A BRIJENDRA SINGH & ORS.

v.

STATE OF RAJASTHAN

(Criminal Appeal No. 763 of 2017)

B APRIL 27, 2017

[A. K. SIKRI AND ASHOK BHUSHAN, JJ.]

Code of Criminal Procedure, 1973 – s.319 – Power of court to summon accused not arraigned as accused – Exercise of – When – Held: Prima facie *opinion which is to be formed requires stronger and cogent evidence than mere probability of his complicity – Degree of satisfaction is to be more than the degree which is warranted at the time of framing of the charges against others in respect of whom chargesheet was filed – Power is not to be exercised in a casual or a cavalier manner – On facts, trial court acted in a casual and cavalier manner in passing the summoning order against the appellants – Documentary and other evidence collected during the investigation, showed that appellants plea of* alibi *was correct – Evidence recorded during trial was nothing more than the statements which was already there u/s. 161 Cr.P.C. recorded at the time of investigation of the case – Trial court was duty bound to see while forming* prima facie *opinion and to see as to whether 'much stronger evidence than mere possibility of the appellants' complicity came on record – There was no satisfaction of this nature – High Court too ignored the said material – Thus, the order of summoning the appellants u/s. 319 set aside.*

Allowing the appeal, the Court

HELD: 1.1 The powers of the court to proceed under Section 319 Cr.P.C. even against those persons who are not arraigned as accused, cannot be disputed. This provision is meant to achieve the objective that real culprit should not get away unpunished. Section 319 Cr.P.C., which is an enabling provision empowering the Court to take appropriate steps for proceeding against any person, not being an accused, can be exercised at any time after the charge-sheet is filed and before the pronouncement of the judgment, except during the stage of

Section 207/208 Cr.P.C., the committal etc., which is only a pre-trial stage intended to put the process into motion. [Paras 9, 10][381-H; 383-B-C] A

1.2 The principles enunciated in *Hardeep Singh's* case are recapitulated. The power under Section 319 Cr.P.C. can be exercised by the trial court, once it finds that there is some '*evidence*' against such a person on the basis of which evidence it can be gathered that he appears to be guilty of offence. The '*evidence*' means the material that is brought before the court during trial. Insofar as the material/evidence collected by the IO at the stage of inquiry is concerned, it can be utilised for corroboration and to support the evidence recorded by the court to invoke the power under Section 319. No doubt, such evidence that has surfaced in examination-in-chief, without cross-examination of witnesses, can also be taken into consideration. However, since it is a discretionary power given to the court under Section 319 Cr.P.C. and is also an extraordinary one, same has to be exercised sparingly and only in those cases where the circumstances of the case so warrants. The degree of satisfaction is more than the degree which is warranted at the time of framing of the charges against others in respect of whom chargesheet was filed. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised. It is not to be exercised in a casual or a cavalier manner. The prima facie opinion which is to be formed requires stronger evidence than mere probability of his complicity. [Para 13][385-B-G] B C D E

1.3 When the said principles with their application are translated to the facts of this case, an impression is gathered that the trial court acted in a casual and cavalier manner in passing the summoning order against the appellants. The police investigation revealed that the statements of these persons regarding the presence of the appellants at the place of occurrence was doubtful and did not inspire confidence, in view of the documentary and other evidence collected during the investigation, which depicted another story and clinchingly showed that appellants plea of *alibi* was correct. This record was before the trial court. Notwithstanding the same, the trial court F G H

A **went by the deposition of complainant and some other persons in their examination-in-chief, with no other material to support their so-called verbal/ocular version. Thus, the '*evidence*' recorded during trial was nothing more than the statements which was already there u/s.161 Cr.P.C. recorded at the time of investigation of the case. No doubt, the trial court would be competent to** B **exercise its power even on the basis of such statements recorded before it in examination-in-chief. However, in a case like the instant where plethora of evidence was collected by the IO during investigation which suggested otherwise, the trial court was at least duty bound to look into the same while forming *prima facie*** C **opinion and to see as to whether 'much stronger evidence than mere possibility of their (i.e. appellants) complicity has come on record. There is no satisfaction of this nature. Even it is presumed that the trial court was not apprised of the same at the time when it passed the order, the High Court too blissfully ignored the said material. Except reproducing the discussion contained in** D **the order of the trial court and expressing agreement therewith, nothing more was done. Such orders cannot stand judicial scrutiny. The order of summoning the appellants under Section 319 Cr.P.C. is set aside. [Paras 14, 15 and 16][385-F; 386-A-F]**

E *Hardeep Singh v. State of Punjab & Ors.* **[2014] 2 SCR 1 : (2014) 3 SCC 92 – relied on.**

Case Law Reference

[2014] 2 SCR 1	**relied on**	**Paras 14, 15**

F CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 763 of 2017.

From the Judgment and Order dated 11.01.2016 by the High Court of Judicature for Rajasthan at Jaipur Bench, Jaipur in S. B. Criminal Revision Petition No. 1355/2015.

G Sushil Kumar Jain, Sr. Adv., Abhinav Gupta, Ms. Priyal Jain, Ms. Pratibha Jain, Advs. for the Appellants.

Ram Naresh Yadav, Milind Kumar, Advs. for the Respondent.

The Judgment of the Court was delivered by

A. K. SIKRI, J. 1. The appellants herein, three in number, have been summoned by the Court of Special Judge, SC/ST Act, which is in

H

seisin of the trial in respect of FIR No. 53 of 2000, wherein charges for offences under Sections 147, 148, 149, 323, 448, 302/149 of Indian Penal Code (IPC) as well as under Sections 3 and 3(2)(V) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (SC/ST Act) have been framed. The appellants were not arraigned as accused in the chargesheet. The charges were framed against those who were accused in the chargesheet and prosecution evidence is being recorded. The appellants are summoned as additional accused persons under Section 319 of Code of Criminal Procedure, 1973 (Cr.P.C.) to face the trial along with other accused persons. The trial court has passed the Order dated 06.10.2015 on an application filed by the complainant Harkesh Meena under Section 319 of Cr.P.C. This order was challenged by the appellants before the High Court. However, the High Court has dismissed the revision petition preferred by the appellants on 11.01.2016.

2. Factual details pertaining to the FIR and registration of case against other persons as well as filing of the application by the complainant under Section 319 of Cr.P.C. and the orders therein are as under:

On the basis of a written complaint, FIR No. 53 of 2000 was registered at 10:30 pm on 29.04.2000 under Sections 147, 148, 149, 323, 448, 302/149 IPC as well as under Sections 3 and 3(2)(V) of SC/ST Act. In this complaint, the complainant had stated that at about 3:00 pm on 29.04.2000 when he was at his Khejra well, making his cattle drink water, certain persons including appellants who belong to his village came there armed with axe, lathi sabbal (iron rod) and knives in their hands, with intention to kill the complainant. On seeing them, the complainant ran from that place and came to his uncle's (Nathu) house and cried loudly. His uncle was sleeping in front of the house and Lakhpat was sleeping under Neem tree. As soon as he came into the thatch, Pratap Singh inflicted lathi blow on him from behind which hit on his back. The complainant ran into the house of Bharatlal. Brijendra Singh inflicted sabbal at the head of his uncle Nathu who was sleeping at that time and Pratap hit his uncle with axe above the ear. Thereafter, all these accused persons started inflicting lathi sticks. Lakhpat tried to run in order to rescue himself. These persons gave beating to him as well, with lathi sticks. When the complainant's elder brother went to rescue them, these accused persons gave lathi sticks blow to him as well. In the meantime, their wives, wives of their sons had also come. Rishi, son of Ramu

A Brahmin of Talabka and Bhanu, nephew of Jagdish Singh of Jaipur were also along with them. Because of the beating by the accused persons, complainant's uncle Nathu died on the spot. Thereafter, accused persons fled away. The incident was witnessed by a number of villagers. In the FIR, the appellants were also named as accused persons.

B 3. FIR was registered and the matter was investigated by the Investigating Officer (IO). During the investigation, the appellants were also interrogated. They had stated that they are residing at Jaipur and at the time of incident, they were in Jaipur. Thus, plea of *alibi* was taken by these persons. Appellant No.1 and 2 are in police service and at relevant time they were posted at Jaipur. Appellant No.2 Jagdish has C lost his leg while on traffic police duty. Appellant No.3 Bhanu is the appellant's sister's son and claimed that he was also at Jaipur. The police after investigation and considering the evidence with regard to the *alibi* of the appellants Brijendra, Jagdish (who lost his leg while discharging traffic police duty) and Bhanu, did not find any sufficient D and reliable evidence against the appellants and, therefore, did not file any challan against them and kept the investigation pending under Section 178(3) Cr.P.C. When the trial court by its Order dated 06.09.2000, without any challan being submitted by the police, directed cognizance of the matter, the appellants filed the S.B. Criminal Revision No. 505/ 2000 before the High Court and the High Court vide its Order dated E 16.04.2009 allowed the Revision and set aside the Order dated 06.09.2000 of the trial court. The High Court, however, made it clear that the said Order dated 16.04.2009 shall be without prejudice to the powers of the Sessions Court to add any person in the array of accused under Section 319 Cr.P.C.

F 4. During the period when S.B. Criminal Revision No. 505 of 2000 was pending before the High Court, the police came to the conclusion that the appellants were not involved in the incident. The police after investigation, prepared the Final Report of closure of the case against the appellants which was approved by the SP. In this manner, after G completing the investigation, the police filed the Challan only against other accused persons, namely, Bhanwar Singh, Pratap Singh and Shambhu Singh.

5. Though, at the time of filing of the Challan, the police kept investigation pending, subsequently it came to the conclusion that the H appellants were not involved and the final report of closure of the case

against the appellants was filed. The trial court framed charges against the aforesaid three accused persons and the trial proceeded, though it has been delayed abnormally as more than 15 years have been passed. Be that as it may, the prosecution examined 23 witnesses including PW-1 Bharat Lal, PW-2 Kamla, PW-3 Lakhpat, PW-4 Harkesh and PW-5 Amritlal sometime in the year 2009. On 26.03.2014 i.e. after five years of examination of the aforesaid witnesses, complainant filed application under Section 319 of Cr.P.C. It is this application which has been allowed by the Special Judge and the said order has been affirmed by the High Court.

6. Mr. Sushil Kumar Jain, learned senior counsel appearing for the appellant, submitted that the appellant had obtained information from the authorities under the Right to Information Act about the status of the investigation that was carried out by the Investigating Officer culminating into filing of the final report. He drew our attention to the letter dated 19.02.2016 that was received by the appellant in response to his query under the Right to Information Act wherein the information was supplied to the appellant along with requisite documents that were collected during the investigation. The details of these documents are as under:

(i) Duty Certificate No. 2407 dated 04.05.2000 signed by the Assistant Inspector General of Police (Training), Jaipur, Rajasthan, certifying that Brijendra Singh, Junior Driver, was present on duty on 29.04.2000.

(ii) Medical Certificate No. 13365 dated 28.04.2000 issued by the Medical Officer, Primary Medical Centre, Moti Kotla, Jaipur, certifying that Jagdish Singh was suffering from ..... (illegible) disease on 24.04.2000 and was advised five days rest.

(iii) Letter dated 17.02.2002 signed by the Police Superintendent, District Karauli, addressed to the Circle Officer, Circle – Kailadevi, giving the sanction under Section 173(9) of the Cr.P.C. to end investigation in Cr.No. 53/2K, Police Station, Sapotra, and submit the report in the Court.

(iv) Statement of Rajendra Prasad, Deputy Inspector General of Police, Police Head Office, Jaipur, recorded under Section 161 Cr.P.C. on 07.12.2000, wherein he stated that on 29.04.2000, he was working on the post of Assistant Inspector General of Police (Training), Jaipur, Rajasthan and Brijendra Singh,

A Constable, was his driver who was present on duty on that day. Log book of the vehicle was also produced to show the presence of Brijendra Singh.

(v)Statement recorded under Section 161 Cr.P.C. of Smt. Shashi Rajawat, Medical Officer In-charge, Government Ayurvedic
B Hospital, Nahati Ka Naka, wherein she had stated that as per the record one Bhanu Pratap Singh had come to the hospital on 26.4.2000, suffering from sickness as he was having loose motions and was vomiting as well. He was treated by the said Medical Officer and was also prescribed medicines on a slip written by her. She verified the prescription.
C

(vi)Statement of Mr. Naveel Kasliwal of Jain Medical Store, Opposite Government Hospital, Moti Katla, Jaipur, recorded under Section 161 Cr.P.C., wherein stated that the said Medical Store was owned by him. He verified that the medical slip of the Government Hospital had been written by Sudhir Sharma
D on 29.04.2000 and based thereupon he had given the medicines.

(vii) Statement of Sudhir Sharma, Medical Officer, Government Hospital, Moti Katla, Jaipur, recorded under Section 161 Cr.P.C., wherein he stated that from 22.02.2000 to 04.05.2000, his duty was at Vidhan Sabha from 3.00 p.m. to 7.00 p.m. and in the
E morning from 8.00 a.m. till 12.00 noon at the Government Hospital. He further stated that on 29.04.2000, a patient named Jagdish Singh, who was suffering from malaria fever, had come and was prescribed medicines by him on the slip, which are medicines of the Government Hospital. He verified that the
F slip was written by him, containing the prescription. Three days medicines were given to the patient. On 02.05.2000, again two days medicines for the patient were prescribed on the said slip.

(viii)Statement of Shri Mahendra Singh Tanwar, who was working
G as a driver at the Government District Mahila Hospital, Sanganeri Gate, Jaipur, recorded under Section 161 Cr.P.C. He stated that son of his elder brother, Bhanu Pratap Singh, who was a student, was unwell for 15 to 20 days in the month of April, 2000. For this purpose, he was given treatment in private hospital but no improvement was found and, therefore,
H

he was taken to Ayurvedic Hospital on 26.04.2000 for treatment. He was suffering from loose motions and cough for which he was prescribed three days medicines and the medicines were repeated again on 29.04.2000 for further three days.

7. Mr. Jain, learned senior counsel, submitted that it is on the basis of the aforesaid documents and statements of various persons, recorded during investigation, the Investigating Officer was convinced that these three appellants were in Jaipur at the time of the incident and, therefore, could not have been present at the place of incident, i.e. Karauli, which is at a distance of 176 kms. approximately, from Jaipur. Submission of Mr. Jain was that merely on the basis of the statement of the complainant, which was there before the Investigating Officer as well at the time of investigation, the Special Judge could not have allowed the application under Section 319 Cr.P.C. as no further or new material was produced before the Court which could indicate the involvement of the appellants. Learned counsel submitted that for exercising the powers under Section 319 Cr.P.C., which was discretionary and extraordinary in nature, the trial court should have convinced itself that there is strong and cogent evidence indicating that the appellants may be guilty of committing the offence. This condition, according to him, was not satisfied. He further submitted that the High Court also did not examine the matter from the aforesaid perspective and merely went by the fact that the witnesses have deposed about the involvement of the appellants in their deposition before the Court.

8. Learned counsel for the respondents, on the other hand, argued that the trial court has rightly exercised its power on the basis of depositions of the witnesses before it, which were in the form of '*evidence*' to the effect that the appellants may have committed the offence in question. It was argued that provisions of Section 319 Cr.P.C. were not meant for this purpose only and the exercise of power by the trial court cannot be treated as unwarranted. It was so observed by the High Court also while dismissing the revision petition and observing that no illegality or perversity was found in the orders of the trial court.

9. Powers of the Court to proceed under Section 319 Cr.P.C. even against those persons who are not arraigned as accused, cannot be disputed. This provision is meant to achieve the objective that real culprit should not get away unpunished. A Constitution Bench of this Court in

A ***Hardeep Singh*** v. ***State of Punjab & Ors.***, (2014) 3 SCC 92, explained the aforesaid purpose behind this provision in the following manner:

> "8. The constitutional mandate under Articles 20 and 21 of the Constitution of India provides a protective umbrella for the smooth administration of justice making adequate provisions to ensure a
> B fair and efficacious trial so that the accused does not get prejudiced after the law has been put into motion to try him for the offence but at the same time also gives equal protection to victims and to society at large to ensure that the guilty does not get away from the clutches of law. For the empowerment of the courts to ensure that the criminal administration of justice works properly, the law
> C was appropriately codified and modified by the legislature under CrPC indicating as to how the courts should proceed in order to ultimately find out the truth so that an innocent does not get punished but at the same time, the guilty are brought to book under the law. It is these ideals as enshrined under the Constitution and
> D our laws that have led to several decisions, whereby innovating methods and progressive tools have been forged to find out the real truth and to ensure that the guilty does not go unpunished.
>
> xx xx xx
>
> 12. Section 319 CrPC springs out of the doctrine *judex damnatur*
> E *cum nocens absolvitur* (Judge is condemned when guilty is acquitted) and this doctrine must be used as a beacon light while explaining the ambit and the spirit underlying the enactment of Section 319 CrPC.
>
> 13. It is the duty of the court to do justice by punishing the real
> F culprit. Where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial. The question remains under what circumstances and at what stage should the court exercise its power as contemplated in Section 319 CrPC?
>
> G xx xx xx
>
> 19. The court is the sole repository of justice and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the
>
> H

real accused, at times, get away by manipulating the investigating and/or the prosecuting agency. The desire to avoid trial is so strong that an accused makes efforts at times to get himself absolved even at the stage of investigation or inquiry even though he may be connected with the commission of the offence."

10. It also goes without saying that Section 319 Cr.P.C., which is an enabling provision empowering the Court to take appropriate steps for proceeding against any person, not being an accused, can be exercised at any time after the charge-sheet is filed and before the pronouncement of the judgment, except during the stage of Section 207/208 Cr.P.C., the committal etc., which is only a pre-trial stage intended to put the process into motion.

11. In ***Hardeep Singh's*** case, the Constitution Bench has also settled the controversy on the issue as to whether the word *'evidence'* used in Section 319(1) Cr.P.C. has been used in a comprehensive sense and indicates the evidence collected during investigation or the word *'evidence'* is limited to the evidence recorded during trial. It is held that it is that material, after cognizance is taken by the Court, that is available to it while making an inquiry into or trying an offence, which the court can utilise or take into consideration for supporting reasons to summon any person on the basis of evidence adduced before the Court. The word *'evidence'* has to be understood in its wider sense, both at the stage of trial and even at the stage of inquiry. It means that the power to proceed against any person after summoning him can be exercised on the basis of any such material as brought forth before it. At the same time, this Court cautioned that the duty and obligation of the Court becomes more onerous to invoke such powers consciously on such material after evidence has been led during trial. The Court also clarified that *'evidence'* under Section 319 Cr.P.C. could even be examination-in-chief and the Court is not required to wait till such evidence is tested on cross-examination, as it is the satisfaction of the Court which can be gathered from the reasons recorded by the Court in respect of complicity of some other person(s) not facing trial in the offence.

12. The moot question, however, is the degree of satisfaction that is required for invoking the powers under Section 319 Cr.P.C. and the related question is as to in what situations this power should be exercised in respect of a person named in the FIR but not charge-sheeted. These two aspects were also specifically dealt with by the Constitution Bench

A in ***Hardeep Singh's*** case and answered in the following manner:

"95. At the time of taking cognizance, the court has to see whether a prima facie case is made out to proceed against the accused. Under Section 319 CrPC, though the test of prima facie case is the same, the degree of satisfaction that is required is much stricter.
B A two-Judge Bench of this Court in *Vikas* v. *State of Rajasthan* [(2014) 3 SCC 321] , held that on the *objective satisfaction* of the court a person may be "arrested" or "summoned", as the circumstances of the case may require, if it appears from the evidence that any such person not being the accused has committed an offence for which such person could
C be tried together with the already arraigned accused persons.

xx xx xx

105. Power under Section 319 CrPC is a discretionary and an extraordinary power. It is to be exercised sparingly and only in
D those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier
E manner.

106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. The test that has
F to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 CrPC. In Section
G 319 CrPC the purpose of providing if "it appears from the evidence that any person not being the accused has committed any offence" is clear from the words "*for which such person could be tried together with the accused*". The words used are not "for which such person could be convicted". There is, therefore, no scope for the court acting under Section 319 CrPC to form any opinion

H

as to the guilt of the accused. A

(emphasis supplied)"

13. In order to answer the question, some of the principles enunciated in ***Hardeep Singh's*** case may be recapitulated:

Power under Section 319 Cr.P.C. can be exercised by the trial B court at any stage during the trial, i.e., before the conclusion of trial, to summon any person as an accused and face the trial in the ongoing case, once the trial court finds that there is some '*evidence*' against such a person on the basis of which evidence it can be gathered that he appears to be guilty of offence. The '*evidence*' herein means the material that is brought before the Court during trial. Insofar as the material/ C evidence collected by the IO at the stage of inquiry is concerned, it can be utilised for corroboration and to support the evidence recorded by the Court to invoke the power under Section 319 Cr.P.C. No doubt, such evidence that has surfaced in examination-in-chief, without cross-examination of witnesses, can also be taken into consideration. However, D since it is a discretionary power given to the Court under Section 319 Cr.P.C. and is also an extraordinary one, same has to be exercised sparingly and only in those cases where the circumstances of the case so warrants. The degree of satisfaction is more than the degree which is warranted at the time of framing of the charges against others in respect of whom chargesheet was filed. Only where strong and cogent E evidence occurs against a person from the evidence led before the Court that such power should be exercised. It is not to be exercised in a casual or a cavalier manner. The prima facie opinion which is to be formed requires stronger evidence than mere probability of his complicity.

14. When we translate the aforesaid principles with their application F to the facts of this case, we gather an impression that the trial court acted in a casual and cavalier manner in passing the summoning order against the appellants. The appellants were named in the FIR. Investigation was carried out by the police. On the basis of material collected during investigation, which has been referred to by us above, G the IO found that these appellants were in Jaipur city when the incident took place in Kanaur, at a distance of 175 kms. The complainant and others who supported the version in the FIR regarding alleged presence of the appellants at the place of incident had also made statements under Section 161 Cr.P.C. to the same effect. Notwithstanding the same, the

H

police investigation revealed that the statements of these persons regarding the presence of the appellants at the place of occurrence was doubtful and did not inspire confidence, in view of the documentary and other evidence collected during the investigation, which depicted another story and clinchingly showed that appellants plea of *alibi* was correct.

15. This record was before the trial court. Notwithstanding the same, the trial court went by the deposition of complainant and some other persons in their examination-in-chief, with no other material to support their so-called verbal/ocular version. Thus, the '*evidence*' recorded during trial was nothing more than the statements which was already there under Section 161 Cr.P.C. recorded at the time of investigation of the case. No doubt, the trial court would be competent to exercise its power even on the basis of such statements recorded before it in examination-in-chief. However, in a case like the present where plethora of evidence was collected by the IO during investigation which suggested otherwise, the trial court was at least duty bound to look into the same while forming *prima facie* opinion and to see as to whether 'much stronger evidence than mere possibility of their (i.e. appellants) complicity has come on record. There is no satisfaction of this nature. Even if we presume that the trial court was not apprised of the same at the time when it passed the order (as the appellants were not on the scene at that time), what is more troubling is that even when this material on record was specifically brought to the notice of the High Court in the Revision Petition filed by the appellants, the High Court too blissfully ignored the said material. Except reproducing the discussion contained in the order of the trial court and expressing agreement therewith, nothing more has been done. Such orders cannot stand judicial scrutiny.

16. As a consequence, this appeal is allowed setting aside the order of summoning the appellants under Section 319 Cr.P.C.

Nidhi Jain

Appeal allowed.