

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

108

2023:PHHC:115518

CRR-1913-2023

Date of decision: August 28th, 2023

Kishmish Garg

.....Petitioner

Versus

State of Punjab

.....Respondent

CORAM: HON'BLE MRS. JUSTICE MANJARI NEHRU KAUL

Present: Mr. M.S. Khaira, Senior Advocate
with Ms. Ritu Punj and Ms. Navdeep Kaur, Advocates
for the petitioner.

MANJARI NEHRU KAUL, J.

The petitioner is impugning the order dated 13.07.2023 passed by learned Special Court, Moga, whereby an application moved by the prosecution for discharge of petitioner-Kishmish Garg has been dismissed and instead he had been summoned to face trial along with already challaned co-accused Sukhdev Singh in FIR No.44 dated 04.04.2019 under Section 22 of the NDPS Act which was registered against both the petitioner as well as co-accused Sukhdev Singh.

2. Learned senior counsel has made the following submissions:

On the fateful day i.e. 04.04.2019, the petitioner was just travelling with co-accused Sukhdev Singh, when their car was stopped by the police party and recovery of 24000 intoxicant tablets Mark Clovidol-100 SR and 7200 intoxicant tablets of Prozolam 0.5 was allegedly been effected from the car. Though, on the spot itself the petitioner had apprised the police party qua his innocence, and that he had no role to play in the crime in question, however, it fell on deaf ears. Thereafter, his brother moved an application before the authorities

concerned qua his false implication in the FIR. The application was marked on 01.07.2019 to I.G. Ferozepur Range, Ferozepur, for carrying out a fair investigation. On 04.07.2019, the I.G., Ferozepur Range, Ferozepur, in turn marked the investigation to S.S.P., Faridkot and S.P. (D) Faridkot. The S.S.P., Faridkot, on directions of I.G.P., Ferozepur, then handed over the entire investigation to S.P. (D), Faridkot. The record of the case was called for, the concerned parties were heard and joined, and their statements recorded. After a thorough investigation, S.P. (D), Faridkot, rightly concluded that the petitioner was innocent and had been falsely implicated in the case in hand. Thereafter, the S.P. (D) forwarded his report to S.S.P., Faridkot, who in turn, forwarded it to I.G. Ferozepur Range vide letter dated 26.08.2019. The report was finally approved by A.D.G.P. (Crime) posted in the office of Director, Bureau of Investigation, pursuant to which an application for the discharge of the petitioner was moved before the trial Court concerned by the S.H.O., Police Station Nihal Singh Wala on 09.10.2019 (Annexure P-1). The aforesaid application remained pending and undecided, however, in the meantime, the Court also ordered the petitioner to be released from custody till further orders vide order dated 30.10.2019 (Annexure P-2). After being released on 30.10.2019, no charges were framed against the petitioner and it was also a matter of record that he had neither misused his concession of bail nor had he been involved in any other criminal case much less under the NDPS Act. When the trial was at an advance stage, the prosecution yet again made a prayer before the trial Court for allowing application dated 09.10.2019 (Annexure P-1). However, the trial Court, instead of allowing the application seeking discharge of the petitioner,

erroneously summoned him under Section 319 Cr.P.C. and that too, four years after he had been declared innocent by the investigating team; it was a matter of record that no new incriminating material in the interregnum had come to light against the petitioner.

3. Learned senior counsel has further vehemently argued that the Hon'ble Supreme Court in a catena of judgments has categorically held that merely because the name of a person is disclosed in the FIR, it would not be a sufficient enough ground to warrant his summoning under Section 319 Cr.P.C. He submits that no doubt the petitioner was travelling with the co-accused and the alleged recovery too had been effected in his presence, however, it was from the boot of the car of the co-accused and hence, it could not be said to be from the conscious possession of the petitioner. It has, thus, been vehemently asserted that the impugned order was patently illegal as there was no material on record from which the involvement of the petitioner in the crime in question could be even remotely discerned, which in turn could lead to his conviction in the instant case.

4. I have heard learned senior counsel for the petitioner and perused the relevant material on record.

5. The petitioner is aggrieved by the dismissal of the application dated 09.10.2019 (Annexure P-1) moved by the prosecution for his discharge as well as the order vide which he has been summoned to face trial as an accused under Section 319 Cr.P.C.

6. The law is well settled that an accused can be discharged in a case only if, even presuming the entire prosecution evidence to be true, no case would be made out against him. It is a matter of record that the application (Annexure P-1) seeking discharge of the petitioner

was still pending for decision, hence, it is not that after the discharge of the petitioner by the Court, he had been summoned under Section 319 Cr.P.C. Mere pendency of the application (Annexure P-1) could not have, in any manner, come in the way of the trial Court from exercising its powers *suo moto* under Section 319 Cr.P.C. It may be pointed out that while exercising its powers under Section 319 Cr.P.C., the Court has to see whether there exists some material which *prima facie* links the person, sought to be summoned as an additional accused to the crime in question. Merely on an application moved by the brother of the petitioner, if the Investigating Officer had found him innocent, it cannot be a ground to not summon the petitioner under Section 319 as it would defeat the very purpose and object of Section 319 Cr.P.C., which is, that no person, who *prima facie*, appears guilty, escapes trial to that guilt. In *Hardeep Singh Versus State of Punjab 2014 (3) SCC 92*, the Hon'ble Supreme Court has laid down the following parameters, which must be taken into account while summoning a person as an additional accused under Section 319 Cr.P.C.:-

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.*

Q.(v) In what situations can the power under this section be exercised: Not named in FIR; Named in the FIR but not charge-sheeted or has been discharged?"

7. Trite to say that under Section 319 (1) Cr.P.C., the power of a Court to summon some person can also be exercised *suo moto*, not necessarily on an application moved under Section 319 Cr.P.C., if the Court is *prima facie* satisfied that any person other than the accused has committed any offence for which he should be tried with the other accused, who is already facing trial.

8. Adverting to the case in hand, the petitioner as per his own admission, was travelling with the co-accused when the car was intercepted by the police and subsequently, a huge recovery of 24000 intoxicant tablets Mark Clovidol-100 SR and 7200 intoxicant tablets of Prozolam 0.5 was allegedly effected from the boot of the car. Thereafter, a personal search of both the petitioner as well as co-accused was carried out, after due compliance of the provisions of Section 50 of the NDPS Act. The said search was carried out by a

Gazetted Officer, D.S.P. Kuljinder Singh. It is also a matter of record that after the registration of the FIR, and investigation carried out, report under Section 172 (2) Cr.P.C. was prepared by the police against the petitioner as well as co-accused Sukhdev Singh. However, subsequently, the petitioner was declared innocent, pursuant to an investigation carried out by S.P. (D), Faridkot, on an application moved by the petitioner's brother. Though the petitioner was declared innocent in the inquiry conducted by S.P. (D), Faridkot, however, it is a matter of record that, strangely, Gazetted Officer D.S.P. Kuljinder Singh, in whose presence, search of the car as well as the person of the petitioner was carried out, was neither called, joined or heard by the Inquiry Officer i.e. S.P. (D), Faridkot during investigation. Still further and most significantly and as not disputed by the learned Senior counsel also, PW-1 S.I. Harbans Lal (Investigating Officer) and PW-2 D.S.P. Kuljinder Singh, while stepping into the witness box during trial deposed as per the initial version detailed in the FIR in question, wherein they reiterated that a recovery of 24000 intoxicant tablets Mark Clovidol-100 SR and 7200 intoxicant tablets of Prozolam 0.5 was effected from car, in which both the petitioner and his co-accused were travelling on the fateful day. It would also be most pertinent to refer to the deposition of PW-4 Inspector Paramjeet Kuarm (Annexure P-7), wherein he categorically stated *"After completion of investigation I had prepared challan against accused Sukhdev Singh alias Kala present in the court and Kishmish Garg alias Kinu. I have seen said report under Section 73 Cr.P.C. on the case file and same is Ex.P29 which bears my signature. But thereafter accused Kismish Garg was declared innocent during inquiry and challan was not presented against Kishmish Garg*

alias Kinu”. Thus, once the investigation was complete and even final report under Section 173 (2) Cr.P.C. was ready to be presented, this Court finds it very odd and in fact, it does raise eyebrows, as to how the S.P. (D), Faridkot, during his investigation, concluded that the petitioner was innocent, more so, when it was a matter of record that the Gazetted Officer PW-2 D.S.P. Kuljinder Singh, who was the most crucial witness was not even joined, for reasons, best known to the S.P. (D), Faridkot.

9. This Court finds no credence in the submission made by learned senior counsel that the recovery was not effected from the conscious possession of the petitioner. Section 35 of the Act deals with the presumption of culpable mental state of an accused i.e. whether he had any intention or knowledge of a fact etc. The onus to prove that there was no mental culpability of the petitioner would be delved into during trial and cannot be gone into at this stage.

10. Coming to the next contention of the learned senior counsel that the petitioner had been summoned to face trial as an additional accused at a highly belated stage i.e. almost at the fag end of the trial, is yet again devoid of any merit as the law in the said regard stands settled by the Hon’ble Supreme Court. The Hon’ble Supreme Court in *Sukhpal Singh Khaira Versus State of Punjab 2022 LiveLaw SC 1009* has held that a person can be summoned to face trial as an additional accused under Section 319 Cr.P.C., at any stage of the trial, but before the sentence of conviction is passed or judgment of acquittal is delivered, as the case may be. The Court below thus, cannot be faulted with for passing the impugned order as it was well within its right to summon the accused to face trial along with co-accused since the trial was still underway.

11. This Court, as a sequel to the above, has no hesitation in observing that the Court below has exercised its discretionary power under Section 319 Cr.P.C. judiciously, after giving due regard to the facts and circumstances of the case in hand in addition to the evidence, led during the trial.

12. The instant revision being devoid of any merit is dismissed.

13. 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.

August 28th, 2023
Puneet

(MANJARI NEHRU KAUL)
JUDGE

Whether speaking/reasoned : Yes
Whether reportable : No