

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Criminal Misc. Application (C-482) No. 442 of 2010

Diwan Singh Dhek & others Applicants

versus

State of Uttarakhand & another Respondents

with

Criminal Misc. Application (C-482) No. 454 of 2010

Krishana Nand Suteri Applicant

versus

State of Uttarakhand & another Respondents

with

Criminal Misc. Application (C-482) No. 472 of 2010

K.S. Kafalia & another Applicants

versus

State of Uttarakhand & another Respondents

with

Criminal Misc. Application (C-482) No. 516 of 2010

Amar Nath Goswami Applicant

versus

State of Uttarakhand & another Respondents

with

Criminal Misc. Application (C-482) No. 581 of 2010

Basant Ballabh Joshi Applicant

versus

State of Uttarakhand & another Respondents

Mr. Sanjay Bhatt, Advocate for the applicant(s).

Mr. P.S. Saun, AGA with Mr. Asif Ali, Brief Holder for the State /
respondent no. 1.

U.C. Dhyani, J. (oral)

Since all the above applications, moved under Section 482 of Cr.P.C., have been filed against the same summoning order, therefore, they are being decided by this common judgment and order for the sake of brevity.

2) The applicant(s), by means of present applications / petitions under Section 482 of Cr.P.C., seek to quash the entire proceedings of criminal case no. 195 of 2009, State vs. Suresh Ram and others, under Sections 420, 467, 468, 471, 120-B of IPC as also the impugned order dated 27.04.2010, passed in aforesaid criminal case, pending before the court of Chief Judicial Magistrate, Champawat.

3) Sri N.S. Dangi, Sub Divisional Magistrate, Lohaghat submitted a report (Annexure –1 to the petition) on 8th January 2008, regarding embezzlement of the money obtained under Jan Shree Beema Yojana. Sub Divisional Magistrate recommended penal action against the wrongdoers. Mahipal Singh Chauhan, Assistant Manager, Uttarakhand Multipurpose Finance and

Development Corporation, Champawat lodged an FIR against nine accused persons on 16.06.2008, at police station, Kotwali, Champawat, which was registered as case crime no. 180 of 2008, under Section 420 of IPC. After the investigation, a charge-sheet was submitted against the accused persons for the selfsame offence. Trial against them proceeded in the court of Chief Judicial Magistrate, Champawat. While the trial against the main accused persons was underway and examination-in-chief of PW1 Narain Singh Dangi, Sub Divisional Magistrate was recorded, an application under Section 319 of Cr.P.C. was moved on behalf of prosecution to summon other accused persons also. Those accused persons, against whom no charge-sheet was submitted, but were sought to be summoned under Section 319 of Cr.P.C., were - K.S. Kafalia, Dr. S.C. Joshi, Madhav Ram Arya, Narayan Ram, Umrao Saini, Kishan Ram, Basant Ballabh Joshi, Yogesh Joshi, Krishnanand, Amar Nath Goswami, Diwan Singh Dhek and A.S. Gunjyal.

4) On the application dated 27.04.2010 of the Prosecuting Officer, Champawat, learned Chief Judicial Magistrate, Champawat summoned these accused persons in exercise of his jurisdiction under Section 319 of Cr.P.C., vide order dated 27.04.2010. The said order dated 27.04.2010, is under challenge before this Court in the aforesaid applications under Section 482 of Cr.P.C.

5) It was PW1, who submitted the inquiry report dated 8th January 2008 to the District Magistrate, Champawat and recommended taking penal action against those who were responsible for the embezzlement of money under Jan Shree Beema Yojana. It was on the basis of the report of the PW1 that the Assistant Manager of Uttarakhand Multipurpose Finance and Development Corporation, Champawat lodged a report against nine accused persons. **The FIR was not lodged against the present applicants, despite the fact that a full-fledged inquiry was conducted by PW1 in this behalf. It was again on the basis of examination-in-chief of PW1 and on the application of the Prosecuting Officer that the jurisdiction under Section 319 of Cr.P.C. was invoked by the learned Chief Judicial Magistrate, Champawat for summoning present applicants.** Such an application under Section 319 of Cr.P.C. was filed by the Prosecuting Officer without having waited for the cross-examination of PW1. Needless to say that no other prosecution witness, by then, entered into the witness box. Said action of Prosecuting Officer, as also of invoking jurisdiction under Section 319 of Cr.P.C. by learned Chief Judicial Magistrate was premature.

6) Hon'ble Supreme Court in **Mohd. Shafi v Mohd. Rafiq and another, AIR 2007 SC 1899**, observed in paras 11 and 12 as under:

“The Trial Judge, as noticed by us, in terms of Section 319 of the Code of Criminal Procedure was required to arrive at his satisfaction. If he thought that

the matter should receive his due consideration only after the cross-examination of the witnesses is over, no exception thereto could be taken far less at the instance of a witness and when the State was not aggrieved by the same.

.....Such satisfaction can be arrived at inter alia upon completion of the cross-examination of the said witness. For the said purpose, the court concerned may also like to consider other evidence.....”

7) Hon’ble Apex Court in **Lok Ram v Nihal Singh, (2006) 10 SCC 192**, observed as below:

“6.....The court, while examining an application under Section 319 of the Code, has also to bear in mind that there is no compelling duty on the court to proceed against other persons. In a nutshell, for exercise of discretion under Section 319 of the Code all relevant factors, including those noticed above, have to be kept in view and an order is not required to be made mechanically merely on the ground that some evidence had come on record implicating the person sought to be added as an accused.”

.....Different standards are to be required to be applied at different stages. Whereas the test of prima facie case may be sufficient for taking cognizance of an offence, the court must be satisfied that there exists a strong suspicion at the stage of framing of charge. While framing charge, the court must consider the entire material on record to form an opinion that the

evidence if unrebutted would lead to a judgment of conviction.

.....Whether a higher standard be set up for the purpose of invoking the jurisdiction under Section 319 of the Code is the question. An answer to this question should be rendered in the affirmative. Unless a higher standard for the purpose of forming an opinion to summon a person as an additional accused is laid down, the ingredients thereof, viz., (i) an extraordinary case, and (ii) a case for sparing exercise of jurisdiction, would not be satisfied.....”

8) In **Y. Saraba Reddy v Puthur Rami Reddy, (2007) 4 SCC 773**, Hon’ble Supreme Court opined that – “an order under Section 319 of the Code, therefore, should not be passed only because the first informant or one of the witnesses seeks to implicate other person(s). Sufficient and cogent reasons are required to be assigned by the court so as to satisfy the ingredients of the provisions. Mere *Ipse Dixit* would not serve the purpose. Such an evidence must be convincing one at least for the purpose of exercise of the extraordinary jurisdiction. For the aforementioned purpose, the courts are required to apply stringent tests; one of the tests being whether evidence on record is such which would reasonably lead to conviction of the person sought to be summoned.

The observation of this Court in MCD and other decisions following the same is that mere existence of a prima facie case may not serve the purpose. Different standards are required to be applied at different stages. Whereas the test of prima facie case may be sufficient for taking cognizance of an offence at the stage of framing of

charge, the court must be satisfied that there exists a strong suspicion. While framing charge in terms of Section 227 of the Code, the court must consider the entire materials on record to form an opinion that the evidence if unrebutted would lead to a judgment of conviction.

Whether a higher standard be set up for the purpose of invoking the jurisdiction under Section 319 of the Code is the question. The answer to those questions should be rendered in the affirmative. Unless a higher standard for the purpose of forming an opinion to summon a person as an additional accused is laid down, the ingredients thereof viz. (i) an extraordinary case, and (ii) a case for sparingly (*sic* sparing) exercise of jurisdiction, would not be satisfied.

We, therefore, are of the opinion that the impugned judgment cannot be sustained which is set aside accordingly and the matter is remitted to the learned Sessions Judge for consideration of the matter afresh. The appeals are allowed with the aforementioned directions.”

9) **In Lal Suraj alias Suraj Singh and another v State of Jharkhand, (2009) 2 SCC 696**, the Hon’ble Supreme Court laid down following guidelines:

“The principle of strong suspicion may be a criterion at the stage of framing of charge as all the materials brought during investigation were required to be taken into consideration, but, for the purpose of summoning a person, who did not figure as accused, a different legal principle is required to be applied. A court framing a charge would have before it all the materials on record which were required to be proved by the prosecution. In a case where, however, the court

exercises its jurisdiction under Section 319 CrPC, the power has to be exercised on the basis of the fresh evidence brought before the court. There lies a fine but clear distinction.”

10) It was further cautioned by the Hon’ble Apex Court in **Kailash v State of Rajasthan and another, (2008) 14 SCC 51**, that the discretion under Section 319 CrPC has to be exercised very sparingly and with caution and only when the court concerned is satisfied that some offence has been committed by such person. This power has to be essentially exercised only on the basis of the evidence. It could, therefore, be used only after the legal evidence comes on record and from that evidence it appears that the person concerned has committed an offence. The words “it appears” are not to be read lightly. In that the court would have to be circumspect while exercising this power and would have to apply the caution which the language of the section demands.

11) It was further observed by Supreme Court in para no. 9 of the said judgment that it is not, therefore, that merely because some witnesses have mentioned the name of such person or that there is some material against that person, the discretion under Section 319 CrPC would be used by the court.....such satisfaction can be arrived at, *inter alia*, upon completion of the cross-examination of the said witness.

12) Learned counsel for the applicants contended that summoning of the accused-applicants under Section 319 of Cr.P.C. was nothing but abuse of the process of the Court, in as much as the impugned order dated 27.04.2010, whereby the accused-applicants were summoned to face the trial, was passed contrary to the scheme of law.

13) It is further contended by learned counsel for the applicants that learned Chief Judicial Magistrate, Champawat ought not have summoned the applicants under Section 319 of Cr.P.C., on the basis of the examination-in-chief of PW1 N.S. Dangi only.

14) It was held by Hon'ble Apex Court in **Brindaban Das and others vs State of West Bengal, (2009) 2 SCC (Cri) 79** that the power under Section 319 Cr.P.C. is to be invoked, not as a matter of course, but in circumstances where the invocation of such power is imperative to meet the ends of justice. The fulcrum on which the invocation of Section 319 Cr.P.C. rests is whether the summoning of persons other than the named accused would make such a difference to the prosecution as would enable it not only to prove its case but to also secure the conviction of the persons summoned. It is only logical that there must be substantive evidence against a person in order to summon him for trial, although he is not named in the charge-sheet or he has been discharged from the case, which would warrant his

prosecution thereafter with a good chance of his conviction.

15) It was observed by Hon'ble Supreme Court in **Sarojben Ashwinkumar Shah etc. vs. State of Gujarat and another, 2011 (2) N.C.C. 414** that the power to proceed against any person, not being the accused before the court, must be exercised only where there appears during inquiry or trial sufficient evidence indicating his involvement in the offence as an accused and not otherwise. The power conferred upon the court is although discretionary but is not to be exercised in a routine manner – In a sense, it is an extraordinary power which should be used very sparingly and only if evidence has come on record which sufficiently establishes that the other person has committed an offence. A mere doubt about involvement of the other person on the basis of the evidence led in before the court is not enough. The court while exercising its power under Section 319 of the Code must keep in view full conspectus of the case including the stage at which the trial has proceeded already and the quantum of evidence collected till then.

16) The Hon'ble Apex Court further cautioned in respect of exercise of jurisdiction under Section 319 of Cr.P.C. in the case of **Sarabjit Singh and another vs State of Punjab and another, 2009 AIR SCW 4236.** Relevant extract of the judgment is reproduced here-in-below:

“An order under Section 319 of the Code, therefore, should not be passed only because the first informant or one of the witnesses seeks to implicate other person(s). Sufficient and cogent reasons are required to be assigned by the court so as to satisfy the ingredients of the provisions. Mere *ipse dixit* would not serve the purpose. Such an evidence must be convincing one at least for the purpose of exercise of the extraordinary jurisdiction.

For the aforementioned purpose, the courts are required to apply stringent tests; one of the tests being whether evidence on record is such which would reasonably lead to conviction of the person sought to be summoned.”

17) The role assigned to some of the present applicants was that they introduced certain bogus persons to open the accounts in their names. Pronouncement of Hon’ble Supreme Court in **Manoranjan Das v State of Jharkhand, (2004) 12 SCC 90**, was cited by learned counsel for the applicants to show that the applicants could not be convicted merely on the basis that they introduced same persons to open their accounts. .

18) **It was PW1, who conducted preliminary inquiry and submitted report to the District Magistrate. It was on the basis of the report of PW1 that the FIR was lodged by the informant against nine persons. Although PW1 conducted full-fledged inquiry on the role of the present applicants, but even then, they were not named in the FIR. Accused-**

applicants were not named in the charge-sheet either, whereas the fact of the matter is that a full-fledged investigation was conducted by the Investigating Officer. Applicants Diwan Singh, Yogesh Joshi and Krishna Singh were the introducers, who introduced some accountholders. The other applicants were public servants, who put their counter-signatures on certain documents, such as, death certificate and income certificates. It was, therefore, not proper on the part of learned Chief Judicial Magistrate to have summoned the applicants only on the basis of the examination-in-chief of PW1.

19) Impugned order suffers from infirmity, in as much as, the grounds mentioned under Section 319 of Cr.P.C. for invoking such power were not met properly. Liberty may, however, be granted to learned Chief Judicial Magistrate to exercise his jurisdiction under Section 319 of Cr.P.C. when the cross-examination of PW1 is complete and some of other prosecution witnesses are also examined.

20) The applications under Section 482 of Cr.P.C. are, accordingly, partly allowed. Impugned order dated 27.04.2010, passed in aforesaid criminal case, pending in the court of Chief Judicial Magistrate, Champawat is hereby quashed qua present applicants only. Liberty is, however, granted to learned Chief Judicial Magistrate, Champawat to exercise his jurisdiction under Section 319 of Cr.P.C. when the cross-examination of PW1 is

complete and some of other prosecution witnesses are also examined. The moment learned Chief Judicial Magistrate arrives at a satisfaction, on the basis of cogent reasons (after obtaining new or fresh evidence), that any person, not being the accused, including the applicants, have committed any offence for which such person(s) could be tried together with the accused, he may proceed against such person(s) for the offence which he (or they) appear(s) to have committed.

(U.C. Dhyani, J.)

Dt. November 25, 2013.

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