

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

**CRR-3429-2019(O&M)
Date of Decision:-. 20.12.2022**

Hitesh Kumar

.....Petitioner

Versus

State of Haryana and anr.

.....Respondents

CORAM: HON'BLE MR. JUSTICE JASJIT SINGH BEDI

Present: Mr. Eklavya Gupa, Advocate for the petitioner.

Mr. Neeraj Poswal, Asstt. A.G., Haryana.

JASJIT SINGH BEDI, J. (Oral)

The prayer in the present revision petition is for setting aside the order dated 05.11.2019 passed by the Sessions Judge, Jhajjar, whereby an application under Section 319 Cr.P.C. for summoning Mamta Devi as additional accused has been dismissed.

2. The brief facts of the case are that an FIR No.127 dated 03.03.2018 under Sections 328, 380, 457 and 34 IPC Police Station City, Bahadugarh, District Jhajjar, came to be registered at the instance of petitioner/complainant-Hitesh Kumar, who stated that his house was located near Shiv Mandir in the village. On the intervening night of 02/03.03.2018, a theft took place at his house and gold and silver ornaments along with cash and 05 watches and other valuables came to be stolen by administering some stupefying substance to the family members from which for which they did not wake up. No specific person was named in

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the FIR. A copy of the FIR is annexed as Annexure P-1 to the present petition.

3. During the course of investigation, a supplementary statement of the complainant was recorded in which he named three persons as having committed the offence, namely, Amit son of Kaptan, Sahil son of Sanjay and Mohit son of Mahender.

Based on the said statement, the aforementioned accused were arrested and recoveries were effected from them. Pursuant to the conclusion of the investigation, a report under Section 173 Cr.P.C. was filed against the said three persons.

4. During the course of the Trial, the petitioner-complainant Hitesh Kumar was examined as PW-5 and in his deposition while narrating the facts, stated that it had come to their knowledge that his wife Mamta daughter of Jagbir (respondent No.2) was behind the commission of offence in question in connivance with the other accused. A copy of the deposition is attached as Annexure P-3 to the petition.

Based on the aforesaid depositions, an application under Section 319 Cr.P.C. was moved on 18.10.2019. A copy of the said application is attached as Annexure P-2 to the petition. However, the said application came to be dismissed vide order dated 05.11.2019. It is this order which is under challenge in the present petition.

5. The learned counsel for the petitioner contends that there was sufficient evidence against the proposed accused-Mamta as the complainant-petitioner Hitesh Kumar has specifically named her while appearing in the witness box as PW-5. It was his categoric deposition that some stupefying substance had been administered to the family members which had been facilitated by her, leading to the commission of theft in his

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house. He contends that the Trial Court has not properly appreciated the evidence on record and had dismissed the application under Section 319 Cr.P.C. without due application of mind to the facts and circumstances of the case. Thus, he contends that proposed respondent No.2 ought to be summoned as an additional accused to face Trial alongwith the accused already facing Trial.

6. The learned counsel for the State, on the other hand, while referring to the record submits that the statement of the proposed respondent No.2-Mamta had been recorded under Section 161 Cr.P.C. and she is a prosecution witness. He states that respondent No.2-Mamta was not named in the complaint, FIR or supplementary statement of the complainant. He, however, submits that once the evidence of the complainant has been recorded wherein she has named respondent No.2 an accused, she ought to be summoned as an additional accused.

7. I have heard the learned counsel for the parties.

8. Before proceeding further, it would be apposite to refer to the provisions of Section 319 Cr.P.C. The same are reproduced hereinbelow:-

“319 Cr.P.C. -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

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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.”

9. The Hon’ble Supreme Court of India has dealt with the issue in hand in a number of judgments and two of the most celebrated judgements in this regard are discussed hereinbelow:-

In “***Michael Machado and another versus Central Bureau of Investigation and another, 2000 (3) SCC 262***”, the Hon’ble Supreme Court of India held as under:-

“11. The basic requirements for invoking the above section is that it should appear to the court from the evidence collected during trial or in the inquiry that some other person, who is not arraigned as an accused in that case, has committed an offence for which that person could be tried together with the accused already arraigned. It is not enough that the court entertained some doubt, from the evidence, about the involvement of another person in the offence. In other words, the court must have reasonable satisfaction from the evidence already collected regarding two aspects. First is that the other person has committed an offence. Second is that for such offence that other person could as well be tried along with the already arraigned accused.

12. But even then, what is conferred on the court is only a discretion as could be discerned from the words the court may proceed against such person. The discretionary power so conferred should be exercised only to achieve criminal justice. It is not that the court should turn against another person whenever it comes across

evidence connecting that another person also with the offence. A judicial exercise is called for, keeping a conspectus of the case, including the stage at which the trial has proceeded already and the quantum of evidence collected till then, and also the amount of time which the court had spent for collecting such evidence. It must be remembered that there is no compelling duty on the court to proceed against other persons”.

The Hon’ble Supreme Court in ‘**Manjeet Singh versus State of Haryana & others, 2021(4) RCR (Criminal) 25**’, held as under:-

“13. The ratio of the aforesaid decisions on the scope and ambit of the powers of the Court under section [319](#) CrPC, 1973 can be summarized as under:

- (i) That while exercising the powers under section [319](#) CrPC, 1973 and to summon the persons not charge-sheeted, the entire effort is not to allow the real perpetrator of an offence to get away unpunished;
- (ii) for the empowerment of the courts to ensure that the criminal administration of justice works properly;
- (iii) the law has been properly codified and modified by the legislature under the CrPC indicating as to how the courts should proceed to ultimately find out the truth so that the innocent does not get punished but at the same time, the guilty are brought to book under the law;
- (iv) to discharge duty of the court to find out the real truth and to ensure that the guilty does not go unpunished;
- (v) where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial;
- (vi) section [319](#) CrPC, 1973 allows the court to proceed against any person who is not an accused in a case before it;
- (vii) the court is the sole repository of justice and a duty is cast upon it to uphold the rule of law and, therefore, it

will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency;

(viii) section [319](#) CrPC, 1973 is an enabling provision empowering the court to take appropriate steps for proceeding against any person not being an accused for also having committed the offence under trial;

(ix) the power under section [319](#)(1) CrPC, 1973 can be exercised at any stage after the charge-sheet is filed and before the pronouncement of judgment, except during the stage of Sections [207](#) / [208](#) CrPC, committal, etc. which is only a pretrial stage intended to put the process into motion;

(x) the court can exercise the power under section [319](#) CrPC, 1973 only after the trial proceeds and commences with the recording of the evidence;

(xi) the word "evidence" in section [319](#) CrPC, 1973 means only such evidence as is made before the court, in relation to statements, and as produced before the court, in relation to documents;

(xii) it is only such evidence that can be taken into account by the Magistrate or the court to decide whether the power under section [319](#) CrPC, 1973 is to be exercised and not on the basis of material collected during the investigation;

(xiii) 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](#) CrPC, 1973 and can proceed against such other person(s);

(xiv) that the Magistrate/court is convinced even on the basis of evidence appearing in examination-in-chief, powers under section [319](#) CrPC, 1973 can be exercised;

(xv) that power under section [319](#) CrPC, 1973 can be exercised even at the stage of completion of examination-in-chief and the court need not wait till the said evidence is tested on cross-examination;

(xvi) even in a case where the stage of giving opportunity to the complainant to file a protest petition urging upon the trial court to summon other persons as well who were named in FIR but not implicated in the charge-sheet has gone, in that case also, the Court is still not powerless by virtue of section [319](#) CrPC, 1973 and even those persons named in FIR but not implicated in the charge-sheet can be summoned to face the trial, provided during the trial some evidence surfaces against the proposed accused (may be in the form of examination-in-chief of the prosecution witnesses);

(xvii) while exercising the powers under section [319](#) CrPC, 1973 the Court is not required and/or justified in appreciating the deposition/evidence of the prosecution witnesses on merits which is required to be done during the trial”.

10. A perusal of Section 319 Cr.P.C. as also the judgment in Michael Machado case's (supra) and Manjeet Singh's case (supra) would clearly show that the Court has wide powers to summon a person as an additional who has been exonerated by the Investigating Agency, if it finds that there is sufficient evidence available against the said person in order to try him along with the accused already facing trial. However, there is no compelling duty to summon an accused. The discretionary power so conferred should only be exercised to achieve justice and must be based on the quality of evidence collected. In fact, the Court being the sole repository of justice, there is a duty cast upon it to uphold the law and ensure that the real accused should not get away by manipulating the Investigating

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Agency/Prosecuting Agency. What the Court needs to examine while adjudicating upon an application under Section 319 Cr.P.C. is that there should be evidence available on the file in the shape of oral evidence or documentary evidence in order to invoke its powers to summon an additional accused under Section 319 Cr.P.C.

11. In the present case, admittedly, respondent No.2 is not named in the complaint, FIR or in the supplementary statement of the complainant-petitioner. On the contrary, she is cited as a prosecution witness her statement having been recorded under Section 161 Cr.P.C. Further, a perusal of the deposition of the complainant as PW-5 (Annexure P-3) would show that he stated that he had come to know that his wife was involved in the commission of offence. Taking the said statement to be true, it would amount to *hear say* evidence at best, which is otherwise inadmissible.

12. In view of the above discussion and the evidence on record, by no stretch of imagination can it be held that the respondent No.2/Mamta ought to be tried as an additional accused.

13. In view of the above, I find no merit in the present petition and therefore, the same is dismissed.

20 .12.2022

sukhpreet

(JASJIT SINGH BEDI)
JUDGE

Whether speaking/reasoned:-
Whether Reportable:-

Yes/No
Yes/No