

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION**

Present:

The Hon'ble Justice Tirthankar Ghosh

C.R.R. 1462 of 2021

***Hriday Chandra Mandal
versus
The State of West Bengal***

For the Petitioner : Mr. Soubhik Mitter,
Ms. Rajnandini Das.

For the State : Mr. S. G. Mukherjee, Ld. P.P.,
Mr. Saryati Datta.

Heard On : 23-02-2023 & 24-02-2023.

Judgement On : 24-02-2023.

Tirthankar Ghosh, J. :

The present revisional application has been preferred challenging the order dated 01.03.2021 passed by learned Sessions Judge, Malda in connection with S.T. No. 01/2021 (corresponding to S.C. No. 11/2021) arising out of Mothabari Police Station Case No. 229 of 2020 dated 24.06.2020 (corresponding to G.R. Case No. 2651/2020) under Sections 302/34 of the Indian Penal Code wherein the learned trial court was pleased to allow the application of the prosecution under Section 319 of

the Code of Criminal Procedure and directed issuance of summons against the petitioner viz. Hriday Chandra Mandal.

Mr. Mitter, learned advocate appearing for the petitioner has submitted that in this case the petitioner was discharged after thorough investigation was completed. Learned Magistrate while taking cognizance did not find any material to consider that there was any complicity of the present petitioner nor did the learned trial court while considering the charges. According to the learned advocate, there are hardly any fresh material for the learned trial court to invoke the powers under Section 319 of the Code of Criminal Procedure except a part examination-in-chief of PW-1 viz., Sulekha Bibi who according to the learned advocate is a hearsay witness.

By referring to the following decisions of the Hon'ble Supreme Court on this issue, the learned advocate substantiates his argument :

- (i) ***Sagar Vs. State of Uttar Pradesh and another*** reported in ***(2022) 6 Supreme Court Cases 389***,
- (ii) ***Periyasami and Others Vs. S. Nallasamy*** reported in ***(2019) 4 SCC 342***,
- (iii) ***Ajay Kumar alias Bittu and Another Vs. State of Uttarakhand and Another*** reported in ***(2021) 4 Supreme Court Cases 301***,

- (iv) ***Hardeep Singh Vs. State of Punjab and Others*** reported in ***(2014) 3 Supreme Court Cases 92***,
- (v) ***Sukhpal Singh Khaira Vs. State of Punjab*** reported in ***(2019) 6 Supreme Court Cases 638***,
- (vi) ***S. Mohammed Ispahani Vs. Yogendra Chandak and Others*** reported in ***(2017) 16 Supreme Court Cases 226*** and
- (vii) ***Juhru & Ors. Vs. Karim & Anr.*** – Criminal Appeal No. 549 of 2023 [arising out of Special Leave Petition (Criminal) No. 1658 of 2020].

Mr. Mukherjee, learned Public Prosecutor submitted that in this case PW-1, Sulekha Bibi in her deposition before the court has corroborated what she earlier stated in the letter of complaint which has been treated to be the FIR of the instant case. Learned Public Prosecutor referred to the chargesheeted witnesses and drew the attention of the Court particularly to the statement in reference to the present petitioner. It was pointed out that three witnesses, viz. Motiur Rahaman, Jahangir Hasan Sk and Md. Mistarul Sk. cited as CSW-3, CSW-4 and CSW-5 respectively alleged complicity regarding the present petitioner while Md. Hasim Sk., CSW-9 and Asmaul Sk, CSW-10 stated before the investigating officer regarding their opinion that the present petitioner may not be involved. Learned advocate submits that so far as the CSWs 3, 4 and 5 are concerned, their statement would fail to distinguish the

distinction between the participation of the accused who are facing trial and the present petitioner who has not been sent up for trial. Additionally, it has been stated that the investigating officer has not assigned any reason also why the present accused was left out in the charge-sheet.

In support of his submission, learned Public Prosecutor has relied upon the following decisions of the Hon'ble Supreme Court :

- (i) ***Sartaj Singh Vs. State of Haryana and another*** reported in ***(2021) 5 Supreme Court Cases 337*** and
- (ii) ***Naveen Kumar Vs. Rishipal and others*** reported in ***(2021) 11 Supreme Court Cases 563***.

The genesis of the present case is on the basis of a complaint lodged by Sulekha Bibi (CSW-1 and PW-1) to the effect that her family had a land adjacent to the land of the accused persons which they themselves cultivated and produced crops. For the last few days dispute arose between her husband and the accused persons over the issue of harvesting when the accused persons threatened her husband of dire consequences. On the fateful day her husband left in the early morning and reached the field when he found that the accused persons were involved in stealing the produce. It was also found that the accused persons had stacked some of the crops after illegally taking it from the

field and her husband protested. There was altercation when the accused persons with the aid of sharp cutting weapon (Hasua) struck him at different parts of his body. Hearing the same, she sent her son who after reaching the field found her husband Sajjad Sk was lying dead. On such complaint, Mothabari Police Station Case No. 229 of 2020 dated 24.06.2020 was registered for investigation. On completion of investigation, charge-sheet was submitted before the learned Chief Judicial Magistrate, Malda. The case was thereafter committed to the court of sessions. The charge-sheet so submitted reflects that the investigating authorities relied upon 14 witnesses which included Sulekha Bibi, Rafikul Islam, Motiur Rahaman, Jahangir Hasan Sk, Md. Mistarul Sk, Satyajit Roy, ASI Shyamal Barman, Constable Amiya Thakur, Md. Hasim Sk, Asmaul Sk, ASI Sk Sariful, Dr. Alope Mazumder, SI Chiranjit Nandy and SI Chandan Kumar Das.

It would not be out of place to state that in the letter of complaint there was a specific allegation against four persons by the CSW-1, Sulekha Bibi who happens to be the wife of the deceased. They are Dijen Mandal, Biren Mandal, Hriday Chandra Mandal and Bapan Mandal. The three witnesses viz. Motiur Rahaman, Jahangir Hasan Sk and Md. Mistarul Sk in their statement which was recorded on 24.06.2020 by the investigating officer stated that when the deceased Sajjad Sk protested against the act of the accused persons, then Dijen Mandal, Hriday

Chandra Mandal, Biren Mandal and Bapan Mandal together entered into a hot altercation and they attacked the deceased with sharp weapon and struck at different parts of the body which resulted in his death. The other two witnesses whose statements were recorded on 15.09.2020 which are of Md. Hasim Sk and Asmaul Sk, it was recorded by the investigating officer that Hriday Mandal had no enmity with the deceased and as he was a teacher, he was not there at the relevant point of time when the incident took place. The investigating officer while submitting charge-sheet gave his opinion under the heading brief facts of the case (at serial No. 17) “during investigation it could be learnt that one FIR named person viz. Hriday Chandra Mandal s/o Lt. Biswanath Mandal of Nayagram, P.S. Mothabari, district Malda has been not established in this case as per leading statement of the witnesses”.

Mr. Mitter, learned advocate for the petitioner emphasises on the factum of materials available including the evidence in examination-in-chief of a witness who is a hearsay witness. Learned advocate by relying upon **S. Mohammed Ispahani** (supra) emphasises that it was not open to the High Court to rely upon the statement recorded under Section 161 of the Code of Criminal Procedure as independent evidence at this stage when the charge has already been framed and the trial court at the stage of consideration of charges was not of any opinion that the petitioner should have been called upon to face the ordeal of a criminal trial.

Learned advocate for the petitioner by referring to **Ajay Kumar alias Bittu and Another** (supra) has submitted that the principles which have been laid down in respect of Section 319 of the Code of Criminal Procedure also includes within its ambit the test which is more than prima facie case as exercised at the time of framing of charge and it has been held that the same should be short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. Drawing the attention of the Court to the relevant paragraph of the judgement, learned advocate has submitted that in the absence of satisfaction of such nature being available, the courts are refrained from exercising power under Section 319 of the Code of Criminal Procedure.

Learned advocate for the petitioner has relied upon the decision in the case of **Hardeep Singh** (supra) and drawn the attention of the Court to paragraph 105 which is set out as follows :

“**5.** 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.”

Learned advocate for the petitioner has referred to the Constitution Bench judgement of the Hon'ble Supreme Court in **Sukhpal Singh Khaira** (supra) and placed the guidelines laid down by the Hon'ble

Supreme Court in relation to the questions which were considered at paragraph 26 of the said judgement which is set out as follows :

“**26.** After pursuing the relevant facts and circumstances, the following substantial questions of law arise for further consideration—

26.1.(i) Whether the trial court has the power under Section 319 CrPC for summoning additional accused when the trial with respect to other co-accused has ended and the judgment of conviction rendered on the same date before pronouncing the summoning order?

26.2.(ii) Whether the trial court has the power under Section 319 CrPC for summoning additional accused when the trial in respect of certain other absconding accused (whose presence is subsequently secured) is ongoing/pending, having been bifurcated from the main trial?

26.3.(iii) What are the guidelines that the competent court must follow while exercising power under Section 319 CrPC?”

Learned advocate for the petitioner also relies upon the decision of the Hon’ble Supreme Court in **Juhru & Ors.** (supra) wherein reliance was placed upon **Sukhpal Singh Khaira** (supra) and **Hardeep Singh** (supra) to arrive at its finding in the facts of the said case.

Mr. Mukherjee, learned Public Prosecutor on the other hand has relied upon **Sartaj Singh** (supra). Referring to paragraphs 13.1.7, 13.2, 13.3 and 13.4 of the said judgement, it has been submitted that the power invoked by the learned trial court was appropriate and in the fitness of the circumstances. The relevant paragraphs are set out as follows :

“**13.1.7.** While answering Question (v), namely, in what situations can the power under Section 319 CrPC be exercised : named in the FIR, but not charge-sheeted or has been discharged, this Court has observed and held as under : (*Hardeep Singh case [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86]* , SCC pp. 139-41, paras 112 & 116)

“112. However, there is a great difference with regard to a person who has been discharged. A person who has been discharged stands on a different footing than a person who was never subjected to investigation or if subjected to, but not charge-sheeted. Such a person has stood the stage of inquiry before the court and upon judicial examination of the material collected during investigation, the court had come to the conclusion that there is not even a prima facie case to proceed against such person. Generally, the stage of evidence in trial is merely proving the material collected during investigation and therefore, there is not much change as regards the material existing against the person so discharged. Therefore, there must exist compelling circumstances to exercise such power. The court should keep in mind that the witness when giving evidence against the person so discharged, is not doing so merely to seek revenge or is naming him at the behest of someone or for such other extraneous considerations. The court has to be circumspect in treating such evidence and try to separate the chaff from the grain. If after such careful examination of the evidence, the court is of the opinion that there does exist evidence to proceed against the person so discharged, it may take steps but only in accordance with Section 398 CrPC without resorting to the provision of Section 319 CrPC directly.

116. Thus, it is evident that power under Section 319 CrPC can be exercised against a person not subjected to investigation, or a person placed in Column 2 of the charge-sheet and against whom cognizance had not been taken, or a person who has been discharged. However, concerning a person who has been discharged, no proceedings can be commenced against him

directly under Section 319 CrPC without taking recourse to provisions of Section 300(5) read with Section 398 CrPC.”

13.2. Considering the law laid down by this Court in *Hardeep Singh* [*Hardeep Singh v. State of Punjab*, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] and the observations and findings referred to and reproduced hereinabove, it emerges that (i) the court can exercise the power under Section 319 CrPC even on the basis of the statement made in the examination-in-chief of the witness concerned and the court need not wait till the cross-examination of such a witness and the court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination; and (ii) a person not named in the FIR or a person though named in the FIR but has not been charge-sheeted or a person who has been discharged can be summoned under Section 319 CrPC, provided from the evidence (may be on the basis of the evidence collected in the form of statement made in the examination-in-chief of the witness concerned), it appears that such person can be tried along with the accused already facing trial.

13.3. In *S. Mohammed Ispahani v. Yogendra Chandak* [*S. Mohammed Ispahani v. Yogendra Chandak*, (2017) 16 SCC 226 : (2018) 2 SCC (Cri) 138], this Court has observed and held as under : (SCC p. 243, para 35)

“35. 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 CrPC. However, this

section gets triggered when during the trial some evidence surfaces against the proposed accused.”

13.4. In *Rajesh v. State of Haryana* [*Rajesh v. State of Haryana*, (2019) 6 SCC 368 : (2019) 2 SCC (Cri) 801] , after considering the observations made by this Court in *Hardeep Singh* [*Hardeep Singh v. State of Punjab*, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] referred to hereinabove, this Court has further observed and held that 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 the 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 and even those persons named in the FIR but not implicated in charge-sheet can be summoned to face the trial provided during the trial some evidence surfaces against the proposed accused.”

Learned Public Prosecutor also relied upon the decision of the Hon’ble Supreme Court in the case of ***Naveen Kumar*** (supra). Attention of the Court has been drawn to paragraph 5 of the said judgement which is set out as follows :

“**5.** In the above circumstances, there is adequate material so as to summon the accused persons and we find no material on the basis of which the police have left out the accused who have been named in the FIR. Be that as it may, in view of the material on record, the FIR and the statements of PW 1 and Hitesh, we are satisfied that there was adequate material on record to summon these accused persons.”

I have considered the rival submissions of the parties and also taken into account the provision under Section 319 of the Code of Criminal Procedure. The applicability of the said Section cannot be uniform and is variable according to the circumstances of the case and that is why the Section incorporates “in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused”

The purpose of a criminal trial is to unearth the truth and also to see that neither innocent persons are convicted nor guilty persons are left scot-free. The satisfaction of the court is to be from the materials available from the records of the case. The availability of such materials on which the prosecution has relied to frame its charge particularly the documents under Section 207 of the Code of Criminal Procedure cannot be ignored at the initial stages of the trial and obviously would be a guiding factor of consideration to assess the test of a *prima facie* case. So far as the present case is concerned, the complicity of the accused persons who are facing trial cannot be distinguished on a major score so far as the role which was attributed to the present petitioner which is already available in the materials collected and the personal opinion of the two witnesses which were recorded just prior to submission of the charge-sheet, there was hardly any relevance which weighed with the investigating officer for not assigning any reason in not sending the

present petitioner as an accused in the trial. When a higher court exercises its jurisdiction under Section 482 of the Code of Criminal Procedure, it is also the duty of the higher court to see that there is no miscarriage of justice being caused. As such, the observations made in paragraph 5 of **Naveen Kumar** (supra) wherein it has been held that no reason was assigned by the investigating officer to leave out the accused in the charge-sheet who was named in the FIR also applies in this case. In the present case also I find that the petitioner's name was appearing in the FIR. Three of the witnesses on whom the prosecution has relied upon have also stated regarding his complicity. Further at the time of recording of evidence in the examination-in-chief PW-1 has corroborated the evidence. Thereafter the public prosecutor took out an application under Section 319 of the Code of Criminal Procedure. The learned trial court on an assessment of the whole of the materials came to its finding and allowed the application under Section 319 of the Code of Criminal Procedure thereby summoning the present petitioner.

Having considered the propositions of law and the reasons so assigned by the learned trial court, I am of the view that there is no illegality in the order dated 01.03.2021 passed by the learned Sessions Judge, Malda. As such, there is no scope for interference.

Accordingly, the revisional application being CRR 1462 of 2021 is dismissed.

Interim order, if any, is hereby vacated.

All pending connected applications, if any, are consequently disposed of.

If the petitioner appears before the learned trial court, learned trial court would invoke the powers under Section 88 of the Code of Criminal Procedure and taking into account that the response of the petitioner was prompt and there was no non-cooperation on the side of the present petitioner would consider his application for bail.

Case diary be returned to the learned Public Prosecutor.

All parties shall act on the server copy of this order duly downloaded from the official *website* of this Court.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(Tirthankar Ghosh, J.)