fact that section 319 (4)(a) is for the benefit of accused, who has been newly added, who can insist upon its implementation, the complainant in the present case has no right to decide which witnesses are to be examined. The complainant cannot control the proceedings. In the case of *Rekha Murarka Vs. The State of West Bengal and Anr.* (supra) the appellant was the wife of deceased, who was murdered. She was also injured person. She made an application under Section 301 r/w proviso to Section 24(8) to advance oral argument in support of question of law and fact only

after the learned public prosecutor, if so required (b) to raise objection in case any irrelevant question is put to any prosecution witness, if so required (c) to examine the prosecution witnesses only after the learned Public Prosecutor, if so required (d) to cross examine the defense witness, if adduced, only the learned Public Prosecutor, if so required (e) to assist the process of Justice in accordance with law. The Sessions Court rejected the application. Permission was granted to furnish written arguments after the completion of the arguments of the prosecution. The High Court affirmed the order of Sessions Court. The Supreme Court in paragraphs 8, 9, 10, 11, 12, 12.1, 12.2, 12.3, 12.4 and 12.5 as follows:-

“8. In our criminal justice system, the Public Prosecutor occupies a position of great importance. Given that crimes are treated as a wrong against the society as a whole, his role in the administration of justice is crucial, as he is not just a representative of the aggrieved person, but that of the State at large. Though he is appointed by the Government, he is not a servant of the Government or the investigating agency. He is an officer of the Court and his primary duty is to assist the Court in arriving at the truth by putting forth all the relevant material on behalf of the prosecution. While discharging these duties, he must act in a manner that is fair to the Court, to the investigating agencies, as well to the accused. This means that in instances where he finds material indicating that the accused legitimately deserves a benefit during the trial, he must not conceal it. The space carved out for the Public Prosecutor is clearly that of an independent officer who secures the cause of justice and fair play in a criminal trial.

9. In light of this exposition, we find it useful to advert to certain provisions of the Cr.P.C. that highlight the role of a Public Prosecutor and the prerequisites for a person holding that office, most significant amongst which is Section 24:

‘24. Public Prosecutors– (1) For every High Court, the Central Government or the State Government shall, after consultation with the

High Court, appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors, for conducting in such Court, any prosecution, appeal or other proceeding on behalf of the Central Government or State Government, as the case may be...

(7) A person shall be eligible to be appointed as a Public Prosecutor or an Additional Public Prosecutor... only if he has been in practice as an advocate for not less than seven years.

(8) The Central Government or the State Government may appoint, for the purpose of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor.

Provided that the Court may permit the victim to engage an advocate of his choice to assist the prosecution under this sub-section.”
(*emphasis supplied*)

Other important provisions are as follows:

“225. Trial to be conducted by Public Prosecutor– In every trial before a Court of Session, the prosecution shall be conducted by a Public Prosecutor.

xxx

301. Appearance by Public Prosecutors– (1) The Public Prosecutor or Assistant Public Prosecutor in charge of a case may appear and plead without any written authority before any Court in which that case is under inquiry, trial or appeal.

(2) If in any such case any private person instructs a pleader to prosecute any person in any Court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so instructed shall act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor, and may, with the permission of the Court, submit written arguments after the evidence is closed in the case.

302. Permission to conduct prosecution– (1) Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than police officer below the rank of Inspector; but no person, other than the Advocate General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission...

(2) Any person conducting the prosecution may do so personally or by a pleader.”

10. From a reading of these provisions, it is clear that a Public Prosecutor is entrusted with the responsibility of conducting the prosecution of a case. That this is a crucial role is evident from conditions such as in Section 24 (7), which stipulates a minimum legal experience of seven years for a person to be eligible to be a Public Prosecutor. It is

further clear from a joint reading of Section 301 and the proviso to Section 24 (8) that the two provisions are mutually complementary. There is no bar on the victim engaging a private counsel to assist the prosecution, subject to the permission of the Court.

11. Contrary to the argument made by learned Senior Counsel for Respondent No. 1, we do not find that the use of the words “under this sub-section” in the proviso to Section 24 (8) implies that a victim’s counsel can only be engaged to assist a Special Public Prosecutor. Such an interpretation would go against Section 301(2), which makes the pleader instructed by a private person subject to the directions of the Public Prosecutor or the Assistant Public Prosecutor. In our considered opinion, a harmonious reading should be given to these provisions to give them full effect. Furthermore, credence should be given to the overall emphasis on victimology underlying the 2009 Amendment Bill, as reflected in its Statement of Objects and Reasons:

“Statement of Objects and Reasons.– The need to amend the Code of Criminal Procedure, 1973 to ensure fair and speedy justice and to tone up the criminal justice system has been felt for quite sometime. The Law Commission has undertaken a comprehensive review of the Code of Criminal Procedure in its 154 th Report and its recommendations have been found very appropriate, particularly those relating to provisions concerning... victimology...

2. ... At present victims are the worst sufferers in a crime and they don’t have much role in the Court proceedings. They need to be given certain rights and compensation so that there is no distortion of the criminal justice system.”

In view of this context and the provisions of the Cr.PC., there appears to be no justifiable basis for applying the provision only with respect to Special Public Prosecutors. Thus, we find that the assistance given by the victim’s counsel is meant to be given to the prosecution in general.

12. In light of this, we now proceed to consider the extent to which such assistance can be accorded. As mentioned supra, learned Senior Counsel for the Appellant has argued that there may be instances where the Public Prosecutor may fail to perform his functions properly, whether deliberately or due to oversight, which may obstruct justice instead of furthering it. To meet the ends of justice in such cases, he submitted that the role of the victim’s counsel should not be limited to filing of written arguments as provided with respect to pleaders engaged by private parties under Section 301(2). Instead, it should extend to making oral arguments and examining witnesses as well. On a perusal of the arguments advanced and the decisions relied on by both the parties, we find that such a broad mandate for the victim’s counsel cannot be given effect, as it is not rooted in the text of the Cr.PC.

12.1 The use of the term “assist” in the proviso to Section 24(8) is crucial, and implies that the victim’s counsel is only intended to have a secondary role qua the Public Prosecutor. This is supported by the fact that the original Amendment Bill to the Cr.P.C. had used the words “co-ordinate with the prosecution”. However, a change was later proposed and in the finally adopted version, the words “co-ordinate with” were substituted by “assist”. This change is reflective of an intention to only assign a supportive role to the victim’s counsel, which would also be in consonance with the limited role envisaged for pleaders instructed by private persons under Section 301(2). In our considered opinion, a mandate that allows the victim’s counsel to make oral arguments and cross-examine witnesses goes beyond a mere assistive role, and constitutes a parallel prosecution proceeding by itself. Given the primacy accorded to the Public Prosecutor in conducting a trial, as evident from Section 225 and Section 301(2), permitting such a free hand would go against the scheme envisaged under the Cr.P.C.

12.2 In some instances, such a wide array of functions may also have adverse consequences on the fairness of a trial. For instance, there may be a case where the Public Prosecutor may make a strategic call to examine some witnesses and leave out others. If the victim’s counsel insists upon examining any of the left out witnesses, it is possible that the evidence so brought forth may weaken the prosecution case. If given a free hand, in some instances, the trial may even end up becoming a vindictive battle between the victim’s counsel and the accused, which may further impact the safeguards put in place for the accused in criminal trials. These lapses may be aggravated by a lack of advocacy experience on the part of the victim’s counsel. In contrast, such dangers would not arise in the case of a Public Prosecutor, who is required to have considerable experience in the practice of law, and act as an independent officer of the Court. Thus, it is important to appreciate why the role of a victim’s counsel is made subject to the instructions of the Public Prosecutor, who occupies a prime position by virtue of the increased responsibilities shouldered by him with respect to the conduct of a criminal trial.

12.3 At the same time, the realities of criminal prosecutions, as they are conducted today, cannot be ignored. There is no denying that Public Prosecutors are often overworked. In certain places, there may be a single Public Prosecutor conducting trials in over 2-3 courts. Thus, the possibility of them missing out on certain aspects of the case cannot be ignored or discounted. A victim-centric approach that allows for greater participation of the victim in the conduct of the trial can go a long way in plugging such gaps. To this extent, we agree with the submission made by the learned Senior Counsel for the Appellant that the introduction of the proviso to Section 24(8) acts as a safety valve, inasmuch as the victim’s counsel can make up for any oversights or deficiencies in the prosecution case. Further, to ensure that the right of appeal accorded to a victim under the proviso to Section 372 of the Cr.P.C. is not rendered meaningless due to the errors of the Public Prosecutor at the trial stage itself, we find that some significant role should be given to the victim’s

counsel while assisting the prosecution. However, while doing so, the balance inherent in the scheme of the Cr.P.C. should not be tampered with, and the prime role accorded to the Public Prosecutor should not be diluted.

12.4 In this regard, given that the modalities of each case are different, we find that the extent of assistance and the manner of giving it would depend on the facts and circumstances of each case. Though we cannot detail and discuss all possible scenarios that may arise during a criminal prosecution, we find that a victim's counsel should ordinarily not be given the right to make oral arguments or examine and cross-examine witnesses. As stated in Section 301(2), the private party's pleader is subject to the directions of the Public Prosecutor. In our considered opinion, the same principle should apply to the victim's counsel under the proviso to Section 24 (8), as it adequately ensures that the interests of the victim are represented. If the victim's counsel feels that a certain aspect has gone unaddressed in the examination of the witnesses or the arguments advanced by the Public Prosecutor, he may route any questions or points through the Public Prosecutor himself. This would not only preserve the paramount position of the Public Prosecutor under the scheme of the Cr.P.C. but also ensure that there is no inconsistency between the case advanced by the Public Prosecutor and the victim's counsel.

12.5 However, even if there is a situation where the Public Prosecutor fails to highlight some issue of importance despite it having been suggested by the victim's counsel, the victim's counsel may still not be given the unbridled mantle of making oral arguments or examining witnesses. This is because in such cases, he still has a recourse by channelling his questions or arguments through the Judge first. For instance, if the victim's counsel finds that the Public Prosecutor has not examined a witness properly and not incorporated his suggestions either, he may bring certain questions to the notice of the Court. If the Judge finds merit in them, he may take action accordingly by invoking his powers under Section 311 of the CrPC or Section 165 of the Indian Evidence Act, 1872. In this regard, we agree with the observations made by the Tripura High Court in *Smt. Uma Saha Vs. State of Tripura* (supra) that the victim's counsel has a limited right of assisting the prosecution, which may extend to suggesting questions to the Court or the prosecution, but not putting them by himself."

22. In the recent decision of Supreme Court in the case of *Jagjeet Singh and Others Vs. Ashish Mishra and Anr.*⁹ the question felt for consideration is whether a 'victim' as defined under section 2(wa) of

9 (2022) 9 SCC 321

the Criminal Procedure code, 1973 is entitled to be heard at the stage of adjudication of bail application of an accused. It was observed that recent amendments to Cr.P.C. have recognised victims rights in the Indian Criminal Justice system. A victim within the meaning of Cr.P.C. cannot be asked to await the commencement of trial for asserting his/her right to participate in the proceedings. He/she has a legally vested right to be heard at every step post the occurrence of an offence. Such a victim has unbridled participatory rights from the stage of investigation till culmination of the proceedings in an appeal or revision. The Indian Jurisprudence is constantly evolving, whereby the right of victims to be heard, especially in cases involving heinous crime is increasingly being acknowledged. Where victims themselves have come forward to participate in a criminal proceedings, they must be accorded with an opportunity of a fair and effective hearing. If the right to file an appeal against acquittal is not accompanied with the right to be heard at the time of deciding a bail application, the same may result in grave miscarriage of justice. Victims certainly cannot be expected to be sitting on the fence and watching the proceedings from a far, especially when they may have legitimate grievances. It is the solemn duty of the court to deliver justice before the memory of an injustice eclipses. It was held that in case before apex Court, the

victim have been denied a fair and effective hearing at the time of granting bail to the accused.

23. In the present case the original complainant/victim could not have made application under Section 319 (4)(a) for de-novo trial in the light of object of that provision. It is also difficult to hold that victim/*de-facto* complainant would conduct criminal trial/examine witnesses in state prosecution. The Supreme Court in the case of *Rekha Murarkha Vs. State of West Bengal and Anr.* (supra) has noted that on reading section 24, 225, 301 and 302 of Cr.P.C. it is clear that, Public Prosecutor is entrusted with responsibility of conducting prosecution case. The Court had considered the extent to which assistance of victim's counsel can be accorded in paragraphs quoted herein above.

24. In the case of *Hardeep Singh Vs. State of Punjab and Ors.* (supra) it was observed that if the Magistrate/ Court is convinced even on the basis of evidence appearing in examination in chief, it can exercise the power under Section 319 Cr.P.C. and can proceed against such other persons. It is essential to note that the section also uses the words "such persons could be tried" instead of should be tried. Hence, what is required is not to have a mini-trial at this stage by having examination and cross examination and thereafter rendering a decision on the overt act of such person sought to be

added. Mini-trial would affect the right of the person sought to be arraigned as an accused rather than not having any cross-examination at all, for in light of sub-section (4) of section 319 Cr.P.C., the person would be entitled to a fresh trial where he would have all the rights including the right to cross examine prosecution witnesses and examine defense witnesses and advance his arguments upon the same. Thus, the apex Court in this decision has recognised the right newly added accused embodied in Section 319 (4) of the Code. In the case of Shashikant Singh Vs. Tarkeshwar Singh and Anr. (supra), the question fell for consideration is can a person summoned pursuant to an order passed by a Court in exercise of power conferred by Section 319 of the Code of Criminal Procedure 1973, be tried for the offence for which he is summoned after the conclusion of trial wherein such an order of summoning was passed. It was held that trial against original accused was pending when the order under section 319(1) of the Code was passed by the Court. Thus, the order cannot be said to be without jurisdiction. In the context of issue under consideration it was observed that, the proceedings against the person summoned under sub-section (1) are required to be commenced afresh and the witnesses reheard. The proceedings have to recommence from the beginning of the trial. All the witnesses have to be examined afresh. Opportunity has to be

granted to such a person to cross-examine those witnesses. There has to be *de-novo* trial. The effect of the conclusion of the trial against the accused who was being proceeded with when the order was passed under Section 319(1) for the proceedings against the newly added person, is to be examined in the light of sub-section (4) of section 319 which stipulates *de-novo* trial in respect of newly added persons. In the present case, the facts are distinguishable. The accused themselves relinquished their right to cross-examine the witnesses, who were already examined before their addition. The complainant has already impleaded the newly added accused, due to which they are summoned. In *Sukhpal Singh Khaira Vs. State of Punjab* (supra) it was held that, the object of section 319 of Cr.P.C. is to bring home the guilt of all the accused and render complete justice and it is the duty of the state to take every criminal prosecution to its logical end. The primary question for consideration was, whether summoning order under Section 319 Cr.P.C. could be passed after the pronouncement of judgment against original accused. In view of observations in the case of *Hardeep Singh* (supra) the case was referred to large Bench. In the case of *Manjeet Singh Vs. State of Haryana and Ors.* (supra), it was held that, powers under Section 319 Cr.P.C. can be exercised at any stage from commencing of trial and recording of evidence and before conclusion of trial. In the case

of *Kishan Govind Patil Vs. State of Maharashtra and Ors.* (supra) it was observed that sub-section 4 of Section 319 is mandatory. The said section stipulates that *de-novo* trial in respect of newly added accused is mandatory. The facts of that case indicate that, the trial against co-accused was over and he was acquitted. The applicant, newly added accused was yet to be tried. The submission was made at the instance of applicant about procedure to be followed, since the trial against co-accused was not pending which prompted this Court to make the aforesaid observation.

25. Interpretation of Section 319 (4) of Cr.P.C. cannot infer that witnesses are to be re-heard at the instance of original complainant. When the newly added accused is summoned before the Court, he cannot be deprived of the right to cross-examine the witnesses, whose evidence has been adduced before the Court. The newly added accused deserves fair trial. It is in this context, sub-Section (4) has been incorporated in Section 319 of Cr.P.C. to give an opportunity to the newly added accused and thus, the said section provides that, proceedings in respect of such person shall be commenced afresh and witnesses re-heard. Such person contemplated in the said provision i.e. newly added accused is entitled for fresh trial. It is an option of the accused to cross-examine the said witnesses, who are already examined before the newly

added accused, were summoned to face the prosecution with other accused. In the present case, the petitioner had exercised his option of adopting cross examination of the witnesses, who are examined by the prosecution. The complainant has preferred application as stated above. It is ample clear that, the examination of the witnesses again as sought by complainant would provide an opportunity to the prosecution to improvise its case, which is not an object and scope of Section 319 (4) of Cr.P.C. the Learned Magistrate has therefore committed an error in allowing the application preferred by complainant and passing impugned order dated 10th April 2019. Hence I pass the following order:

ORDER

- (i) Criminal Writ Petition No.2456 of 2019 is allowed and disposed off.
- (ii) Impugned order dated 10th April 2019 passed by learned J.M.F.C., Pandharpur below Exhibit 52 in RCC No.188 of 2015 is set aside.
- (iii) Pursis filed by Petitioner vide Exhibit – 46 on 27.11.2018 adopting cross examination of witnesses examined by prosecution, conducted by accused Nos. 1 & 2 is allowed.
- (iv) The trial shall proceed further in accordance with law.

(PRAKASH D. NAIK, J.)