

IN THE HIGH COURT AT CALCUTTA

Criminal Revisional Jurisdiction

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 2546 of 2022

Ejabul Ali Khan @ Ajabull Khan & Ors.

Vs

The State of West Bengal & Anr.

For the Petitioners : Mr. Arindam Jana,
Mr. Soumojit Chatterjee,
Mr. Partha Pratim Dutta.

For the State : Mr. Bibaswan Bhattacharya.

Hearing concluded on : 27.11.2024

Judgment on : 09.12.2024

Shampa Dutt (Paul), J.:

1. The present revisional application has been preferred against order no. 14 dated 31.03.2022 passed by the learned Additional Sessions Judge, Fast Track 2nd Court, Contai, Purba Medinipur in SC No. 88/2021 arising out of GR No. 1242 of 2018, corresponding to Contai P.S. Case No. 337 of 2018 dated 06.10.2018 under Sections 448/342/325/326/307/376/511/427/379/506/34 of the Indian Penal Code, with added Sections 365/368 of the Indian Penal Code thereby allowing the prayer of the opposite party under Section 319 of the Cr.P.C.
2. **Vide the said order dated 31.03.2022 the learned Magistrate considered the application filed by the learned Public Prosecutor under Section 319 Cr.P.C. and on considering the materials on record held as follows :**

".....It is worth mentioning in this aspect that statement of the witnesses recorded U/Sec. 161 of Cr.P.C. and U/Sec. 164 of Cr.P.C. are relevant facts as per Indian Evidence Act. While those statements are made under scrutiny to reach to the conclusion as regards prima facie involvement of the accused persons in the commission of offence, it cannot by any stretch of imagination be concluded that the trial has not yet commenced.

The rule of criminal jurisprudence as prevalent of India is to ensure that the accused persons shall not get prejudiced. There is no likelihood that the accused persons, who are on record at present will get prejudiced if, these four accused persons, who are not on record at present

are implicated at this stage of proceeding by allowing the application filed U/Sec. 319 of Cr.P.C.

If for the sake of argument it is for the time being presumed that the name of the non-charge sheeted accused persons comes during the course of evidence then at that point of time application of Sec. 319 of Cr.P.C. will make the conclusion of the trial delayed because in that case, the trial against the accused persons who would be added U/Sec. 319 of Cr.P.C., is to be commenced in de-novo manner.

This court after having perused the entire materials on record and C.D. and in the light of the above noted observation is of the considered opinion that there is sufficient materials against those four non-charge sheeted accused persons.....”

3. The Court considered the following submission of the learned Public Prosecutor:-

*“.....Though those four accused persons were FIR named accused persons and sufficient materials has come out against them from the statement of Mirja Zinna Beg, Sk. Aktar, Sk. Jahangir and Sk. Alfaz recorded under section 161 Cr.P.C. and from the statement of the witnesses Champa Bibi and Aleka Bibi recorded under **section 164 of Cr.P.C.**, yet the investigation agency while submitting charge sheet has shown them as not sent up for the reason/reasons best known to it and that; Those four accused persons have been intentionally omitted from the charge sheet and they should be included at this stage of framing of charge as not only there is prima facie materials having been collected*

against them but also the defacto informant who put the criminal case into the motion against the accused persons will get highly prejudiced.....”

4. Learned counsel for the State has placed the case dairy.
5. Learned counsel for the petitioners have relied upon the following judgments:-

- I. In **S.Mohammed Ispahani Vs. Yogendra Chandak and Ors., (2017) 16 SCC 226**, wherein the Supreme Court held:-

“34) The aforesaid reasons given by the High Court do not stand the judicial scrutiny. The High Court has not dealt with the subject matter properly and even in the absence of strong and cogent evidence against the appellant, it has set aside the order of the Chief Metropolitan Magistrate and exercised its discretion in summoning in summoning the appellants as accused persons. No doubt, at one place the Constitution Bench observed in Hardeep Singh’s case that the word ‘evidence’ has to be understood in its wider sense, both at the stage of trial and even at the stage of inquiry. In paragraph 105 of the judgment, however, it is observed that ‘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. This sentence gives an impression that only that evidence which has been led before the Court is to be seen and not the evidence which was collected at the stage of inquiry. However there is no contradiction between the two observations as the Court also clarified that the ‘evidence’, on the basis of which an accused is to be summoned to face the trial in an ongoing case, has to be the material that is brought before the Court during trial. The material/evidence collected by the investigating officer at the stage of inquiry can only be utilised for corroboration and to support the evidence recorded by the Court to invoke the power under Section 319 Cr.P.C.

36) *In view of the above, it was not open to the High Court to rely upon the statements recorded under Section 161 Cr.P.C. as independent evidence. It could only be corroborative material. In the first instance, 'evidence' led before the Court had to be taken into consideration. As far as deposition of PW-1 which was given in the Court is concerned, on going through the said statement, it becomes clear that he has not alleged any conspiracy on the part of the appellants/landlords. In fact, none of the witness has said so. In the absence thereof, along with the important fact that these appellants/landlords were admittedly not present at the site when the alleged incident took place, we do not find any 'evidence' within the meaning of Section 319 Cr.P.C. on the basis of which they could be summoned as accused persons. PW-1 and PW-4 have deposed about the incident that took place at the site and the manner in which the persons who are present allegedly behaved. In the statement of PW-4, he has alleged that "Subsequently I came to know the said people is not police officials the people was sent by landlords of the building...". That statement may not be enough for roping in the appellants/ landlords to face the charge under those provisions of IPC with which others are charged. The standard of evidence mentioned in Hardeep Singh's case, namely, 'strong and cogent evidence', is lacking.*

37) *Insofar as the appellant/bailiff is concerned, there is no specific attribution in the FIR or in the depositions of PWs 1 to 6 in the Court. As far as the departmental inquiry, which was held against the bailiff is concerned, as already noted above, he has been found guilty of dereliction of duty only and not of other charge. Pertinently, in the said inquiry, thought the de facto complainant appeared and he also produced another witness, there was no utterance against the appellant/bailiff on these allegations, because of which even the Inquiry Officer has held that such a charge has not been proved. No doubt, that is not a determinative factor as the criminal proceedings are judicial proceedings, totally independent in nature. However, what is relevant is that the Police, during investigation, after the registration of FIR, did not find anything against the appellant/bailiff and even the department has not found anything against him in the departmental inquiry. Further, as pointed out above, during trial, no*

‘strong and cogent evidence’ has surfaced against the appellant/bailiff on the basis of which he could be summoned.”

II. In *Dharam Pal & Ors vs State Of Haryana & Anr.*, AIR 2013

SC 3018, the Supreme Court held as follows:-

“24. In our view, the Magistrate has a role to play while committing the case to the Court of Session upon taking cognizance on the police report submitted before him under Section 173(3) Cr.P.C. In the event the Magistrate disagrees with the police report, he has two choices. He may act on the basis of a protest petition that may be filed, or he may, while disagreeing with the police report, issue process and summon the accused. Thereafter, if on being satisfied that a case had been made out to proceed against the persons named in column no.2 of the report, proceed to try the said persons or if he was satisfied that a case had been made out which was triable by the Court of Session, he may commit the case to the Court of Session to proceed further in the matter.

25. This brings us to the third question as to the procedure to be followed by the Magistrate if he was satisfied that a prima facie case had been made out to go to trial despite the final report submitted by the police. In such an event, if the Magistrate decided to proceed against the persons accused, he would have to proceed on the basis of the police report itself and either inquire into the matter or commit it to the Court of Session if the same was found to be triable by the Session Court.

27. This takes us to the next question as to whether under Section 209, the Magistrate was required to take cognizance of the offence before committing the case to the Court of Session. It is well settled that cognizance of an offence can only be taken once. In the event, a Magistrate takes cognizance of the offence and then commits the case to the Court of Session, the question of taking fresh cognizance of the offence and, thereafter, proceed to issue summons, is not in accordance with law. If cognizance is to be taken of the offence, it could be taken either by the Magistrate or by the Court of Session. The language of Section 193 of the Code very clearly indicates that

once the case is committed to the Court of Session by the learned Magistrate, the Court of Session assumes original jurisdiction and all that goes with the assumption of such jurisdiction. The provisions of Section 209 will, therefore, have to be understood as the learned Magistrate playing a passive role in committing the case to the Court of Session on finding from the police report that the case was triable by the Court of Session. Nor can there be any question of part cognizance being taken by the Magistrate and part cognizance being taken by the learned Session Judge.

28. In that view of the matter, we have no hesitation in agreeing with the views expressed in *Kishun Singh's* case (*supra*) that the Session Courts has jurisdiction on committal of a case to it, to take cognizance of the offences of the persons not named as offenders but whose complicity in the case would be evident from the materials available on record. Hence, even without recording evidence, upon committal under Section 209, the Session Judge may summon those persons shown in column 2 of the police report to stand trial along with those already named therein.

29. We are also unable to accept Mr. Dave's submission that the Session Court would have no alternative, but to wait till the stage under Section 319 Cr.P.C. was reached, before proceeding against the persons against whom a prima facie case was made out from the materials contained in the case papers sent by the learned Magistrate while committing the case to the Court of Session."

III. In *Hardeep Singh vs State Of Punjab & Ors.*, AIR 2014 SC 1400, the Supreme Court held as follows:-

"110. we accordingly sum up our conclusions as follows:

Question Nos.1 & III Q.1 What is the stage at which power under Section 319 Cr.P.C. can be exercised?

AND Q.III Whether the word "evidence" used in Section 319(1) Cr.P.C. 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?

A. In Dharam Pal's case, 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 investigation. Such cognizance can be taken under Section 193 Cr.P.C. and the Sessions Judge need not wait till 'evidence' under Section 319 Cr.P.C. becomes available for summoning an additional accused.

? Section 319 Cr.P.C., 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 Cr.P.C.; and under Section 398 Cr.P.C. are species of the inquiry contemplated by Section 319 Cr.P.C. Materials coming before the Court in course of such enquiries can be used for corroboration of the evidence recorded in the court after the trial commences, for the exercise of power under Section 319 Cr.P.C., and also to add an accused whose name has been shown in Column 2 of the chargesheet.

In view of the above position the word 'evidence' in Section 319 Cr.P.C. has to be broadly understood and not literally i.e. as evidence brought during a trial.

Question No. II Q.II Whether the word "evidence" used in Section 319(1) Cr.P.C. 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?

?A. Considering the fact that under Section 319 Cr.P.C. a person against whom material is

disclosed is only summoned to face the trial and in such an event under Section 319(4) Cr.P.C. the proceeding against such person is to commence from the stage of taking of cognizance, the Court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination.

Question No. IV Q.IV What is the nature of the satisfaction required to invoke the power under Section 319 Cr.P.C. to arraign an accused? Whether the power under Section 319 (1) Cr.P.C. can be exercised only if the court is satisfied that the accused summoned will in all likelihood be convicted?

A. Though under Section 319(4)(b) Cr.P.C. the accused subsequently impleaded is to be treated as if he had been an accused when the Court initially took cognizance of the offence, the degree of satisfaction that will be required for summoning a person under Section 319 Cr.P.C. would be the same as for framing a charge. The difference in the degree of satisfaction for summoning the original accused and a subsequent accused is on account of the fact that the trial may have already commenced against the original accused and it is in the course of such trial that materials are disclosed against the newly summoned accused. Fresh summoning of an accused will result in delay of the trial - therefore the degree of satisfaction for summoning the accused (original and subsequent) has to be different.

Question No.V Q.V Does the power under Section 319 Cr.P.C. extend to persons not named in the FIR or named in the FIR but not chargesheeted or who have been discharged?

A. 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 Cr.P.C. provided from the evidence it appears that such person can be tried along with the accused already facing trial. However, in so far as an accused who has been discharged is concerned

the requirement of ?Sections 300 and 398 Cr.P.C. has to be complied with before he can be summoned afresh.

The matters be placed before the appropriate Bench for final disposal in accordance with law explained hereinabove.”

6. Thus in view of the judgments in ***Dharam Pal & Ors vs State Of Haryana & Anr.(Supra)*** and ***Hardeep Singh vs State Of Punjab & Ors.(Supra)***, the order under revision dated 31.03.2022 passed in SC No. 88 of 2021 arising out of GR No. 1242 of 2018, corresponding to Contai P.S. Case No. 337 of 2018 dated 06.10.2018 under Sections 448/342/325/326/307/376/511/427/379/506/34 of the Indian Penal Code, with added Sections 365/368 of the Indian Penal Code thereby allowing the prayer of the opposite party under Section 319 of the Cr.P.C., being in accordance with law, needs no interference.
7. **CRR 2546 of 2022 is dismissed.**
8. Trial Court to proceed expeditiously with the trial.
9. All connected applications, if any, stand disposed of.
10. Interim order, if any, stands vacated.
11. Copy of this judgment be sent to the learned Trial Court for necessary compliance.
12. Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)