

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

(Heard through VC)

CRM-M-7448 of 2021 (O&M)
Date of Decision: January 20, 2022

Gurjinder Singh and another

...Petitioners

Versus

State of Punjab and another

...Respondents

CORAM:- HON'BLE MS. JUSTICE JAISHREE THAKUR

Present:- Mr. G.P.S. Bal, Advocate
for the petitioners.

Mr. R.S. Khaira, AAG Punjab.

Mr. Sandeep Gahlawat, Advocate
for respondent No.2.

JAISHREE THAKUR, J.

CRM-18731-2021

1. Allowed as prayed for.
2. Annexures P-1 to P-7 are taken on record, subject to all just exceptions.

CRM-M-7448-2021

1. The instant petition has been filed under Section 482 of Code of Criminal Procedure (for short 'the Cr.P.C.'), as the petitioners herein are aggrieved by the order dated 20.02.2019 passed by the Judge, Special Court, SAS Nagar, under Section 319 of the Cr.P.C., whereby the petitioners have been summoned to face trial as additional accused in an FIR No.230 dated

29.11.2017, under Sections 328, 363, 376-D of the Indian Penal Code (for short 'the IPC'), registered at Police Station Lalru, District SAS Nagar, along with co-accused Gursewak Singh.

2. In brief, the facts of the case are that the aforesaid FIR came to be registered against Gursewak Singh (who is already facing the trial) and the two petitioners herein, Gurjinder Singh and Parminder Singh. The statement of the prosecutrix was recorded, wherein she stated that on the intervening night of 13/14.11.2017, she had been kidnapped and forcibly taken by 3 boys, who committed rape upon her, and that she had been exploited physically and sexually. She was dropped near a hotel in village Kurali and at that time, she noted the registration number of the car as PB-65-R-8599. She was threatened that in case, she disclosed about the incident, she and her entire family would have to face the consequences of the same. The prosecutrix took a lift from a passer-by and was met by her maternal uncle, who told her that she was being searched for and a missing report was lodged. Out of fear, the prosecutrix did not disclose anything about the aforesaid incident, either to the police or her relatives. Her marriage, which had been fixed for 19.11.2017, was broken. After a few days, when she had an acute pain in her stomach, she was taken to the Government Hospital Derabassi, it was then that she disclosed to her parents about the incident of rape upon her and that she had been exploited sexually. The matter was investigated and accused Gursewak Singh was arrested on 03.02.2018. A report under section 173(2) of the Cr.P.C was submitted in the court on 21.04.2018 and charges framed only against Gursewak Singh, as inquiry against the present two petitioners was still

pending. Thereafter, the trial commenced against accused Gursewak Singh only and the prosecutrix was examined as PW1 and she was subjected to lengthy cross-examination on 26.07.2018. On the said very date when the prosecutrix was examined as PW1 viz. 26.07.2018, the trial court had directed the SHO of Police Station Lalru to file the status report qua the role of the two petitioners herein, consequent to which, a supplementary challan under Section 173(8) of the Cr.P.C. was filed before the trial court, declaring petitioners herein namely Gurjinder Singh and Parminder Singh as innocent. Thereafter on 11.09.2018, an application under Section 319 of the Cr.P.C. was filed by the prosecutrix to summon the petitioners herein as additional accused to face the trial along with accused Gursewak Singh, which was allowed on 20.02.2019. Due to non-appearance of the petitioners despite issuance of non-bailable warrants, proclamations were issued against the petitioners herein and they were declared as proclaimed offenders by an order dated 03.10.2019 by the trial court. The petitioners herein were allowed anticipatory bail by the High Court and they were directed to appear before the trial court. Thereupon, the petitioners herein appeared before the trial court and furnished the requisite bail bonds. Thereafter, when the matter was fixed for framing of charges against the petitioners herein, the petitioners herein filed an application for setting aside/recalling the impugned summoning order as well as an application under Section 227 of the Cr.P.C. for discharge. Aggrieved against the summoning order dated 20.02.2019, the petitioners herein have also assailed the same in the instant petition.

3. Mr. G.P.S. Bal, learned counsel appearing on behalf of the

petitioners would argue that the petitioners herein have wrongly been summoned to face the trial, as there is nothing on record, which would substantiate the fact of involvement of the petitioners herein in the alleged offence. He vehemently argued that the impugned order is not sustainable in the light of the fact that there is enough material available on record to establish that the prosecutrix and Gursewak Singh were well known to each other. It is contended that they have been falsely implicated in the present case being brother and friend of said Gursewak Singh. It is also argued that initially the challan was presented only against said accused Gursewak Singh and not the petitioners herein and after the role of the petitioners herein was investigated, a supplementary challan under Section 173(8) of the Cr.P.C. was presented qua the petitioners herein, declaring them as innocent. It is submitted that the investigation report was presented, after an application under Section 319 of the Cr.P.C. was filed by the prosecutrix and the same ought to have been taken into account, while allowing the application under Section 319 of the Cr.P.C. It is further argued that while allowing the application under Section 319 Cr.P.C., the trial court has observed that *“In view of the aforesaid discussions, supplementary challan presented under Section 173(8) Cr.P.C., declaring the accused Gurjinder Singh and Parminder Singh innocent, is not accepted.”* as such, if the supplementary challan presented under Section 173(8) of the Cr.P.C., declaring the petitioners herein as innocent is not accepted, it would not form a part of the court record and they would not be able to rely upon on it at the time of their defence.

4. Per contra, Mr. R.S. Khaira, learned AAG appearing on behalf

of respondent No.1-State, opposes the instant petition, while arguing that the trial court has rightly allowed the application under Section 319 of the Cr.P.C., considering the allegations made against the petitioners herein.

5. On the other hand, Mr. Sandeep Gahlawat, learned counsel appearing on behalf of complainant/respondent No.2, opposes the instant petition, while submitting that the instant petition is nothing, but an abuse of process of law merely to delay the proceedings of the case, which is pending adjudication before the trial court since 2017. It is argued that the instant FIR came to be registered on 29.11.2017 and accused Gursewak Singh was arrested on 03.02.2018, when the father of the prosecutrix wrote various representations to the senior police officials and an application came to be filed by the prosecutrix on 22.01.2018 before the concerned Magistrate under Section 156(3) Cr.P.C. for calling the status report of the case. It is also submitted that report under Section 173(2) of the Cr.P.C. was filed in the trial court on 01.05.2018 only against accused Gursewak Singh and the inquiry was shown to be pending against accused Gurjinder Singh and Parminder Singh. It is argued that the investigation agency kept on lingering the investigation firstly against Gursewak Singh and thereafter, again the petitioners herein, as the supplementary challan under Section 173 (8) of the Cr.P.C. came to be filed in the court on 10.09.2018, after the statement of the prosecutrix had been recorded before the trial court as PW1 and after recording her statement, the trial court had also directed the SHO of Police Station Lalru to file the status report qua the role of the present petitioners. It is argued that accused Gurjinder Singh and Parminder Singh from the very beginning are trying to delay the proceedings of the case on

one pretext of the order, by moving frivolous applications. It is pointed out when the statement of the serving constable was recorded on 02.02.2019 by the trial court regarding his report on the proclamations, the petitioners herein instead of joining proceedings before the trial court, preferred an application for setting aside the proclamation proceedings initiated against them by order dated 01.08.2019, however, the said application came to be dismissed on the same very date by the trial court and thereafter, the petitioners were declared as proclaimed offenders on 03.10.2019. On getting bail from this Court, they are again trying to delay the trial proceedings by moving applications for recalling of the impugned summoning order as well as for their discharge, apart from challenging the impugned summoning order in the instant petition. It is contended that once the trial court, after appreciating the material available on record, passed an order under Section 319 of the Cr.P.C., and summoned the petitioners herein to face the trial along with accused Gursewak Singh, the trial court has no power under the provisions of the Cr.P.C. to recall its own order or discharge the accused persons, as would amount to recalling of its own order.

6. I have heard learned counsel for the parties, apart from perusing the pleadings of the case.

7. In the present case, this court would first like to discuss the procedure provided under Section 173 Cr.P.C., which reads as under:-

“173. Report of police officer on completion of investigation.

(1) Every investigation under this Chapter shall be completed without unnecessary delay.

(2) (i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating-

(a) the names of the parties;

(b) the nature of the information;

(c) the names of the persons who appear to be acquainted with the circumstances of the case;

(d) whether any offence appears to have been committed and, if so, by whom;

(e) whether the accused has been arrested;

(f) whether he has been released on his bond and, if so, whether with or without sureties;

(g) whether he has been forwarded in custody under section 170.

(ii) The officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him, to the person, if any, by whom the information relating to the commission of the offence was first given.

(3) Where a superior officer of police has been appointed under section 158, the report shall, in any case in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police station to make further investigation,

(4) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order- for the discharge of such bond or otherwise as he thinks fit.

(5) When such report is in respect of a case to which section 170 applies, the police officer shall forward to the

Magistrate alongwith the report-

(a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

(b) the statements- recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses.

(6) If the police officer is of opinion that any part of any such statement is not relevant to the subject- matter of the proceedings or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request.

(7) Where the police officer investigating the case finds it convenient so to do, he may furnish to the accused copies of all or any of the documents referred to in sub- section (5).

(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub- section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub- sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub- section (2).”

Section 173 of the Cr.P.C. pertains to submission of report by the police officer on completion of investigation, by submitting whether any

offence appears to have been committed, if so, by whom or otherwise, in the form of cancellation or untraced report, if it appears to the police officer on investigation, that no offence has been committed or that no clue has been found against the culprits during investigation, as the case may be.

8. At this juncture, it is important to make it clear that the court is not bound by the opinion drawn by the police officer in the report under Section 173 of the Cr.P.C., as the court cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court, while applying its judicial mind. On being unsatisfied with the report under Section 173(2) of the Cr.P.C., the court is very well empowered to ask for further investigation, as would be evident from the provisions of Section 173(8) Cr.P.C., which categorically submits that *‘Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub- section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub- section (2).’* It shows that in the eventuality of the police submitting a supplementary challan qua the investigation of accused in regard to whom the report had not been initially submitted (as in the instant case), the procedure adopted will remain the same as applicable to a report under

Section 173(2) Cr.P.C. In other words, any supplementary challan presented under Section 173(8) of the Cr.P.C. would be in continuation of the report filed under Section 173(2) of the Cr.P.C. and would remain part and parcel of the record of the proceedings of the case. As such, the argument, as raised by the counsel for the petitioners, that once a supplementary report is not accepted, the same would not be a part of the record of the court, is not sustainable in view of the detailed procedure as provided under Section 173 of the Cr.P.C., and the accused can rely upon the same as per the provisions of the Indian Evidence Act. Moreover, the trial court has nowhere held or observed that the supplementary challan will not be read as part of the evidence. The court does not accept the findings that the petitioners are innocent; as the investigating agency has relied upon their call records and tower location which itself would not be sufficient evidence.

9. The law is now well settled as regards summoning a person as an additional accused under Section 319 Cr.P.C. The power to summon a person as an additional accused is undisputed, but the same has to be exercised sparingly, with caution, and to be exercised in order to ensure that the culprit does not get away. In **Hardeep Singh v. State of Punjab, (2014) 3 SCC 92** the Constitution bench of the Supreme Court held:

“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 un rebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Cr.PC. In Section 319 Cr.PC 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.”(emphasis supplied).

10. In the instant, as observed by the trial court in its impugned order, the prosecutrix remained consistent with her statement right from the day when she reported the matter to the police, in her statement recorded as PW1/A before the police, in her statement recorded by the Magistrate under Section 164 Cr.P.C. Ex.PW1/B and her statement recorded in the court, wherein, she has clearly stated that accused namely Gursewek Singh, Gurjinder Singh and Parminder Singh committed rape upon her, while she was confined in the room. This consistent stand of the prosecutrix cannot be negated merely because the investigation agency has submitted a report

declaring Gurjinder Singh and Parminder Singh as innocent. The trial court has rightly observed its order that the status report filed by the police declaring accused Gurjinder Singh and Parminder Singh as innocent, is not binding upon it.

11. The inquiry report, on which the petitioners herein are placing their reliance and are seeking setting aside of the impugned order, is available on record as Annexure P-13, in which the prosecutrix had not been joined, as per stand of the prosecutrix. Furthermore, the trial court has rightly observed that the cell tower locations are not conclusive proof of anybody's presence or absence on a particular spot. The trial court has also granted liberty to the petitioners herein to use the material, as they would like to rely upon, in their defence, which is even otherwise available to the petitioners herein.

12. In view of the above discussion, this court does not find any infirmity or illegality in the impugned order passed by the trial court, as such, the instant petition is hereby dismissed.

13. Needless to say, nothing observed by this court herein above shall not be construed as an opinion on the merits of the case, which is only for the purpose of deciding the instant petition.

January 20, 2022 <i>vijay saini</i>	(JAISHREE THAKUR) JUDGE
Whether speaking/reasoned	Yes
Whether reportable	Yes