

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
: NAGPUR BENCH : NAGPUR.

CRIMINAL APPLICATION (APL) NO. 676 OF 2020

APPLICANT : Bharat S/o Wamanrao Rane,
Aged about 56 years, Occu. Service,
R/o Dwarka Nagari, Behind Bhatru Mandal
Karyalaya, Tq. & Dist. Akola.

VERSUS

NON-APPLICANTS: 1] State of Maharashtra,
Through Police Station Officer,
Police Station, Khadan, Dist. Akola,

2] Gauri D/o Kishor Patte,
Aged 21 years, Occu. Student,
R/o Lahariya Nagar, Near Durga Devi Mandir,
Kaulkhed, Tq. & Dist. Akola.

3] Gopal Ninu Ingle,
Age 52 years, Occu. Principal,
Akola Arts, Commerce and Science Junior
College, Harish Colony, Sahakar Nagar,
Gandhi Nagar, Post. Gaurakshan Road,
Akola,
President of Vidarbha Gramin Shikshan Sanstha,
“Madhuri Niwas”, Shastri Nagar,
Amankha Plot, Akola.

4] Sandeepkumar S/o Suresh Patil,
Age 40 years, Occu. Vice President of
Vidarbha Gramin Shikshan Sanstha,
“Madhuri Niwas”, Shastri Nagar,
Amankha Plot, Akola.

Mr. Nikhil R. Tekade,, Advocate for the applicant
Mr. Amit R. Chutke, A.P.P. for the non-applicant No.1
Ms. Garima Jain, Advocate h/f Mr. S.V. Sirpurkar, Advocate for
non-applicant no.2
Mr. Ayush Sharma with Mr. Adarsh Dubey, Advocates for
non-applicant nos.3 and 4.

CORAM : G. A. SANAP, J.
DATE : JANUARY 16, 2023.

ORAL JUDGMENT

1. Heard.
2. **ADMIT.** Taken up for final disposal with the consent of the learned advocates for the parties.
3. In this application, filed under Section 482 of the Code of Criminal Procedure (for short “Cr.P.C.”), correctness of the order dated 01.10.2020 passed by the learned Extra Joint District Judge and Additional Sessions Judge, Akola is questioned, whereby the learned Judge was pleased to reject the application at Exh.76 made by the applicant/accused no.1 under Section 319 of the Cr.P.C. to add non-applicant nos.3 and 4 as accused in Sessions Trial No. 209 of 2016.

4. In the sessions trial, there are three accused. They are facing prosecution for commission of alleged offences punishable under Sections 354, 354-A, 504, 506, 507 read with Section 34 of the Indian Penal Code and under Section 12 of the Protection of Children from Sexual Offences Act, 2012 (For short “POCSO Act”).

5. Non-applicant no.2/victim was studying in 11th standard in Akola Arts, Commerce and Science Junior College, Akola. Non-applicant no.3 (proposed accused) is the Principal of the said college and non-applicant no.4 (proposed accused) is the Vice President of Vidarbha Gramin Shikshan Sanstha, which runs the college. On the report of the informant, the crime as above came to be registered.

6. It is the case of the prosecution against accused nos.1 to 3 that accused no.1, on the occasion of birthday of non-applicant no.2 gave a chocolate to her. When she bowed down for taking blessing, accused no.1 kept his hand on her back and touched her chicks with bad intention. Father of the victim as well as parents of two more female students made similar grievance. The matter was reported to

non-applicant nos.3 and 4. A grievance has been made by accused no.1 that in spite of reporting the matter to non-applicant nos.3 and 4, they failed to report the matter to police station and as such they were liable to be prosecuted under Section 21 of the POCSO Act.

7. It is to be noted that except the allegation by the parents of the victim about failure of non-applicant nos.3 and 4 to report the matter to police, no role in the main incident has been attributed to them. The applicant/accused no.1 made application (Exh.76) under Section 319 of the Cr.P.C. after framing of the charge against the applicant and remaining two accused. In the said application, accused no.1 contended that the material compiled in the charge-sheet is sufficient to implead non-applicant nos.3 and 4 as accused in the case to face the charge under Section 21 of the POCSO Act.

8. The application (Exh.76) was opposed by the learned Additional Public Prosecutor vide reply Exh.80. It is the case of the State that non-applicant nos.3 and 4 have been cited as witness by the prosecution. Non-applicant nos.3 and 4, during the course of

investigation, disclosed the necessary information to the Investigating Officer. There was no suppression of any fact on their part. Their statements were recorded. They were not required to be added as accused. It is further contended that the provisions of Section 319 of Cr.P.C. would have to be invoked after recording the evidence.

9. Learned Judge after bestowing thoughtful consideration to the matter found that the application was without merit and as such rejected the same. Learned Judge has made certain observations touching the merits of the matter with regard to the absence of *mens rea* on the part of non-applicant nos.3 and 4. It is to be noted that the learned Judge while passing the order has not at all taken into consideration the main objection raised by the learned APP that the said application (Exh.76) was not maintainable before recording the evidence in the case, in view of the nature of the materials placed on record at that stage. It is to be noted that the learned Judge has taken into consideration the facts and the material compiled in the charge-sheet and formed an opinion that no case is made out to add non-applicant nos.3 and 4 as accused in the said case by invoking the

provisions of Section 319 of the Cr.P.C.

10. In my view, this order cannot be sustained for more than one reasons. The first and foremost, the law laid down by the Constitution Bench of Hon'ble Apex Court in the case of ***Hardeep Singh .vs. State of Punjab and others***, reported at ***(2014) 3 SCC 92*** would be required to be considered. In paragraph 57 of the decision, the Hon'ble Apex Court has held as follows :

“57. Thus, the application of the provisions of Section 319 Cr.P.C., at the stage of inquiry is to be understood in its correct perspective. The power under Section 319 Cr.P.C. can be exercised only on the basis of the evidence adduced before the court during a trial. So far as its application during the course of inquiry is concerned, it remains limited as referred to hereinabove, adding a person as an accused, whose name has been mentioned in Column 2 of the charge-sheet or any other person who might be an accomplice.”

11. In view of this settled legal position, the application during the course of inquiry under Section 319 of the Cr.P.C. remains limited for adding a person as an accused, whose name has been mentioned in column no.2 of the charge-sheet or any other person who might be accomplice. It is to be noted that the names of non-applicant nos.3 and 4 have not been mentioned in column no.2 of the

charge-sheet. Similarly, on the basis of the material available on record, they could not be said to be accomplice. As far as the stage at which power under Section 319 of the Cr.P.C. can be exercised, has been specifically dealt with by the Hon'ble Apex Court in paragraph 78 of the decision in *Hardeep Sing's* case (supra). Paragraph 78 reads thus :

“78. It is, therefore, clear that the word “evidence” in Section 319 Cr.P.C. means only such evidence as is made before the court, in relation to statements, and as produced before the court, in relation to documents. It is only such evidence that can be taken into account by the Magistrate or the Court to decide whether power under Section 319 Cr.P.C. is to be exercised and not on the basis of material collected during investigation.”

12. Perusal of the observations of the Ho'ble Apex Court in paragraph 78 makes it abundantly clear that word “evidence” in Section 319 of Cr.P.C. means only such evidence as is made before the Court in relation to a statement or as produced before the Court in relation to the documents and not the material collected during investigation.

13. It is necessary to state that the names of non-applicant nos.3 and 4 were not mentioned in column no.2 of the charge-sheet. Similarly, it is not the case of the accused no.1 in his application that they were accomplice in commission of the crime. In my view,

considering this settled legal position, the learned Judge instead of deciding that application on merit, should have waited till recording evidence of the witnesses. It is undisputed that the charge has been framed. The application (Exh.76) was made by accused no.1 after framing of the charge, for joining non-applicant nos.3 and 4 as accused for commission of offence under Section 21 of the POCSO Act. The learned Judge, as can be seen from the impugned order, has made certain observations touching the merits of the material sought to be relied upon. In my view, in the backdrop of the law laid down in *Hardeep Singh's* case (supra), the learned Judge ought to have rejected the application on the ground that it was premature at that stage. Section 319 of Cr.P.C. has been incorporated with an object to take care of the persons who are accused, but have not been made as accused for one reason or the other.

14. As held by the Hon'ble Apex Court in *Hardeep Singh's* case (supra), the stage to invoke said provision would arise after adducing on record the evidence unless the person sought to be added as accused, is named in column no.2 of the charge-sheet or is

accomplice in commission of the crime. The application ought to have been rejected being not maintainable at that stage. The learned Judge proceeded to decide the same on merits. The material relied upon for deciding the fate of the application could not have been taken into consideration at all. Learned Judge, as can be seen from the order, has formed his opinion with regard to the role played by non-applicant nos.3 and 4 on merits. Learned Judge opined on the basis of the material that there was no *mens rea* on their part and therefore, they cannot be added as accused to face the trial with accused nos.1 to 3. In my view, this approach was not proper. Adjudication of the application (Exh.76) touching the merits was premature. The stage to invoke Section 319 of Cr.P.C. in this case would arise after recording evidence. The learned Judge, as can be seen from the record, has exercised the jurisdiction to decide the application under Section 319 of Cr.P.C. before actual commencement of the evidence. Therefore, the order is required to be set aside.

15. Accordingly, the criminal application is partly allowed.

(i) The order dated 01.10.2020 passed by the learned

Additional Sessions Judge, Akola, deciding application (Exh.76) on merits is set aside.

(ii) Application (Exh.76) made by the applicant stands disposed of as premature. Since, it is held that the application (Exh.76) made by the applicant/accused no.1 at that stage was premature, liberty is granted to the applicant/accused no.1 to make such application in future depending upon the evidence adduced before the Court by the prosecution. It is made clear that as and when such an application is made after recording evidence, depending upon the evidence of the witnesses, such an application shall be decided.

(iii) The application stands disposed of.

(G. A. SANAP, J.)

Diwale