

IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

231

CRR-342-2023

Date of decision: 24.11.2023

Joginder Singh

.....Petitioner

Versus

Sanjay and others

.....Respondents

CORAM: HON'BLE MRS. JUSTICE MANJARI NEHRU KAUL

Present : Mr. Jangvir Singh Hooda, Advocate
for the petitioner.

Mr. Ankit Yadav, Advocate
for respondents No.1 to 3.

Ms. Jasleen Chahal, AAG, Haryana.

MANJARI NEHRU KAUL, J. (ORAL)

1. The petitioner/complainant is impugning order dated 19.11.2022 (which has been annexed with the petition), passed by learned Additional Sessions Judge, Palwal whereby an application moved by him under Section 319 of the Cr.P.C. for summoning respondents No.1 to 3 as additional accused in case FIR No.327 dated 15.11.2022 under Sections 452, 307, 379-B, 302, 34 of the IPC registered at Police Station Sadar Palwal, was dismissed.

2. Learned counsel for the petitioner has vehemently contended that the impugned order has been passed without appreciating the evidence on record, and merely on conjectures and surmises. It has been further submitted that the trial Court failed to consider that “more than a prima facie case” was made out against the private respondents even from a bare perusal of the allegations leveled in the FIR annexed as Annexure P/1, as well as from the deposition of

the complainant (PW1 Joginder Singh) and mother of Mahesh (hereinafter referred to as 'deceased') (PW 2 Dayawati), who were not only eye witnesses to the crime in question but who also while stepping into the witness box during trial, reiterated all the allegations against the private respondents, which in turn, find due corroboration with the medical evidence on record. In support, learned counsel has drawn the attention of this Court to their depositions annexed as P/2 and P/3 with the instant petition respectively. Learned counsel has further submitted that the Court below had erred in ignoring that the allegations levelled against the private respondents was identical to that of accused Netarpal, who had been challaned by the investigating agency and was already facing trial. Furthermore, learned counsel while drawing the attention of this Court to the impugned order has argued that it was a totally perverse order and not in consonance with the settled law including the parameters laid down by the Hon'ble Supreme Court in a catena of judgments including ***Hardeep Singh Vs. State of Punjab, (Constitution Bench) : 2014(3) SCC 92.***

3. Learned counsel, has in particular, referred to the following observations and discussion by the learned Additional Sessions Judge, in the impugned order, which as per him, are not supported by any cogent evidence:-

“6. On the perusal of the police file, it is observed that after the investigation by SHO, PS Sadar Palwal in its final report submitted before the court on 15.02.2022, it was mentioned that arrest of proposed accused namely Sanjay, Rotash and Sonu are pending, meaning thereby the investigating agency was of the view that they are the persons involved in the commission of the offence. However, in subsequent zimni order dated 28.03.2022, it transpires that as many as 13 persons from the

complainant side and 16 persons from the accused side, all residents of village Deeghot, appeared before DSP Palwal.

7. Proposed accused Rohtash claimed that he had drinks with the deceased along with Balram, Netrpal @ Bhambal. He had lot of drinks. Thereafter, he slept there only. He does not know what had happened there. Further proposed accused Sonu deposed that on the date of the incident, he was not present along with Mahesh, rather he was performing duties at the petrol pump and he came to know about the incident subsequently.

8. Further another proposed accused Sanjay disclosed that when he went to house of Mahesh, he saw Rohtash and Netra Pal @ Bhambal and Mahesh were having liquor at their house. He remained present for sometime and then he came to the Flour Mill of Mool Chand and remained there till 2.00 pm to 4.00 pm. Thereafter, he went to his uncle Bisan's house to repair his machine and then he went to the clinic of Dr. Amar Chand and came back to his house. He subsequently, came to know about the incident.

9. It is pertinent that proposed two accused Sanjay and Rohtash admitted that they had visited the house of the deceased Rohtash after consuming liquor and slept there, whereas proposed accused Sanjay left the place being electrician. Further proposed accused Sonu claimed that he was present at the petrol pump and came to know about the incident, subsequently. The statements of these persons were verified by the DSP.

10. It is pertinent that the case of Rohtash was supported by Dharambir son of Ram Kala, Dharambir son of Sukh Ram, Bansi Lal son of Roop Ram, Parsi @ Ram Saran son of Girraj, Arun Kumar, Surehs, Chet Ram, Rattan Singh, Devi Singh, Dal Chand.

11. Further affidavits were furnished by the villagers in respect of Sonu by Budh Ram, Harish, Jatinder Sharma, Krishan, Nem Pal, Kanhiya, Madan Mohan, Jawahar Lal Tewatia, Sukhbir. Out of them, Jawahar Lal Tewatia is the owner of the petrol pump, who claimed that on the date of incident proposed accused Sonu was present at the petrol pump from 8.00 am to 8.00 pm on 13.11.2021.

12. Further in respect of proposed accused Sanjay, affidavits have been executed by Bir Singh, Ramesh Chand, Rajbir, Budh Singh, Ashish Tanwar, Mange Ram, Her Gopal and they categorically deposed that at that time Sanjay was present to repair the Flour Mill of Mool Chand and also visited clinic of Dr. Amar Chand.

13. From the affidavits of various villagers so executed in

presence of complainant party and further the parties were not having any previous enmity, they were having no reason to cause his death. Moreover, the deceased at the time of incident was also under the influence of liquor.

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15. In view of the fact that the investigating agency have looked into the allegations levelled by the complainant by joining proposed accused and other person from the village and on being satisfied, came to the conclusion that the proposed accused were not involved though in the initial report, the SHO PS Sadar Palwal was of the view that the proposed accused were involved and they were yet to be arrested. Considering the contents of zimni order dated 28.03.2022 vis-a-vis the affidavit on file, further proposed accused were having no enmity. Thus, it appears that the proposed accused Rohtash might have consumed liquor but he did not cause death of Mahesh. Further Sonu remained present at the petrol pump and Sanjay had left the house. Thus, the court is of the view that there are not sufficient material on record to summon proposed accused for commission of offence u/s 302 of IPC. Hence, the application is hereby dismissed.”

4. A vehement prayer has, therefore, been made for setting aside the impugned order and allowing the instant revision petition as the Trial Court has virtually recorded an order of acquittal qua the proposed accused i.e. the private respondents.

5. Per contra, learned counsel appearing for the private respondents has vehemently opposed the prayer made by the counsel for the petitioners by contending that the impugned order did not warrant any interference as it was a well reasoned one coupled with the fact that DSP, Palwal, after the registration of the FIR, had carried out a detailed investigation; it had come to the fore that the private respondents were not even present when the deceased was fatally injured with lethal weapons. He has further submitted that during

investigation by DSP, Palwal, it had also come to light that the private respondents had, though, consumed liquor with the deceased prior to the occurrence in question, however, they had already left when the deceased was attacked and inflicted fatal injuries. Learned counsel has also drawn the attention of this Court to the various affidavits which were submitted by the villagers and some other persons with regard to the non-involvement of the private respondents in the crime in question. Learned counsel has, thus, asserted that in the facts and circumstances, it is evident that the private respondents were indeed innocent and were being sought to be falsely implicated for the murder of the deceased. Moreover, there was no previous history of enmity between them and the deceased, which fact had also been rightly noticed by the Trial Court in the impugned order. Learned counsel has further asserted that once there was ample material collected by the investigating agency, which finds recorded in the case diary/police zimnis, qua the private respondents not being present at the place of occurrence, much less anywhere in its vicinity at the time of commission of crime, the Trial Court did not err in dismissing the application of the petitioner under Section 319 of the Cr.P.C. A prayer has, therefore, been made for dismissal of the instant petition.

6. I have heard learned counsel for the parties and perused the relevant material on record.

7. Section 319 of the Cr.P.C. originates from the principle of “judge is condemned when guilty is acquitted” (*judex damnatur cum nocens absolvitur*), emphasizing that the Court must ensure that those who are guilty are not allowed to escape justice. This doctrine acts as a

guiding principle, shedding light on the essence and scope of Section 319 of the Cr.P.C.

8. The essence of this provision lies in maintaining a delicate equilibrium between two essential principles: firstly, that the innocent should not unjustly endure suffering, and secondly, the true perpetrator of a crime should not escape unpunished.

9. Given that Section 319 of the Cr.P.C. holds a distinct status within legal proceedings, coupled with the powers entrusted in the Courts being discretionary in nature, a cautious and judicious approach has to be adopted both, for summoning, and non summoning of a person as an additional accused. Section 319 of the Cr.P.C. serves as a legal tool to ensure that justice is not thwarted due to technicalities or initial limitations in the charges brought forth. Section 319 of the Cr.P.C. does not in any manner preclude the Court to summon any person(s) who was excluded by the police during investigation but for whom, evidence, indicating his involvement in the crime in question emerges during trial. Resultantly, such a person/accused can be called to stand trial as an additional accused along with the other accused who already stands challaned and is facing trial.

10. It would be apposite to reproduce Section 319 of the Cr.P.C. which reads as under:-

“319. 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 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.”

11. Thus, what flows from a minute reading of the aforementioned provisions is word “evidence” appearing in Section 319(1) of the Cr.P.c. contemplates only “evidence” of witnesses which is given during Court proceedings.

12. The Supreme Court in a catena of cases has highlighted that the standard for deciding whether to summon a person as an additional accused under Section 319 of the Cr.P.C. lies between establishing a prima facie case and reaching a level of satisfaction where the “evidence”, if un-rebutted, would inevitably lead to the conviction of the accused sought to be summoned. This standard demands “evidence” that is more than just initial suspicion yet falls short of establishing guilt of a person beyond a reasonable doubt.

13. The Hon’ble Supreme Court in ***Y. Saraba Reddy Vs. Puthur Rami Reddy : (2007) 4 SCC 773*** has held that when exercising its powers to summon a person as an additional accused under Section 319 of the Cr.P.C., the Court must assess whether there exists adequate ground to proceed against the person and whether the testimony of the

prosecution witnesses points towards the complicity of the accused in the crime.

14. The Hon'ble Supreme Court in *Hardeep Singh's case (supra)* and also in *Rajendra Singh Vs. State of UP : 2007(3) RCR (Criminal) 1022* has dealt with the threshold of "evidence" required at different stages of criminal proceedings.

15. It, thus, needs to be stressed that while deciding an application under Section 319 of the Cr.P.C., the Court should not take into account any material brought forth in the charge sheet in the form of statements recorded under Section 161 of the Cr.P.C. or affidavits filed by some persons or the case diary/police zimnis because these would not constitute "evidence". Rather, it is only the testimony of witnesses in the Court which would qualify as "evidence", as contemplated in Section 319(1) of the Cr.P.C. Furthermore, the findings or the report of an investigating officer with respect to alibi of an accused should not be allowed to outweigh his summoning under Section 319 of the Cr.P.C. as doing so would diminish the fundamental intent behind the enactment of Section 319 of the Cr.P.C., which however, the Trial Court has shockingly done in the impugned order.

16. In *Hardeep Singh's case (supra)* the Supreme Court has emphasized that to establish a prima facie case against an accused, the evidence led before the Court should be stronger than mere indication of a slight possibility of the involvement of the accused. It necessitates more robust evidence, beyond mere suspicion or likelihood, for the Court to consider a case as having been prima facie established, even if it is not rigorously tested on the anvil of cross-examination. Relevant

observations of the Hon'ble Supreme Court in *Hardeep Singh's case* (*supra*) are extracted as under:

“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.”

17. Further, it would also be relevant to reproduce the FIR, which was lodged at the instance of one of the eye witnesses PW1 Joginder Singh (cousin brother of the deceased). The contents of the FIR read as under:-

“To the SHO P.S Sadar Palwal for taking legal action. Sir I, Joginder Singh s/o Bodalli is r/o Village Deeghot Tehsil Hodal District Palwal is Jat by caste. That during on 13.11.2021 at about 2:30 PM petitioner was crossing in front of the house of her Mausi (Aunt) Daya wati, than he heard sound bachao-bachao, than he entered in side the house by opening and saw that Sanjay s/o Vijay, Neterpal s/o Kishan lal, Rohtash s/o Ram Kala, Sonu s/o Kishan lal who all are the residents of his village Deeghot were giving beating with iron rod danada and kulahari on his Aunt's son Mahesh Sanjay was having sariya in his hand, Neterpal was having iron rod Rohtash was having Kulhari and Sonu was having Danda. All the assailants attacked on the head and face of the Mahesh. Petitioner immediately came out and shouted for help than mu Aunt Dayawati came running from the neighbor house and we saw that my cousin Mahesh was lying in the blood pool on the bedew tried to caught hold of the four assailants and all the accused ran away from the spot. Hearing the sound

many other people also gathered at the place and one of the accused while running left his cycle and Chari at the spot and my Mausi saw that the Lock of almirah was found to be open and it was found that Rs.2 lakh 10 thousand were missing which were received at money received by selling the plot which were taken away by the accused. Neighbourer call the police and about an hour police came at the spot and my cousin Mahesh was taken to hospital by me and Govind s/ol Arjun to the Govt. Hospital and from the Govt. Hospital my cousin was referred to pvt. Hospital Opex and their my cousin Kirparam came and Mahesh was taken to the Sarvodaya Hospital from the Apex Hospital and from there doctors referred him to Delhi Trauma Center where he is under treatment After the occurrence were busy in taking care of the Mahesh so today had come to report the matter strict legal action be taken against the accused persons. dated 15.11.202 sd/- Joginder sd/-”

18. A perusal of the FIR leaves no manner of doubt that the case is based on eye witness account. Both the complainant PW1 Joginder Singh as well as PW2 Dayawati i.e. mother of the deceased, who too had rushed to the place of occurrence on hearing cries of the deceased, while stepping into the witness box stood their ground and reiterated the allegations contained in the FIR against all the accused including the private respondents and also detailed the weapons used by them in inflicting injuries to the deceased. The observations made by the Trial Court which have been reproduced in the earlier part of this order, are profoundly startling. The conclusions drawn by the Court in the impugned order that in the absence of any previous enmity, the accused had no motive to murder the deceased are inexplicable, more so, when the case is based on ocular account and does not rest on circumstantial evidence. Furthermore, it is neither the case of the prosecution, nor that of the complainant PW1 Joginder Singh or even PW2 Dayawati, that the deceased was in the company of the

accused/private respondents prior to the crime in question, much less had been consuming alcohol with them. The Trial Court has relied on affidavits supposedly given by the co-villagers and some others to the DSP during investigation which are not even part of the challan. The Trial Court in blatant disregard to the basic tenets of law has based his conclusions, qua the innocence of the private respondents, treating the contents of the case diary/police zimnis as substantive piece of evidence. Further, this reliance on the case diary/police zimnis is especially shocking in the absence of any corroborative evidence, much less medical. The Trial Court appears to be totally ignorant of the purpose and object behind maintaining a case diary/police zimnis, which it needs to be reminded of. Section 172 of the Cr.P.C. which deals with the diary of proceedings in investigation, reads as under:-

“172. Diary of proceedings in investigation-

(1) Every police officer making an investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained through his investigation.

(2) Any Criminal Court may send for the police diaries of a case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial.

(3) Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court; but, if they are used by the police officer who made them to refresh his memory, or if the Court uses them for the purpose of contradicting such police officer, the provisions of section 161 or section 145, as the case may be, of the Indian Evidence Act, 1872 (1 of 1872), shall apply.”

19. Thus, what flows from a reading of the above reproduced

provisions is that Section 172 of the Cr.P.C. mandates that every police officer conducting an investigation has to diligently record the daily proceedings of a case in a designated diary. The Court can only request for the case diary/police zimnis for reference during trial or a police officer during an inquiry or during his testimony in Court, as the case may be, can use a case diary/police zimnis to refresh his memory. There are limitations and permissible uses of case diary/police zimnis during proceedings before a Criminal Court. The Hon'ble Supreme Court has time and again emphasized that the case diary/police zimnis can be used only for aiding purposes, during trials or inquiries by police, however, they should not serve as the primary basis for judgments or for confirming opinions on appreciation of its contents.

20. It goes without saying that the police diaries/police zimnis cannot be taken to be “evidence”, the Courts are precluded from relying upon them, much less for drawing any inference, while passing judicial orders. The Courts, therefore, must refrain from employing them to formulate evidentiary opinion or drawing any inference, as they cannot be accorded the status of substantive or corroborative evidence as has been erroneously done by the Trial Court in the instant case.

21. As a sequel to the above, this Court has no hesitation in observing that the impugned order on the face of it is perverse and contrary to the settled principles of law. Prima facie, there exists sufficient material on record, warranting the summoning of the private respondents, namely Sanjay, Rohtash and Sonu, under Section 319 of the Cr.P.C. to stand trial in the case in hand along with the co-accused who is already facing trial.

22. Accordingly, the instant revision petition is hereby allowed and the impugned order dated 19.11.2022 is hereby set aside. Respondents No.1 to 3 namely Sanjay, Rohtash and Sonu are ordered to be summoned as additional accused to face trial along with co-accused.

23. However, it is made clear that anything observed hereinabove shall not be construed to be an expression of opinion on the merits of the case.

24.11.2023	(MANJARI NEHRU KAUL)
Vinay	JUDGE
Whether speaking/reasoned	: Yes/No
Whether reportable	: Yes/No