A K. RADHAI

v.

C.B.I., COCHIN UNIT

SEPTEMBER 28, 2007

B **[C.K. THAKKER AND ALTAMAS KABIR, JJ.]**

Service Law:

C *Prevention of Corruption Act, 1988; S. 13(1)(d) r/w S. 13(2)/Penal Code, 1860; Ss. 420, 465, 468 and 471:*

Corruption—Bank employee allegedly withdrawn certain amount from bank account fraudulently—Trial Court found accused-employee guilty of committing offences u/ss. 420 and 468 IPC and u/s. 13(2) r/
D *w s.13(1)(d) of 1988 Act and sentenced her accordingly—On appeal, High Court affirmed conviction reducing sentence from 2 years to 1 year for offences punishable u/ss. 420 IPC and s.13(2) r/w S.13(1)(d) of the 1988 Act, but no reduction in sentence was ordered for offence punishable u/s. 468 IPC—On appeal, Held: On the facts and in the*
E *circumstances of the case, ends of justice would be met if conviction of the accused is maintained but substantive sentence imposed on her u/s. 468 IPC is reduced from two years to one year—Directions issued accordingly—Sentencing.*

F **Appellant was employed as a Clerk in a Bank. According to the Prosecution, the appellant got opened a false bank account in the bank and fraudulently withdrawn an amount of Rs.42,000/-. After investigation, charges were framed against the accused-appellant for committing offences punishable under Sections 465, 471 and 420 of the**
G **Indian Penal Code as also under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988. The Trial Court held the charge proved against the appellant, convicted and ordered her to undergo rigorous imprisonment for two years each for offences punishable under Sections 420 and 468 IPC; rigorous imprisonment for**
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six months each under Sections 465 and 471 IPC and rigorous imprisonment for two years for an offence punishable under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 and also imposed fine. Aggrieved, the appellant preferred an appeal before the High Court. The High Court confirmed the conviction reducing the sentence to one year for offences punishable u/s.13(2) r/w s.13(1)(d) of the Prevention of Corruption Act and also u/s.420 IPC. However, no reduction in sentence was ordered by the High Court for offence punishable u/s.468 IPC. Hence the present appeal.

Accused-appellant contended that though the High Court had reduced substantive sentence from two years to one year for certain offences, however, sentence of two years imposed on her has remained as it is, in view of the fact that no reduction in sentence for the offence punishable u/s.468 IPC was ordered and the sentence of two years as imposed by the trial Court continued to remain as it was.

Partly allowing the appeal, the Court

HELD:1.1. It appears that the High Court was of the view that an order of conviction recorded by the trial Court did not call for interference and, hence, it confirmed the conviction of the appellant. It, however, exercised discretion by reducing the sentence imposed on the appellant. Precisely, because of that the High Court reduced the sentence from two years to one year for the offences punishable under the Prevention of Corruption Act, 1988 as also for an offence punishable under Section 420 IPC. Since there was no mention of Section 468 IPC, the sentence of two years imposed on the appellant has remained as it was. [Para 8] [384-C-D]

1.2. On the facts and in the circumstances of the case, ends of justice would be met if conviction of the appellant-accused for an offence punishable under Section 468 IPC is maintained but the substantive sentence imposed on her for the said offence is reduced from two years to one year. [Para 9] [384-E]

1.3. The appellant-accused who is convicted for offences punishable

A **under the Indian Penal Code and under the Prevention of Corruption Act, 1988 is ordered to undergo rigorous imprisonment for one year.**
[Para 10] [384-G]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1303 of 2007.

B

From the Judgment and Order dated 12.10.2006 of the High Court of Kerala at Ernakulam in Criminal Appeal No. 9 of 1997.

Romy Chacko for the Appellant.

C P. Parmeswaran for the Respondent.

The Judgment of the Court was delivered by

C.K. THAKKER, J. 1. Leave granted.

2. This appeal is filed against the judgment and final order passed D by the High Court of Kerala on October 12, 2006 in Criminal Appeal No. 9 of 1997. By the said appeal, the High Court confirmed the conviction of the appellant recorded by the Court of the Special Judge (CBI), Ernakulam on December 27, 1996 but reduced the sentence.

E 3. The facts in nutshell are that the appellant was employed as a Clerk in Syndicate Bank at Fort Branch, Trivendrum. It was the case of the prosecution that a false bank account got opened with Account No. 15799 in the said Branch and an amount of Rs.42,000/- was fraudulently withdrawn by the accused. After investigation, charge was framed against the accused-appellant in the Court of the Special Judge, Central Bureau F of Investigation (CBI), Ernakulam for offences punishable under Sections 465, 468, 471 and 420 of the Indian Penal Code (IPC) as also under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988.

G 4. The Special Judge, after appreciating the evidence of prosecution witnesses, held the charge proved, convicted the appellant and ordered her to undergo rigorous imprisonment for two years each for offences punishable under Sections 420 and 468, IPC, rigorous imprisonment for six months each under Sections 465 and 471, IPC and rigorous H imprisonment for two years for an offence punishable under Section 13(2)

read with Section 13(1)(d) of the Prevention of Corruption Act, 1988. Fine was also imposed by the Court.

5. Being aggrieved by the order passed by the trial Court, the appellant preferred an appeal. The High Court held that no illegality was committed by the trial Court in finding the appellant-accused guilty and in convicting her. With regard to sentence, however, the High Court observed that on the facts and in the circumstances of the case, liberal view was required to be taken. The High Court, therefore, in the operative part of the judgment, observed:

> "Last question is regarding the punishment. Counsel for the appellant argued that the alleged offence was in 1993 and the money was taken during a catastrophic situation as mentioned in Ext.P19. It is further submitted that her husband has deserted her, that she has to maintain her children, that she lost the job also because of the misconduct she has committed and that a lenient view may be taken. Taking into account all these circumstances together, the sentence of imprisonment for two years each imposed for the offence punishable under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act and 420 IPC is reduced to an imprisonment for one year each. No interference is required with regard to the imposition of fine or punishment imposed for other offences. The sentence of imprisonment shall run concurrently".

6. The appellant approached this Court against the order passed by the High Court. On March 9, 2007, when the matter was called out for admission hearing, it was submitted by the learned counsel that though the sentence of imprisonment for two years imposed by the trial Court for an offence punishable under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 was reduced from two years to one year as also sentence of imprisonment for two years for an offence punishable under Section 420, IPC was reduced from two years to one year, no order of reduction of sentence was passed so far as the offence punishable under Section 468, IPC was concerned. The resultant effect was that though the High Court had reduced substantive sentence of the appellant-accused from two years to one year for certain offences,

A sentence of two years imposed on the appellant-accused has remained as it is in view of the fact that for an offence punishable under Section 468, IPC, no reduction was ordered and the sentence imposed by the trial Court continued to remain as it was. Notice was, therefore, issued by the Court only on question of reduction of sentence.

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7. We have heard learned counsel for the parties.

8. On the facts and in the circumstances of the case, in our opinion, the submission of the learned counsel for the appellant is well founded and must be accepted. It appears that the High Court was of the view C that an order of conviction recorded by the trial Court did not call for interference and, hence, it confirmed the conviction of the appellant. It, however, exercised discretion by reducing the sentence imposed on the appellant. Precisely, because of that the High Court reduced the sentence from two years to one year for the offences punishable under the D Prevention of Corruption Act, 1988 as also for an offence punishable under Section 420, IPC. Since there was no mention of Section 468, IPC, the sentence of two years imposed on the appellant has remained as it was.

9. On the facts and in the circumstances of the case, in our opinion, E ends of justice would be met if conviction of the appellant-accused for an offence punishable under Section 468, IPC is maintained but the substantive sentence imposed on her for the said offence is reduced from two years to one year.

10. For the foregoing reasons, in our opinion, the appeal deserves F to be partly allowed and is accordingly allowed to the extent that the conviction of the appellant for an offence punishable under Section 468, IPC is confirmed but the substantive sentence imposed by the trial Court and confirmed by the High Court is reduced from two years to one year. In other words, the appellant-accused who is convicted for offences G punishable under the Indian Penal Code and under the Prevention of Corruption Act, 1988 is ordered to undergo rigorous imprisonment for one year. The appeal is allowed to the extent indicated above.

S.K.S. Appeal partly allowed.

GURIYA @ TABASSUM TAUQUIR AND ORS. A

v.

STATE OF BIHAR AND ANR.

SEPTEMBER 28, 2007

B

[DR. ARIJIT PASAYAT AND D.K. JAIN, JJ.]

Code of Criminal Procedure, 1973:

s. 319—Nature and scope of—Held: The power under the provision is discretionary and extraordinary—It can be exercised by Court **suo motu** *as well as on application—Court has the jurisdiction to direct trial of a person not an accused before it—But such jurisdiction has to be used sparingly and only when compelling reasons exist for such action.* C D

s. 319—Trial of accused—Not originally arraigned as accused—Permissibility—Trial sought on the basis of evidence of witness examined on permission of Court after closure of prosecution evidence and recording of statement of accused—Evidence of PWs not attributing specific roles to the accused—Held: Trial of the accused is not permissible in the facts of the case. E

s. 319(4)(1)(b)—Cognizance of accused—Subsequently added in trial—Held: Cognizance would be presumed to have been taken in respect of such person by virtue of legal fiction created under the provision—Cognizance. F

Words and Phrases—'Evidence'—Meaning of in the context of s. 319 Cr.P.C.

On a complaint, three persons were arraigned as accused and the appellants herein were not arraigned as accused. PWs 1, 2 and 3, in their evidence, had stated only about the presence of the appellants and no definite roles were ascribed to them. After closure of prosecution evidence and after examination of the accused u/s 313 Cr.P.C., an G

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A application u/s 311 Cr.P.C. was filed and on its being allowed two more witnesses namely PWs 4 and 5 were examined. Thereafter an application u/s 319 Cr.P.C. was filed seeking trial of the appellants herein, in view of examination of PWs 4 and 5 new evidence has surfaced requiring their trial. Trial Court rejected the application holding that no such case B was made out. However in their revisional jurisdiction, Sessions Judge as well as High Court held that there were materials against the appellants, on the basis of which his trial was required. Hence the present appeal.

C Allowing the appeal, the Court

HELD: 1.1 On a careful reading of Sec. 319 Cr.P.C. as well as the law laid down by this Court, it becomes clear that the trial court has undoubted jurisdiction to add any person not being the accused before it to face the trial along with other accused persons, if the Court is D satisfied at any stage of the proceeding on the evidence adduced that the persons who have not been arraigned as accused should face the trial. [Para 13]

Joginder Singh and Anr. v. *State of Punjab and Anr.*, AIR (1979) E SC 339 and *Municipal Corporation of Delhi* v. *Ram Kishan Rohtagi and Ors.*, [1983] 1 SCC 1, relied on.

1.2. It is further evident that such person even though had initially been named in the F.I.R. as an accused, but not charge sheeted, can also be added to face the trial. The trial court can take such a step to F add such persons as accused only on the basis of evidence adduced before it and not on the basis of materials available in the charge-sheet or the case diary, because such materials contained in the charge sheet or the case diary do not constitute evidence. The position of an accused who has been discharged stands on a different footing. G [Para 13] [394-H; 395-A]

Sohan Lal and Ors. v. *State of Rajasthan*, AIR (1990) SC 2158, relied on.

H 1.3. Power under Section 319 Cr.P.C. can be exercised by the Court

suo motu or on an application by someone including accused already before it, if it is satisfied that any person other than accused has committed an offence and he is to be tried together with the accused. The power is discretionary and such discretion must be exercised judicially having regard to the facts and circumstances of the case. Undisputedly, it is an extraordinary power which is conferred on the Court and should be used very sparingly and only if compelling reasons exist for taking action against a person against whom action had not been taken earlier. [Para 14] [395-D-E]

Michael Machado and Anr. v. *Central Bureau of Investigation and Anr.*, [2000] 3 SCC 262 and *Krishnappa* v. *State of Karnataka,* [2004] 7 SCC 792, relied on.

1.4. The word "evidence" in Section 319 Cr.P.C. contemplates evidence of witnesses given in Court. Under sub-section (4)(1)(b) of the aforesaid provision, it is specifically made clear that it will be presumed that newly added person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced. That would show that by virtue of sub-section (4)(1)(b) a legal fiction is created that cognizance would be presumed to have been taken so far as newly added accused is concerned. [Para 14] [395-E-F]

Shashikant Singh v. *Tarkeshwar Singh and Anr.*, [2002] 5 SCC 738 and *Lok Ram* v. *Nihal Singh and Anr.*, AIR (2006) SC 1892, relied on

2.1. The Trial Court had rightly rejected the application filed under Section 319 Cr.P.C. The factual position of the present case goes to show that there was no new material after examination of the accused persons under Section 313 Cr.P.C., which threw any light on the incident. The evidence of PWs 4 and 5 is not the basis of the application under Section 319 Cr.P.C. as they have not spoken anything about the appellants. [Paras 15 and 17] [396-E; 395-G-H]

2.2. PWs 1, 2 and 3 have stated about the presence of the appellants without any definite role being ascribed to them in their evidence recorded on three occasions. If really the complainant had any grievance

about the appellants being not made accused, that could have, at the most, be done immediately after the recording of evidence of PWs 1, 2 and 3. That has apparently not been done. Additionally, after the charge-sheet was filed, a protest petition was filed by the complainant and it was dismissed. No explanation whatsoever has been offered as to why the application in terms of Section 319 Cr.P.C. was not filed earlier. Nothing has been stated about the appellants by PWs 4 and 5.

[Para 16] [396-A-D]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1305 of 2007.

From the Judgment and Order dated 22.07.2005 of the High Court of Judicature at Patna in Crl. Revision No. 745 of 2004.

S. Wasim A Qadri and Lakshmi Raman Singh for the Appellants.

Gopal Singh, Anukul Raj, Rituraj Biswas and Shashi Bhushan Kumar for the Respondents.

The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. 1. Leave granted.

2. The appellants call in question legality of the order passed by a learned Single Judge of the Patna High Court dismissing the Criminal Revision filed by them. Challenge before the High Court was to the revisional order passed by learned Additional Sessions Judge, Fast Track Court No.1, Motihari. By order dated 10.09.2004, learned Additional Sessions Judge set aside the order of learned Judicial Magistrate, Motihari in G.R. No.996 of 99/Tr. No.693 of 2004.

3. Background facts in a nutshell are as follows:-

FIR was lodged on 29.05.1999 by Manzoor Baitha alleging that his parents, brother and sisters had a fight with his family members. Annu Siddiqui hit on the head of his son Akbar Hawari with the butt of a pistol and he also snatched away a wrist watch of his son. Cognizance was taken on 27.9.1999 and charge-sheet was filed on 09.09.1999. Charges were framed on 14.3.2000. Only three persons were arrayed as accused

persons and the present appellants were not arrayed as accused. It appears that a protest petition was filed before charges were framed on 14.03.2000 but the same was rejected. Recording of prosecution evidence commenced on 16.04.2001 and continued till 29.04.2002. The prosecution evidence was thereafter closed and the statement of accused persons was recorded in terms of Section 313 of the Code of Criminal Procedure, 1973 (in short 'Cr.P.C.') on 19.02.2003. Thereafter on 07.05.2003, an application in terms of Section 311 Cr.P.C. was filed and was allowed and two more witnesses i.e. PWs 4 and 5 were examined. An application under Section 319 Cr.P.C. was filed on 14.01.2004 stating that new evidence has surfaced which requires the trial of the present appellants. It is to be noted that PWs 4 and 5 were examined on 6.1.2004 pursuant to the order in the application filed under Section 311 Cr.P.C. The petition filed under Section 319 Cr.P.C. was rejected by the Trial Court holding that no case was made out for putting the appellants on trial. Learned Sessions Judge was moved for revision and the same was allowed. The High Court dismissed the revision petition filed on the ground that there are materials against the appellants.

4. Learned counsel for the appellants submitted that the application under Section 319 Cr.P.C. was nothing but an abuse of process of the court as the narration of facts above would go to show. Every possible attempt was made to introduce materials against the appellants which were not on record. Even after the examination of the accused under Section 313 Cr.P.C., an application under Section 311 Cr.P.C. was allowed. Two witnesses were examined on 6.1.2004. Even their evidence in no way connects the appellants to the alleged incident. PWs 1, 2 and 3, who were examined on 16.04.2001, 8.01.2002 and 29.04.2002 merely stated about the alleged presence of the appellants. No definite role was ascribed to them. Therefore, the application in terms of Section 319 Cr.P.C. was not maintainable and in any event was *mala fide*.

5. Learned counsel for the State submitted that the prosecution has not filed any application under Section 319 Cr.P.C. It was only PW-1, the informant who had filed such an application. Learned counsel for the complainant-respondent No. 2 submitted that the appellants were named

A in the FIR. PWs 1, 2 and 3 spoke about their presence. Therefore, they should have been arrayed as accused persons.

6. The parameters for dealing with an application under Section 319 Cr.P.C. have been laid down by this Court in several cases.

B 7. In *Michael Machado and Anr.* v. *Central Bureau of Investigation and Anr.*, [2000] 3 SCC 262 it was observed as follows:-

"The basic requirements for invoking the above section is that it should appear to the court from the evidence collected during trial or in the inquiry that some other person, who is not arraigned C as an accused in that case, has committed an offence for which that person could be tried together with the accused already arraigned. It is not enough that the court entertained some doubt, from the evidence, about the involvement of another person in the offence. In other words, the court must have reasonable satisfaction D from the evidence already collected regarding two aspects. First is that the other person has committed an offence. Second is that for such offence that other person could as well be tried along with the already arraigned accused.

E But even then what is conferred on the court is only a discretion as could be discerned from the words "the court may proceed against such person." The discretionary power so conferred should be exercised only to achieve criminal justice. It is not that the court should turn against another person whenever it comes across F evidence connecting that other person also with the offence. A judicial exercise is called for, keeping a conspectus of the case, including the stage at which the trial has proceeded already and the quantum of evidence collected till then, and also the amount of time which the court had spent for collecting such evidence. It must G be remembered that there is no compelling duty on the court to proceed against other persons.

The court while deciding whether to invoke the power under Section 319 of the Code, must address itself about the other H constraints imposed by the first limb of sub-section (4), that

proceedings in respect of newly-added persons shall be commenced afresh and the witnesses re-examined. The whole proceedings must be recommended from the beginning of the trial, summon the witnesses once again and examine them and cross-examine them in order to reach the stage where it had reached earlier. If the witnesses already examined are quite large in number the court must seriously consider whether the objects sought to be achieved by such exercise are worth wasting the whole labour already undertaken. Unless the court is hopeful that there is a reasonable prospect of the case as against the newly-brought accused ending in being convicted of the offence concerned we would say that the court should refrain from adopting such a course of action"

8. *Shashikant Singh* v. *Tarkeshwar Singh and Anr.,* [2002] 5 SCC 738, it was, *inter-alia* observed as follows:-

"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 courts 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."

9. Again in *Krishnappa* v. *State of Karnataka,* [2004] 7 SCC 792, it was observed as follows:-

"It has been repeatedly held that the power to summon an accused is an extraordinary power conferred on the court and should be used very sparingly and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken.

In the present case, we need not go into the question whether *prima facie* the evidence implicates the appellant or not and whether the possibility of his conviction is remote, or his presence and instigation stood established, for in our view the exercise of discretion by the Magistrate, in any event of the matter, did not call for interference by the High Court, having regard to the facts and circumstances of the case.

In *Michael Machado* v. *Central Bureau of Investigation* construing the words "the court may proceed against such person" in Section 319 CrPC, this Court held that the power is discretionary and should be exercised only to achieve criminal justice and that the court should not turn against another person whenever it comes across evidence connecting that other person also with the offence. This Court further held that a judicial exercise is called for, keeping a conspectus of the case, including the stage at which the trial has already proceeded and the quantum of evidence collected till then, and also the amount of time which the

Court had spent for collecting such evidence. The court, while examining an application under Section 319 CrPC, has also to bear in mind that there is no compelling duty on the court to proceed against other persons. In a nutshell, it means that for exercise of discretion under Section 319 CrPC, all relevant factors, including the one 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.

Applying the test as aforesaid to the facts of the present case, in our view, the trial Magistrate is right in rejecting the application. The incident was of the year 1993. Seventeen witnesses had been examined. The statements of the accused under Section 313 CrPC had been recorded. The role attributed to the appellant, as per the impugned judgment of the High Court, was of instigation. Having regard to these facts coupled with the quashing of proceedings in the year 1995 against the appellant, it could not be held that the discretion was illegally exercised by the Trial Magistrate so as to call for interference in exercise of revisional jurisdiction by the High Court."

10. The scope and ambit of Sec. 319 of the Code have been elucidated in several decisions of this Court. In *Joginder Singh and Anr.* v. *State of Punjab and Anr.*, AIR (1979) SC 339, it was observed:

"6. A plain reading of Sec. 319(1) which occurs in Chapter XXIV dealing with general provisions as to inquiries and trials, clearly shows that it applies to all the Courts including a Sessions Court and as such a Sessions Court will have the power to add any person, not being the accused before it, but against whom there appears during trial sufficient evidence indicating his involvement in the offence, as an accused and direct him to be tried along with the other accused;....."

11. It was further observed in paragraph 9:

"9. As regards the contention that the phrase 'any person not being

A the accused' occurred in Sec. 319 excludes from its operation an accused who has been released by the police under Sec. 169 of the Code and has been shown in column No. 2 of the charge sheet, the contention has merely to be stated to be rejected. The said expression clearly covers any person who is not being tried already B by the Court and the very purpose of enacting such a provision like Sec. 319(1) clearly shows that even persons who have been dropped by the police during investigation but against whom evidence showing their involvement in the offence comes before the Criminal Court are included in the said expression."

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12. In *Municipal Corporation of Delhi* v. *Ram Kishan Rohtagi and Ors.*, [1983] 1 SCC 1 after referring to the decision in *Joginder Singh's* case (supra), it was observed:-

"19. In these circumstances, therefore, if the prosecution can at D any stage produce evidence which satisfies the Court that the other accused or those who have not been arrayed as accused against whom proceedings have been quashed have also committed the offence the Court can take cognizance against them and try them along with the other accused. But, we would hasten to add that E this is really an extraordinary power which is conferred on the Court and should be used very sparingly and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken. More than this we would not like to say anything further at this stage. We leave the entire matter F to the discretion of the Court concerned so that it may act according to law. We would, however, make it plain that the mere fact that the proceedings have been quashed against respondent Nos. 2 to 5 will not prevent the court from exercising its discretion if it is fully satisfied that a case for taking cognizance against them G has been made out on the additional evidence led before it."

13. On a careful reading of Sec. 319 of the Code as well as the aforesaid two decisions, it becomes clear that the trial court has undoubted jurisdiction to add any person not being the accused before it to face the H trial along with other accused persons, if the Court is satisfied at any stage

of the proceeding on the evidence adduced that the persons who have not been arrayed as accused should face the trial. It is further evident that such person even though had initially been named in the F.I.R. as an accused, but not charge sheeted, can also be added to face the trial. The trial court can take such a step to add such persons as accused only on the basis of evidence adduced before it and not on the basis of materials available in the charge-sheet or the case diary, because such materials contained in the charge sheet or the case diary do not constitute evidence. Of course, as evident from the decision reported in *Sohan Lal and Ors.* v. *State of Rajasthan,* AIR (1990) SC 2158 the position of an accused who has been discharged stands on a different footing.

14. Power under Section 319 of the Code can be exercised by the Court *suo motu* or on an application by someone including accused already before it, if it is satisfied that any person other than accused has committed an offence and he is to be tried together with the accused. The power is discretionary and such discretion must be exercised judicially having regard to the facts and circumstances of the case. Undisputedly, it is an extraordinary power which is conferred on the Court and should be used very sparingly and only if compelling reasons exist for taking action against a person against whom action had not been taken earlier. The word "evidence" in Section 319 contemplates evidence of witnesses given in Court. Under Sub-section (4)(1)(b) of the aforesaid provision, it is specifically made clear that it will be presumed that newly added person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced. That would show that by virtue of Sub-section (4)(1)(b) a legal fiction is created that cognizance would be presumed to have been taken so far as newly added accused is concerned. (See *Lok Ram* v. *Nihal Singh and Anr.*, AIR (2006) SC 1892)

15. The factual position noted above goes to show that there was no new material after examination of the accused persons under Section 313 Cr.P.C., which threw any light on the incident. The evidence of PWs 4 and 5 is not the basis of the application under Section 319 Cr.P.C. as they have not spoken anything about the appellants.

A 16. As noted above, PWs 1,2 and 3 have stated about the presence of the appellants without any definite role being ascribed to them in their evidence recorded on 16.04.2001, 08.01.2002 and 29.04.2002. If really the complainant had any grievance about the appellants being not made accused, that could have, at the most, be done immediately after the B recording of evidence of PWs 1,2 and 3. That has apparently not been done. Additionally, after the charge-sheet was filed, a protest petition was filed by the complainant which was dismissed. No explanation whatsoever has been offered as to why the application in terms of Section 319 Cr.P.C. was not filed earlier. The revisional court did not deal with these aspects C and came to an abrupt conclusion that all the PWs have stated that the appellants have committed overt acts and their names also find place in the protest petition. Undisputedly, no overt act has been attributed to the appellants by PWs 1, 2 and 3. Nothing has been stated about the appellants by PWs 4 and 5. There was mention of their names in the FIR. D A protest petition was filed. Same was also rejected. These could not have formed the basis of accepting the prayer in terms of Section 319 Cr.P.C. The High Court's order, to say the least, is bereft of any foundation. It merely states that there are materials against the petitioners before it. It also did not deal with various aspects highlighted above.

E 17. Above being the position, the order of the High Court and that of learned Additional Sessions Judge cannot be maintained and are set aside. The Trial Court had rightly rejected the application filed under Section 319 Cr.P.C.

F 18. The appeal is, accordingly, allowed.

K.K.T. Appeal allowed.