



219-2 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRR-255-2021 (O & M)
Date of decision: 23.07.2024

AJAY KAPOOR ALIAS KITTU

...PETITIONER

V/S

STATE OF PUNJAB AND ANOTHER

...RESPONDENTS

CORAM: HON'BLE MR. JUSTICE HARPREET SINGH BRAR

Present: Mr. Vipin Mahajan, Advocate for the petitioner.
 Mr. Rishabh Singla, AAG, Punjab.
 Mr. Santosh Kumar, Advocate for respondent No.2.

HARPREET SINGH BRAR J. (ORAL)

1. The instant revision petition has been preferred against the impugned order dated 10.12.2019 passed by learned Additional Sessions Judge, Pathankot, vide which, the petitioner has been summoned as an additional accused to face trial along with co-accused by allowing the application filed under Section 319 of Cr.P.C. in case FIR No.7 dated 07.04.2018 registered under Sections 376-D, 292, 34 IPC and 67-A of Information Technology Act at Police Station Dhar Kalan, Pathankot.
2. Brief facts of the case are that the FIR (supra) was registered on the statement of prosecutrix on the allegations that main accused Harish Kumar and her husband Vjay Kumar were doing business together in partnership and that family of Harish Kumar was known to her family and during this period she and Harish Kumar became closer and that there were money transactions between Harish Kumar and her husband. In February, 2015 when husband of the complainant had gone for some work, Harish Kumar along with Rohit *alias* Bablu whose face was covered with handkerchief and one unknown person



came to the house of the complainant and that Harish Kumar committed rape and the person who was wearing handkerchief caught hold of her and unknown person took her pictures and made video and that under threat she was constantly harassed and raped by Harish Kumar. The complainant also makes a reference of some monetary transactions between the petitioner and her husband. Hence the FIR (supra) was registered.

3. In consequence of the FIR (supra) and after completion of the investigation by the concerned police, final report under Section 173 Cr.P.C. was presented in the learned trial Court on 06.03.2019 against co-accused but not against the present petitioner. The learned trial Court framed charges against the co-accused. Thereafter, the prosecution moved an application dated 28.11.2019 under Section 319 Cr.P.C. before the learned trial Court for summoning the petitioner as additional accused and the same was allowed vide impugned order dated 10.12.2019. Hence, the present revision petition.

4. Learned counsel for the petitioner *inter alia* contends that initially, the FIR (supra) was registered against three persons and during investigation, except accused Harish Kumar, other two were declared innocent. Learned counsel further contends that admittedly, the complainant/respondent No.2 is a married lady aged 32 years old having children and the complainant/respondent No.2 and family of Harish Kumar were known to each other and were on visiting terms. During this period, they both came closer to each other and developed relations. Learned counsel submits that during the period, when relations between Harish Kumar and the complainant/respondent No.2 were good, she and her husband had been taking money from Harish Kumar. The complainant/respondent No.2 took Rs.4,00,000/- from Harish Kumar and gave a cheque to return the said amount, which got dishonoured on 27.02.2018.



Thereafter, Harish Kumar filed criminal complaint against the husband of the complainant/respondent No.2 for getting his money back and as a counter blast to the criminal complaint, the complainant/respondent No.2 concocted false story and got FIR (supra) registered.

5. Mr. Santosh Kumar, Advocate has put in appearance on behalf of respondent No.2 and filed his power of attorney, after obtaining no objection from the previous counsel. The same is taken on record. Registry is directed to tag the same at the appropriate place. Learned counsel opposes the prayer of the petitioner on the ground that the complainant/respondent No.2 made a statement in the Court that accused along with the petitioner also committed the same offence but he having high political and police approach managed to get his skin saved. Learned counsel further submits that at the time of committing the offence, petitioner was unknown to the complainant/respondent No.2 but his identification was already given to the police. At that time, the complainant/respondent No.2 also submitted that she can recognize him on his coming in front of her but the police intentionally and deliberately did not bring the petitioner in identification parade at his instance and when the complainant/respondent No.2 identified the petitioner, she immediately reported the matter to the police.

6. Learned State counsel submits that the actions of the petitioner enunciated in the evidence on record which duly establishes his guilt. He submits that the impugned order has been passed in accordance with law and due appreciation of the entire evidence on record and thus, no interference is warranted by this Court.

7. I have heard the learned counsel for the parties and perused the material available on record. It transpires that the FIR (supra) was registered at



the instance of the complainant/respondent No.2 and initially, challan was presented against Harish Kumar only and all other accused were declared innocent during the investigation. Since, the petitioner was not involved in the case, in any manner, she never named him as an accused. Further, the petitioner has been named as an additional accused after about 2^{1/2} years.

8. Mere statement of the complainant, which is not substantiated by any credible material, cannot be a ground to invoke the discretionary and extraordinary power of this Court to summon an additional accused under Section 319 Cr.P.C. In the absence of any material suggesting existence of more than prima facie case available during the course of trial of an offence, the Courts ought to refrain themselves from exercising its discretionary and extraordinary power under Section 319 Cr.P.C. The Constitution Bench of the Hon'ble Supreme Court in ***Hardeep Singh Vs. State of Punjab, SC 2014(1) RCR (Criminal) 623*** has held that the power under Section 319 Cr.P.C is a discretionary and extraordinary power. It is to be exercised only on the basis of the material available before the Court during the trial and not because the Magistrate or the Sessions Judge is of the opinion that some other accused/person may also be guilty of committing that offence. Speaking through Justice B.S. Chauhan, the following was observed :

"105. Power under Section 319 Cr.P.C. 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 Cr.P.C. In Section 319 Cr.P.C. the purpose of providing if "it appears from the evidence that any person not being the accused has committed any offence" is clear from the words "for which such person could be tried together with the accused". The words used are not "for which such person could be convicted". There is, therefore, no scope for the Court acting under Section 319 Cr.P.C. to form any opinion as to the guilt of the accused."

9. Subsequently, Hon'ble Supreme Court in the case of **Sagar Vs. State of Uttar Pradesh and another** Criminal Appeal No. 397 of 2022 (Arising out of SLP(Crl) No.7373 of 2021), referring to **Hardeep Singh** (supra) made the following observations:

"The Constitution Bench has given a caution that power under Section 319 of the Code is a discretionary and extraordinary power which should be exercised sparingly and only in those cases where the circumstances of the case so warrant and the crucial test as noticed above 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."

10. Recently Hon'ble Supreme Court in case of **Juhru & Ors. Versus Karim & Anr. 2023 AIR (Supreme Court) 1160** observing the scope of section 319 Cr.P.C held that:

"It is, thus, manifested from a conjoint reading of the cited decisions that power of summoning under Section 319 Cr.P.C. is not to be exercised routinely and the existence of more than a prima-facie case is sine quo non to summon an additional accused. We may hasten to add that with a view to prevent the frequent misuse of power to summon



additional accused under Section 319 Cr.P.C., and in conformity with the binding judicial dictums referred to above, the procedural safeguard can be that ordinarily the summoning of a person at the very threshold of the trial may be discouraged and the trial Court must evaluate the evidence against the persons sought to be summoned and then adjudge whether such material is, more or less, carry the same weightage and value as has been testified against those who are already facing trial. In the absence of any credible evidence, the power under Section 319 Cr.P.C. ought not to be invoked.”

11. In view of the discussion made hereinabove, the present revision petition is allowed in the following terms: -

- (i). The impugned order dated 10.12.2019 passed by learned Additional Sessions Judge, Pathankot, is hereby, set aside.
- (ii). Nothing observed herein shall be construed as a comment on the merits of the case at hand, thereby, causing prejudice to the case of the prosecution.

12. Pending CRM(s), if any, are also disposed of accordingly.

July 23, 2024
manisha

(HARPREET SINGH BRAR)
JUDGE

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|------|---------------------------|--------|
| (i) | Whether speaking/reasoned | Yes/No |
| (ii) | Whether reportable | Yes/No |