

IN THE HIGH COURT AT CALCUTTA

Criminal Revisional Jurisdiction

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 71 of 2022

Sk. Abdul Halim @ Abdul Halim

Vs.

The State of West Bengal & Anr.

For the Petitioners : Mr. Uday Sankar Chattopadhyay,
Ms. Aishwarya Datta,
Ms. Trisha Rakshit,
Ms. Rajashree Tah.

For the State : Mr. Imran Ali,
Ms. Debjani Sahu.

For the Opposite Party No.2 : Mr. Sayan Chattopadhyay,
Ms. Payel Shome.

Hearing concluded on : 12.11.2024

Judgment on : 14.11.2024

Shampa Dutt (Paul), J.:

1. The present revision has been preferred against an order dated 21.12.2021 passed by the learned Additional District and Sessions Judge, Fast Track 2nd Court, Burdwan, in connection with Sessions Case No.76/2008 arising out of Bhatar Police Station Case No.42 of 2007 dated 05.09.2007 under Sections 147/148/149/324/325/304/506 of the Indian Penal Code (G.R. Case No.540 of 2007) thereby rejecting the petition dated 11.02.2020 filed by the prosecution under Section 319 of the Code of Criminal Procedure.
2. **By the said order under revision the learned Sessions Judge has held as follows :-**

“.....It appears from the record that as early as in 2015, P.W 1 Abdul Halim, who is the defacto complainant of this case, stated in his examination in chief that instead of Sk. Nasir Ali and one Sk. Suraj has been shown as accused by the Police in the charge sheet. So, it was within the knowledge of the prosecution and defacto complainant from the year 2015 that Sk. Nasir Ali has not been shown as accused in the charge sheet. But they kept silent for so many years and when noticed was served on the defacto complainant he did not file any Narazi Petition to the same. So, after keeping silent for more than six years, the prosecution on the date of the examination of the accused under Section 313 of the Cr.P.C on 11.02.2020 filed the instant petition under Section 319 of the Cr.P.C like a bolt from the blue. Also the role of Nasir Ali in the commission of the crime is not very clear.

Under the aforesaid circumstances, the petition filed by the prosecution under Section 319 of the Cr.P.C on 11.02.2020 is dismissed on contest..... ”

3. Learned counsel for the petitioner has placed the relevant evidence which was recorded before the trial court in support of his prayer.

4. **PW-1 is the defacto complainant** is an eye-witness under Section 319 Cr.P.C and has stated on oath that he has named **Sk. Nasir in the FIR**. Admittedly, **Sk. Nasir** was not charge sheeted at the time of deposing before the court. PW-1 categorically stated that **Sk. Nasir** is not present in court and it was stated that he was not aware that **Sk. Nasir** has not been charge sheeted.
5. **PW-2, Sk. Nazrul** is the son of the deceased and the relevant portion of his evidence is as follows :-

*“.....On the next day i.e. on 05.05.2007 the accused persons from Natun Gram and Shibpur and from the locality of Dharampur of village brought the persons and all together 19 accused persons, whose name I can recall, namely, Sk. Hasem Ali, Sk. Julu, Sk. Sirajul, Sk. Santanu, Sk. Dhani, Sk. Anu, Sk. Tewali, SI/Jamat Ali, Sk. Rajhat Ali, Sk. Bablu, Sk. Dalim, Sk. Noor Mohammad, Sk. Ansar, Sk. Mohiuddin and Sk. Amjad, all of Dharampur, Sk. Nizamuddin of Shibpur and Sakir, **Moina and Nasir of Natungram armed with lathi, bamboo, iron rod, tangi etc.** entered into our house and started assaulting my father and my brothers, myself and other members of the family. My father and myself due to fear of life trying to flee away towards the field. The accused persons above brought down my father and us and started assaulting us with lathi, tangi, rod etc. As my brother Saidul Islam tried to rescue to my father the accused persons assaulted my brother Saidul Islam and as a result his one of the legs was fractured and he sustained injuries all over the body due to the assault of the aforesaid assailants. Sk. Mohammad Ali received injury on his head and his one of the legs was also fractured. The accused assaulting us over the land which was owned by Dalim Sk. and it is situated near Ghoi Mail Math, Saidul Islam, Halim Mohammad Ali, Makhon, Rubi Begam were also present there while my father was assaulted by the accused persons. Rubi Begam was also assaulted, on her back by the accused*

persons. After assaulting my father the accused persons fled away leaving him injured. Thereafter in between 9 a.m. to 9.30 a.m. police came and my father was removed to Bhatar Hospital by the Police vehicle. Sk. Saidul Islam and Sk. Mohammad Ali were also shifted to Hospital by the police vehicle. My father and the other injured persons, namely, Sk. Saidul Islam and Sk. Mohammad Ali were referred to Burdwan Medical College and Hospital by government vehicle as the condition of the aforesaid three persons were not well. After my father and other two persons, namely, Sk. Saidul Islam and Sk. Mohammad Ali were removed to B.M.C.H. at about 1 p.m to 1.30 p.m my father was declared brought dead. The other two injured persons Sk. Saidul Islam and Sk. Mohammad Ali were admitted in the B.M.C.H for their treatment. I was present and eye witness the aforesaid incident on my own.

Post mortem examination was done on the dead-body of my father by the doctor of B.M.C.H. We have reported the incident at the police station and also informed the villagers. I was examined by the I.O of this case on the date when my father was declared brought dead.

All the accused persons except accused Nasir and Amjad are present before the court today. Witness identifies the accused persons. Accused Amjad is dead. **Had accused Nasir been present before the court today, I could have identified him."**

6. **PW-3, Sk. Md. Ali** is a co-villager and also an **eye witnesses** to the incident has stated on oath:-

"I know Sk. Omar Ali of Village-Dharampur. He is no more. He has been murdered. I cannot recall the exact date, but he was murdered about 10 years back in the last part of 'Baisak'. On the previous day of his murder in the afternoon at about 5 p.m there was a dispute and following that an altercation cropped up in between Omar Ali and Jamat Ali and his brothers and the same was specified by the village people. On the date of murder of Omar Ali, in the morning I was in my house. At about 7 a.m to 7.30. a.m about 20 to 22 people chased Omar Ali towards the six mile filed and fell him down over the agricultural

land and started assaulting him. I rushed to the spot while the said accused persons were assaulting Sk. Omar Ali and having reached there I found that the accused persons were assaulting Omar Ali by iron rod, lathi etc. and I asked them not to assault Omar Ali as Omar Ali would be killed. Thereafter, Dhoni came to me and assaulted me on my leg with an iron rod and Hasu assaulted me on my head with the tangi. I became senseless due to assault on my head. I regained my sense at B. M. C. H I was admitted in the hospital as in patient for 21 days. I was examined by Police while I was admitted in the hospital. I can say the name of the accused persons who chased the said Omar Ali towards the field. They are Hasu, Jalu, Monu, Dhoni, Santa, Anu Deb Ali, Absar, Jamat Ali, Bablu, Rahat Ali, Dalim, Norai, Amjad, Military of Dharampur, Sagir Moyna, **Nasir of Natungram** and Nizam of Shibpur. After I regained my sense, I came to know that Omar Ali has died. All the accused persons save and **except the three accused persons of Natungram** and Amjad are present before the court. Witness identifies the accused persons. **Had the said absentee accused persons been present before the Court, I could have identified them.**

7. **PW-4 is Sk. Saidul Islam**, he is also the son of the deceased. This witness is also an eye witness has stated on oath:-

“.....Sk. Omar Ali is my father. He is no more. He was murdered by Jamat Ali, Bablu, Rahat, Dalim, Absar, Sk. Toyeb, Sirajul, Dhoni, Santanu, Anu, Hasu, Sk. Jalu, Noor Mohammad, Mohiruddin, Amjad since deceased, Sakir, Moina, **Nasir**, Nizamuddin. All the accused persons are present before the Court **except Nasir** and Amjad since deceased. **Had Nasir been present I could have identified him.** The accused persons are residents of Dharampur, Natungram and Shibpur.

On 05.05.2007 in between 7.00 a.m to 7.30 a.m, the accused persons entered into our house and started assaulting the male, female and children of the house at random. My father was in the house and being attacked, my father being frightened for his life started running towards six

mile field. The accused persons chased him and fell him down on the agricultural land of six mile. The accused persons started assaulting my father with iron rod, lathi, tangi etc. I rushed to the field to save my father and at that time accused Noor Mohammad assaulted me on my right leg with iron rod and I was also assaulted by Absar by lathi. Due to assault by Noor Mohammad, my right leg was fractured.”

8. PW-5 Ruby Begum is the daughter-in-law of the deceased and has

deposed as follows :-

*“.....Sk. Omar Ali happened to be my father-in-law. Sk. Saidul Islam is my brother-in-law (Debor). In the year 2008 we all used to reside in a single mess. On 05.05.2007 at about 7 a.m to 7.30 a.m in the morning there was an incident in our house. In the morning my father-in-law Omar Ali, my brother-in-law Sk. Saidul Islam, my elder brother-in-law Sk. Nazrul Islam and the female members of the house including my mother in law, my sister in laws myself and the children of the house were present. At that time Jamat Ali, along with his men entered into our house suddenly. Jamat Ali, Hasem Ali, Sk. Sirajul, Sk. Anu, Sk. Dhoni, Sk. Santa, Sk. Toyeb Ali, Sk. Dalim, Sk. Bablu, Sk. Rahat, Sk. Absar, Sk. Noor Mohammad, Sk. Nizam, Sk. Sakir, Sk. Moina, **Sk. Nasir**, Sk. Military, Sk. Amjad and others of Dharampur, Natungram and Shibpur after entering into our house started abusing us, assaulted my brother in law Sk. Saidul and the accused were also in search of Sk. Omar Ali. The accused persons were armed with lathi, Sword, rod and tangi were trying to find out my father-in-law Sk. Omar Ali in order to kill him. My father-in-law was trying to hide himself being afraid. Thereafter, my father in-law Sk. Omar Ali in order save his life was fleeing to six miles field and the accused persons chased him in order to assault him. The accused persons at first assaulted my father-in-law on his leg and as a result he fell down on the agricultural land. The accused persons then started assaulted my father-in-law at random and at that time my brother-in-law Sk. Saidul tried to rescue my father-in-law. My elder brother-in-law Sk.*

Mohammad Ali also tried to resist the accused persons. The accused persons assaulted my elder brother-in-law on his head and they also assaulted him on his leg and as a result his leg was fractured. The accused persons also assaulted my 'debor' causing fracture of his leg. The accused persons in our house assaulted the female members of the family. Due to assault by the accused persons my father-in-law was lying unconscious on the field. My elder brother-in-law and brother-in-law (Debor) were also lying on the field being injured. Police came to the P.O and removed the victims to the hospital by the Police vehicle. I was present in the police vehicle while my father-in-law Sk. Omar Ali, my elder brother-in-law Mohammad Ali and brother-in-law Sk. Saidul Islam were removed to hospital.

I was medically treated at Bhatar Hospital. The said Sk. Omar Ali, Mohammad Ali and Sk. Saidul Islam were brought to Bhatar Hospital. From there they were shifted to B.M.C.H. I accompanied with my father-in-law and brother-in-laws during their way to B.M.C.H. My brother-in-laws were admitted in B.M.C.H but the attending doctor after examining my father-in-law Sk. Omar Ali declared him as brought dead."

9. **The State has placed the case diary wherein it appears that though Sk. Nasir was specifically mentioned in the written complaint, his name was not recorded in the formal FIR. The said Sk. Nasir was also not charge sheeted.**
10. **The following judgments are relied upon on behalf of the petitioner:-**
 1. *Rajesh and Ors Vs. State of Hariyana, (2019) 6 SCC 368.*
 2. *Hardeep Singh Vs. State of Punjab & Ors., (2014) 3 SCC 92.*
 3. *Jitendra Nath Mishra Vs State of Uttar Pradesh and Anr, (2023) 7 SCC 344.*
11. **Learned counsel for Sk. Nasir/Opposite Party No. 2 has relied upon the following judgments :-**

1. *Vishal Singh Vs. State of Uttar Pradesh and Ors*, 2024 SCC OnLine SC 730.

2. *Hardeep Singh Vs. State of Punjab and Ors.*, (2014) 3 SCC 92.

12. This Court now relies upon a decision of a constitution Bench of the Supreme Court in ***Sukhpal Singh Khaira vs. The State of Punjab (2022 LiveLaw (SC) 1009) in Criminal Appeal No. 885 of 2019 on December 05, 2022***, where in the Court issued elaborate **guidelines on the exercise of powers to summon additional accused under Section 319 Cr.P.C.**

13. **The relevant paragraphs applicable in the present case before this Court are:-**

“13. In the background of the rival contentions, in order to determine the question referred to us, it would be appropriate for us to at the outset, take note of the provision as contained in Section 319 of CrPC, which reads as hereunder: -

“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 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.”

14. 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.**

15. In that regard, the object of incorporating the provision in the CrPC and bestowing such power to the Court was based on the recommendation made by the Law Commission of India in its Forty-First Report to which all the learned senior counsel have made extensive reference, read as hereunder:-

24.80. It happens sometimes, though not very often, that a Magistrate hearing a case against certain accused finds from the evidence that some person, other than the accused before him, is also concerned in that very offence or in a connected offence. It is only proper that the Magistrate should have the power to call and join him in the proceedings. Section 351 provides for such a situation, but only if that person happens to be attending the Court. He can then be detained and proceeded against. There is no express provision in section 351 for summoning such a person if he is not present in Court. Such a provision would make section 351 fairly comprehensive, and we think it proper to expressly provide for that situation.

24.81. Section 351 assumes that the Magistrate proceeding under it has the power of taking cognizance of the new case. It does not, however, say in what manner cognizance is taken by the Magistrate. The modes of taking cognizance are mentioned in section 190, and are, apparently, exhaustive. The question is, whether against the newly added accused, cognizance will be supposed to have been taken on the Magistrate's own information under section 190(1)(c), or only in the manner in which cognizance was first taken of the offence against the other accused. In concrete terms, if the original case was instituted on a police report, i.e. under section 190(1)(b), will cognizance against the new accused be supposed to have been taken in the same manner, or under section 190(1)(c)? The question is important, because the methods of enquiry and trial in the two cases differ. About the true position under the existing law, there has been difference of opinion, and we think it should be made clear. It seems to us that the main purpose of this particular provision is, that the whole case against all known suspects should be proceeded with expeditiously, and convenience requires that cognizance against the newly added accused should be taken in the same manner as against the other accused. We, therefore, propose to re-cast section 351 making it comprehensive and providing that there will be no difference in the mode of taking cognizance if a new person is added as an accused during the proceedings. It is, of course, necessary (as is already provided) that in such a situation the evidence must be re-heard in the presence of the newly added accused.

24.82 The offence for which the newly added accused can be tried is not indicated in precise terms in the section. Obviously, that offence should be connected with the one for which the original accused is under trial. To bring that out, a small verbal amendment is recommended.

16. In the above backdrop, the issue relating to the power to be exercised under Section 319 of CrPC had arisen for detailed consideration in Hardeep Singh (supra) wherein the scope, procedure and the stage at which such power was to be exercised was considered and summarised as follows:-

12. Section 319 CrPC springs out of the doctrine *judex damnatur cum nocens absoluitur* (Judge is condemned when guilty is acquitted) and this doctrine must be used as a beacon light while explaining the ambit and the spirit underlying the enactment of Section 319 CrPC.

13. It is the duty of the court to do justice by punishing the real culprit. Where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in **calling the said accused to face trial**. The question remains under what circumstances and at what stage should the court exercise its power as contemplated in Section 319 CrPC?

15. It would be necessary to put on record that the power conferred under Section 319 CrPC is only on the court. This has to be understood in the context that Section 319 CrPC empowers only the court to proceed against such person. The word “court” in our hierarchy of criminal courts has been defined under Section 6 CrPC, which includes the Courts of Session, Judicial Magistrates, Metropolitan Magistrates as well as Executive Magistrates. The Court of Session is defined in Section 9 CrPC and the Courts of the Judicial Magistrates have been defined under Section 11 thereof. The Courts of the Metropolitan Magistrates have been defined under Section 16 CrPC. The courts which can try offences committed under the Penal Code, 1860 or any offence under any other law, have been specified under Section 26 CrPC read with the First Schedule. The Explanatory Note (2) under the heading of “Classification of offences” under the First Schedule specifies the expression “Magistrate of First Class” and “any Magistrate” to include Metropolitan Magistrates who are empowered to try the offences under the said Schedule but excludes Executive Magistrates.

40. Even the word “course” occurring in Section 319 CrPC, clearly indicates that the power can be exercised only during the period when the inquiry has been commenced and is going on or the trial which has commenced and is going on. It covers the entire wide range of the process of the pre-trial and the trial stage. The word “course” therefore, allows the court to invoke this power to proceed against any

person from the initial stage of inquiry up to the stage of the conclusion of the trial. The court does not become functus officio even if cognizance is taken so far as it is looking into the material qua any other person who is not an accused. The word "course" ordinarily conveys a meaning of a continuous progress from one point to the next in time and conveys the idea of a period of time : duration and not a fixed point of time.

42. To say that powers under Section 319 CrPC can be exercised only during trial would be reducing the impact of the word "inquiry" by the court. It is a settled principle of law that an interpretation which leads to the conclusion that a word used by the legislature is redundant, should be avoided as the presumption is that the legislature has deliberately and consciously used the words for carrying out the purpose of the Act. The legal maxim a verbis legis non est recedendum which means, "from the words of law, there must be no departure" has to be kept in mind.

47. Since after the filing of the charge-sheet, the court reaches the stage of inquiry and as soon as the court frames the charges, the trial commences, and therefore, the power under Section 319(1) CrPC can be exercised at any time after the charge- sheet is filed and before the pronouncement of judgment, except during the stage of Sections 207/208 CrPC, committal, etc. which is only a pre- trial stage, intended to put the process into motion. This stage cannot be said to be a judicial step in the true sense for it only requires an application of mind rather than a judicial application of mind. At this pre-trial stage, the Magistrate is required to perform acts in the nature of administrative work rather than judicial such as ensuring compliance with Sections 207 and 208 CrPC, and committing the matter if it is exclusively triable by the Sessions Court. Therefore, it would be legitimate for us to conclude that the Magistrate at the stage of Sections 207 to 209 CrPC is forbidden, by express provision of Section 319 CrPC, to apply his mind to the merits of the case and determine as to whether any accused needs to be added or subtracted to face trial before the Court of Session.

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

(emphasis supplied)

17. In view of the reference contained in the order passed by the Bench consisting of two Hon'ble Judges seeking clarity in the matter due to the view taken by another Bench of two Hon'ble Judges in **Shashikant Singh** (supra) where, purportedly the summoned accused was proceeded against after the judgment was passed against the accused who were originally charged, it is necessary to take note of the situation that had arisen therein and the conclusion reached in that case. It is noted that in a case under Section 302/34 of IPC wherein Shivakant Singh, the brother of Shashikant Singh (supra) was murdered, the trial proceeded against one Chandra Shekar Singh. When the evidence was recorded it was found that Tarkeshwar Singh and two others had also committed the offence of murder of Shivakant Singh. **The learned Additional Sessions Judge by order dated 07.04.2001 exercised the power under Section 319 of CrPC and ordered to issue a warrant of arrest so that they may be tried together with Chandra Shekar Singh, the accused against whom the trial was proceeding.** The said order dated 07.04.2001 summoning the accused came to be assailed by Tarkeshwar Singh before the High Court in Criminal Revision No.269 of 2001. During the pendency of the said Revision Petition before the High Court the learned Additional Sessions Judge concluded the pending trial against the originally charged accused Chander Shekar Singh and convicted him by the judgment dated 16.07.2001. The question which therefore arose in that context was as to whether the trial in the case in which additional accused were summoned under Section

319 of CrPC including Tarkeshwar Singh can proceed in view of the phrase “could be tried together with the accused” contained in Section 319(1) of CrPC after the trial against other accused had concluded with the order of conviction.

18. In that context the Bench of two Hon’ble Judges which allowed the trial to proceed against the summoned accused, Tarkeshwar Singh and others held as hereunder:

“9. The intention of the provision here is that where in the course of any enquiry into, or trial of, an offence, it appears to the court from the evidence that any person not being the accused has committed any offence, the court may proceed against him for the offence which he appears to have committed. At that stage, the court would consider that such a person could be tried together with the accused who is already before the court facing the trial. **The safeguard provided in respect of such person is that, the proceedings right from the beginning have mandatorily to be commenced afresh and the witnesses reheard. In short, there has to be a de novo trial against him. The provision of de novo trial is mandatory. It vitally affects the rights of a person so brought before the court. It would not be sufficient to only tender the witnesses for the cross-examination of such a person. They have to be examined afresh. Fresh examination-in-chief and not only their presentation for the purpose of the cross-examination of the newly added accused is the mandate of Section 319(4). The words “could be tried together with the accused” in Section 319(1), appear to be only directory. “Could be” cannot under these circumstances be held to be “must be”. The provision cannot be interpreted to mean that since the trial in respect of a person who was before the court has concluded with the result that the newly added person cannot be tried together with the accused who was before the court when order under Section 319(1) was passed, the order would become ineffective and inoperative, nullifying the opinion earlier formed by the court on the basis of the evidence before it that the newly added person appears to have committed the offence**

resulting in an order for his being brought before the court.”

(emphasis supplied)

19. Thus, to put the matter in perspective, a perusal of the recommendation of the Law Commission would indicate the intention that an accused who is not charge sheeted but if is found to be involved should not go scot-free. Hence, Section 319 of CrPC was incorporated which provides for the Court to exercise the power to ensure the same before the conclusion of trial so as to try such accused by summoning and being proceeded along with the other accused. In **Shashikant Singh** (supra), a Bench of two Hon’ble Judges, on holding that the joint trial is not a must has held the requirement as contained in Section 319(1) of CrPC as only directory, and as such the judgment of conviction dated 16.07.2001 against the charge-sheeted accused was considered not to be an impediment for the court to proceed against the accused who was added by the summoning order dated 07.04.2001, which in any case was prior to the conclusion of the trial which in our view satisfies the requirement since the summoning order was before the judgment. In the case of **Hardeep Singh** (supra) also the power of the Court under Section 319 of CrPC has been upheld, reiterated, and it has been held that such power is available to be exercised at any time before the pronouncement of judgment. Therefore, there is no conflict or diverse view in the said decisions insofar as the exercise of power, the manner and the stage at which power is to be exercised. However, a certain amount of ironing the crease is required to explain the connotation of the phrase “could be tried together with the accused” appearing in sub-section (1) read with the requirement in sub-section 4(a) to Section 319 of CrPC and to understand the true purport of exercising the power as per the phrase “before the pronouncement of judgment”.

20. A close perusal of Section 319 of CrPC indicates that the power bestowed on the court to summon any person who is not an accused in the case is, when in the course of the trial it appears from the evidence that such person has a role in committing

the offence. **Therefore, it would be open for the Court to summon such a person so that he could be tried together with the accused and such power is exclusively of the Court. Obviously, when such power is to summon the additional accused and try such a person with the already charged accused against whom the trial is proceeding, it will have to be exercised before the conclusion of trial.** The connotation 'conclusion of trial' in the present case cannot be reckoned as the stage till the evidence is recorded, but, is to be understood as the stage before pronouncement of the judgment as already held in **Hardeep Singh** (supra) since on judgment being pronounced the trial comes to a conclusion since until such time the accused is being tried by the Court.

27. Therefore, from a perusal of the provisions and decisions of this Court, it is clear that the conclusion of the trial in a criminal prosecution if it ends in conviction, a judgment is considered to be complete in all respects only when the sentence is imposed on the convict, if the convict is not given the benefit of Section 360 of CrPC. Similarly, in a case where there are more than one accused and if one or more among them are acquitted and the others are convicted, the trial would stand concluded as against the accused who are acquitted and the trial will have to be concluded against the convicted accused with the imposition of sentence. When considered in the context of Section 319 of CrPC, there would be no dichotomy as argued, since what **becomes relevant here is only the decision to summon a new accused based on the evidence available on record** which would not prejudice the existing accused since in any event they are convicted.

28. In that view of the matter, if the Court finds from the evidence recorded in the process of trial that any other person is involved, such power to summon the accused under Section 319 of CrPC can be exercised by passing an order to that effect before the sentence is imposed and the judgment is complete in all respects bringing the trial to a conclusion. While arriving at such conclusion what is also to be kept in view is the requirement of sub-section (4) to Section 319 of CrPC. **From the said provision it is clear**

that if the learned Sessions Judge exercises the power to summon the additional accused, the proceedings in respect of such person shall be commenced afresh and the witnesses will have to be re-examined in the presence of the additional accused. In a case where the learned Sessions Judge exercises the power under Section 319 of CrPC after recording the evidence of the witnesses or after pronouncing the judgment of conviction but before sentence being imposed, the very same evidence which is available on record cannot be used against the newly added accused in view of Section 273 of CrPC. **As against the accused who has been summoned subsequently a fresh trial is to be held.** However while considering the application under Section 319 of CrPC, if the decision by the learned Sessions Judge is to summon the additional accused before passing the judgment of conviction or passing an order on sentence, the conclusion of the trial by pronouncing the judgment is required to be withheld and the application under Section 319 of CrPC is required to be disposed of and only then the conclusion of the judgment, either to convict the other accused who were before the Court and to sentence them can be proceeded with. This is so since the power under Section 319 of CrPC can be exercised only before the conclusion of the trial by passing the judgment of conviction and sentence.

29. Though Section 319 of CrPC provides that such person summoned as per sub-section (1) thereto could be jointly tried together with the other accused, keeping in view the power available to the Court under Section 223 of CrPC to hold a joint trial, it would also be open to the learned Sessions Judge at the point of considering the application under Section 319 of CrPC and deciding to summon the additional accused, to also take a decision as to whether a joint trial is to be held after summoning such accused by deferring the judgment being passed against the tried accused. If a conclusion is reached that the fresh trial to be conducted against the newly added accused could be separately tried, in such event it would be open for the learned Sessions Judge to order so and proceed to pass the judgment and conclude the trial insofar as the accused against

whom it had originally proceeded and thereafter proceed in the case of the newly added accused. However, what is important is that **the decision to summon an additional accused** either suo-moto by the Court or on an application under Section 319 of CrPC shall in all eventuality be considered and disposed of before the judgment of conviction and sentence is pronounced, as otherwise, the trial would get concluded and the Court will get divested of the power under Section 319 of CrPC. Since a power is available to the Court to decide as to whether a joint trial is required to be held or not, this Court was justified in holding the phrase, “could be tried together with the accused” as contained in Section 319(1) of CrPC, to be directory as held in **Shashikant Singh** (supra) which in our opinion is the correct view.

30. One other aspect which is necessary to be clarified is that if the trial against the absconding accused is split up (bifurcated) and is pending, that by itself will not provide validity to an application filed under Section 319 of CrPC or the order of Court to summon an additional accused in the earlier main trial if such summoning order is made in the earlier concluded trial against the other accused. This is so, since such power is to be exercised by the Court based on the evidence recorded in that case pointing to the involvement of the accused who is sought to be summoned. If in the split up (bifurcated) case, on securing the presence of the absconding accused the trial is commenced and if in the evidence recorded therein it points to the involvement of any other person as contemplated in Section 319 of CrPC, such power to summon the accused can certainly be invoked in the split up (bifurcated) case before conclusion of the trial therein.

31. In analysing the issue and making the above conclusion on all aspects, we are also persuaded by the view taken by this Court, among others, in the case of **Rajendra Singh vs. State of U.P. and Another** (2007) 7 SCC 378 wherein it is concluded with regard to the object of Section 319 of CrPC as hereunder:-

“20. The power under Section 319 of the Code is conferred on the court to ensure that justice is done to the society by bringing to book all those guilty of

an offence. One of the aims and purposes of the criminal justice system is to maintain social order. It is necessary in that context to ensure that no one who appears to be guilty escapes a proper trial in relation to that guilt. There is also a duty to render justice to the victim of the offence. It is in recognition of this that the Code has specifically conferred a power on the court to proceed against others not arrayed as accused in the circumstances set out by this section. It is a salutary power enabling the discharge of a court's obligation to the society to bring to book all those guilty of a crime.

21. Exercise of power under Section 319 of the Code, in my view, is left to the court trying the offence based on the evidence that comes before it. The court must be satisfied of the condition precedent for the exercise of power under Section 319 of the Code. There is no reason to assume that a court trained in law would not exercise the power within the confines of the provision and decide whether it may proceed against such person or not. There is no rationale in fettering that power and the discretion, either by calling it extraordinary or by stating that it will be exercised only in exceptional circumstances. It is intended to be used when the occasion envisaged by the section arises.”

32. We have also kept in view the point by point analysis of the object and power to be exercised under Section 319 of CrPC, as has been indicated in para 34 of **Manjit Singh vs. State of Haryana and Others** (2021) SCC Online SC 632.

33. For all the reasons stated above, we answer the questions referred as hereunder:-

“I. Whether the trial court has the power under Section 319 of CrPC for summoning additional accused when the trial with respect to other co-accused has ended and the judgment of conviction rendered on the same date before pronouncing the summoning order?

The power under Section 319 of CrPC is to be invoked and exercised before the pronouncement of the order of sentence where there is a judgment of conviction of the accused. In the case of acquittal,

the power should be exercised before the order of acquittal is pronounced.

Hence, the summoning order has to precede the conclusion of trial by imposition of sentence in the case of conviction. If the order is passed on the same day, it will have to be examined on the facts and circumstances of each case and if such summoning order is passed either after the order of acquittal or imposing sentence in the case of conviction, the same will not be sustainable.

II. Whether the trial court has the power under Section 319 of the CrPC for summoning additional accused when the trial in respect of certain other absconding accused (whose presence is subsequently secured) is ongoing/pending, having been bifurcated from the main trial?

The trial court has the power to summon additional accused *when the trial is proceeded in respect of the absconding accused after securing his presence, subject to the evidence recorded in the split up (bifurcated) trial pointing to the involvement of **the accused sought to be summoned**. But the evidence recorded in the main concluded trial cannot be the basis of the summoning order if such power has not been exercised in the main trial till its conclusion.*

III. What are the guidelines that the competent court must follow while exercising power under Section 319 CrPC?"

(i) If the competent court finds evidence or if application under Section 319 of CrPC 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.

(ii) The Court shall thereupon first decide the need or otherwise to summon the additional accused and pass orders thereon.

(iii) If the decision of the court is to exercise the power under Section 319 of CrPC and summon the accused, *such summoning order shall be*

passed before proceeding further with the trial in the main case.

(iv) If the summoning order of additional accused is passed, depending on the stage at which it is passed, the Court shall also apply its mind to the fact as to whether such summoned accused is to be tried along with the other accused or separately.

(v) If the decision is for joint trial, the fresh trial shall be commenced only after securing the presence of the summoned accused.

(vi) If the decision is that the summoned accused can be tried separately, on such order being made, there will be no impediment for the Court to continue and conclude the trial against the accused who were being proceeded with.

(vii) If the proceeding paused as in (i) above is in a case where the accused who were tried are to be acquitted and the decision is that the summoned accused can be tried afresh separately, there will be no impediment to pass the judgment of acquittal in the main case.

(viii) If the power is not invoked or exercised in the main trial till its conclusion and if there is a split-up (bifurcated) case, the power under Section 319 of CrPC 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.

(ix) If, after arguments are heard and the case is reserved for judgment the occasion arises for the Court to invoke and exercise the power under Section 319 of CrPC, the appropriate course for the court is to set it down for re-hearing.

(x) On setting it down for re-hearing, the above laid down procedure to decide about summoning; holding of joint trial or otherwise shall be decided and proceeded with accordingly.

(xi) Even in such a case, at that stage, if the decision is to summon additional accused and hold a joint trial the trial shall be conducted afresh and de novo proceedings be held.

(xii) *If, in that circumstance, the decision is to hold a separate trial in case of the summoned accused as indicated earlier;*

(a) *The main case may be decided by pronouncing the conviction and sentence and then proceed afresh against summoned accused.*

(b) *In the case of acquittal the order shall be passed to that effect in the main case and then proceed afresh against summoned accused.”*

14. The Supreme Court in **Sartaj Singh Vs. The State of Haryana, AIR 2021 SC 1513**, held as follows:-

6.1 *While considering the rival submissions, the law on the scope and ambit of Section 319 CrPC is required to be considered and for that few decisions of this Court are required to be referred to.*

6.1.1 *In Hardeep Singh (supra), this Court had an occasion to consider in detail the scope and ambit of the powers of the Magistrate under Section 319 CrPC, the object and purpose of Section 319 CrPC etc. It is observed in the said decision that the entire effort is not to allow the real perpetrator of an offence to get away unpunished. It is observed that this is also a part of fair trial and in order to achieve this very end that the legislature thought of incorporating the provisions of Section 319 CrPC. It is further observed that for the empowerment of the courts to ensure that the criminal administration of justice works properly, the law has been appropriately codified and modified by the legislature under the CrPC indicating as to how the Courts should proceed to ultimately find out the truth so that the innocent does not get punished but at the same time, the guilty are brought to book under the law. It is also observed that it is the duty of the court to find out the real truth and to ensure that the guilty does*

not go unpunished. In Paragraphs 8 and 9, this Court observed and held as under:

“8. The constitutional mandate under Articles 20 and 21 of the Constitution of India provides a protective umbrella for the smooth administration of justice making adequate provisions to ensure a fair and efficacious trial so that the accused does not get prejudiced after the law has been put into motion to try him for the offence but at the same time also gives equal protection to victims and to society at large to ensure that the guilty does not get away from the clutches of law. For the empowerment of the courts to ensure that the criminal administration of justice works properly, the law was appropriately codified and modified by the legislature under CrPC indicating as to how the courts should proceed in order to ultimately find out the truth so that an innocent does not get punished but at the same time, the guilty are brought to book under the law. It is these ideals as enshrined under the Constitution and our laws that have led to several decisions, whereby innovating methods and progressive tools have been forged to find out the real truth and to ensure that the guilty does not go unpunished.

9. The presumption of innocence is the general law of the land as every man is presumed to be innocent unless proven to be guilty. Alternatively, certain statutory presumptions in relation to certain class of offences have been raised against the accused whereby the presumption of guilt prevails till the accused discharges his burden upon an onus being cast upon him under the law to prove himself to be

innocent. These competing theories have been kept in mind by the legislature. The entire effort, therefore, is not to allow the real perpetrator of an offence to get away unpunished. This is also a part of fair trial and in our opinion, in order to achieve this very end that the legislature thought of incorporating provisions of Section 319 CrPC. It is with the said object in mind that a constructive and purposive interpretation should be adopted that advances the cause of justice and does not dilute the intention of the statute conferring powers on the court to carry out the abovementioned avowed object and purpose to try the person to the satisfaction of the court as an accomplice in the commission of the offence that is the subjectmatter of trial.”

6.1.2 In the said case, the following five questions fell for consideration before this Court.

- (i) What is the stage at which power under Section 319 CrPC can be exercised?
- (ii) Whether the word “evidence” used in Section 319(1) CrPC could only mean evidence tested by cross examination or the court can exercise the power under the said provision even on the basis of the statement made in the examination in chief of the witness concerned?
- (iii) Whether the word “evidence” used in Section 319(1) CrPC has been used in a comprehensive sense and includes the evidence collected during investigation or the word “evidence” is limited to the evidence recorded during trial?
- (iv) What is the nature of the satisfaction required to invoke the power under Section 319 CrPC to arraign an accused? Whether the power under Section 319(1) CrPC can

be exercised only if the court is satisfied that the accused summoned will in all likelihood be convicted?

(v) Does the power under Section 319 CrPC extend to persons not named in the FIR or named in the FIR but not charged or who have been discharged?”

6.1.3 *While considering the aforesaid questions, this Court in Hardeep Singh (supra) observed and held as under:*

12. *Section 319 CrPC springs out of the doctrine judex damnatur cum nocens absolvitur (Judge is condemned when guilty is acquitted) and this doctrine must be used as a beacon light while explaining the ambit and the spirit underlying the enactment of Section 319 CrPC.*

13. *It is the duty of the court to do justice by punishing the real culprit. Where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial. The question remains under what circumstances and at what stage should the court exercise its power as contemplated in Section 319 CrPC?*

14. *The submissions that were raised before us covered a very wide canvas and the learned counsel have taken us through various provisions of CrPC and the judgments that have been relied on for the said purpose. The controversy centres around the stage at which such powers can be invoked by the court and the material on the basis whereof such powers can be exercised.*

17. Section 319 CrPC allows the court to proceed against any person who is not an accused in a case before it. Thus, the person against whom summons are issued in exercise of such powers, has to necessarily not be an accused already facing trial. He can either be a person named in Column 2 of the chargesheet filed under Section 173 CrPC or a person whose name has been disclosed in any material before the court that is to be considered for the purpose of trying the offence, but not investigated. He has to be a person whose complicity may be indicated and connected with the commission of the offence.

18. The legislature cannot be presumed to have imagined all the circumstances and, therefore, it is the duty of the court to give full effect to the words used by the legislature so as to encompass any situation which the court may have to tackle while proceeding to try an offence and not allow a person who deserves to be tried to go scotfree by being not arraigned in the trial in spite of the possibility of his complicity which can be gathered from the documents presented by the prosecution.

19. The court is the sole repository of justice and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency. The desire to avoid trial is so strong that an accused makes efforts at times to get himself absolved even at the stage of investigation or inquiry even though

he may be connected with the commission of the offence.

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22. In our opinion, Section 319 CrPC is an enabling provision empowering the court to take appropriate steps for proceeding against any person not being an accused for also having committed the offence under trial. It is this part which is under reference before this Court and therefore in our opinion, while answering the question referred to herein, we do not find any conflict so as to delve upon the situation that was dealt with by this Court in *Dharam Pal (CB)* [*Dharam Pal v. State of Haryana*, (2014) 3 SCC 306 : AIR 2013 SC 3018].

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47. Since after the filing of the chargesheet, the court reaches the stage of inquiry and as soon as the court frames the charges, the trial commences, and therefore, the power under Section 319(1) CrPC can be exercised at any time after the chargesheet is filed and before the pronouncement of judgment, except during the stage of Sections 207/208 CrPC, committal, etc. which is only a pretrial stage, intended to put the process into motion. This stage cannot be said to be a judicial step in the true sense for it only requires an application of mind rather than a judicial application of mind. At this pre trial stage, the Magistrate is required to perform acts in the nature of administrative work rather than judicial such as ensuring compliance with Sections 207 and 208 CrPC, and committing the matter if it is exclusively triable by the Sessions Court. Therefore, it would be legitimate for us to conclude that the Magistrate at the stage of Sections

207 to 209 CrPC is forbidden, by express provision of Section 319 CrPC, to apply his mind to the merits of the case and determine as to whether any accused needs to be added or subtracted to face trial before the Court of Session.

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53. It is thus aptly clear that until and unless the case reaches the stage of inquiry or trial by the court, the power under Section 319 CrPC cannot be exercised. In fact, this proposition does not seem to have been disturbed by the Constitution Bench in *Dharam Pal (CB)* [*Dharam Pal v. State of Haryana*, (2014) 3 SCC 306 :

AIR 2013 SC 3018] . The dispute therein was resolved visualising a situation wherein the court was concerned with procedural delay and was of the opinion that the Sessions Court should not necessarily wait till the stage of Section 319 CrPC is reached to direct a person, not facing trial, to appear and face trial as an accused. We are in full agreement with the interpretation given by the Constitution Bench that Section 193 CrPC confers power of original jurisdiction upon the Sessions Court to add an accused once the case has been committed to it.

54. In our opinion, the stage of inquiry does not contemplate any evidence in its strict legal sense, nor could the legislature have contemplated this inasmuch as the stage for evidence has not yet arrived. The only material that the court has before it is the material collected by the prosecution and the court at this stage *prima facie* can apply its mind to find out as to whether a person, who can be an accused, has been erroneously omitted from being arraigned or has

been deliberately excluded by the prosecuting agencies. This is all the more necessary in order to ensure that the investigating and the prosecuting agencies have acted fairly in bringing before the court those persons who deserve to be tried and to prevent any person from being deliberately shielded when they ought to have been tried. This is necessary to usher faith in the judicial system whereby the court should be empowered to exercise such powers even at the stage of inquiry and it is for this reason that the legislature has consciously used separate terms, namely, inquiry or trial in Section 319 CrPC.

55. Accordingly, we hold that the court can exercise the power under Section 319 CrPC only after the trial proceeds and commences with the recording of the evidence and also in exceptional circumstances as explained hereinabove.

56. There is yet another set of provisions which form part of inquiry relevant for the purposes of Section 319 CrPC i.e. provisions of Sections 200, 201, 202, etc. CrPC applicable in the case of complaint cases. As has been discussed herein, evidence means evidence adduced before the court. Complaint case is a distinct category of criminal trial where some sort of evidence in the strict legal sense of Section 3 of the Evidence Act 1872 (hereinafter referred to as "the Evidence Act") comes before the court. There does not seem to be any restriction in the provisions of Section 319 CrPC so as to preclude such evidence as coming before the court in complaint cases even before charges have been framed or the process has been issued. But at that stage as there is no accused before the court,

such evidence can be used only to corroborate the evidence recorded during the trial (sic or) for the purpose of Section 319 CrPC, if so required. What is essential for the purpose of the section is that there should appear some evidence against a person not proceeded against and the stage of the proceedings is irrelevant. Where the complainant is circumspect in proceeding against several persons, but the court is of the opinion that there appears to be some evidence pointing to the complicity of some other persons as well, Section 319 CrPC acts as an empowering provision enabling the court/Magistrate to initiate proceedings against such other persons. The purpose of Section 319 CrPC is to do complete justice and to ensure that persons who ought to have been tried as well are also tried. Therefore, there does not appear to be any difficulty in invoking powers of Section 319 CrPC at the stage of trial in a complaint case when the evidence of the complainant as well as his witnesses are being recorded.

6.1.4 *While answering Questions (iii), namely, whether the word “evidence” used in Section 319(1) CrPC has been used in a comprehensive sense and includes the evidence collected during investigation or the word “evidence” is limited to the evidence recorded during trial, this Court, in the aforesaid decision has observed and held as under:*

“58. *To answer the questions and to resolve the impediment that is being faced by the trial courts in exercising of powers under Section 319 CrPC, the issue has to be investigated by examining the circumstances which give rise to a situation for the court to invoke such powers. The*

circumstances that lead to such inference being drawn up by the court for summoning a person arise out of the availability of the facts and material that come up before the court and are made the basis for summoning such a person as an accomplice to the offence alleged to have been committed. The material should disclose the complicity of the person in the commission of the offence which has to be the material that appears from the evidence during the course of any inquiry into or trial of offence. The words as used in Section 319 CrPC indicate that the material has to be “where ... it appears from the evidence” before the court.

59. *Before we answer this issue, let us examine the meaning of the word “evidence”. According to Section 3 of the Evidence Act, “evidence” means and includes:*

“(1) all statements which the court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry; such statements are called oral evidence; (2) all documents including electronic records produced for the inspection of the court; such documents are called documentary evidence.”

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78. *It is, therefore, clear that the word “evidence” in Section 319 CrPC 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 the power under Section 319 CrPC is to be exercised and not on the basis of*

material collected during the investigation.

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82. This pretrial stage is a stage where no adjudication on the evidence of the offences involved takes place and therefore, after the material along with the chargesheet has been brought before the court, the same can be inquired into in order to effectively proceed with framing of charges. After the charges are framed, the prosecution is asked to lead evidence and till that is done, there is no evidence available in the strict legal sense of Section 3 of the Evidence Act. The actual trial of the offence by bringing the accused before the court has still not begun. What is available is the material that has been submitted before the court along with the charge sheet. In such situation, the court only has the preparatory material that has been placed before the court for its consideration in order to proceed with the trial by framing of charges.

83. It is, therefore, not any material that can be utilised, rather it is that material after cognizance is taken by a court, that is available to it while making an inquiry into or trying an offence, that the court can utilise or take into consideration for supporting reasons to summon any person on the basis of evidence adduced before the court, who may be on the basis of such material, treated to be an accomplice in the commission of the offence. The inference that can be drawn is that material which is not exactly evidence recorded before the court, but is a material collected by the court, can be utilised to corroborate evidence already recorded for the purpose of summoning any other person, other than the accused. This would

harmonise such material with the word “evidence” as material that would be supportive in nature to facilitate the exposition of any other accomplice whose complicity in the offence may have either been suppressed or escaped the notice of the court.

84. *The word “evidence” therefore has to be understood in its wider sense both at the stage of trial and, as discussed earlier, even at the stage of inquiry, as used under Section 319 CrPC. The court, therefore, should be understood to have the power to proceed against any person after summoning him on the basis of any such material as brought forth before it. The duty and obligation of the court becomes more onerous to invoke such powers cautiously on such material after evidence has been led during trial.*

85. *In view of the discussion made and the conclusion drawn hereinabove, the answer to the aforesaid question posed is that apart from evidence recorded during trial, any material that has been received by the court after cognizance is taken and before the trial commences, can be utilised only for corroboration and to support the evidence recorded by the court to invoke the power under Section 319 CrPC. The “evidence” is thus, limited to the evidence recorded during trial.*

6.1.5 *While answering Question (ii) namely, whether the word “evidence” used in Section 319(1) CrPC means as arising in examination in chief or also together with cross examination, in the aforesaid decision, this Court has observed and held as under:*

86. *The second question referred to herein is in relation to the word “evidence” as used under Section 319 CrPC, which leaves no room for doubt that the evidence as understood under Section 3 of the Evidence Act is the statement of the witnesses that are recorded during trial and the documentary evidence in accordance with the Evidence Act, which also includes the document and material evidence in the Evidence Act. Such evidence begins with the statement of the prosecution witnesses, therefore, is evidence which includes the statement during examination in chief. In Rakesh [(2001) 6 SCC 248 : 2001 SCC (Cri) 1090 : AIR 2001 SC 2521], it was held that: (SCC p. 252, para 10)*

“10. ... It is true that finally at the time of trial the accused is to be given an opportunity to cross examine the witness to test its truthfulness. But that stage would not arise while exercising the court's power under Section 319 CrPC. Once the deposition is recorded, no doubt there being no cross examination, it would be a prima facie material which would enable the Sessions Court to decide whether powers under Section 319 should be exercised or not.”

87. *In Ranjit Singh [Ranjit Singh v. State of Punjab, (1998) 7 SCC 149 : 1998 SCC (Cri) 1554 : AIR 1998 SC 3148], this Court held that: (SCC p. 156, para 20)*

“20. ... it is not necessary for the court to wait until the entire evidence is collected for exercising the said powers.”

88. *In Mohd. Shafi [Mohd. Shafi v. Mohd. Rafiq, (2007) 14 SCC 544 :*

(2009) 1 SCC (Cri) 889 : AIR 2007 SC 1899] , it was held that the prerequisite for exercise of power under Section 319 CrPC is the satisfaction of the court to proceed against a person who is not an accused but against whom evidence occurs, for which the court can even wait till the crossexamination is over and that there would be no illegality in doing so. A similar view has been taken by a twoJudge Bench in Harbhajan Singh v. State of Punjab [(2009) 13 SCC 608 : (2010) 1 SCC (Cri) 1135] . This Court in Hardeep Singh [Hardeep Singh v. State of Punjab, (2009) 16 SCC 785 : (2010) 2 SCC (Cri) 355] seems to have misread the judgment in Mohd. Shafi [Mohd. Shafi v. Mohd. Rafiq, (2007) 14 SCC 544 : (2009) 1 SCC (Cri) 889 : AIR 2007 SC 1899] , as it construed that the said judgment laid down that for the exercise of power under Section 319 CrPC, the court has to necessarily wait till the witness is crossexamined and on complete appreciation of evidence, come to the conclusion whether there is a need to proceed under Section 319 CrPC.

89. *We have given our thoughtful consideration to the diverse views expressed in the aforementioned cases. Once examination in chief is conducted, the statement becomes part of the record. It is evidence as per law and in the true sense, for at best, it may be rebuttable. An evidence being rebutted or controverted becomes a matter of consideration, relevance and belief, which is the stage of judgment by the court. Yet it is evidence and it is material on the basis whereof the court can come to a prima facie opinion as to complicity of some other*

person who may be connected with the offence.

90. *As held in Mohd. Shafi [Mohd. Shafi v. Mohd. Rafiq, (2007) 14 SCC 544 : (2009) 1 SCC (Cri) 889 : AIR 2007 SC 1899] and Harbhajan Singh [(2009) 13 SCC 608 : (2010) 1 SCC (Cri) 1135], all that is required for the exercise of the power under Section 319 CrPC is that, it must appear to the court that some other person also who is not facing the trial, may also have been involved in the offence. The prerequisite for the exercise of this power is similar to the prima facie view which the Magistrate must come to in order to take cognizance of the offence. Therefore, no straitjacket formula can and should be laid with respect to conditions precedent for arriving at such an opinion and, if the Magistrate/court is convinced even on the basis of evidence appearing in examination in chief, it can exercise the power under Section 319 CrPC and can proceed against such other person(s). It is essential to note that the section also uses the words "such person could be tried" instead of should be tried. Hence, what is required is not to have a minitrial at this stage by having examination and cross-examination and thereafter rendering a decision on the overt act of such person sought to be added. In fact, it is this minitrial that would affect the right of the person sought to be arraigned as an accused rather than not having any cross-examination at all, for in light of sub-section (4) of Section 319 CrPC, the person would be entitled to a fresh trial where he would have all the rights including the right to cross-examine prosecution witnesses and examine defence witnesses and advance his arguments upon the same. Therefore, even on the basis of*

examination in chief, the court or the Magistrate can proceed against a person as long as the court is satisfied that the evidence appearing against such person is such that it prima facie necessitates bringing such person to face trial. In fact, examination in chief untested by cross-examination, undoubtedly in itself, is an evidence.

91. *Further, in our opinion, there does not seem to be any logic behind waiting till the cross examination of the witness is over. It is to be kept in mind that at the time of exercise of power under Section 319 CrPC, the person sought to be arraigned as an accused, is in no way participating in the trial. Even if the cross examination is to be taken into consideration, the person sought to be arraigned as an accused cannot cross examine the witness(es) prior to passing of an order under Section 319 CrPC, as such a procedure is not contemplated by CrPC. Secondly, invariably the State would not oppose or object to naming of more persons as an accused as it would only help the prosecution in completing the chain of evidence, unless the witness(es) is obliterating the role of persons already facing trial. More so, Section 299 CrPC enables the court to record evidence in absence of the accused in the circumstances mentioned therein.*

92. *Thus, in view of the above, we hold that power under Section 319 CrPC can be exercised at the stage of completion of examination in chief and the court does not need to wait till the said evidence is tested on cross examination for it is the satisfaction of the court which can be gathered from the reasons recorded by the court, in respect of complicity*

of some other person(s), not facing the trial in the offence.

6.1.6 *While answering Question (iv), namely, what is the degree of satisfaction required for invoking the power under Section 319 CrPC, this Court after considering various earlier decisions on this point, has observed and held as under:*

105. *Power under Section 319 CrPC 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 un rebutted, 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 319 CrPC to form any opinion as to the guilt of the accused.

6.1.7 *While answering Question (v), namely, in what situations can the power under Section 319 CrPC be exercised: named in the FIR, but not chargesheeted or has been discharged, this Court has observed and held as under:*

112. *However, there is a great difference with regard to a person who has been discharged. A person who has been discharged stands on a different footing than a person who was never subjected to investigation or if subjected to, but not charge-sheeted. Such a person has stood the stage of inquiry before the court and upon judicial examination of the material collected during investigation, the court had come to the conclusion that there is not even a prima facie case to proceed against such person. Generally, the stage of evidence in trial is merely proving the material collected during investigation and therefore, there is not much change as regards the material existing against the person so discharged.*

Therefore, there must exist compelling circumstances to exercise such power. The court should keep in mind that the witness when giving evidence against the person so discharged, is not doing so merely to seek revenge or is naming him at the behest of someone or for such other extraneous considerations. The court has to be circumspect in treating such evidence and try to separate the chaff from the grain. If after such careful examination of the evidence, the court

is of the opinion that there does exist evidence to proceed against the person so discharged, it may take steps but only in accordance with Section 398 CrPC without resorting to the provision of Section 319 CrPC directly.

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116. Thus, it is evident that power under Section 319 CrPC can be exercised against a person not subjected to investigation, or a person placed in Column 2 of the chargesheet and against whom cognizance had not been taken, or a person who has been discharged. However, concerning a person who has been discharged, no proceedings can be commenced against him directly under Section 319 CrPC without taking recourse to provisions of Section 300(5) read with Section 398 CrPC.

6.2 Considering the law laid down by this Court in *Hardeep Singh* (supra) and the observations and findings referred to and reproduced hereinabove, it emerges that (i) the Court can exercise the power under Section 319 CrPC even on the basis of the statement made in the examination in chief of the witness concerned and the Court need not wait till the cross examination of such a witness and the Court need not wait for the evidence against the accused proposed to be summoned to be tested by cross examination; and (ii) a person not named in the FIR or a person though named in the FIR but has not been chargesheeted or a person who has been discharged can be summoned under Section 319 CrPC, provided from the evidence (may be on the basis of the evidence collected in the form of statement made in the examination in chief of the witness concerned), it appears that such person can be tried along with the accused already facing trial.

6.3 In *S. Mohammed Ispahani v. Yogendra Chandak*, (2017) 16 SCC 226, this Court has observed and held as under: (SCC p. 243)

“35. It needs to be highlighted that when a person is named in the FIR by the complainant, but police, after investigation, finds no role of that particular person and files the charge-sheet without implicating him, the Court is not powerless, and at the stage of summoning, if the trial court finds that a particular person should be summoned as accused, even though not named in the chargesheet, it can do so. At that stage, chance is given to the complainant also to file a protest petition urging upon the trial court to summon other persons as well who were named in the FIR but not implicated in the chargesheet. Once that stage has gone, the Court is still not powerless by virtue of Section 319 CrPC. However, this section gets triggered when during the trial some evidence surfaces against the proposed accused.”

6.4 In the case of *Rajesh v. State of Haryana* (2019) 6 SCC 368, after considering the observations made by this Court in *Hardeep Singh* (supra) referred to hereinabove, this Court has further observed and held that even in a case where the stage of giving opportunity to the complainant to file a protest petition urging upon the trial court to summon other persons as well who were named in FIR but not implicated in the chargesheet has gone, in that case also, the Court is still not powerless by virtue of Section 319 CrPC and even those persons named in FIR but not implicated in charge sheet can be summoned to face the trial provided during the trial some evidence surfaces against the proposed accused.

7. Applying the law laid down by this Court in the aforesaid decisions to the case of the accused on hand, we are of the opinion that learned Trial Court was justified in summoning the private respondents herein to face the trial as accused on the basis of the deposition of the appellant – injured eye witness. As held by this Court in the aforesaid decisions, the accused can be summoned on the basis of even examination in chief of the witness and the Court need not wait till his cross examination. If on the basis of the examination in chief of the witness the Court is satisfied that there is a prima facie case against the proposed accused, the Court may in exercise of powers under Section 319 CrPC array such a person as accused and summon him to face the trial. At this stage, it is required to be noted that right from the beginning the appellant herein – injured eye witness, who was the first informant, disclosed the names of private respondents herein and specifically named them in the FIR. But on the basis of some enquiry by the DSP they were not charge sheeted. What will be the evidentiary value of the enquiry report submitted by the DSP is another question. It is not that the investigating officer did not find the case against the private respondents herein and therefore they were not charge sheeted. In any case, in the examination in chief of the appellant injured eye witness, the names of the private respondents herein are disclosed. It might be that whatever is stated in the examination in chief is the same which was stated in the FIR. The same is bound to be there and ultimately the appellant herein – injured eye witness is the first informant and he is bound to again state what was stated in the FIR, otherwise he would be accused of contradictions in the FIR and the statement before the Court. Therefore, as such, the learned Trial Court was

justified in directing to issue summons against the private respondents herein to face the trial.

8. *Now, so far as the impugned judgment and order passed by the High Court is concerned, it appears that while quashing and setting aside the order passed by the learned Trial Court, the High Court has considered/observed as under:*

“No evidence except the statement of Sartaj Singh, which has already been investigated into by the concerned DSPs was relied upon by the trial Court to summon, which was not sufficient for exercising power under Section 319 Cr.P.C.

As per statement of Sartaj Singh, Palwinder Singh and Satkar Singh gave him lathi blows on the head. Manjeet Singh, Amarjeet Singh, Rajwant Singh, Narvair Singh and Sukhdev Singh were holding gandasi. Manjeet Singh, Amarjeet Singha and Rajwant Singh gave him gandasi blows on the head and face. All the injuries are stated to fall in the offence under Sections 323, 324, 326, 341 read with Section 149 IPC. In case, so many people as mentioned above were giving gandasi and lathies blows on the head, Sartaj Singh was bound to have suffered more injuries, which would not have left him alive and probably he would have been killed on the spot.

He seems to have escaped with only such injuries as have invited offence only under Sections 323, 324, 326, 341 read with Section 149 of IPC. Therefore, the trial Court erred in exercising his jurisdiction summoning the other accused where exaggeration and implication is evident on both sides.”

8.1 *The aforesaid reasons assigned by the High Court are unsustainable in law*

and on facts. At this stage, the High Court was not required to appreciate the deposition of the injured eye witness and what was required to be considered at this stage was whether there is any prima facie case and not whether on the basis of such material the proposed accused is likely to be convicted or not and/or whatever is stated by the injured eye witness in his examination in chief is exaggeration or not. The aforesaid aspects are required to be considered during the trial and while appreciating the entire evidence on record. Therefore, the High Court has materially erred in quashing and setting aside the order passed by the learned Trial Court summoning the accused to face the trial in exercise of powers under Section 319 CrPC, on the reasoning mentioned hereinabove. Even the observations made by the High Court referred to hereinabove are on probability. Therefore, the impugned judgment and order passed by the High Court is not sustainable in law and on facts and is beyond the scope and ambit of Section 319 CrPC.

8.2 *In view of the above and for the reasons stated above, the present appeals succeed. The impugned judgment and order passed by the High Court dated 28.08.2020 in revision application bearing CRR No. 3238 of 2018 and CRMM No. 55631 of 2018 is hereby quashed and set aside and the order passed by the learned Trial Court summoning the private respondents herein to face the trial is hereby restored. The private respondents herein now to face the trial as summoned by the learned Trial Court. The present appeals are allowed accordingly.”*

15. Section 319 Cr.P.C., lays down:-

“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.”

16. **Thus from the evidence placed before this Court** it appears that Sk. Nasir Ali was part of the group of accused persons who have been charged with crime of committing the offences in this case and he has been named by all the eye witnesses. As such he is to be tried along with the persons facing trial.
17. The order under revision thus being not in accordance with law is set aside.
18. The application under Section 319 Cr.P.C. stands allowed.

19. The trial Court to proceed against Sk. Nasir Ali of village Natungram as per Section 319 (4) Cr.P.C.
20. **CRR 71 of 2022 is thus allowed.**
21. All connected applications, if any, stands disposed of.
22. Interim order, if any, stands vacated.
23. Copy of this judgment be sent to the learned Trial Court for necessary compliance.
24. Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)