HARDEEP SINGH

v.

STATE OF PUNJAB & ORS.

(Criminal Appeal No. 1750 of 2008)

NOVEMBER 7, 2008

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

Code of Criminal Procedure, 1973:

s. 319 – Power under – Scope of – Application under, whether maintainable barely on the basis of examination-in-chief of the witness or after cross-examination of the witness – Conflicting decisions on the point by coordinate Benches of Supreme Court – Another judgment of Supreme Court in the opinion of the Court substantially curtailing discretionary power u/s. 319 (1) – Hence, the questions as to (i) when should the power u/s. 319 be exercised and (ii) what are the test and guidelines for exercising the power u/s. 319 referred to larger Bench of Supreme Court for consideration.

s. 319 – Applications under – On the basis of evidence of prosecution witness – Rejection of, by courts below – On appeal, held: On facts, the person whose name appeared in FIR and was arrested from the scene of occurrence, ought to have been included in the charge-sheet – The order rejecting application in respect of the other persons was not unlawful as nothing was found against them.

s. 173 – Report under – Held: Should contain only the information – Investigating Officer is not expected to record findings of fact nor to give clean chit by exercising power of a Court or judicial Authority.

Instant appeals are emanating as a result of cross FIRs for the same incident. Appellants in Criminal Appeal No. 1750 of 2008 filed FIR for commission of offences u/

A ss. 307, 336 and 427 r/w ss. 120B, 148 and 149 IPC and u/ss. 25, 27, 54 and 59 of Arms Act, 1959. Respondent Nos. 2 and 3 (the accused) made applications to the police that they were falsely implicated and hence sought inquiry into the matter. Inquiry was made by the police B and in the report it was stated that respondent Nos. 2 and 3 were falsely implicated. As a result, both the accused were discharged. During trial, PW 2 in his examination-in-chief stated that both the accused were present at the time of incident with weapons. The name of respondent C No. 2 was also mentioned in FIR. On the basis of the evidence of PW 2, prosecution filed application u/s. 319 Cr.P.C. to include respondent Nos. 2 and 3 as accused and to summon them for trial. Trial court rejected the application. The order was confirmed by High Court. D Hence the present appeal.

Appellants in Criminal Appeal No.1751 of 2008 had lodged FIR u/ss. 307, 326. 336, 447, 427 r/w ss. 148 and 149 IPC and u/ss. 25, 27, 54 and 49 of Arms Act. Name of respondent No. 2 was not included in charge-sheet. PW.5 E Stated during trial that respondent No. 2 was one of the members of unlawful assembly. In view of that, prosecution filed application u/s. 319 Cr.P.C. to include his name as accused and to summon him. The application was rejected by trial court and in Revision by High Court. F Hence the present appeal.

Referring two questions for consideration to three Judges Bench, the Court

HELD: 1.1 Sometimes while hearing a case against G one or more accused, it *appears* to a court from the *evidence* that some person other than the accused before it is also involved in that very offence. Section 319 Cr.P.C. empowers a court to proceed against any person if it appears from the evidence that such person has also H

committed an offence for which he can be tried together with other accused. [Paras 26 and 27] [747-H; 748-A, H; 749-A] A

1.2. 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 added accused should be taken in the same case and in the same manner as against the original accused. The power must be conceded as incidental and ancillary to the main power to take cognizance as part of normal process in the administration of criminal justice. [Para 28] [749-B-C] B C

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;** *Shashikant Singh v. Tarkeshwar Singh and Anr.* **(2002) 5 SCC 738;** *Michael Machado and Anr. V. Central Bureau of Investigation and Anr.,* **2000 (3) SCC 262 and** *Bholu Ram v. State of Punjab and Anr.* **JT 2008 (9) SC 504, relied on.** D E

***Mohd. Shafi v. Mohd. Rafiq and Anr.,* (2007) 4 SCR 1023, held inapplicable.**

Krishnappa v. State of Karnataka, **2004 (7) SCC 792;** *Y. Saraba Reddy v. Puthur Rami Reddy and Anr.* **2007 (6) SCR 68 and** *Guriya and Ors. v. State of Bihar and Anr.,* **2007 (8) SCC 224, referred to.** F

2.1. It is not correct to say that the term 'evidence' used in sub-section (1) of Section 319 Cr.P.C. would mean evidence which is tested by cross-examination. The question of testing the evidence by cross-examination would arise only after addition of the accused. There is no question of cross-examining the witness prior to adding such person as accused. Section does not contemplate an additional stage of first summoning the person and G H

A giving him an opportunity of cross-examining the witness who has deposed against him and thereafter deciding whether such person should or should not be added as accused. The word "evidence" occurring in sub-section (1) of Section 319 is used in comprehensive and broad B sense which would also include the material collected by the investigating officer and the evidence which comes before the Court and from which the Court is satisfied that person not arraigned before it is involved in the commission of the crime. [Para 54] [757-E-H; 758-A]

C **Rakesh and Anr. v. State of Haryana,* 2001 (6) SCC 248 and *State of H.P. v. Surinder Mohan and Ors.* 2000 (2) SCC 396, relied on.

2.2. It is settled law that at the stage of issuing D summons or process, a court has to see whether there is prima facie case against the person sought to be summoned or against whom process is sought to be issued. At that stage, there is no question of giving an opportunity of hearing to such person. The entire E scheme of Cr.P.C. is that an accused does not come into picture at all till process is issued. Till summons or process is issued against the accused, he has no right of audience and in that case, it cannot be said that on being satisfied on the basis of examination-in-chief, an F application under Section 319 Cr.P.C. is not maintainable. [Para 58] [758-D-E, G]

Nagavva v. Veeranna, (1976) 3 SCC 736, relied on.

2.3. When a person who is not shown as an accused G is sought to be added on the basis of evidence, in exercise of power under Section 319 Cr.P.C. he is not before the Court. Other accused against whom the trial has commenced are very much before the Court and generally they are represented by an advocate/advocates. H In the evidence of a witness, when role of other person

i.e. other than the accused is described by prosecution witnesses, *normally,* accused who are already on record are not affected. Grant or rejection of application under Section 319 would generally not alter their position. Therefore, holding that unless the cross-examination of a witness by accused who were already on record is over and complete, no power under Section 319 can be exercised, does not appear to be sound. [Para 59] [759-A-C] A B

2.4. Cr.P.C. has taken care by sufficiently protecting and safeguarding the interest of such added accused. Sub-section (4) of Section 319 expressly provides that where the Court exercises power under sub-section (1) and proceeds against a person not arrayed as an accused, *"the proceedings in respect of such person shall be commenced afresh, and witnesses re-heard".* Thus, after exercise of power by the Court under Section 319(1), such added accused would be placed in the same position as other accused and will get all rights an accused can get under Cr.P.C. The proceedings against the added accused shall be commenced *afresh* and witnesses will be *reheard.* Their evidence, prior to addition of the accused cannot be used against the accused who was not there earlier. The question of prejudice, hence, does not arise at all. [Para 60] [759-D-F] C D E

3.1. In Criminal Appeal No. 1750 of 2008, the final report submitted by the Superintendent of Police (D), to Senior Superintendent of Police, under Section 173 Cr.P.C. is not in consonance with law. The report contemplated by Section 173 should contain the information required by the said provision. The Investigating Officer is not expected to record findings of fact nor to give clean chit by exercising power of a court or judicial authority. In the instant case, however, the Superintendent of Police not only refers to investigation made by him and the statements recorded in the course F G H

A of investigation but records a *'finding'* that the statements were 'correct'. Investigating Officer was required to submit report in terms of Section 173 Cr.P.C. [Paras 66, 70 and 72] [760-G; 762-E-F; 763-F]

B 3.2. *Prima facie,* in the light of factual scenario, name of respondent No. 2 ought to have been included in the charge sheet and the application under Section 319 Cr.P.C. deserves to be allowed. His name finds place in the FIR. Not only that he was present at the place of offence with a weapon *(gandasi)* but was also arrested by C the police from the scene of offence. His name was, however, excluded and charge sheet was not submitted in pursuance of an application made by his father. It was the allegation of the complainant that the said action was taken with a view to oblige his father who was Chairman D of Panchayat Samiti. [Paras 65 and 73] [760-E-F; 763-G]

3.3. So far as respondent No. 3 is concerned, he was not charge-sheeted. Both the Courts considered the report of the Investigating Officer and held that the action E of non-issuing of process against him could not be held illegal or unlawful. Hence, the order cannot be termed unlawful or unwarranted which requires interference. [Para 64] [760-C-D]

4. In Criminal Appeal No. 1751 of 2008, there was F nothing against respondent No.2 and the report submitted by the Investigating Officer had been accepted by the trial Court as well as by the High Court and there is no infirmity therein. [Para 63] [760-B]

G 5. **Rakesh's* case ruled that an application under Section 319 Cr.P.C. is maintainable even without completion of cross-examination of a witness. *Mohd. Shafi's*** case held that satisfaction under Section 319 Cr.P.C. could be arrived at *only after cross-examination of* H *the witness is over.* Thus there are conflicting decisions of

co-ordinate Benches. The test formulated in Mohd. Shafi's case substantially curtails discretionary power of the Court conferred by Cr.P.C. under sub-section (1) of Section 319. This point also requires fresh consideration. Therefore, the following two questions are referred for the consideration of a Bench of three Judges i.e. (1) When the power under sub-section (1) of Section 319 Cr.P.C. of addition of accused can be exercised by a Court? Whether application under Section 319 is not maintainable unless the cross-examination of the witness is complete? and (2) What is the test and what are the guidelines of exercising power under sub-section (1) of Section 319 Cr.P.C.? Whether such power can be exercised only if the Court is satisfied that the accused summoned *in all likelihood* would be convicted? [Paras 46, 55, 62 78 and 79] [754-C; 758-A-B; 760-A; 765-C-F]

Case Law Reference:

1979 (1) SCC 345	Relied on.	Para 29
1983 (1) SCC 1	Relied on.	Para 31
(2002) 5 SCC 738	Relied on.	Para 34
2000 (3) SCC 262	Relied on.	Para 35
JT 2008 (9) SC 504	Relied on.	Para 43
2004 (7) SCC 792	Referred to.	Para 38
2007 (6) SCR 68	Referred to.	Para 39
2007 (8) SCC 224	Referred to.	Para 41
2007 (4) SCR 1023	held inapplicable.	Para 45
2001 (6) SCC 248	Relied on.	Para 48
2000 (2) SCC 396	Relied on.	Para 53
1976 (3) SCC 736	Relied on.	Para 58

A CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1750 of 2008.

From the Judgment and final Order dated 23.10.2006 of the High Court of Punjab and Haryana at Chandigarh in Criminal B Revision No. 773 of 2006.

WITH

Criminal Appeal No. 1751 of 2008.

C Vibhakar Misra, Abhisth Kumar, K.K. Pandey, Satinder Singh Gulati and Kamaldeep Gulati for the Appellant.

K.K. Khurana, Addl. A.G., Ajay Pal, Addl. A.G., A.K. Mehta and Kuldip Singh for the Respondents.

D The Judgment of the Court was delivered by

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

2. Both the parties in the High Court have filed present appeals against the judgment and order passed by the High E Court of Punjab & Haryana, dated October 23, 2006 in Criminal Revision Nos. 773 of 2006 and 1648 of 2006.

3. To appreciate the contentions raised by the parties, it would be appropriate to narrate few facts.

F 4. In the appeal arising out of Special Leave Petition (Crl.) No. 166 of 2007, the case of the prosecution is that an auction for leasing the land was held by the Gram Panchayat of village Indrapuri, Tehsil Samana, District Patiala on April 21, 2004 for cultivation on yearly basis *(Eksali)* for the year 2004-05. The G bid of the appellant was accepted and lease was granted in his favour. The appellant was thus in possession of the land.

5. According to the prosecution, on June 24, 2004, the appellant was ploughing the land. The accused persons went H there with deadly weapons and caused injuries to the appellant

as well as other prosecution witnesses. First Information Report (FIR) was lodged against the accused at Police Station Sadar, Samana for commission of offences punishable under Sections 307, 326, 336 and 427 read with Sections 120B, 148 and 149 of the Indian Penal Code, 1860 (IPC) as also for offences punishable under Sections 25, 27, 54 and 59 of the Arms Act, 1959. Accused were arrested. Vijay Preet Singh (respondent No. 2) was one of them.

6. It is the allegation of the appellant that Vijay Preet Singh-respondent No.2 herein is the son of Sukhvinder Singh, Chairman of Panchayat Samiti, Samana. The said Sukhvinder Singh interfered with the investigation. With a view to get the name of his son Vijay Preet Singh deleted by exercising influence on Police Authorities, he made an application on June 26, 2004, i.e. within two days of the incident, lodging of FIR and arrest of Vijay Preet Singh to Senior Superintendent of Police (SSP), Patiala, inter alia, stating therein that Vijay Preet Singh was resident of village Meayalkhurd, was studying in 10+2 class and at the time of occurrence he was not there but was at his residence and was falsely implicated in the case. He, therefore, asked the Senior Superintendent of Police (SSP) to make an inquiry either himself or through some senior officer so that justice be done to Vijay Preet Singh.

7. It also appears that Jagtar Singh-respondent No.3 herein also made a similar application on July 03, 2004 to Deputy Inspector General (DIG), Patiala asserting that in an incident dated June 24, 2004, his name was not mentioned in the FIR, but he had been falsely involved and he was likely to be arrested. His name was given by some persons due to grudge by the complainant side. There was a cross-case also. He, therefore, prayed that an inquiry may be conducted through an independent officer and the applicant may not be arrested till he is proved guilty.

8. It appears that an inquiry was conducted by police and a report was submitted by Superintendent of Police (D), Patiala

A to SSP, Patiala on July 12, 2004 wherein it was stated that respondent Nos. 2 and 3 i.e. Vijay Preet Singh and Jagtar Singh had not committed any offence and they were falsely implicated. A recommendation was, therefore, made not to initiate proceedings against both of them. Both the persons B were, therefore, discharged.

9. During the course of trial, however, depositions of witnesses were recorded. PW2 Hardeep Singh, in his deposition, stated that Vijay Preet Singh as also Jagtar Singh, respondents Nos. 2 and 3 were present at the time of incident C with weapons. So far as respondent No.2-Vijay Preet Singh is concerned, his name was mentioned in the FIR. He participated in the incident and was having a weapon with him (gandasi). He was also arrested by the police from the place of offence. Similarly, respondent No.3-Jagtar Singh was present with soti. D He also participated in the incident by raising lalkaras. In furtherance of common object, all the accused assaulted the complainant party and committed the offences with which they were charged. It is on the basis of the report submitted by Superintendent of Police (D), Patiala to Senior Superintendent E of Police, Patiala that they were discharged. An application was, therefore, made by the Addl. Public Prosecutor under Section 319 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code') to include respondent Nos. 2 and 3 as accused and to summon them for trial.

F

10. The Court of the Addl. Sessions Judge, Patiala, however, by an order dated January 12, 2006 rejected the application observing that he did not find sufficient grounds to proceed against Vijay Preet Singh and Jagtar Singh.

G

11. Being aggrieved by the said order, the appellant herein approached the High Court of Punjab & Haryana by filing Criminal Revision No. 773 of 2007. The High Court, however, dismissed the Revision and confirmed the order passed by the trial Court. The said order is challenged in the present appeal.

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12. In the appeal arising out of Special Leave Petition (Crl.) No. 2051 of 2007, the case of the appellant was that the accused [complainant party in SLP (Crl.) No. 166 of 2007] had formed unlawful assembly and committed offences punishable under Sections 307, 326, 336, 447, 427 read with Sections 148 and 149, Indian Penal Code (IPC) as also under Sections 25, 27, 54 and 59 of the Arms Act, 1959. Cross FIR was, therefore, filed on the same day i.e. on June 24, 2004.

13. According to the appellant, respondent No.2-Kashmir Singh, son of S. Sucha Singh was very much present but his name was not included in the charge-sheet and as per the report submitted by the Police Authorities, said Kashmir Singh was innocent. During the course of trial, however, PW5-Jagdeep Singh stated that Kashmir Singh was also present and was one of the members of unlawful assembly. An application was, therefore, made to the trial Court (Addl. Sessions Judge) by the Addl. Public Prosecutor under Section 319 of the Code to include the name of Kashmir Singh as an accused and to issue summons to him. The prayer was, however, rejected by the trial Court which was challenged by the appellant herein by filing Criminal Revision No. 1648 of 2006, but it was also dismissed by the High Court. The said order is challenged by the appellant in this Court.

14. Notice in SLP (Crl) No. 166 of 2007 was issued on January 22, 2007. In the other matter, i.e. SLP (Crl) No. 205 of 2007, notice was issued on April 02, 2007. Both the cases were ordered to be heard together. The Registry was directed to list the matter for final hearing on a non-miscellaneous day and that is how the matters have been placed before us.

15. We have heard learned counsel for the parties.

16. The learned counsel for the appellant in the appeal arising out of SLP (Crl) No. 166 of 2007 submitted that the order passed by the trial Court and confirmed by the High Court is clearly erroneous and deserves to be set aside. It was

A submitted that so far as Vijay Preet Singh is concerned, he was very much present at the time of incident with a weapon (gandasi), his name was included in the First Information Report (FIR) and he was also arrested by the police from the place of offence since he actually participated in the crime. The B Investigating Agency was, therefore, wholly wrong in deleting his name and in reporting that Vijay Preet Singh was not present at the time of incident and he reached at the place of offence after the incident was over. Such report was made only with a view to oblige Sukhvinder Singh, father of Vijay Preet C Singh who was Chairman of Panchayat Samiti, Samana. Even otherwise, during the course of trial, the prosecution evidence revealed that Vijay Preet Singh was present at the time of incident. A clear case for application of Section 319 of the Code had been made out and the trial Court was wrong in D rejecting the application to join Vijay Preet Singh as an accused and to issue summons to him. Similar error was committed by the High Court.

17. Likewise, the Investigating Agency wrongly recommended deletion of name of Jagtar Singh. From the E examination of prosecution witnesses, it was clear that Jagtar Singh was also present at the time of incident with weapon and he participated in the crime. An application under Section 319 of the Code, hence, ought to have been allowed.

F 18. It was submitted that even if name of a particular person is not mentioned in the FIR as an accused, he can, later on, be added as an accused and a summons can be issued by a Court in exercise of power under Section 319 of the Code. It was, therefore, submitted that the order passed by the trial G Court and confirmed by the High Court deserves to be set aside and the appeal deserves to be allowed.

19. The learned counsel for respondent Nos. 2 and 3, on the other hand, supported the order passed by the trial Court and confirmed by the High Court.

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20. It was stated that an inquiry had been conducted by the Investigating Agency and on the basis of statements recorded during investigation, it was proved that respondent Nos.2-Vijay Preet Singh reached at the spot after the incident was over and hence, he could not be joined as accused though his name was found in FIR and he was arrested by police and accordingly report was made to delete his name.

21. So far as Jagtar Singh is concerned, his name was not mentioned in the FIR. During the investigation also, nobody stated that Jagtar Singh participated in the incident and, hence, his name was deleted.

22. According to the counsel, only at the time of trial, with a view to falsely implicate respondent Nos. 2 and 3, prosecution witnesses had named them. The trial Court, therefore, rightly rejected the prayer and the High Court confirmed it. No case for interference by this Court in exercise of discretionary jurisdiction under Article 136 of the Constitution has been made out and the appeal deserves to be dismissed.

23. The learned counsel for the State also supported the respondents and prayed for dismissal of the appeal.

24. In the cross-appeal, learned counsel for the appellant submitted that Kashmir Singh was present and participated in the incident. In the course of trial, the prosecution witnesses expressly stated about the presence and participation of respondent No.2-Kashmir Singh and the action of non-issuance of summons to respondent No.2-Kashmir Singh by the trial Court and confirmed by the High Court is erroneous and the appeal deserves to be allowed.

25. The learned counsel for Kashmir Singh supported the order and prayed for dismissal of appeal. The counsel for the State also prayed for dismissal of appeal.

26. Now, Section 319 of the Code empowers a Court to proceed against any person if it appears from the evidence that

such person has also committed an offence for which he can be tried together with other accused. The said section reads as under;

> *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 tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.
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> **(2)** Where such person is not attending the Court he may 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 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 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.
>
> (emphasis supplied)

27. Sometimes while hearing a case against one or more accused, it *appears* to a Court from the *evidence* that some

person other than the accused before it is also involved in that very offence. It is only proper that a Court should have power to summon such person by joining him as an accused in the case. A

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

29. Before three decades, in *Joginder Singh & Anr. v. State of Punjab & Anr.*, (1979) 1 SCC 345, charge sheet was submitted against certain accused. During trial, however, evidence of some of the witnesses was recorded who implicated the appellants. A Public Prosecutor, therefore, moved an application to summon them and to try them along with other accused. The application was granted. The order was challenged by the appellants. D E

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 accused before it, as accused and direct him to be tried along with the other accused for the offence or offences the added accused appears to have committed. F

31. In *Municipal Corporation of Delhi v. Ram Kishan 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 G H

A 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.

B

32. Replying the question in the affirmative and quoting with approval observations in Joginder Singh, this Court held that if it appears to the Court that any person not being the accused before it, but against whom there appears, during trial, sufficient evidence indicating his involvement in the offence, he can be summoned.

C

33. The Court, however, was conscious of the extraordinary nature of the power under Section 319 of the Code and stated;

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"(W)e 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".*

E

(emphasis supplied)

F

34. 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. It was held by this Court that the words "could be tried together with the accused" in Section 319(1) were merely directory and if the trial against the other accused is over, such a person who was subsequently added as an accused, could be tried after the conclusion of the trial of the main accused.

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35. In *Michael Machado & Anr. V. Central Bureau of*

Investigation & Anr., (2000) 3 SCC 262, considering the basic requirements of Section 319 of the Code, this Court said;

> "The basic requirement 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 as an accused in that case, had 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 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".

36. Highlighting the underlying object of the provision, the Court proceeded to state;

> "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 evidence connecting that another 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 be remembered that there is no compelling duty in the Court to proceed against other persons".

37. Observing that there was no reasonable prospect of conviction of the persons sought to be arraigned as accused,

A the Court held that no order could be made under Section 319 of the Code.

38. In *Krishnappa v. State of Karnataka,* (2004) 7 SCC 792, applying *Ram Kishan Rohtagi* and *Michael Machado,* the Court ruled that the power to summon an accused is an extraordinary power conferred on the Court and it should be used very sparingly and only if compelling reasons exist for taking cognizance against the person other than the accused.

39. In *Y. Saraba Reddy v. Puthur Rami Reddy & Anr.,* (2007) 4 SCC 773 : (2007) 6 SCR 68, a three-Judge Bench of this Court to which one of us was a party (D.K. Jain, J.), a similar situation arose. In the FIR, names of certain persons were mentioned. On an application by those persons, the matter was investigated by the Deputy Superintendent of Police and the report was submitted that they were not present at the time of incident. On the basis of the report, their names were deleted from the array of accused. The case was then committed to the Court of Session. PW1, in his examination involved the said persons and an application under Section 319 of the Code was filed for issuing summons to them. The trial Court rejected the application primarily on the ground that the plea of alibi was investigated by the Deputy Superintendent of Police and was found to be correct. The High Court did not find infirmity in the order. The action was challenged in this Court.

40. Allowing the appeal and setting aside the order of the High Court, Dr. Pasayat, J. said; "If the satisfaction of the Investigating Officer or Supervising Officer is to be treated as determinative, then the very purpose of Section 319 of the Code would be frustrated. Though it cannot always be the satisfaction of the Investigating Officer which is to prevail, yet in the instant case the High Court has not found the evidence of PW-1 to be unworthy of acceptance. Whatever be the worth of his evidence for the purposes of Section 319 of the Code it was required to be analysed. *The conclusion that the IO's satisfaction should*

be given primacy is unsustainable". A

(emphasis supplied)

41. In *Guriya & Ors. v. State of Bihar & Anr.,* (2007) 8 SCC 224, appellants were not arrayed as accused. On the basis of prosecution evidence, however, an application under Section 319 of the Code was filed which was allowed by the High Court and appellants were added as accused. Appellants questioned the legality of the order. B

42. This Court allowed the appeal, set aside the order of the High Court and dismissed the application filed under Section 319 of the Code observing that there was no material against appellants, their names were not found in FIR, no overt act had been attributed to them and the protest petition filed by the complainant against them had also been dismissed. C D

43. Very recently, in *Bholu Ram v. State of Punjab & Anr.,* JT 2008 (9) SC 504, we were called upon to consider such a situation. Referring to earlier decisions, we held that such a course is open to a Court and power under Section 319 of the Code can be exercised by the Court to issue summons to a person who was not originally shown as an accused. Such an order cannot be said to be illegal, unlawful or otherwise objectionable. E

44. It is, however, submitted on behalf of the accused that in the instant case, an application was made by the Public Prosecutor before the cross-examination of PW2-Hardeep Singh was over. It was strenuously contended that for application of Section 319 of the Code and exercise of power to proceed against person other than the person shown as an accused, there must be an *evidence* before the Court and such satisfaction can be arrived at by the Court only upon completion of cross-examination. F G

45. In this connection, reference was made to a two Judge Bench decision of this Court in *Mohd. Shafi v. Mohd. Rafiq &* H

A *Anr.*, (2007) 4 SCR 1023. In Mohd. Shafi, an FIR was lodged against the accused alleging the commission of an offence punishable under Section 302, IPC. The police submitted charge-sheet against K but not against M (appellant). At the trial, PW1 was examined and in his examination-in-chief, he B asserted that M also participated in the incident. An application was filed for summoning him under Section 319 of the Code which was rejected by the trial Court but allowed by the High Court. M approached this Court.

C 46. Allowing the appeal and setting aside the order passed by the High Court, this Court observed that the order passed by the High Court was not sustainable. It was held that satisfaction under Section 319 of the Code could be arrived at *only after cross-examination of the witness is over. The Court stated;*

D

> "The Trial Judge, as noticed by us, in terms of Section 319 of the Code of Criminal Procedure was required to arrive at his satisfaction. *If he thought that the matter should receive his due consideration only after the cross-*
> E *examination of the witnesses is over, no exception thereto could be taken* far less at the instance of a witness and when the State was not aggrieved by the same".
>
> (emphasis supplied)

F 47. The counsel submitted that admittedly in the instant case, cross-examination of PW2-Hardeep Singh was not over. In the course of cross-examination by some of the accused persons, the learned Additional Public Prosecutor moved the Court under Section 319 of the Code and further cross-
G examination was deferred. It was, therefore, submitted that no order under Section 319 could be made and the application was liable to be dismissed.

48. The learned counsel for the complainant, however,
H placed reliance on a two Judge Bench decision in *Rakesh &*

Anr. V. State of Haryana, (2001) 6 SCC 248. An identical issue was raised there. The father of the prosecutrix lodged an FIR alleging commission of offences under Sections 363, 366 and 376, IPC by Rakesh and others. According to the complainant, his daughter was taken by three persons due to previous enmity with the object of committing rape. The girl was then found with P. After the investigation, charges were framed only against P. At the trial, however, certain witnesses were examined and on the basis of their evidence, the Public Prosecutor filed an application under Section 319 of the Code for arraying persons other than P as additional accused. The prayer was granted. The order was confirmed by the High Court. The appellants approached this Court. The question before this Court was whether the statement of a prosecution-witness without such witness having been cross-examined, constituted 'evidence' within the meaning of Section 319 of the Code.

49. Replying the question in the affirmative, noticing conflicting views of different High Courts and holding that the term 'evidence' used in sub-section (1) of Section 319 of the Code is comprehensive, the Court stated;

> "Once the Sessions Court records a statement of the witness it would be part of the evidence. It is true that finally at the time of trial the accused is to be given an opportunity to cross-examine the witness to test its truthfulness. But that stage would not arise while exercising court's power under Section 319 Cr.P.C. Once the deposition is recorded, no doubt there being no cross-examination, it would be a prima facie material, which would enable the sessions court to decide whether powers under Section 319 should be exercised or not. Sub-section (1) of Section 319 itself provides that in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any persons not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence

which he appears to have committed".

50. The Court added;

"Hence, it is difficult to accept the contention of the learned counsel for the appellants that the term 'evidence' as used in Section 319 Criminal Procedure Code would mean evidence which is tested by cross examination. The question of testing the evidence by cross-examination would arise only after addition of the accused. There is no question of cross-examining the witness prior to adding such person as accused. Section does not contemplate an additional stage of first summoning the person and giving him an opportunity of cross-examining the witness who has deposed against him and thereafter deciding whether such person is to be added as accused or not. Word "evidence" occurring in sub-section is used in comprehensive and broad sense which would also include the material collected by the investigating officer and the material or evidence which comes before the Court and from which the Court can prima facie conclude that person not arraigned before it is involved in the commission of the crime".

51. Thus, once the Sessions Court records a statement of a witness, it becomes a part of evidence. It is true that finally at the time of trial, the accused must be given an opportunity to cross-examine the witness to test truthfulness of such statement. But that stage would come only after the person is added as an accused. The Code in such situation has afforded sufficient protection by enacting sub-section (4).

52. When an examination-in-chief of a witness is over, there being no cross-examination, it would be merely prima facie material. But it would enable the Sessions Court to decide whether powers under Section 319 of the Code should be exercised or not. Sub-section (1) of Section 319 itself provides that in the course of any inquiry into, or trial of, an offence, it

appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

53. In *State of H.P. v. Surinder Mohan & Ors.*, (2000) 2 SCC 396, this Court negatived the contention that before granting pardon under Section 306 of the Code, accused should be permitted to cross examine such person whose evidence is recorded by the Magistrate. The Court held that at the time of investigation or inquiry into an offence, the accused cannot claim any right under law to cross-examine the witness. The right to cross-examine arises only at the time of trial. During the course of investigation by the police, the question of cross-examination by the accused does not arise. Under Section 200 of the Code, when the Magistrate before taking cognizance of the offence, that is, before issuing process holds an inquiry, the accused has no locus standi or right to be heard, and, therefore, there is no question of cross-examination of the witness.

54. It is thus difficult to accept the contention of the learned counsel for the appellants that the term 'evidence' used in sub-section (1) of Section 319 of the Code would mean evidence which is tested by cross examination. The question of testing the evidence by cross-examination would arise only after addition of the accused. There is no question of cross-examining the witness prior to adding such person as accused. Section does not contemplate an additional stage of first summoning the person and giving him an opportunity of cross-examining the witness who has deposed against him and thereafter deciding whether such person should or should not be added as accused. The word "evidence" occurring in sub-section (1) of Section 319 is used in comprehensive and broad sense which would also include the material collected by the investigating officer and the evidence which comes before the

A Court and from which the Court is satisfied that person not arraigned before it is involved in the commission of the crime.

55. *Rakesh* thus ruled that an application under Section 319 of the Code is maintainable even without completion of cross-examination of a witness. If the Court is satisfied on the basis of examination-in-chief of a witness that a person not shown to be an accused appears to have committed an offence, it can exercise the power under Section 319 of the Code.

56. According to *Mohd. Shafi,* however, no such order can be passed by a Court under Section 319 unless the cross-examination of the witness is complete.

57. Both the cases *i.e. Rakesh and Mohd. Shafi* were decided by a two Judge Bench. Whereas Rakesh was decided in 2000, Mohd. Shafi was decided in 2007. In *Mohd. Shafi,* however, the attention of the Court was not invited to Rakesh.

58. We may only observe that it is settled law that at the stage of issuing summons or process, a Court has to see whether there is prima facie case against the person sought to be summoned or against whom process is sought to be issued. At that stage, there is no question of giving an opportunity of hearing to such person. The entire scheme of the Code is that an accused does not come into picture at all till process is issued. As held by this Court in several cases including a leading decision in *Nagavva v. Veeranna,* (1976) 3 SCC 736, the accused at pre-process stage has no locus standi and is not entitled to be heard on the question whether the process should be issued against him or not. It may, therefore, be said that till summons or process is issued against the accused, he has no right of audience and in that case, it cannot be said that on being satisfied on the basis of examination-in-chief, an application under Section 319 of the Code is not maintainable.

59. There is yet another reason which is also very relevant

and material. When a person who is not shown as an accused is sought to be added on the basis of evidence in exercise of power under Section 319 of the Code, he is not before the Court. Other accused against whom the trial has commenced are very much before the Court and generally they are represented by an advocate/advocates. In the evidence of a witness, when role of other person i.e. other than the accused is described by prosecution witnesses, normally, accused who are already on record are not affected. Grant or rejection of application under Section 319 would generally not alter their position. In our considered opinion, therefore, holding that unless the cross-examination of a witness by accused who were already on record is over and complete, no power under Section 319 of the Code can be exercised, does not appear to be sound.

60. The matter can still be looked at from another angle. The Code has taken care by sufficiently protecting and safeguarding the interest of such added accused. Sub-section (4) of Section 319 expressly provides that where the Court exercises power under sub-section (1) and proceeds against a person not arrayed as an accused, *"the proceedings in respect of such person shall be commenced afresh, and witnesses re-heard"*. Thus, after exercise of power by the Court under Section 319(1), such added accused would be placed in the same position as other accused and will get all rights an accused can get under the Code. The proceedings against the added accused shall be commenced *afresh* and witnesses will be *reheard.* Their evidence, prior to addition of the accused cannot be used against the accused who was not there earlier. The question of prejudice, hence, does not arise at all.

61. It was submitted on behalf of the appellants that being a decision of two Judge Bench, Rakesh was binding upon *Mohd. Shafi* and the subsequent decision thus is *per incurium.* The accused, on the other hand, submitted that being latest in point of time, *Mohd. Shafi* should be followed by this Court.

A 62. In our considered opinion, however, in the light of conflicting decisions of co-ordinate Benches, (both of two Hon'ble Judges), it would be appropriate if we refer the matter to a Bench of three Hon'ble Judges.

B 63. In the case on hand, in an appeal arising out Special Leave Petition (Crl) No. 2051 of 2007 (*Manjit Pal Singh v. State of Punjab & Anr.*), there was nothing against respondent No.2-Kashmir Singh and the report submitted by the Investigating Officer had been accepted by the trial Court as well as by the High Court and there is no infirmity therein.

C

64. Likewise, in an appeal arising out of Special Leave Petition (Crl) No. 166 of 2007 (*Hardeep Singh v. State of Punjab & Ors.*), Jagtar Singh was not charge-sheeted. Both the Courts considered the report of the Investigating Officer and D held that the action of non-issuing of process against Jagtar Singh could not be held illegal or unlawful. We are of the view that the order cannot be termed unlawful or unwarranted which requires interference.

E 65. As far as Vijay Preet Singh is concerned, the matter stands on a different footing. His name finds place in the FIR. Not only that he was present at the place of offence with a weapon *(gandasi)* but was also arrested by the police from the scene of offence. His name was, however, excluded and charge sheet was not submitted in pursuance of an application made F by his father. It was the allegation of the complainant that the said action was taken with a view to oblige Sukhvinder Singh, father of Vijay Preet Singh who was Chairman of Panchayat Samiti.

G 66. We are further of the view that the final report submitted by the Superintendent of Police (D), Patiala to Senior Superintendent of Police, Patiala on July 12, 2004 under Section 173 of the Code is also not in consonance with law.

H 67. The said section provides for submission of final report

by the Police Officer on completion of investigation. Sub-sections (1) and (2) of the said section are relevant and read thus;

> *173. Report of police officer on completion of investigation.*- (1) Every investigation under this Chapter shall be completed without unnecessary delay.
>
> (2) (i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating –
>
> (a) the names of the parties;
>
> (b) the nature of the information;
>
> (c) the names of the persons who appear to be acquainted with the circumstances of the case;
>
> (d) whether any offence appears to have been committed and, if so, by whom;
>
> (e) whether the accused has been arrested;
>
> (f) whether he has been released on his bond and, if so, whether with or without sureties;
>
> (g) whether he has been forwarded in custody under section 170.
>
> (ii) The officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him, to the person, if any, by whom the information relating to the commission of the offence was first given.

68. Sub-section (1) of Section 173 of the Code lays down that every investigation must be completed without unnecessary delay. Slackness or inordinate delay on the part of the

A investigating agency may result in the disappearance of material evidence which might otherwise be available and may prevent effective detection of the crime. It may also result into unnecessary detention of the accused in custody.

B 69. Sub-section (2) enacts that as soon as investigation is completed, the officer in charge of the police station shall forward a report to a Magistrate empowered to take cognizance of the offence on a police report in the form prescribed by the State Government, stating (i) the names of the parties; (ii) the nature of the information; (iii) the names of C the persons who appear to be acquainted with the circumstances of the case; (iv) whether any offence appears to have been committed and, if so, by whom; (v) whether the accused has been arrested; (vi) whether he has been released on his bond and, if so, whether with or without sureties; (vii) D whether he has been forwarded in custody under section 170. He shall also communicate to the informant the action taken by him.

70. The report contemplated by Section 173 should E contain the information required by the said provision. The Investigating Officer is not expected to record findings of fact nor to give clean chit by exercising power of a Court or judicial authority. In the instant case, however, the Superintendent of Police not only refers to investigation made by him and the F statements recorded in the course of investigation but records a *'finding'* that the statements were *'correct'*. Vijay Preet Singh was not present at the place of offence when the incident took place but reached after the occurrence was over. Thereafter police had arrested him. Likewise, Jagtar Singh was not G present at the spot at the time of occurrence.

71. The report stated;

"However, Vijay Preet Singh is totally innocent because he came there after finalizing of the occurrence. The police H had already been there after reaching him and the fight

stood already finished. Moreover, Balbir Singh Dhanoa and Hardeep Singh named Jagtar Singh son of Suchha Singh resident of Fatehmajri later on. This fact is also totally wrong because the son-in-law of Joginder Singh was expired a few days earlier. He was found to be at the ceremony of taking the bones with other men and women. Except this, this fact has also come in the notice that Hardeep Singh has stated in FIR that he was taken this land on lease. He went there to cultivate but prior to the occurrence Davinder Singh party had already cultivated his corn yield and jantars in this land, which was already 2 feet in height. If he wanted to cultivate then he could cultivate this land alone. What was the necessity to come with these group of men. It is evident therefrom that these all men armed with their weapons came to get possession of this land forcibly after making a plan. The statement which was given by Balbir Singh Dhanoa that he had deposited his gun at Verma Gun House, Model Town, Patiala on 2.6.04 has been deposited with connivance. Because Inspector Rajesh Chijjar snatched gun from Balbir Singh Dhanoa with the help of his employees. Later on Dhanoa party got the weapons forcibly from the police due to a big gathering of men. It is recommended to take legal action against Verma Gun House, Patiala".

72. We may only state that the Investigating Officer was required to submit report in terms of Section 173 of the Code and nothing more. He should not record a finding nor he can give clean chit which is a function and power of the Magistrate who will exercise the said power as provided in the Code.

73. *Prima facie,* in the light of factual scenario, the submission on behalf of the appellant is well-founded that name of Vijay Preet Singh ought to have been included in the charge sheet and the application under Section 319 of the Code deserves to be allowed. The learned counsel for the accused, however, referring to *Mohd. Shafi,* submitted that in the said

A decision, this Court held that the jurisdiction under Section 319 of the Code can be exercised by the Court only if the Court is satisfied that *in all likelihood* such person would be convicted.

74. The Court in Mohd. Shafi, stated;

B "From the decisions of this Court, as noticed above, it is evident that before a court exercises its discretionary jurisdiction in terms of Section 319 of the Code of Criminal Procedure, it must arrive at the satisfaction that *there exists a possibility that the accused so summoned is in all* C *likelihood would be convicted.* Such satisfaction can be arrived at inter alia upon completion of the cross-examination of the said witness. For the said purpose, the court concerned may also like to consider other evidence".

D (emphasis supplied)

[see also *Kailash v. State of Rajasthan.& Anr.,* JT 2008 (3) SC 279]

75. With respect, the above observations do not appear E to be in consonance with statutory provisions or previous decisions of this Court. We have reproduced Section 319 of the Code in the earlier part of the judgment. Bare reading of sub-section (1) leaves no room of doubt what it requires. It states that for addition of accused, *it must appear* to the Court F from the evidence that any person not being the accused has committed any offence for which such person should be tried along with other accused.

76. In *Joginder Singh,* a three-Judge Bench of this Court stated;

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"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 H 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..." A

77. In *Michael Mechdo,* this Court held that the Court must have *reasonable satisfaction* from the evidence led that the other person has committed an offence. B

78. In *Krishnappa,* it was observed that such power should be exercised if there are compelling reasons and in Mohd. Shafi this Court has held that such power can be exercised only if the Court is satisfied that the accused so summoned is *in all likelihood* would be convicted. The test formulated in *Mohd. Shafi* substantially curtails discretionary power of the Court conferred by the Code under sub-section (1) of Section 319. Even on this point, therefore, the matter requires fresh consideration. C D

79. We, therefore, refer the following two questions for the consideration of a Bench of three Hon'ble Judges;

(1) When the power under sub-section (1) of Section 319 of the Code of addition of accused can be exercised by a Court? Whether application under Section 319 is not maintainable unless the cross-examination of the witness is complete? E

(2) What is the test and what are the guidelines of exercising power under sub-section (1) of Section 319 of the Code? Whether such power can be exercised only if the Court is satisfied that the accused summoned in all likelihood would be convicted? F

80. We direct the Registry to place the matter before the Hon'ble the Chief Justice of India for taking an appropriate action. G

81. Ordered accordingly.

K.K.T. Appeal dismissed. H