

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL REVISION APPLICATION NO. 296 OF 2022

Anand s/o Shivaji Ghodale
Age : 28 years, Occu: Service,
R/o Andoor, Tq. Tuljapur,
Dist. Osmanabad.

...Applicant

Versus

1. The State of Maharashtra
Through its Police Station,
Naldurg, Dist. Osmanabad.

2. XYZ

...Respondents

Mr. V.B. Deshmukh, Advocate for Applicant.
Mr. S.P. Sonpawale, APP for Respondent/State.
Mr. Nisargraj Garje, Advocate for Respondent No.2.

...

CORAM : S.G. MEHARE, J.

DATED : JANUARY 23, 2023

ORAL JUDGMENT:-

1. Rule. Rule made returnable forthwith. By consent of the parties heard finally.

2. The applicant has impugned the order of the learned Extra Joint Additional Sessions Judge, Osmanabad, in Special Case No.26 of 2021 below Exhibit-99 dated 14.09.2022.

3. A Special Public Prosecutor had moved an application under Section 319 of the Criminal Procedure Code for summoning the applicant to face the trial and then to allow the charge sheet under

Section 173(8) of the Criminal Procedure Code. The applicant was named in the FIR but was not arraigned as an accused in the charge sheet. Before passing the impugned order, he was called and heard.

4. In a report, the allegations were also made against the applicant. His brother had submitted an application before the investigating officer that, at the time of the alleged incident, the applicant was at his workplace. He claimed that he was captured in the CCTV footage of his workplace. The investigating officer collected the CCTV footage and was satisfied that the applicant was at his workplace at the time of the alleged incident. The investigating officer submitted a charge sheet against the other accused. He put a footnote thereon reserving his right to file a charge sheet if any adverse material was found in the CCTV footage on receiving the Chemical analysis (C. A. report for short) report. He received the C. A. report and placed it before the Court. But he did not apply for leave to file a charge sheet against the applicant. The report supported the case of the applicant that at the time of the alleged incident, he was in the bank where he was serving. Thereafter, the victim led the evidence before the Court, and she deposed against the applicant. Then, the Special Public Prosecutor moved an application as mentioned above, and the impugned order was passed.

5. It is not a matter in dispute that, *prima facie*, the investigation officer was satisfied from the electronic evidence that

the applicant was not present on the spot at the time of the alleged incident. After receiving the C. A. report, he did not pray to the Court to submit a supplementary charge sheet under Section 173(8) of the Criminal Procedure Code.

6. The learned Extra Joint Additional Sessions Judge, Osmanabad recorded the findings in paragraph no.9 of the impugned order that "It is equally true that though learned advocate for the accused submits of his plea of alibi and allegedly CCTV footage and statement of the witnesses in favour of the allegedly intended accused and alleged CDR and SDR reports produced on record alleging that accused was at far distance away from the spot, but that would come in consideration at later stage. It is also equally true as submitted by APP that presently what evidence is on record has to be considered and it does not depend on the submission of learned advocate for the accused like at the time of consideration of bail, those reports were considered at the Hon'ble High Court and accused was given bail". It has been further observed in paragraph no.10 that "The alleged claimed defence of alibi and whatever evidence brought on record may or do not affect the merits of the prosecution story and prosecution case claimed by the learned advocate for the accused, but its consideration would be at the appropriate time in the evidence not opinion can be formed as regards it. Hence, it concludes to issue

summons to the intended accused to face the trial by adding him in the charge sheet."

7. With the above observations, the summons was issued under Section 319 of the Criminal Procedure Code.

8. Learned counsel for the applicant has vehemently argued that the impugned order is against the extraordinary jurisdiction of the Court summoning the accused to face the trial. Even if it is accepted that the applicant was allegedly involved in the case, the evidence placed on record through CCTV footage in rebuttal is sufficient to hold that the trial against him would not culminate in conviction. He also argued that it is not the case that in the absence of any evidence in favour of the applicant, he is claiming that he cannot be summoned under Section 319 of the Criminal Procedure Code. To bolster his case, he relied on the cases of Anil Singh and Another Vs. State of Bihar and Others, (2006) 13 SCC 421, Brindaban Das and Others Vs. State of West Bengal, (2009) 3 SCC 329 and Hardeep Singh Vs. State of Punjab and Others, (2014) 3 SCC 92. He claimed that in such a case, the plea of alibi could not be considered at the fag end of the trial. The investigation officer has correctly believed the CCTV footage and reserved his right to submit the supplementary charge sheet under Section 173(8) of the Criminal Procedure Code. However, when the report was received, the investigation officer was satisfied that the CCTV footage was genuine. Therefore, he correctly

did not seek leave to file a supplementary charge sheet against the applicant under Section 173(8) of the Criminal Procedure Code. Therefore, though the victim stuck up to her statement as per the FIR, Section 319 of the Criminal Procedure Code would not attract. The learned Court did not consider the purport of Section 319 of the Criminal Procedure Code and erroneously held that the defence of alibi is a matter of later stage. Therefore, the petition deserves to be allowed.

9. Per contra, learned counsel for the victim and learned APP for the State would argue that the impugned order is legal, proper and correct. Learned counsel for the victim would argue that this is not the case where there was no evidence. The victim, who was a child, is consistent as regards the allegations against the applicant. She is the best witness to the incident. Her evidence would prevail over the other evidence. They have also vehemently argued that the applicant was not discharged under Section 169 of the Criminal Procedure Code. Therefore, a supplementary charge sheet can be filed against him under Section 173(8) of the Criminal Procedure Code. He has vehemently argued that the offence is serious. For the sole reason that the applicant was not present on the spot of the incident, the evidence of the victim cannot be discarded. To bolster his arguments, he relied upon the case of Hardeep Singh (supra), in which case some guidelines, what should be the satisfaction of the Court to invoke the

powers under Section 319 of the Criminal Procedure Code to arraign a person as an accused were issued. He would also rely on the case of Sukhpal Singh Khaira Vs. State of Punjab with another matter, (2019) 6 SCC 638, in which without diluting the pronouncement in the case of Hardeep Singh, the Hon'ble Supreme Court referred the substantial questions for further consideration to the Larger Bench. The relevant points referred to the Larger Bench were in para 26.3. (iii), which reads thus:

"(iii) What are the guidelines that the competent court must follow while exercising power under Section 319 Cr.PC?"

10. In the case of Anil Singh (supra), the ratio has been laid down that if the Court comes to a conclusion having regard to the material on record, the prosecution ultimately may not be able to bring home the charge against the persons against whom processes were to be issued, it would decline to do so. The Court must also take into consideration the fact as to whether an appropriate case has been made out for the exercise of the extraordinary jurisdiction. It is required to scrutinise the materials more closely. Power under Section 319 of the Code of Criminal Procedure is not to be exercised in a mechanical manner. Only because some evidence has been brought on record, the same by itself may not be a ground to issue processes.

11. In the case of Brindaban Das (cited supra), it has been observed in para 93 thus :

"93. Section 319(1) CrPC empowers the Court to proceed against other persons who appear to be guilty of an offence, though not an accused, before the Court. The word "appear" means "clear to comprehension" or a phrase near to, if not synonymous with ", proved". It imparts a lesser degree of probability than proof."

12. It has also been observed in the above case that Section 319 Cr.PC. contemplates a situation where the evidence adduced by the prosecution not only implicates a person other than the named accused but is sufficient for the purpose of convicting the person to whom the summons is issued. The law in this regard was explained in Ram Kishan Rohtagi case (supra) and as pointed out by Mr. Ghosh, consistently followed thereafter, except for the note of discord struck in Rajendra Singh's case (supra). It is only logical that there must be substantive evidence against a person in order to summon him for trial, although he is not named in the charge sheet or he has been discharged from the case, which would warrant his prosecution thereafter with a good chance of his conviction."

13. In the case of Hardeep Singh (cited supra), it has been observed in para 95 and 105, which read thus:

"95. At the time of taking cognisance, the Court has to see whether a prima facie case is made out to proceed against the accused. Under Section 319 Cr.P.C., though the test of prima facie case is the same, the degree of satisfaction that is required is much stricter. A two- Judge Bench of this Court in Vikas v. State of Rajasthan, (2014) 3 SCC 321, held that on the objective satisfaction of the Court a person may be 'arrested' or 'summoned', as the circumstances of the case may require, if it appears from the evidence that any such person not being the accused has committed an offence for which such person could be tried together with the already arraigned accused persons.

"105. Power under Section 319 Cr.P.C. is a discretionary and an extra- ordinary 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".

14. Considering the facts of the case, the powers of the investigating officer as regards the investigation have to be examined. Section 157 Cr.P.C. provides for the procedure for investigation. As per the said section, upon receiving any information of the offence, the investing officer has reason to suspect the commission of the cognisable offence, he shall proceed to the spot, investigate the facts and circumstance, and if necessary, take measures for the discovery

and arrest of the offender. It is clear from the words used in the said section that he has to investigate the facts and circumstances where the offence is cognisable. It is not a rule that the investigation officer shall believe what is alleged in FIR is gospel truth. He has to investigate the facts and find out the truth. He has reason to believe that allegations are *prima facie* true, and a prudent man should believe the incident as alleged happened.

15. The facts of the case do not reveal that the investigation officer was *prima facie* satisfied during the course of the investigation that the applicant was not present at the alleged spot of the incident. He had reserved his right to file a supplementary charge sheet if he would be satisfied with the C A. report. He has sincerely submitted the C A. report on record but did not request the Court to exercise power under Section 173(8) of the Criminal Procedure Code. His silence shows that he was satisfied that the applicant was not present on the spot of the incident. Hence, no further investigation was made against him. In light of these facts, the argument of the learned counsel for respondent no.2 that the applicant was not discharged under Section 169 of the Criminal Procedure Code would not stand for consideration because the investigation officer was satisfied with the absence of the accused on the spot of the incident. Bearing in mind the principles observed in the pronouncement in the above case laws about the exercise of powers, the Court has to consider the

material on record. The evidence was already on record that the applicant was not present on the spot of the incident. This significant material appears to have been completely ignored by the learned Extra Joint Additional Sessions Judge, Osmanabad. It was not the case that the plea of alibi was coming before the Court for the first time. The defence of alibi was taken during the investigation of the allegations, and the investigating officer had investigated the facts. The question is raised frequently whether the investigating officer could consider the material supplied by the accused during the investigation. Section-I paragraph no. 137 in Chapter -V of the Maharashtra Police manual is relevant to answer the above frequently asked question., that reads thus :

"137. Investigation to be impartial and local.---(1) Police enquiries should always be impartial. It is the duty of the Police to do all they can to find out the truth. An investigating officer is to aim at discovering the actual facts and arresting the real offender. He ought not prematurely to commit himself to any view of the facts for or against any person. He should consider carefully any evidence tendered to him on behalf of an accused person. He should not make up his mind on any point hastily, but keep, as far possible, an open mind to be influenced by evidence only."

16. It is clear from the above guideline that if any evidence is produced on behalf of an accused, the investigating officer should consider it carefully. Such evidence should be the part of

investigation that may help the investigating officer to discover the truth. His primary duty is to collect the evidence and satisfy himself that it is sufficient to send the case to the Magistrate.

17. The next question that emerges from the reasons for discarding the plea of alibi is when to raise the plea of alibi.

18. The accused may claim discharge, raising the plea of alibi. The discharge is normally claimed before the framing of the charge. The law does not prescribe the stage when such a plea should be raised. Applying the stage of claiming discharge, it is always wise to raise the plea of alibi as early as possible in the initial stage of the trial. The initial stage could be the stage of framing charge. In the case of Lakhan Singh @ Pappu v The State of (NCT) Delhi, Crl Appeal No. 166/1999 decided on 16th September 2011, in paragraph 13, the Delhi High Court has observed thus :

"13. It must be noted that the above two decisions (Ram Kisan V State (20002) 1 SCC 71 and Kashi Ram and ors v State of MP Appeal (Crl) 320/2000 decided by Hon'ble Supreme Court on 17th October 2001) pertained to the pleas of self-defence. The plea of alibi cannot be equated with the plea of self-defence and ought to be taken at the first instance and not belatedly at the stage of defence evidence....."

19. Reading the relevant provisions of law as stated above, it emerges that it is not a rule that the plea of alibi should be considered only at the stage of defence evidence. On the contrary, it should be

raised at the earliest. Soon after the Court called the applicant after the application of prosecution to add him under section 319 of Cr.PC., he raised the plea of alibi. In the case at hand, there was positive evidence collected by the investigating officer that at the time of the alleged incident, the applicant was not on the spot of the incident. He has proved his alibi through electronic evidence, which is admissible evidence. Therefore, it can safely be said that the plea of alibi has been proved with absolute certainty, completely excluding the possibility of the presence of the applicant at the place of occurrence. In the circumstances discarding the plea of alibi supported by the genuine electronic evidence collected by a neutral investigating officer soon after registering a crime appears not legally correct.

20. Considering the purport of Section 319 of Cr. P. C. and the material on record, the prosecution appears not able to bring home the charge against the applicant. Hence the learned trial court ought to have declined to exercise power under section 319 of Cr.PC.

21. For the above reasons, the impugned order appears illegal, improper and incorrect and warrants interference. As a result, the impugned order is set aside, and the application moved by the Special Public Prosecutor below Exhibit-99 in Special Case No.26 of 2021 is dismissed.

22. Rule is made absolute in the above terms.

(S. G. MEHARE, J.)