

VRJ

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

WRIT PETITION NO.695 OF 2023

Shubham Subrato Roy	... Petitioner
V/s.	
The State of Maharashtra	... Respondent

**WITH
WRIT PETITION NO.715 OF 2023**

Sapna Subrato Roy	... Petitioner
V/s.	
The State of Maharashtra	... Respondent

Mr. Irfan A. Shaikh for the petitioner.

Mr. Arfan Sait, APP for the respondent/State.

Mr. J.S. Sapkale, PSI, Dongri Police Station.

CORAM : AMIT BORKAR, J.

DATED : APRIL 10, 2023

P.C.:

1. The challenge in these petitions is to the order dated 3rd February 2023, passed by the revisional court, thereby allowing the revision applications of the prosecution challenging order passed by the Magistrate rejecting applications of prosecution under section 319 of the Code of Criminal Procedure, 1973.
2. Since the nature of the controversy and the point involved are similar, both petitions are disposed of by common judgment.

3. The father of the petitioner in Writ Petition 695 of 2023 and the husband of the petitioner in Writ Petition No.715 of 2023 is an accused of an offence under section 420 of the Indian Penal Code, 1860. The prosecution's case against him is that he defrauded fourteen persons to Rs.12,20,000/- by luring them into that he would secure a job for them in railways. The trial against him proceeded till the examination of six witnesses. During the examination of witnesses, material indicating the present petitioner's involvement surfaced; therefore, the prosecution filed applications below Exhibits-25 and 49 to add present petitioners as accused along with accused No.1.

4. The trial Court rejected both applications holding that there is no material to hold that the petitioners dishonestly induced victims to deliver any property (amount) to any person. The allegations of dishonest inducement are only against the main accused and not against the petitioners herein. None of the witnesses has alleged common intention on the part of petitioners.

5. Based on the statement of witnesses stating that they handed over the money to the petitioners at the instance of the main accused, the revisional court allowed the revision application.

6. Aggrieved thereby, the petitioners have filed the present petition. The learned advocate for the petitioners invited my attention to the evidence of the witnesses who stated that they handed over amounts to the petitioners as a material improvement. In cross-examination, they admitted that despite such a statement being made at the time of investigation, the

investigating officer did not record it under section 161 of the Code of Criminal Procedure. Relying on the judgment in the case of **Hardeep Singh vs State of Punjab and Others**, reported in 2014 (3) SCC 92, it is submitted that the evidence on record is prima facie not sufficient to convict the accused (petitioners). He, therefore, submitted that the impugned orders deserve to be quashed and set aside.

7. Learned APP for the state invited my attention to the statement of witnesses recorded before the Trial Court wherein it is specifically stated that the petitioner accepted amounts from the victims. While handing over the amount, the main accused identified his wife on a cell phone, and after having a conversation with him, the victim handed the amount over to the wife. It is stated that before handing over the amount, the petitioners introduced themselves as the wife and son of the main accused and after receiving a call from the main accused, the amount was handed over to the petitioners. Therefore, it is clear that the material on record is sufficient prima facie to convict the petitioners.

8. The parameters of exercise of power under section 319 of the Code of Criminal Procedure are no longer res integra in view of the Constitution Bench judgment of Apex Court in **Hardeep Singh** (supra). Accordingly, in paragraphs Nos.98 and 99, the Apex Court has delineated parameters for exercising such power under section 319. Paragraphs Nos.98 and 99 read as under:

“98. 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.

99. 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.P.C. In Section 319 Cr.P.C. 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 Cr.P.C. to form any opinion as to the guilt of the accused."

9. Conspectus of the decision in **Hardeep Singh's** case (supra), it is only where strong and cogent evidence occurs against a person that the power under section 319 can be exercised. The nature of inquiry is not similar to the inquiry held at the time of framing of charge but short satisfaction to the extent that if such evidence goes un rebutted, 'it would lead to a conviction'.

10. In the light of aforesaid principles, I have examined the material on record. Witness No.1 has stated in his evidence that

the main accused demanded Rs.1,50,000/- from him in 2017. It was told to the witness that his wife and son (petitioners) met the witness as per the direction of the main accused, and he handed over the amount of Rs.1,20,000/- to the son of the main accused.

11. Witness No.3 also stated that the amount was handed over to the son of the main accused as per the direction of his father (main accused). The rest of the witnesses have also stated about handing over the amount to either son or wife at the instance of the main accused. Witness No.12 specifically stated that the amount of Rs.1,60,000/- was handed over to the wife as per the direction of the main accused after the main accused called on his wife's cell phone. The wife handed over her cell phone to the witness, and after identifying her through a cell phone call with the main accused, the amount was handed over to the wife. The petitioner (wife) stated to the victim not to worry and assured him of his job. She also assured that the amount would be refunded in case of failure to employ the victim. Similar is the statement of witness No.13. Therefore, on consideration of the overall material on record, it is clear that if the material against the petitioners goes un rebutted, there is a strong possibility of conviction of the petitioners. Hence there is no merit in the petition.

12. At this stage learned advocate for the petitioner seeks a stay of the proceedings. However, in the facts of the case, no case for a grant of stay is made out.

13. The writ petitions stand disposed of. No costs.

(AMIT BORKAR, J.)