

IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
Appellate Side

Present:

The Hon'ble Justice Ajay Kumar Gupta

C.R.R. 764 of 2022

Bikash Sarkar & Others

Versus

The State of West Bengal & Another

For the Petitioners : Mr. Supriyo Chattopadhyay, Adv.
Mr. Samaresh Chandra Dhara, Adv.
Ms. Deboshree Chatterjee, Adv.

For the State : Mr. Madhusudan Sur, Adv.
Mr. Dipankar Pramanik, Adv.

For the O.P. No. 2 : Mr. Prabir Majumder, Adv.
Mr. Debraj Shil, Adv.

Heard on : 22.02.2024

Judgment on : 19.03.2024

Ajay Kumar Gupta, J:

1. This instant Criminal Revisional application has been filed by the petitioners challenging the correctness, legality and propriety of an order dated 6th January, 2022 passed by the Court of Learned Additional Chief Judicial Magistrate, Nadia at Ranaghat in connection with G.R. No. 609/2018 arising out of Taherpur Police Station Case No. 64/2018 dated 19th April, 2018 under Sections 447/341/326/307/302/34 of the Indian Penal Code, 1860 whereby the learned Magistrate took cognizance against the present petitioners though they are not charge-sheeted in the police report.

2. The factual matrix of the instant case leading to filing of this application is as under: -

2a. A written complaint was lodged by Subhasis Biswas before the officer-in-charge, Taherpur Police Station on 19th April, 2018 resulted in registration of an FIR being Taherpur Police Station Case No. 64/2018 dated 19th April, 2018 under Sections 447/341/326/307/302/34 of the Indian Penal Code, 1860 against several accused persons including the present petitioners. The investigation of the case has been finally culminated by filing charge sheet against Surajit Mondal and seven others and not charge sheeted against other 9 accused persons including the present

petitioners. De-facto complainant being the opposite party no. 2 herein filed a protest petition (Narazi Petition) on 26th July, 2018 against the alleged mechanical and perfunctory charge-sheet and further prayed for further investigation.

2b. The said protest petition was taken up for hearing together with consideration of charge-sheet on 6th January, 2022. After hearing the parties, the learned Court below rejected the prayer of the de-facto complainant for further investigation. However, cognizance has been taken against all 17 accused persons including the present petitioners although the investigating officer has sought for discharging of the present petitioners along with others as no sufficient materials collected during investigation against them. Be that as it may, the learned Magistrate also rejected the prayer of investigating officer to discharge the petitioners and finally took cognizance against all of them and issued process for their appearance on the next date.

2c. Feeling aggrieved by and dissatisfied with the impugned order of taking cognizance on 6th January, 2022 by the learned Magistrate though no material found against them during investigation, the present petitioners herein have filed this revisional application praying for setting aside the impugned order on the ground that the learned Court below could not take cognizance when

there are no sufficient materials collected during the investigation and they have not been charge-sheeted by the investigating officer.

Under such circumstances, the instant revisional application has come up before this Court for disposal.

SUBMISSION ON BEHALF OF THE PETITIONERS:

3. Learned Advocate appearing on behalf of the Petitioners contended that the learned Court below erred in law in taking cognizance against the present petitioners though they have not been charge-sheeted. The Investigating Officer has prayed for discharge of these petitioners as no sufficient materials found against them during the investigation. When there are no materials against the present petitioners then learned Magistrate should not have been taken cognizance against the present petitioners rather the petitioners herein ought to have been discharged from the case.

4. It is further submitted that there is a provision of Section 319 of the CrPC that the Court may proceed against such persons for any offence when they appear to have committed in course of any enquiry into, or trial of, and offence, if it appears from the evidence that the persons have committed any offence for which such persons may try together with other accused persons and the stage of

applying such provision under Section 319 of the CrPC starts from the stage of trial to at any stage till delivery of final judgment.

5. It is further submitted that a person, not named in the FIR or a person though named in FIR but has not been charge-sheeted or a person who has been discharged, can be summoned under Section 319 of the Cr.PC at later stage i.e. from the stage of trial till at any stage of proceeding. Provided, it appears from the evidence that such persons can be tried along with accused already face trial but not at the initial stage of taking cognizance since they were not charge-sheeted and no materials had been available during the investigation against them as such the learned Magistrate should have discharged the petitioners. To bolster his contentions, the learned advocate referred two judgments as follows:

i. Hardeep Singh Versus State of Punjab and Others¹ ;

ii. Manjeet Singh Versus State of Haryana & Ors.²

SUBMISSION ON BEHALF OF THE STATE:

6. On the other hand, learned counsel appearing on behalf of the State produced the Case Diary and vehemently submitted that the learned Court below did not make any error in taking cognizance

¹ (2014) 3 Supreme Court Cases 92

² 2021 (5) Supreme 718

against the accused persons, when learned Magistrate found sufficient materials against the present petitioners in the case diary. The present petitioners' names are appearing in the FIR and their names are further appearing in the materials collected during the investigation. The Learned Court below cannot close its eyes while considering the materials available in the case diary at the time of taking cognizance. If it is found sufficient material in the case diary against the present petitioners although they were not charge-sheeted by the Investigation Officer, a cognizance can be taken after taking judicial notice of an offence. It is the duty of the learned Magistrate to scan the materials available in the case diary for its judicial notice. Ultimately, the learned Court below took cognizance so question of interference does not arise at all.

7. It is further submitted that Section 319 of the Cr.PC is not at all applicable prior to commencement of trial. It would be applicable at the time of trial or at any stage of the proceedings. Actually, Section 190 of the Cr.PC is applicable in the instant case. Under such provision, the learned Magistrate can take judicial notice for taking cognizance against FIR named accused persons if found sufficient prima facie materials available in the case diary even though they were not charge-sheeted by the investigation officer. The investigating officer of the instant case has overlooked materials and not charge-

sheeted against these petitioners/accused persons while filing police report and prayed for discharge from his end. The learned Court below meticulously gone through the materials available in the case record and rightly took cognizance against charge-sheeted accused persons along with other accused persons against whom sufficient material available in the Case diary. The statements recorded under Sections 161 and 164 of the CrPC of the witnesses established their involvement in the alleged offence and, furthermore, prima facie case has been well established against them. Accordingly, the instant revisional application is liable to be dismissed. Learned Counsel further placed reliance to a decision of Apex Court in ***Vishnu Kumar Tiwari Vs. The State of Uttar Pradesh***³ to bolster his aforesaid contention.

SUBMISSION ON BEHALF OF THE OPPOSITE PARTY NO. 2:

8. Learned counsel appearing on behalf of the Opposite Party No. 2 submitted more or less similar submissions as advanced by the learned counsel appearing on behalf of the State and further submitted that the Section 319 of Cr.PC is not applicable in the instant case at the initial stage of taking cognizance by the learned Magistrate. The allegations against the present petitioners are very serious in nature, they were very much involved in the crime, if

³ AIR 2019 SC 3482, (2019) 8 SCC 27

proved, it attracts mandatory life imprisonment. Furthermore, the Court can take cognizance against the accused persons even if they were not charge-sheeted, if Court may think deem fit and proper on the basis of materials collected during investigation. As such, the instant revisional application is liable to be dismissed.

DISCUSSIONS, ANALYSIS AND CONCLUSION OF THIS COURT:

9. Having heard the rival submissions of the parties and on perusal of the Case Diary, it appears the investigating officer has submitted charge sheet against eight accused persons out of 17 being Charge Sheet No. 119/18 dated 16.08.2018 punishable under Sections 447/341/326/307/302/34 of the Indian Penal Code, 1860 and at the same time, he did not charge sheeted other nine accused persons including the present petitioners. He prayed for discharging of all those accused persons including the petitioners herein from the case. De-facto complainant has filed the protest petition feeling aggrieved by and dissatisfied with the perfunctory investigation done by the IO and prayed for further investigation. Upon hearing the parties, the learned Court below rejected the protest petition with an observation that there is no necessity for further investigation. Although, the learned Court below, on the other hand, took cognizance against all the FIR named accused persons and others considering the materials available in the case diary. The materials

collected during investigation are sufficient to establish prima facie case against all the accused persons.

10. Before coming to a final conclusion with regard to the merits of the case, this Court would like to indicate the provisions of Sections 190 and 319 of the CrPC as under for the sake of convenience and ready reference:

“S.190. Cognizance of offences by Magistrates. —

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence—

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try.

S. 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.”

Upon bare perusal of the aforesaid provisions, this Court finds any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2) of Section 190 of the CrPC, may take cognizance of any offence, which has been committed by the accused persons as contemplated under Section 190 of the CrPC at the initial stage of proceeding.

At the same time, 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, who had facing trial and, in that case, the Court may proceed against such person for the offence which he appears to have committed.

And when the Court proceeds against any person under sub-section (1), then the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard 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 in view of the Section 319 of the CrPC.

Now, this Court would like to go through the judgment referred by the petitioners in ***Hardeep Singh Versus State of Punjab and Others***, the Constitution Bench of the Hon'ble Supreme Court framed five questions while deciding the case in hand as under:

“6.1. (i) What is the stage at which power under Section 319 CrPC can be exercised?

6.2. (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?

6.3. (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?

6.4. (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?

6.5. (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?”

11. From perusal of these formulated questions, the questions stipulated in 6.1 (i) and 6.5. (v) are relevant herein for deciding the present case. To such questions, the Hon’ble Supreme Court sums up conclusions in Paragraphs **117.1 to 117.3** and **117.6** and answered as follows:

“**117.1.** In *Dharam Pal* case, (2014) 3 SCC 306, the Constitution Bench has already held that after committal, cognizance of an offence can be taken against a person not named as an accused but against whom materials are available from the papers filed by the police after completion of the investigation. Such

cognizance can be taken under Section 193 CrPC and the Sessions Judge need not wait till “evidence” under Section 319 CrPC becomes available for summoning an additional accused.

117.2. Section 319 CrPC, significantly, uses two expressions that have to be taken note of i.e. (1) inquiry (2) trial. As a trial commences after framing of charge, an inquiry can only be understood to be a pre-trial inquiry. Inquiries under Sections 200, 201, 202 CrPC, and under Section 398 CrPC are species of the inquiry contemplated by Section 319 CrPC. Materials coming before the court in course of such inquiries can be used for corroboration of the evidence recorded in the court after the trial commences, for the exercise of power under Section 319 CrPC, and also to add an accused whose name has been shown in Column 2 of the charge-sheet.

117.3. In view of the above position the word “evidence” in Section 319 CrPC has to be broadly understood and not literally i.e. as evidence brought during a trial.

117.6. A person not named in the FIR or a person though named in the FIR but has not been charge-sheeted or a person who has been discharged can be summoned under Section 319 CrPC provided from the evidence it appears that such person can be tried along with the accused already facing trial. However, insofar as an accused that has been discharged is concerned

the requirement of Sections 300 and 398 CrPC have to be complied with before he can be summoned afresh.”

12. Similarly, in another judgment referred by the petitioners in ***Manjeet Singh Versus State of Haryana & Ors.***, the Hon’ble Supreme Court observes in Paragraph 14.5 as follows:

“**14.5.** Similarly, the submission on behalf of the private respondents herein that after the impugned judgment and order passed by the High Court there is a much progress in the trial and therefore at this stage power under Section 319 CrPC may not be exercised is concerned, the aforesaid has no substance and cannot be accepted. As per the settled preposition of law and as observed by this Court in the case of **Hardeep Singh (Supra)**, the powers under Section 319 CrPC can be exercised at any stage before the final conclusion of the trial. Even otherwise it is required to be noted that at the time when the application under Section 319 CrPC was given only one witness was examined and examination-in-chief of PW 1 was recorded and while the cross-examination of PW 1 was going on, application under Section 319 CrPC was given which came to be rejected by the learned trial Court. The Order passed by the learned trial Court is held to be unsustainable. If the Learned trial Court would have summoned the private respondents herein at that stage such a situation would not have arisen.

Be that as it may as observed herein powers under Section 319 CrPC can be exercised at any stage from commencing of the trial and recording of evidence/deposition and before the conclusion of the trial at any stage.”

13. In view of the discussion and gone through the aforesaid provision and observation made by the Hon’ble Supreme Court, Section 319 of the CrPC is not applicable at the time of taking cognizance by the Magistrate.

14. In the present case in hand, Section 190 (1)(b) of the CrPC is squarely applicable because the Magistrate can ignore the conclusion arrived at by the investigating officer and independently apply judicious mind to the facts emerging from the investigation and take cognizance of the case, if he thinks deem it fit and exercises his power under Section 190 (1) (b). We may not also forget at this moment the well-settled law declared in the judgment of Hon’ble Supreme Court in ***Minu Kumari V. State of Bihar***⁴. Where the Hon’ble Supreme Court held as follows:

“When a report forwarded by the police to the Magistrate under Section 173(2)(i) is placed before him several situations arise. The report may conclude that an offence appears to have been committed by a particular person or persons and in such a

⁴ (2006) 4 SCC 359

case, the Magistrate may either (1) accept the report and take cognizance of the offence and issue process, or (2) may disagree with the report and drop the proceeding, or (3) may direct further investigation under Section 156(3) and require the police to make a further report. The report may on the other hand state that according to the police, no offence appears to have been committed. When such a report is placed before the Magistrate, he has again option of adopting one of the three courses open i.e., (1) he may accept the report and drop the proceeding; or (2) he may disagree with the report and take the view that there is sufficient ground for further proceeding, take cognizance of the offence and issue process; or (3) he may direct further investigation to be made by the police under Section 156(3). The position is, therefore, now well-settled that upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate

can take cognizance of an offence only if the Investigating Officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the Investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, exercise of his powers under Section 190(1)(b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190(1)(a) though it is open to him to act under Section 200 or Section 202 also. [See M/s. India Carat Pvt. Ltd. v. State of Karnataka and another (AIR 1989 SC 885)].”

15. Accordingly, this instant revisional application has lack of merits. Consequentially, **CRR 764 of 2022** is, thus, dismissed without order as to costs. Connected applications, if any, are also, thus, disposed of.

16. Let a copy of this judgment and order be sent to the learned Court below for information.

17. Case Diary is to be returned to the learned counsel for the State.

18. Interim order, if any, stands vacated.

19. Parties shall act on the server copies of this order uploaded on the website of this Court.

20. Urgent photostat certified copy of this judgment, if applied for, is to be given as expeditiously to the parties on compliance of all formalities.

(Ajay Kumar Gupta, J)

P. Adak (P.A.)