

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.31020 of 2016

Arising Out of PS. Case No.-55 Year-2008 Thana- PHULWARIYA District- Gopalganj

Shivjee Singh Son of Indra Shan Singh Resident of Village- Mishra Bataraha,
P.S.Phulwaria, District Gopalganj Bihar.

... .. Petitioner/s

Versus

1. State of Bihar
2. Sudarshan Chaudhary Son of late Sahalu Chaudhary Resident of Village-
Mishra Bataraha, P.S. Phulwaria, District Gopalganj Bihar.

... .. Opposite Party/s

Appearance :

For the Petitioner/s	:	Mr. Gopal Govind Mishra, Advocate
	:	Mr. Vijay Kumar Mishra, Advocate
	:	Mr. Shovendra Kumar, Advocate
For the Opposite Party/s	:	Mr. Navin Kumar Pandey, APP

CORAM: HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA
ORAL JUDGMENT

Date : 26-04-2024

Heard learned counsel for the petitioner and

learned counsel for the respondents.

2. The present quashing petition has been preferred to quash the order dated 13.04.2016 passed in Phulwaria P.S. Case No. 55 of 2008, where learned Additional Sessions Judge-VIII, Gopalganj took cognizance for the offence punishable under Sections 302, 328, 201 and 34 of the Indian Penal Code (in short IPC) against the petitioner.



3. Opposite Party No. 2 fails to join the present court proceedings.

4. Brief case of the prosecution as per the written report of the informant before Phulwari Police dated 17.05.2008 that at about 6 AM on 06.05.2008 Munna Singh and Rabindra Singh took away the deceased Devendra with them and left him to his shop. Then Shivjee Singh took away him Kushaudhi in the mood of consuming wine and left the victim deceased to his house at about 6 PM. Thereafter at about 8 PM Munna Singh, Rabindra Singh and Shivjee Singh all took away him to call. Bhirgun Chaudhary and Jagdish Chaudhary informed the informant that his son Devendra was unchaining with vomiting tendency and speaking alleging word to Munna Singh and Rabindra Singh. That Devendra break his breath in way while he was taking away for treatment. Then FIR was lodged after gap of 11 days, as informant was unconscious.

5. It is submitted by learned counsel for the



petitioner that impugned order appears bad in eyes of law for the reason that petitioner was named in FIR and as such he was not under the purview of "not being accused", which is the most essential ingredient as to attract a case under Section 319 of Code of Criminal Procedure (in short Code). It is pointed out that after investigation police submitted charge-sheet against two persons only i.e., Munna Singh and Rabindra Singh, who are facing trial. It is pointed out that no protest petition was filed, where concerned learned Jurisdictional Magistrate took cognizance against only two charge-sheeted persons and thereafter committed case to the Court of Sessions under Section 209 of the Code. It is further submitted that court of Session even failed to take cognizance against petitioners by exercising its power under Section 193 of the Code. Consequent upon charges were framed and trial was started.

6. It is further pointed out that till date nine witnesses were examined in this case out of which



petitioner was named by P.W. 1 Shiv Shankar Yadav, P.W. 2 Sheo Poojan Chaudhary, P.W. 3 Bhirgun Chaudhary, P.W. 5 Sundar Shan Chaudhary and P.W. 9 Parmeshwar Chauhan, whereafter above petition came to be filed by the prosecution under Section 319 of the Code for issuing summons against petitioner for facing trial. The learned Trial Court through impugned order has allowed the petition dated 21.01.2015 filed by the prosecution. Learned counsel also referred the judgment of this Court where case of **Sohan Lal and Others Vs. State of Rajasthan** as reported in **[(1990) 4 SCC 580]** was followed in similar facts and circumstances, which was decided in Cr. Rev. No. 1277 of 2011 dated 27.03.2012. Learned counsel also relied upon the report of Hon'ble Supreme Court in the case of **Juhru and Others Vs. Karim and Anothers** as reported in **[(2023) 5 SCC 406]**.

7. Learned APP appearing on behalf of State, while opposing the application submitted that most of



the prosecution witnesses named this petitioner. There is apparent involvement of petitioner in alleged crime which is heinous in nature, where his two brothers namely Munna Singh and Rabindra Singh are facing trial. It is submitted that charge-sheet is silent against petitioner. It is pointed out that alleged murder was committed in the background of love affair of deceased with the sister of petitioner. In view of such it is submitted that learned Trial Court was not committed any wrong to summon issue against petitioner to face trial.

8. It would also be apposite to reproduce the paragraph no(s). 14, 30 and 33 of the **Sohan Lal Case (supra)** which reads as under:

14. The crucial words in the section are, 'any person not being the accused'. This section empowers the court to proceed against persons not being the accused appearing to be guilty of offence. Sub-sections (1) and (2) of this section provide for a situation when a court hearing a case against certain accused person finds from the evidence that some person or



persons, other than the accused before it is or are also connected in this very offence or any connected offence; and it empowers the court to proceed against such person or persons for the offence which he or they appears or appear to have committed and issue process for the purpose. It provides that the cognizance against newly added accused is deemed to have been taken in the same manner in which cognizance was first taken of the offence against the earlier accused. It naturally deals with a matter arising from the course of the proceeding already initiated. The scope of the section is wide enough to include cases instituted on private complaint.

30. The question therefore is whether the necessity of making a further inquiry as envisaged in Section 398 could be obviated or circumvented by taking resort to Section 319. As has already been held by this Court, there is need for caution in resorting to Section 319. Once a person was an accused in the case he would be out of reach of this section. The word "discharge" in Section 398 means discharge of an offence relating to the charge within the meaning of Sections 227, 239, 245 and 249. Refusing to proceed further after issue of process is discharge. The discharge has to be in substance and effect though there is no formal order. The language of the section does not indicate that the word "discharge" should be given a restricted meaning in the sense of



absolute discharge where the accused is set at liberty after examination of the whole case. The cases of appellants 4 and 5 would be one of total discharge. But it could not be said that they were not some of the accused in the case, or that cognizance was not taken of the offences against them. A person may be accused of several offences and he may be discharged of some offences and proceeded against for trial in respect of other offences. This was the proposition regarding appellants 1, 2 and 3, who were partially discharged.

33. The above views have to yield to what is laid down by this Court in the decisions above referred to. The provisions of Section 319 had to be read in consonance with the provisions of Section 398 of the Code. Once a person is found to have been the accused in the case he goes out of the reach of Section 319. Whether he can be dealt with under any other provisions of the Code is a different question. In the case of the accused who has been discharged under the relevant provisions of the Code, the nature of finality to such order and the resultant protection of the persons discharged subject to revision under Section 398 of the Code may not be lost sight of. This should be so because the complainant's desire for vengeance has to be tampered (sic tempered) with though it may be, as Sir James Stephen says: "The criminal law stands to the passion of revenge in much the same relation as



marriage to the sexual appetite.” (General View of the Criminal Law of England, p. 99). The APP’s application under Section 216, insofar as the appellants 1 to 3 were concerned, could be dealt with under Section 216. Appellants 4 and 5 could be dealt with neither under Section 216 nor under Section 319. In that view of the matter the impugned order of the Magistrate as well as that of the High Court insofar as the appellants 4 and 5, namely, Vijya Bai and Jiya Bai are concerned, have to be set aside which we hereby do. The appeals are allowed to that extent.

9. It would also be apposite to reproduce the paragraph no(s). 12, 13, 14, 15 and 16 of the **Juhru and Others Case (supra)** which reads as under:

12. Illuminating the scope of Section 319 CrPC, the Constitution Bench of this Court in Hardeep Singh v. State of Punjab [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] laid down that : (SCC pp. 126 & 138, paras 57 & 105-106)

“57. Thus, the application of the provisions of Section 319CrPC, at the stage of inquiry is to be understood in its correct perspective. The power under Section 319CrPC 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.

105. Power under Section 319CrPC is a discretionary and an extraordinary 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.

106. 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 unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 CrPC. In Section 319 CrPC 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 319CrPC to form any opinion as to the guilt of the accused."

13. This Court has very recently, in *Sukhpal Singh Khaira v. State of Punjab* [*Sukhpal Singh Khaira v. State of Punjab*, (2023) 1 SCC 289 : (2023) 1 SCC (Cri) 454] , succinctly explained the powers bestowed on the Court under Section 319CrPC and ruled that : (SCC p. 300, para 15)

"15. At the outset, having noted the provision, it is amply clear that the power bestowed on the Court is to the effect that in the course of an inquiry into, or trial of an offence, based on the evidence tendered before the Court, if it appears to the Court that such evidence points to any person other than the accused who are being tried before the Court to have committed any offence and such accused has been excluded in the charge-sheet or in the process of trial till such time could still be summoned and tried together with the accused for the offence which appears to have been committed by such persons summoned as additional accused."

14. In *Hardeep Singh* [*Hardeep Singh v. State of Punjab*, (2014) 3 SCC 92 : (2014) 2 SCC



(Cri) 86] , it has been eloquently held that the word "evidence" in Section 319CrPC has to be broadly understood and thus materials which have come before the court in course of enquiry can be used for:

(i) corroboration of evidence recorded by court after commencement of trial;

(ii) for exercise of power under Section 319CrPC; and

(iii) also to add an accused whose name is shown in Column 2 of the charge-sheet.

It was further explained that statement made in examination-in-chief also constitutes "evidence" and the court while exercising power under Section 319CrPC post commencement of trial, need not wait for evidence against person proposed to be summoned, to be tested by cross-examination.

15. In *Sukhpal Singh Khaira* [*Sukhpal Singh Khaira v. State of Punjab*, (2023) 1 SCC 289 : (2023) 1 SCC (Cri) 454], the Constitution Bench refreshed the guidelines that the competent court must follow while exercising power under Section 319 CrPC. It was ruled that:

15.1. If the competent court finds evidence or if application under Section 319CrPC is filed, regarding involvement of any other person in committing the offence based on evidence "recorded at any stage in the trial" before passing of the order on acquittal or sentence, it shall pause the trial at that stage



and the court shall proceed to decide the fate of the application under Section 319CrPC.

15.2. If the court decides to summon an accused under Section 319CrPC, such summoning order shall be passed before proceeding further with the trial in the main case and depending upon the stage at which the order is passed, the trial court shall apply its mind to the fact as to whether such summoned accused is to be tried along with other accused or separately.

15.3. If the power under Section 319CrPC is not invoked or exercised in the main trial till its conclusion and if there is a split-up case, such power can be invoked or exercised only if there is evidence to that effect, pointing to the involvement of the additional accused to be summoned in the split-up (bifurcated trial).

16. It is, thus, manifested from a conjoint reading of the cited decisions that power of summoning under Section 319CrPC is not to be exercised routinely and the existence of more than a *prima facie* case is *sine qua non* to summon an additional accused. We may hasten to add that with a view to prevent the frequent misuse of power to summon additional accused under Section 319CrPC, and in conformity with the binding judicial dictums referred to above, the procedural safeguard can be that ordinarily the summoning of a person at the very threshold of the trial may be discouraged and the trial court must evaluate the evidence



against the persons sought to be summoned and then adjudge whether such material, more or less, carry the same weightage and value as has been testified against those who are already facing trial. In the absence of any credible evidence, the power under Section 319CrPC ought not to be invoked.

10. In view of aforesaid factual and legal discussions, as submission of learned counsel for the petitioner finds a convincing note in view of **Sohan Lal Case (supra)**, where it has been clearly held that person who was initially, named accused in the case could not dealt with either under Section 216 or Section 319 of the Code. Same is the position of present case, where petitioner was named as an accused in FIR but he was exonerated after investigation, charge-sheet was not submitted against him and was subsequently ordered to face the trial by issuing summons under Section 319 of the Code after examination of 11 prosecution witnesses.

11. Accordingly, by taking note of guidelines as mentioned in para no(s). 14, 30 and 33 of **Sohan Lal**



Case (supra), impugned summoning order dated 13.04.2016 as to add petitioner an accused under Section 319 of Code, with all its consequential proceedings, *qua*, petitioner, arising thereof, as passed in Phulwaria P.S. Case No. 55 of 2008, pending before learned Additional Sessions Judge-VIII, Gopalganj is hereby quashed and set aside.

12. The application stands allowed.

13. Let a copy of this order be sent to learned Trial Court, immediately.

(Chandra Shekhar Jha, J.)

S.Tripathi/-

AFR/NAFR	AFR
CAV DATE	
Uploading Date	30.04.2024
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