BHOLU RAM

v.

STATE OF PUNJAB & ANR.

(Criminal Appeal No. 1366 of 2008)

AUGUST 29, 2008

[C.K. THAKKER AND D.K. JAIN, JJ.]

Code of Criminal Procedure, 1973:

ss. 319, 197 and 482 – Recalling order of issuance of summons against person other than accused – Permissibility of – Held: Order passed by competent court issuing summons cannot be recalled – Aggrieved party can challenge the order by invoking inherent jurisdiction of High Court u/s. 482 – On facts, Revisional Court and High Court not justified in recalling summoning order passed by Magistrate against Head Master-cum-Drawing and Disbursing Officer other than accused-clerk in Government School – Accused in a complaint alleging forgery and cheating, filed application to add respondent as accused and summon him – Magistrate had power and jurisdiction to entertain the applications – It issued summons on being satisfied that depositions of prosecution witnesses prima facie *made out offence against respondent – Revisional Court erred in entering into correctness of the evidence at the stage of issuance of summons to respondent – Proceedings could not have been quashed on the ground of want of sanction – Application to issue summons could be filed by any person including accused and the court could entertain such application filed belatedly – Thus, orders of Revisional Court and High Court set aside and that of Magistrate restored.*

s. 319 – Summoning of person other than accused – Power of court – Nature and scope of – Discussed.

Penal Code, 1860 – ss. 409, 420, 467, 468, 471 – Offences under – Requirement of sanction u/s. 197 Cr.P.C. –

A *Held: Offences u/ss. 409, 420, 467, 468, 471 cannot be regarded as having been committed by a public servant while 'acting or purporting to act in discharge of official duty,' thus, sanction is not required – On facts, complaint alleging forgery and cheating against accused-clerk in Government school –* B *Issuance of summons against Head Master other than accused – Quashing of, by Revisional Court on the ground of absence of sanction but holding that at the most there was negligence on the part of Head master but no criminal intent – Held: Not correct –* Mens rea *can only be decided at the* C *time of trial and not at the stage of issuing summons – Need or necessity of sanction can be taken during the conduct of trial or at any stage of the proceedings – Code of Criminal Procedure, 1973 – s. 197.*

Administrative law – State authorities – Role of – On D *facts, complaint alleging forgery and cheating against accused-clerk in Government school – Issuance of summons against Head Master other than accused – Challenge to, by State before Sessions Court – Before Supreme Court also State supporting the Head master – Propriety of – Held: Not* E *proper.*

First Information Report was lodged against the appellant u/ss. 409, 420, 467, 468 and 471 IPC. It was alleged that the appellant-Clerk in Government School forged signature of respondent No. 2-Head Master-cum- F **Drawing and Disbursing Officer and embezzled substantial amount. During investigation, signatures of respondent No. 2 were also taken but prosecution never filed the report. Witnesses deposed that respondent No. 2 had withdrawn the amount and signatures purported** G **to have been forged by appellant tallied with the specimen signatures of respondent No. 2. Thereafter, appellant filed applications u/s. 319 Cr.P.C. to add respondent No. 2 as accused and summon him. The Magistrate allowed the application. Respondent No. 2 was**

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issued summons. Aggrieved, respondent No. 1-State filed Revision Petition which was dismissed. Thereafter, respondent No. 2 filed application to review/recall summoning order on the ground that he could not be prosecuted in absence of sanction required by s. 197 of the Code. The Magistrate dismissed the application in view of dismissal of revision petition filed by State. However, Additional Sessions Judge allowed the revision petitions filed by the respondent No. 2 and set aside the order adding respondent No. 2 as an accused and summoning him. High Court upheld the order. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1.1 Section 319 Cr.P.C.,1973 empowers a Court to proceed against any person not shown to be an accused if it appears from the *evidence* that such person has also committed an offence for which he can be tried together with the accused. It is only proper that a Magistrate should have power to summon by joining such person as an accused in the case. The primary object underlying s. 319 is that the whole case against all the accused should be tried and disposed of not only expeditiously but also simultaneously. Justice and convenience both require that cognizance against the newly added accused should be taken in the same case and in the same manner as against the original accused. The power must be regarded and conceded as incidental and ancillary to the main power to take cognizance as part of normal process in the administration of criminal justice. [Paras 19 and 21] [970,G-H; 971,G-H; 972,A]

1.2 The power under Section 319 can be exercised either on an application made to the Court or by the Court *suo motu.* It is in the discretion of the Court to take an action under the said section and the Court is expected to exercise the discretion judicially and judiciously having

A regard to the facts and circumstances of each case. [Para 22] [972,B-C]

1.3 Section 319 of the Code nowhere states that such an application can be filed by a person other than the accused. It also does not prescribe any time limit within B which such application should be filed in the Court. [Para 25] [972,G-H]

1.4 In the instant case, the Magistrate had power and jurisdiction to entertain applications filed by the C appellant-accused u/s.319 of the Code and to issue summons to respondent No. 2 by adding him as accused. The said order could not be said to be illegal, unlawful or otherwise objectionable. The submission that the power u/s.319 of the Code, cannot be exercised belatedly by the D Court, and that an application u/s.319 cannot be filed by a person who is facing the trial, cannot be accepted. It was the case of the appellant that it was during the course of prosecution evidence that he came to know that signatures of respondent No. 2 were sent for examination, some report was received by the prosecution which was E not produced in Court and on the basis of such evidence, the case was made out against respondent No.2. If in these circumstances, applications were made and the prayer was granted, there is no infirmity therein. [Paras 24, 40 and 70] [998,G-H; 972,F; 990,A-B]

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Joginder Singh and Anr. v. State of Punjab and Anr. **1979 (1) SCC 345;** *Municipal Corporation of Delhi v. Ram Kishan Rohtagi and Ors.* **1983 (1) SCC 1;** *Lok Ram v. Nihal Singh and Anr.* **2006 (10) SCC 192;** *Shashikant Singh v. Tarkeshwar* G *Singh and Anr.* **2002 (5) SCC 738 – referred to.**

2.1 Once an order is passed by a competent Court issuing summons or process, it cannot be recalled. [Para 51] [982,E]

H 2.2 It is quite possible that in a given case, a

Magistrate may take cognizance of an offence illegally or arbitrarily without there being any material whatsoever. Such illegal order should not deprive the accused from contending that the Magistrate was wrong and wholly unjustified in entertaining the complaint or taking cognizance of an offence. In such cases, however, the accused is not without legal remedy. If the act of taking cognizance, issuance of process or joining of an innocent person as an accused is totally uncalled for or *ex facie* bad in law, it is open to the aggrieved party to invoke inherent jurisdiction of High Court u/s 482 of the Code. If High Court is satisfied that the order passed by the Magistrate was illegal, improper or arbitrary, it can exercise inherent powers and quash criminal proceedings initiated against the party. But that power is independent and has nothing to do with recalling of an earlier order by the Court which passed it. [Para 55] [983,D-G]

2.3 The submission of the respondent no. 2 that even if it is assumed that the trial court did not possess the power of recalling its order, the Court may consider an important fact that the respondent No. 2, who was really an 'aggrieved party' had preferred revisions in the Court of Sessions and it would not preclude the revisional Court from exercising revisional jurisdiction and quashing and setting aside an order passed by subordinate Court if it was not in accordance with law, cannot be accepted. [Para 54] [983,A-C]

2.4 In the instant case, even on merits, the order passed by the Magistrate issuing summons to respondent No.2 could not be said to be unlawful or even improper. When applications u/s. 319 of the Code were preferred by the appellant praying to join respondent No.2 as an accused and to issue summons, the Magistrate considered the evidence of prosecution witnesses and he was satisfied that depositions of witnesses *prima facie* made out offence against respondent No.2. [Paras 56 and 57] [983,G-H; 984,A-B]

A 2.5 The Revisional Court ought not to have interfered with the order passed by the trial court u/s 319 of the Code. Since the order passed by the Judicial Magistrate was in consonance with law, the Additional Sessions Judge should have refrained from exercising revisional B jurisdiction. The orders passed by the Additional Sessions Judge and the High Court are set aside and the order passed by the Judicial Magistrate is restored. Since the matter pertains to FIR of 1986, the Magistrate is directed to conclude the trial expeditiously. [Paras 71 and 73] C [990,C-D; 991,B]

2.6 The Revisional Court referred to *K.K. Mathew's case and held that a summoning order, being interlocutory in nature, could not be termed as 'judgment' and there was no bar in recalling such order. The Additional D Sessions Judge decided the revision in 1998. The law governing the field at that time was the law laid down in K.K. Mathew. **Adalat Prasad's case had not seen the light of the day. Therefore, there is nothing wrong on the part of the Additional Sessions Judge in considering, E following and deciding the case on the basis of K.K. Mathew. However, Revisional Court was not right in interfering with the order passed by the trial court. The Magistrate issued summons taking into account evidence led by the prosecution. The Revisional Court was having F depositions of those witnesses, the order passed by the Magistrate, the order made by the Additional Sessions Judge in revision instituted by the State and also the order passed by the Magistrate in an application to recall filed by respondent no. 2. Inspite of the above material, G Revisional Court interfered with the order of the trial Court. It was not justified in entering into correctness or otherwise of the evidence at the stage of issuance of summons to respondent No.2. Hence, the order was not in accordance with law. [Paras 62, 63, 64 and 66] [987,A-E; 988,G; 989,B]

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*K.K. Mathew v. State of Kerala and Anr. 1992 (1) SCC 217; **Adalat Prasad v. Rooplal Jindal and Ors. 2004 (7) SCC 338; Nilamani Routray v. Bennett Coleman and Co. Ltd. 1998 (8) SCC 594; Subramaniam Sethuraman v. State of Maharashtra, (2004) 13 SCC 324; N.K. Sharma v. Abhimanya (2005) 13 SCC 213; Everest Advertisement v. State Government of NCT of Delhi 2007 (5) SCC 54 – referred to.

3. The offences punishable u/ss 409, 420, 467, 468, 471 IPC can by no stretch of imagination by their very nature be regarded as having been committed by a public servant while 'acting or purporting to act in discharge of official duty'. The Revisional Court was aware of legal position. It was, however, held by the Court that at the most there was negligence on the part of respondent No.2 but there was no criminal intent and he cannot be held criminally liable. *Mens rea* can only be decided at the time of trial and not at the stage of issuing summons. Moreover, a point as to need or necessity of sanction can be taken during the conduct of trial or at any stage of the proceedings. Hence, proceedings could not have been quashed on the ground of want of sanction in the instant case. [Paras 68 and 69] [989,C-D; 989,E-F]

Prakash Singh Badal v. State of Punjab (2007) 1 SCC 1 – referred to.

4. As regard the role of the State, an order passed by the Judicial Magistrate summoning respondent No.2 as accused was challenged by the State by filing a revision in the Court of Session, which was dismissed. Even in this Court, the State supported respondent No.2. An affidavit in reply was filed by the State even before counter affidavit was filed by contesting respondent No.2. Though in the affidavit, it is not necessary to deal with law points and/or decisions rendered by a Court of law, the deponent refers to and relies on *K.K. Mathew* expressly overruled by a larger

A **Bench in *Adalat Prasad.* No reference at all has been made to *Adalat Prasad.* It is respondent No.2 who, in his counter, refers to both the decisions. In the totality of the facts and circumstances, the submission of the appellant that the State Authorities were helping and assisting respondent**
B **No.2 cannot be said to be totally ill-founded or without substance. The State, could have easily avoided such embarrassment. [Para 72] [990,E-H; 991,A]**

Case Law Reference

C	1979 (1) SCC 345	Referred to.	27
	1983 (1) SCC 1	Referred to.	33
	2006 (10) SCC 192	Referred to.	35
	2002 (5) SCC 738	Referred to.	39
D	1992 (1) SCC 217	Referred to.	42
	2004 (7) SCC 338	Referred to.	45
	1998 (8) SCC 594	Referred to.	46
	2004 (13) SCC 324	Referred to.	50
E	2005 (13) SCC 213	Referred to.	50
	2007 (5) SCC 54	Referred to.	50
	2007 (1) SCC 1	Referred to.	68

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
F No. 1366 of 2008

From the final Judgment and Order dated 27.11.2006 of the High Court of Punjab and Haryana at Chandigarh in Criminal Revision No. 401 of 1998

G Rishi Malhotra for the Appellant.

Seeraj Bagga, Kuldip Singh, P.N. Puri, Dhiraj and Reeta Dewan for the Respondents.

The Judgment of the Court was delivered by

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

2. The present appeal is filed by the appellant-accused against the order passed by the Additional Sessions Judge, Barnala on March 5, 1998 in Criminal Revision Nos. 11 and 12 of 1997 and confirmed by the High Court of Punjab & Haryana on November 26, 2006 in Criminal Revision Nos. 401 and 402 of 1998. B

3. To appreciate the issues raised in the present appeal, few relevant facts may be stated.

4. On August 21, 1986, First Information Report (FIR) No. 87 was lodged against the appellant for commission of offences punishable under Sections 409, 420, 467, 468 and 471 of the Indian Penal Code (IPC). The allegation in the FIR was that the appellant was a Clerk in Government High School, Rurke Kalan. He had forged signature of Sher Singh-respondent No. 2 herein who was the Head Master-cum-Drawing and Disbursing Officer and embezzled substantial amount of more than Rs. one lakh between 1979 and 1986. As stated in the FIR, the said fact came to light when audit was carried out and report was submitted. Hence, the complaint. C D E

5. According to the appellant, during the course of investigation, signatures of respondent No. 2 were also taken and were sent for examination but the report on the said examination was never filed by the prosecution in the proceedings. It was only in the course of recording of prosecution evidence that certain witnesses deposed against respondent No. 2 alleging that it was respondent No. 2 who had withdrawn the amount and signatures purported to have been forged by the appellant really tallied with the specimen signatures of respondent No. 2. In view of the said fact, the appellant on February 05, 1994 and on January 06, 1996, filed applications under Section 319 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code') in the Court of Judicial Magistrate praying therein to add respondent No. 2 as an accused and summon him being Head Master- F G H

A cum-Drawing and Disbursing Officer who had prepared false and forged bills, misappropriated the amount and committed fraud on the Government.

6. The learned Magistrate, after considering the evidence on record, held that *prima facie* case had been made out against B respondent No. 2 and that he should also be joined as accused. The learned Magistrate allowed the applications of the appellant and issued summons to respondent No. 2 by joining him as accused.

C 7. Though the order was passed on January 22, 1996, it was not challenged by respondent No. 2. The order, however, was challenged by the State by filing a Revision Petition in the Court of Additional Sessions Judge, Barnala. The learned Judge vide an order dated May 06, 1996, dismissed the petition filed by respondent No. 1-State. D

8. After a gap of more than eight months from the order passed by the learned Magistrate summoning respondent No. 2, he filed an application on September 25, 1996 to review/ recall summoning order dated January 22, 1996. He also E contended in a separate petition that he could not be prosecuted in absence of sanction as required by Section 197 of the Code. The learned Magistrate by an order dated March 12, 1997 dismissed the application of respondent No. 2 holding it to be not maintainable in view of dismissal of revision of the State by F the Additional Sessions Judge.

9. Being aggrieved by the order passed by the Judicial Magistrate, respondent No. 2 filed two Revision Petitions before the learned Additional Sessions Judge. The learned Judge allowed the revisions of respondent No. 2 and set aside the G order dated January 22, 1996 passed by the Judicial Magistrate adding respondent No. 2 as an accused and summoning him. The said order was passed on March 5, 1998.

10. The appellant challenged both the orders by approaching the High Court by instituting two revision petitions. H

The High Court, however, dismissed both the revisions and confirmed the order passed by the learned Additional Sessions Judge. The said order is challenged in the present appeal.

11. On January 19, 2007, notice was issued by this Court. On February 15, 2007, further proceedings were stayed. Considering the controversy and issues involved, the Registry was directed to place the matter for final hearing. Accordingly, the matter was placed before us.

12. We have heard the learned counsel for the parties.

13. The learned counsel for the appellant contended that once an order was passed and summons was issued by the Judicial Magistrate, he had no power, authority or jurisdiction to review the said order or recall the summons. On that ground alone, the orders passed by the courts below are liable to be set aside. It was also submitted that the order passed by the Judicial Magistrate adding respondent No. 2 and summoning him was in consonance with Section 319 of the Code and should not have been interfered with. It was urged that such an order could be passed on an application of any party including the accused and the matter ought to have been decided on merits and the said order could not have been disturbed by the revisional Court. It was further submitted that the Courts below were wrong in invoking Section 197 of the Code and in holding that sanction was necessary.

14. It was submitted that even on merits, the orders passed by the Judicial Magistrate was in consonance with law and called for no interference. It was, therefore, prayed that the order passed by the Additional Sessions Judge and confirmed by the High Court may be set aside and the order passed by the Judicial Magistrate be restored.

15. The learned counsel for the contesting respondent No. 2, on the other hand, supported the order passed by the Courts below. It was submitted that the Additional Sessions Judge was satisfied that the order passed by the Judicial

A Magistrate was not in consonance with law and it could be recalled. Such order was not an order of review, but recalling of earlier order which was not found legal or lawful. It was also submitted that FIR was lodged as early as in 1986 and applications for adding respondent No. 2 as an accused were
B made by the appellant-accused in the year 1994 and 1996, i.e. after about 8 to 10 years. Such applications, therefore, could not have been entertained by the Court. Again, the respondent No. 2 was admittedly Head Master-cum-Drawing and Disbursing Officer and no prosecution could be launched against him
C without sanction from the Government as envisaged by Section 197 of the Code. Since no such sanction was obtained, no prosecution could be launched against him.

16. The counsel also submitted that no application under Section 319 could be filed by an accused and since the
D appellant herein was the accused, applications by him were not maintainable. The counsel urged that when the Additional Sessions Judge allowed the revisions filed by respondent No. 2 and the said order was confirmed by the High Court, this Court may not interfere with it in exercise of discretionary
E jurisdiction under Article 136 of the Constitution. It was, therefore, submitted that the appeal may be dismissed.

17. The learned Government pleader appearing for respondent No. 1 adopted the arguments of learned counsel for respondent No. 2 and submitted that the appeal deserves
F to be dismissed.

18. Having heard the learned counsel for the parties and in the light of the relevant provisions of law as also judicial pronouncements to which our attention has been invited by the
G learned counsel for the parties, in our opinion, the appeal deserves to be allowed.

19. Section 319 of the Code empowers a Court to proceed against any person not shown to be an accused if it appears from the *evidence* that such person has also committed an
H offence for which he can be tried together with the accused.

20. Section 319 of the Code reads thus; A

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 had committed any offence for which such person could be B 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 C 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 detailed by such Court for the purpose of the inquiry into, or trial of, the offence D 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 E commenced afresh, and 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. F

21. Sometimes a Magistrate while hearing a case against one or more accused finds from the *evidence* that some person other than the accused before him is also involved in that very offence. It is only proper that a Magistrate should have power G to summon by joining such person as an accused in the case. The primary object underlying Section 319 is that the whole case against all the accused should be tried and disposed of not only expeditiously but also simultaneously. Justice and convenience both require that cognizance against the newly H

A added accused should be taken in the same case and in the same manner as against the original accused. The power must be regarded and conceded as incidental and ancillary to the main power to take cognizance as part of normal process in the administration of criminal justice.

B 22. It is also settled law that power under Section 319 can be exercised either on an application made to the Court or by the Court *suo motu*. It is in the discretion of the Court to take an action under the said section and the Court is expected to exercise the discretion judicially and judiciously having regard C to the facts and circumstances of each case.

23. In the instant case, an FIR was lodged against the appellant in August, 1986. But it was during the course of trial that it came to light that signatures of respondent No. 2 were D also taken and were sent for examination and a report was received showing that the signatures on the basis of which amount was withdrawn tallied with the signatures of respondent No. 2. The said report, however, was not filed by the prosecution. It was in these circumstances that the appellant made applications in 1994 and in 1996 under Section 319 of the E Code requesting the learned Magistrate to join respondent No. 2 as accused and to summon him.

24. The contention of the learned counsel for respondent No. 2 is that the power under Section 319 of the Code, cannot F be exercised belatedly by the Court. Again, such order can be made only on the application by the Public Prosecutor or by some person other than the accused. In other words, an application under Section 319 cannot be filed by a person who is facing the trial.

G 25. We are unable to uphold the contentions. We have quoted Section 319 of the Code. It nowhere states that such an application can be filed by a person other than the accused. It also does not prescribe any time limit within which such application should be filed in the Court.

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26. Let us consider few leading decisions of this Court on interpretation and application of the said provision.

27. Before three decades, in *Joginder Singh & Anr. v. State of Punjab & Anr.*, (1979) 1 SCC 345, a case was registered against Joginder Singh, Ram Singh, Bhan Singh, Darshan Singh and Ranjit Singh for committing various offences punishable under the Indian Penal Code. During the investigation, the police found Joginder Singh and Ram Singh (appellants before this Court) to be innocent and, hence, a charge-sheet was submitted against the remaining accused only. The learned Magistrate after holding preliminary inquiry, committed three accused to the Sessions Court for trial.

28. During trial, evidence of some of the witnesses was recorded who implicated the appellants. A Public Prosecutor, therefore, moved an application to summon the appellants and to try them along with other accused. The application was granted by the Sessions Court. The said order was challenged by the appellants.

29. It was, *inter alia*, contended on behalf of the appellants that Section 319 of the Code was not attracted inasmuch as the phrase "any person not being the accused" occurring therein excluded from its operation an accused who had been released by the police under Section 169 of the Code and against whom no sufficient material was found by the police during investigation.

30. This Court considered the relevant provisions of the Code of Criminal Procedure, 1898 (old Code), Forty-first Report of the Law Commission, the amendment made in the present Code and held that the Court could add any person, not an accused before it, as an accused and direct him to be tried along with the other accused for the offence or offences the added accused appears to have committed.

31. The Court, after considering the scheme of the provision, observed;

A "A plain reading of Section 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
B 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,..."

32. Interpreting the expression "any person not being the
C accused", the Court stated;

"As regards the contention that the phrase "any person not being the accused" occurring in Section 319 excludes from its operation an accused who has been released by
D the police under Section 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 by the Court and the very purpose of enacting such a provision like Section 319(1) clearly shows that even
E 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".

F (emphasis supplied)

(See also *Rakesh v. State of Haryana,* (2001) 6 SCC 248

33. In *Municipal Corporation of Delhi v. Ram Kishan*
G *Rohtagi & Ors.,* (1983) 1 SCC 1, the Food Inspector, noticing adulteration in 'Morton Toffees', filed a complaint against the Company, its Managing Director as well as Directors under the Prevention of Food Adulteration Act, 1954. The Managing Director and Directors approached the High Court by invoking
H Section 482 of the Code for quashing of proceedings which

was granted and the proceedings against them were quashed. The question before this Court was whether Section 319 of the Code could be invoked once criminal proceedings against a person were quashed.

34. Replying the question in the affirmative and quoting with approval observations in *Joginder Singh,* this Court said;

> "In these circumstances, therefore, if the prosecution can at 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 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 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 has been made out on the additional evidence led before it".*
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> (emphasis supplied)

35. In *Lok Ram v. Nihal Singh & Anr.,* (2006) 10 SCC 192, again, a similar question came up before this Court. In *Lok Ram,* one Saroj Kumari was killed by her in-laws. A complaint was filed by the father of the deceased against the husband, brother in law and father in law of Saroj Kumari that all of them killed the deceased. Police registered a case against the said persons for offences punishable under Sections 304-B, 498-A read with Section 34, IPC. The case of Lok Ram was

A that he was serving in a school and at the time of incident, he was not present. No charge-sheet was, therefore, filed against him.

36. During the trial, however, depositions of witnesses were recorded which revealed that Saroj Kumari was killed by her husband. Her brother in law and father in law (Lok Ram) poured kerosene oil on her and she was set on fire. Father of the deceased, hence, made an application under Section 319 of the Code to add Lok Ram as accused which was rejected by the trial Court. Meanwhile, the trial proceeded further against the other accused and they were convicted. The High Court directed the trial Court to proceed against Lok Ram. The said order was challenged by Lok Ram in this Court.

37. Dismissing the appeal, referring to earlier decisions of this Court on the point and explaining the scope of Section 319 of the Code, the Court stated;

> "On a careful reading of Section 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 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".

38. Construing the provision liberally, the Court proceeded to state;

"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 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 that 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".

(emphasis supplied)

39. In *Shashikant Singh v. Tarkeshwar Singh & Anr.*, (2002) 5 SCC 738, during the pendency of trial of an accused, another person was summoned by the trial Court under Section 319 of the Code. But by the time he could be brought before the Court, the trial against the accused was over. The question was whether such a person could be summoned and tried for the offence for which he was summoned. This Court held that the words *"should be tried together with the accused"* were merely directory and such a person could be tried even after conclusion of trial of the main accused.

The Court stated;

"The intention of the provision here is that where in the course of any enquiry into, or trial of, an offence, it appears

A to the court from the evidence that any person not being the accused has committed any offence, the Court may proceed against him for the offence which he appears to have committed. At the stage, the Court would consider that such a person could be tried together with the accused
B 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 mandatory to be commenced afresh and the witnesses re-heard. In short, there has to be a de novo trial against him. The
C 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
D 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
E 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,
F nullifying the opinion earlier formed by the Court on the basis of 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".

G 40. In our opinion, therefore, the learned Magistrate had power and jurisdiction to entertain applications filed by the appellant-accused under Section 319 of the Code and to issue summons to respondent No. 2 by adding him as accused. The said order could not be said to be illegal, unlawful or otherwise objectionable.

H

41. The next question is whether an order passed by a Court could be recalled? Before the Courts below as also before us, the learned counsel for respondent No. 2 urged that an order passed by a Magistrate could be recalled.

42. In support of the submission, reliance was placed by the counsel on a two-Judge Bench decision of this Court in *K.M. Mathew v. State of Kerala & Anr.*, (1992) 1 SCC 217. In that case, the appellant was the Editor-in-Chief of a daily newspaper. A complaint was filed against him and others alleging commission of offence punishable under Section 500 read with Section 34, IPC. The Magistrate examined the complainant on oath and issued summons to the accused. The Chief Editor appeared before the Court and prayed for dropping of proceedings against him by recalling the order on the ground that there was no allegation as to how he was responsible for publication of news item alleged to have caused defamation of the complainant. The Magistrate accepted the plea and dropped the proceedings so far as Chief Editor was concerned. The complainant challenged the said order by filing a revision in the High Court which was allowed. The Chief Editor questioned correctness of the order passed by the High Court.

43. The issue before this Court was whether the Magistrate had power to recall an order of summoning the accused. Considering the relevant provisions of the Code, the Court held that an order of summoning an accused could be recalled by the Magistrate. Such order is merely an interim order and not a judgment and recalling thereof would not amount to review.

44. The Court stated;

> "It is open to the accused to plead before the Magistrate that the process against him ought not to have been issued. The Magistrate may drop the proceedings if he is satisfied on reconsideration of the complaint that there is no offence for which the accused could be tried. It is his judicial discretion. No specific provision required for the Magistrate to drop the proceedings or rescind the process. *The order*

A *issuing the process is an interim order and not a judgment. It can be varied or recalled. The fact that the process has already been issued is no bar to drop the proceedings if the complaint on the very face of it does not disclose any offence against the accused".*

B (emphasis supplied)

45. The correctness of *K.M. Mathew* again came up for consideration before a three-Judge Bench of this Court in *Adalat Prasad v. Rooplal Jindal & Ors.,* (2004) 7 SCC 338. In *Adalat* C *Prasad,* the accused, after issuance of summons against him by the trial Magistrate, filed an application under Section 203 of the Code for dismissal of complaint recalling the order of summons. After hearing the parties, the Magistrate granted the prayer and recalled the summons. The order of the Magistrate D was challenged by the complainant in the High Court *inter alia* on the ground that the Magistrate had no jurisdiction to recall the earlier order. The High Court allowed the petition. The accused approached this Court.

46. When the matter was placed for preliminary hearing, E the learned counsel for the accused relied on *K.M. Mathew* wherein it was held that it was open to the Court issuing summons to recall the order on being satisfied that the issuance of summons was not in accordance with law. The Court, however, doubted the correctness of the view taken in *K.M.* F *Mathew* in view of reference made by a two Judge Bench to a three Judge Bench in *Nilamani Routray v. Bennett Coleman & Co. Ltd.,* (1998) 8 SCC 594.

47. The larger Bench considered various provisions of the Code and held that in absence of express provision in the G Code, the Court has no power to recall the process issued. The larger Bench, therefore, concluded that *K.M. Mathew* was not correctly decided and overruled it.

48. The Court concluded;

H "But after taking cognizance of the complaint and

examining the complainant and the witnesses if he is satisfied that there is sufficient ground to proceed with the complaint he can issue process by way of summons under section 204 of the Code. Therefore what is necessary or a condition precedent for issuing process under section 204 is the satisfaction of the Magistrate either by examination of the complainant and the witnesses or by the inquiry contemplated under section 202 that there is sufficient ground for proceeding with the complaint hence issue the process under section 204 of the Code. *In none of these stages the Code has provided for hearing the summoned accused, for obvious reasons because this is only a preliminary stage and the stage of hearing of the accused would only arise at a subsequent stage provided for in the latter provision in the Code.* It is true as held by this Court in Mathew's case before issuance of summons the Magistrate should be satisfied that there is sufficient ground for proceeding with the complaint but that satisfaction is to be arrived at by the inquiry conducted by him as contemplated under Sections 200 and 202, and the only stage of dismissal of the complaint arises under section 203 of the Code at which stage the accused has no role to play therefore the question of the accused on receipt of summons approaching the court and making an application for dismissal of the complaint under section 203 of the Code for a reconsideration of the material available on record is impermissible because by then Section 203 is already over and the Magistrate has proceeded further to Section 204 stage".

(emphasis supplied)

49. Dealing with the contention that an aggrieved party must have a remedy if a Magistrate takes cognizance of an offence without there being any allegation against the accused, the Court stated;

"It is true that if a Magistrate takes cognizance of an offence, issues process without there being any allegation

A against the accused or any material implicating the accused or in contravention of provision of Sections 200 & 202, the order of the Magistrate may be vitiated, but then the relief an aggrieved accused can obtain at that stage is not by invoking section 203 of the Code because
B the Criminal Procedure Code does not contemplate a review of an order. *Hence in the absence of any review power or inherent power with the subordinate criminal courts, the remedy lies in invoking Section 482 of Code".*

(emphasis supplied)

C

50. The law laid down in *Adalat Prasad* was followed and reiterated by this Court in subsequent cases also [*see Subramaniam Sethuraman v. State of Maharashtra,* (2004) 13 SCC 324; *N.K. Sharma v. Abhimanya,* (2005) 13 SCC
D 213; *Everest Advertisement v. State Government of NCT of Delhi,* (2007) 5 SCC 54].

51. From the above discussion, it is clear and well settled that once an order is passed by a competent Court issuing summons or process, it cannot be recalled.

E

52. In the instant case, the learned Magistrate ordered to join respondent No. 2 as an accused on applications filed by the appellant and summons was issued to him. A revision filed by the State against that order was dismissed by the Additional Sessions Judge. The Judicial Magistrate, on the facts and in
F the circumstances, was right in dismissing recall application filed by respondent No. 2.

53. The revisional Court, however, held that the Magistrate had power to recall the earlier order passed by him. For coming
G to that conclusion, the Court relied upon *K.M. Mathew.* The learned Additional Sessions Judge ought to have considered the material fact in its proper perspective that the order passed by the learned Magistrate was legal and proper and because of that, the revision filed against that order by the State was also dismissed by the revisional Court.

H

54. It was, however, contended on behalf of respondent No.2 that even if this Court holds that the Judicial Magistrate had no power to recall its earlier order and dismissal of the application by the learned Magistrate was legal and proper, and that a revision petition filed by the State against the said order was dismissed by the Additional Sessions Judge, the Court may consider an important fact that the respondent No. 2, who was really an 'aggrieved party' had preferred two revisions in the Court of Sessions. Hence, even if it is assumed that the trial Court did not possess the power of recalling its order, it would not preclude the revisional Court from exercising revisional jurisdiction and quashing and setting aside an order passed by a subordinate Court if it was not in accordance with law.

55. Even that ground does not impress us. It is quite possible that in a given case, a Magistrate may take cognizance of an offence illegally or arbitrarily without there being any material whatsoever. Such illegal order should not deprive the accused from contending that the learned Magistrate was wrong and wholly unjustified in entertaining the complaint or taking cognizance of an offence. In such cases, however, the accused is not without legal remedy. If the act of taking cognizance, issuance of process or joining of an innocent person as an accused is totally uncalled for or *ex facie* bad in law, it is open to the aggrieved party to invoke inherent jurisdiction of the High Court under Section 482 of the Code. If the High Court is satisfied that the order passed by the Magistrate was illegal, improper or arbitrary, it can exercise inherent powers and quash criminal proceedings initiated against the party. But that power is independent and has nothing to do with recalling of an earlier order by the Court which passed it.

56. But in the present case, even on merits, we are of the considered view that the order passed by the learned Magistrate issuing summons to respondent No.2 could not be said to be unlawful or even improper.

A 57. When applications under Section 319 of the Code were preferred by the appellant praying to join respondent No.2 as an accused and to issue summons, the learned Magistrate considered the evidence of prosecution witnesses and he was satisfied that depositions of witnesses *prima facie* made out B offence against respondent No.2.

58. Considering the statements of PW2-Treasury Officer, PW14-Senior Assistant and PW11-Assistant Manager, State Bank of Patiala, the learned Magistrate stated;

C "I have heard the learned counsel for the accused and the Ld. APP for the State and have also gone through the file of this case carefully and it appears that Sher Singh who appeared as a prosecution witness in this case was working as a Drawing & Disbursing Officer and Ex. DX audit report discloses that as per Rule 2.2(II) of Punjab D Financial Rules Volume-I, all transactions should be entered in the cash book as soon as they occur and attested by the head of the office in token of check, further Rule 2.31(a) provides that with a view to enable the head of the office to see that all amounts drawn from the treasury E have been entered in the cash book; he should obtain a list of all bills drawn by him during the previous month and trace all the amounts in the cash book. It was held that embezzlement pointed by the Audit was facilitated due to non-observance of procedure regarding the review of the F bill book/bill transit register and reconciliation of the withdrawals form the treasury. Moreover, the evidence led by the prosecution also makes it clear that there is prima-facie evidence against Sher Singh, Head Master as PW2 Satpal Mehta, Treasury Officer has deposed in his cross-G examination that amounts from the accounts were withdrawn through Headmaster Rureke Kalan and in their register signatures of Headmaster have been entered and his name is Sher Singh and they have passed the bills after comparing the signatures on the Bills with the H specimen signatures of Sher Singh as the same are in

their record. Similarly, PW14 Prem Sagar, Senior Assistant in Treasury Office has deposed that Drawing & Disbursing Officer/Authority was Head Master of Rureke Kalan High School and his name was Sher Singh and on the bills signatures of Sher Singh are present which tally with the specimen signatures. Similarly, Prem Chand, Assistant Manager of State Bank of Patiala, PW11 has deposed in his cross-examination that DDO of High School, Rure Ke Kalan is Head Master and the amounts are withdrawn after comparison of specimen signatures with the signatures on the bills of DDO. So, from the evidence on record, it is quite clear that prima facie offence against Head Master Sher Singh is made out whose signatures were with the treasury office and the Treasury Officers have passed the bills after comparing the specimen signatures with the signatures on the bills and there is no evidence on the record to show that the bills which are subject matter of embezzlement, do not bear the signatures of Sher Singh who was DDO of Rureke Kalan High School, so, there is prima facie offence made out to summon Sher Singh, Head Master of Rureke Kalan High School as accused u/s 319 of Cr.P.C. is hereby allowed and Sher Singh, Head Master of Government High School of Rure Ke Kalan is ordered to be summoning as an accused in this case for 1.3.1996. The application of the accused is hereby allowed and is disposed of accordingly".

59. We may recall at this stage that a revision filed by the State (and not by respondent No.2) against the order of the Magistrate was dismissed by the Additional Sessions Judge on May 6, 1996.

60. The Revisional Court also considered the deposition of aforesaid witnesses and said;

"After going through the impugned order, I find that it was found by trial Magistrate that certain bills have been passed by Sher Singh who was disbursing officer, and PW 14

A Prem Sagar, Assistant in the office of Treasury deposed that drawing disbursing officer was Headmaster of Rureke Kalan High School and his name was Sher Singh who was appended his signatures on the bills which tally with the specimen signatures. A similar statement was suffered
B by Assistant Manager of State Bank of Patiala examined as PW11 before Trial Magistrate and on account of this evidence read with the statement of PW2 Sat Pal Mehta, Treasury Officer the trial Magistrate found that prima facie offence is made out to summon Sher Singh as an accused
C and accordingly he allowed the application. In view of this, we find that the Court has exercised his discretion supported by well reasoned order and the opinion was formed by the Court after recording evidence and in such like cases some times the real offender who has also
D committed the crime steps into the shoes of complainant in order to save himself and in the instant case also the evidence spells out that the head master of the school thought of a clever device by registering the case against other accused at his instance".

E 61. It was after the dismissal of revision filed by the State that respondent No.2 moved the Judicial Magistrate to recall the earlier order. The learned Magistrate held that in view of dismissal of revision by the Additional Sessions Judge, an application to recall the order was not maintainable. But the
F Court also stated;

"No doubt summoning order is on interim order and not a judgment and the same can be reviewed or recalled by the Magistrate. Proceedings against the accused can be dropped of the complaint on face of it does not disclose
G any offence against him. In the present case, my learned predecessor after going through the statements of examined prosecution witnesses found that there is prima facie offence made out against the accused Sher Singh. Only thereafter accused/applicant She Singh was
H summoned vide summoning order dated 22.1.1996

passed by Sh. Varinder Aggarwal, PCS, the then Judicial Magistrate, 1st Class, Barnala". A

62. The Revisional court referred to *K.K. Mathew* and held that a summoning order, being interlocutory in nature, could not be termed as 'judgment' and there was no bar in recalling such order. The Additional Sessions Judge decided the revision in 1998. The law governing the field at that time was the law laid down in *K.K. Mathew. Adalat Prasad* had not seen the light of the day. We, therefore, see nothing wrong on the part of the Additional Sessions Judge in considering, following and deciding the case on the basis of *K.K. Mathew.* B C

63. To us, however, the Revisional Court was not right in interfering with the order passed by the trial Court. We have seen that the learned Magistrate issued summons taking into account evidence led by the prosecution, particularly, by PWs 2, 14 and 11. The Revisional Court was thus having depositions of those witnesses, the order passed by the learned Magistrate, the order made by the Additional Sessions Judge in revision instituted by the State and also the order passed by the Magistrate in an application to recall filed by respondent No.2. D E

64. In spite of the above material, the Revisional Court interfered with the order of the trial Court issuing summons by entering into merits of the case.

65. The Court said; F

"As stated above, as per prosecution case during the period from 1979 to 1986 accused Bholu Ram was the Clerk of Govt. High School, Rureke Kalan while Sher Singh revision/petitioner appeared to be the Head Master of the School during the relevant period. It appears that during that period accused Bholu Ram had been drawing various payments from the Treasury by submitting false and bogus Mills to the Treasury, but did not appear to have disbursed the amount of those bills to any person and allegedly misappropriated the amount of those false and bogus bills for G H

which 17 separate challans in case FIR No. 87/86 P.S. Tappa appeared to have been filed against him and he appeared to be facing prosecution in all those cases. However, vide order dated 22.1.1996 of the Ld. Trial Magistrate in all those cases Sher Singh revision petitioners appeared to have been summoned as an accused in those cases on the ground that various bills on the basis of which those payments were drawn appeared to have been signed by Sher Singh as a Drawing and Disbursing Officer and he also appeared to be liable in all those cases. It appears that Sher Singh revision petitioners has already been examined as a prosecution witness in various cases. Though in his statement recorded in the Court, he denied having signed various bills. It appears that those bills appeared to have been signed by him as a Drawing and Disbursing Officer. Being a DDO of the School, it was the duty of Sher Singh to sign various bills for presentation in the treasury, but it was nevertheless the duty Bholu Ram, Clerk to maintain the record regarding the disbursement of those amounts. In case Bholu Ram, Clerk allegedly prepared false and bogus bills and obtained the signatures of the DDO on the same, be alone appeared to be liable to account for the payment of those bills when those amounts did not appear to have been disbursed to various persons as mentioned n various Bills and Bholu ram allegedly misappropriated those amounts. The mere fact that Sher Singh signed those bills as Drawing and Disbursing Officer will not make him criminally liable when the amounts of the various bills, according to the prosecution case, were allegedly misappropriated by Bholu Ram alone".

66. In our considered opinion, the Revisional Court was not justified in entering into correctness or otherwise of the evidence at the stage of issuance of summons to respondent No.2. Admittedly, the Judicial Magistrate had considered a limited question whether on the basis of evidence of prosecution

witnesses, *prima facie* offence had been made out against respondent No.2. He was, on the basis of such evidence, was satisfied that the case was required to be gone into and issued a summons. To us, the Revisional Court was not right in interfering with that order. Hence, even on that ground, the order was not in accordance with law. A B

67. The leaned counsel for respondent No.2, however, submitted that the Revisional Court was right in any case in allowing the revision and in quashing proceedings against the said respondent on the ground of absence of sanction as required by Section 197 of the Code. C

68. We express our inability to agree with the learned counsel. It is settled law that offences punishable under Sections 409, 420, 467, 468, 471 etc. can by no stretch of imagination by their very nature be regarded as having been committed by a public servant while 'acting or purporting to act in discharge of official duty' [*vide Prakash Singh Badal v. State of Punjab*, (2007) 1 SCC 1]. D

69. The Revisional Court was aware of legal position. It was, however, held by the Court that at the most there was negligence on the part of respondent No.2 but there was no criminal intent and he cannot be held criminally liable. We have already held that *mens rea* can only be decided at the time of trial and not at the stage of issuing summons. Moreover, a point as to need or necessity of sanction can be taken during the conduct of trial or at any stage of the proceedings. Hence, proceedings could not have been quashed on the ground of want of sanction in the present case. The order of the Revisional Court deserves to be set aside even on that ground. E F

70. It was also urged that no applications by the appellant could have been entertained by the trial Court after about 8 to 10 years from the date of filing of FIR. Now, an application under Section 319 of the Code can only be made to a Court and the Court may exercise the power under the said Section if it appears from *evidence* that any person other than the G H

A accused had also committed an offence for which he can be tried together with the accused. It was the case of the appellant that it was during the course of prosecution evidence that he came to know that signatures of respondent No. 2 were sent for examination, some report was received by the prosecution
B which was not produced in Court and on the basis of such evidence, the case was made out against respondent No.2. If in these circumstances, applications were made and the prayer was granted, we see no infirmity therein.

71. In our opinion, the Revisional Court, i.e. the Court of
C Additional Sessions Judge ought not to have interfered with the order passed by the trial court under Section 319 of the Code. As already noted earlier, the order of addition of respondent No. 2 as an accused and summoning him was not immediately challenged by respondent No. 2. The challenge
D was by the State and it failed. After a long time, the respondent No. 2 approached the Revisional Court. Since the order passed by the Judicial Magistrate was in consonance with law, the Additional Sessions Judge should have refrained from exercising revisional jurisdiction.

E 72. We may examine the role of the State also. We have already noted earlier that an order passed by the Judicial Magistrate summoning respondent No.2 as accused was challenged by the State by filing a revision in the Court of Sessions, which was dismissed. Even in this Court, the State
F supported respondent No.2. An affidavit in reply is filed by the State through Deputy Superintendent of Police in March 2007, even before counter affidavit was filed by contesting respondent No.2. Though in the affidavit, it is not necessary to deal with law points and/or decisions rendered by a Court of law, the deponent
G refers to and relies on *K.K. Mathew* expressly overruled by a larger Bench in *Adalat Prasad*. No reference at all has been made to *Adalat Prasad*. It is respondent No.2 who, in his counter, refers to both the decisions. In the totality of the facts and circumstances, the submission of the learned counsel for the
H appellant that the State Authorities were helping and assisting

respondent No.2 cannot be said to be totally ill-founded or without substance. The State, in our opinion, could have easily avoided such embarrassment. A

73. For the foregoing reasons, the appeal deserves to be allowed and is accordingly allowed. The orders passed by the Additional Sessions Judge and the High Court are set aside and the order passed by the Judicial Magistrate, Barnala is restored. Since the matter pertains to FIR of 1986, the learned Magistrate is directed to conclude the trial expeditiously. B

74. Before parting with the matter, we may clarify that we have not entered into allegations and counter-allegations. We have considered the facts and circumstanced to a limited extent to decide correctness of the order passed by the Judicial Magistrate under Section 319 of the Code. We make it clear that we may not be understood to have expressed any opinion on the merits of the matter. As and when the case will come up for hearing, it will be decided strictly on its own merits without being inhibited or influenced by any observations made by the trial court, by the Additional Sessions Judge, by the High Court or by us. C D E

75. Ordered accordingly.

N.J. Appeal allowed.