AJAY KUMAR @ BITTU & ANR.

v.

STATE OF UTTARAKHAND & ANR.

(Criminal Appeal No. 88 of 2021)

JANUARY 29, 2021

[ASHOK BHUSHAN,* R. SUBHASH REDDY, M. R. SHAH, JJ.]

Code of Criminal Procedure, 1973:

s. 319 – Application under – Appellants summoned by order dated 17.8.2019 – As the appellants did not appear before the Court, bailable warrant issued on 5.9.2019 and non-bailable warrant issued on 18.9.2019 issuing notice u/s. 446 Cr. P.C. – Criminal Revision by appellants against order dated 17.8.2019 – High Court dismissed the Revision on the ground that there was concealment of fact as order dated 18.9.2019 was not placed on record – Appeal to Supreme Court – Held: Power u/s. 319 is extra-ordinary and discretionary and has to be exercised sparingly – High Court did not consider the correctness of order dated 17.8.2019 – The subsequent proceedings cannot be a ground to not consider the correctness and validity of order dated 17.8.2019 – Order of High court is unsustainable – The High Court is directed to consider the Revision afresh in accordance with law.

Allowing the appeal, the Court Held :

1. **Power under Section 319 Cr.P.C. is a discretionary and extra-ordinary power which has to be exercised sparingly. The test that has 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. [Para 5]**

Hardeep Singh v. State of Punjab and others **(2014) 3 SCC 92 : [2014] 2 SCR 1 – followed.**

Rajesh and Others v. State of Haryana **(2019) 6 SCC 368 : [2019] 8 SCR 187 – relied on.**

* Author

2.1 A perusal of the judgment of the High Court indicates that the High Court did not examine the correctness of the order dated 17.08.2019 by which the appellants were summoned by Additional District Judge under Section 319 Cr.P.C., rather has dismissed the Criminal Revision on the basis of a subsequent fact i.e. order dated 18.09.2019 by which notice has been issued under Section 446 Cr.P.C.. The High Court further took the view that since the proceedings in pursuance of Section 319 Cr.P.C. have already been initiated and that no simultaneous challenge to the impugned order dated 17.08.2019 summoning the revisionists under Section 319 Cr.P.C. would be tenable before the High Court till the order dated 18.09.2019 passed in proceedings at the behest of revisionist subsist. [Para 8]

2.2 The order sheet dated 05.09.2019 indicates that although the summons was served on the appellants but they have not appeared, hence, bailable warrant was issued against the appellants. Subsequently on 18.09.2019 non-bailable warrants were issued. The proceedings on 05.09.2019 and 18.09.2019 are proceedings consequent to and subsequent to the order dated 17.08.2019 by which appellants were summoned. The subsequent proceeding in no manner can be a ground to not consider the correctness and validity of order dated 17.08.2019. High Court completely erred in refusing to consider the correctness of the order dated 17.08.2019 on the ground that on 18.09.2019 notice under Section 446 Cr.P.C. has been issued. As and when it is found that order dated 17.08.2019 could not have been passed in exercise of jurisdiction under Section 319 Cr.P.C., all subsequent proceedings thereto shall automatically come to an end. The order dated 18.09.2019 by which the Court has directed appearance of the accused-appellant, is to be taken to its logical end but that order cannot provide a shield of protection to earlier order dated 17.08.2019 by which appellant has been summoned. [Paras 9, 10, 11 and 13]

3. The subsequent proceedings of the court which have been brought on record indicate that the appellant Nos. 2 and 1 have appeared before the Court and have also been granted bail. [Para 14]

4. One of the grounds taken in this appeal is that appellant No.1 is Juvenile at the date of incident, his Date of Birth being 01.04.2000. The above ground also needs to be considered by the High Court. The Criminal Revision of the appellants be considered afresh by the High Court in accordance with the law. [Paras 15 and 16]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 88 of 2021.

From the Judgment and Order dated 27.09.2019 of the High Court of Uttarakhand at Nainital in Crl. Revision No. 570 of 2019.

Vinay Arora, DAG, Pradeep Gupta, Parinav Gupta, Ms. Mansi Gupta, Krishna Kumar, Ms. Nandani Gupta, Dr. (mrs.)Vipin Gupta, Ranbir Singh Yadav, Prateek Yadav, Mrs. Pratima Yadav, Advs. for the appearing parties.

The Judgment of the Court was delivered by

ASHOK BHUSHAN, J.

Leave granted.

2. This appeal has been filed against the judgment of the High Court of Uttarakhand dated 27.09.2019, by which judgment High Court had dismissed the Criminal Revision filed by the appellants. The Criminal Revision was filed by the appellants against the order dated 17.08.2019 passed by Additional District Judge, Laksar, by which the appellants were summoned by the Court under Section 319 Cr.P.C.

3. Brief facts of the case necessary to be noted for deciding this appeal are:-

   i. The appellant was made an accused in FIR No.175/2015 at Police Station Kotwali, Laksar, Haridwar, under Section 147, 148, 149, 323, 324, 307, 452, 504 and 506 IPC along with six other accused. An FIR No.176/2016 was also registered in the same Police Station under Section 147, 148, 149, 307, 452, 504, 506 IPC in which the complainant with other accused were arrayed. The Police after carrying out the investigation submitted a chargesheet exonerating the appellants. Investigation officer after investigation expunged the names of Bittoo and Jyoti, the appellants from the list of accused from the chargesheet.

ii. The Trial began in case No.228 of 2016 in which informant Pahal Singh was examined as PW-1. In his Statement, Pahal Singh implicated all accused including the appellants but no specific role was assigned to the appellants. Statement was also recorded by PW-2, Monu, in which he implicated the appellants. An application under Section 319 Cr.P.C. was filed by the informant before the Session Judge praying that appellant be also summoned in the case. Learned Session Judge after noticing in detail the statements made by PW-1 and PW-2 made in the Court rejected the application by order dated 21.06.2018. Against the order dated 21.06.2018, Pahal Singh, the informant, filed the Criminal Revision No.304 of 2018 before the High Court.

iii. The High Court relying on the judgment of this Court reported in ***Rajesh and others versus State of Haryana, (2019) 6 SCC 368,*** allowed the Revision and directed the application under Section 319 Cr.P.C. to be considered afresh. Following is the operative portion of the order passed by the High Court in paragraph 7;

> "7. After having considered the aforesaid ratio and also the reasons which have been assigned by the Additional Sessions Judge, Laksar, Haridwar, this Court is of the view that the revision deserves to be allowed and the same is consequently allowed. The order dated 21.06.2018 passed by the learned Additional Sessions Judge, Laksar, District Haridwar in Sessions Trial No.228 of 2016, *State v. Chandra Pal and others* is quashed. The matter is remitted back to the Additional Sessions Judge, Laksar, District Haridwar, to reconsider the application paper No.53 (ka/1) in the light of ratio as propounded by the Hon'ble Apex Courts Judgment in **Rajesh' case (Supra).**"

iv. After the Order of the High Court dated 11.07.2019 in the Criminal Revision, Learned Session Judge again considered the application under Section 319 Cr.P.C. Learned Session Judge referring to the observations made by the High Court in paragraph 5 as well as the judgment of this Court in **Rajesh and others versus State of Haryana (Supra)** allowed the application and summoned the appellants by Order dated 17.08.2019. The Trial Court issued a bailable warrant against the appellants on 05.09.2019 and after bailable warrant being

served when they did not appear on 18.09.2019, Non-Bailable warrant was issued to the appellants and a Notice under Section 446 Cr.P.C. was issued as to why the amount of sureties being not realised from two sureties Arun Kumar and Chandra Pal. The appellants filed Criminal Revision before the High Court against the order dated 17.08.2019 of the Additional Session Judge summoning them.

v. The High Court dismissed the Revision noticing a subsequent order dated 18.09.2019 by which notice has been issued under Section 446 Cr.P.C. The High Court took the view that the Revision was filed on 23.09.2019 but the order passed by the Court on 18.09.2019 has not been brought on record, hence, there is concealment of not placing the order on record. The High Court further observed that since the proceeding in pursuance to allowing the application under Section 319 Cr.P.C. has already been initiated, in which the revisionists have already invoked the jurisdiction of the Revisional Court in which order dated 18.09.2019 has been passed, the Revision is to be dismissed. Aggrieved by the order of the High Court dated 27.09.2019, this appeal has been filed.

4. We have heard the learned counsel for the parties and have perused the record.

5. The principles for exercise of power under Section 319 Cr.P.C. by Criminal Court are well settled. The Constitution Bench of this Court in ***Hardeep Singh versus State of Punjab and others, (2014) 3 SCC 92,*** has elaborately considered all contours of Section 319 Cr.P.C. This Court has held that Power under Section 319 Cr.P.C. is a discretionary and extra-ordinary power which has to be exercised sparingly. This Court further held that the test that has 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 paragraph 105 and 106, following has been laid down: -

”105. Power under Section 319 CrPC is a discretionary and an extraordinary power. It is to be exercised sparingly and only in 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 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 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 un-rebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 CrPC. In Section 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 as to the guilt of the accused."

6. The Two-Judge Bench of this Court again reiterated the same ratio in **Rajesh and others versus State of Haryana (Supra)** which judgment has also been relied by the High Court in the impugned judgment.

7. Now we may notice the reason which persuaded the High Court to reject the Revision. After noticing the facts of the case, the High Court proceeded to consider the revision and recorded its reason for dismissing it in following words: -

"Although a reference has been made in paragraph 10 of the application filed in support of the revision to the effect that the proceedings was taken by the present revisionists before the Sessions Court and an order of 18.09.2019 has been passed, whereby, the notices have been issued to the present revisionists under Section 446 of Cr.P.C.

This order passed by the Court below is that of 18.09.2019. the copy of the said order was received by the revisionists on 21.09.2019, as would be apparent from the folio annexed with the certified copy of the order dated 18.09.2019 as supplied by the learned counsel for the revisionist during the course of arguments to this Court, though it is not part of the Criminal Revision.

The revision itself was filed on 23.09.2019. The said order passed by the Court under Section 446, has not been brought on record. Hence, this Court is of the view that apart from the fact that there is a concealment by not placing the order on record, which otherwise has been procured by the revisionist prior to the filing of the revision and furthermore, since the proceedings in pursuance to allowing the application under Section 319 CrPC has already been initiated, in which the revisionist has already invoked the jurisdiction of the Revisional court, in which the order dated 18.09.2019 has been passed.

In view of the already ongoing proceedings before the Sessions Court prior to the filing of the present revision, this court is of the view that no simultaneous challenge to the impugned order dated 17.08.2019 summoning the revisionists under Section 319 of CrPC would be tenable before this Court till the order dated 18.09.2019, passed in the proceedings at the behest of the present revisionist, subsist.

Consequently, this revision lacks merit and the same is dismissed as it is not sustainable before this Court."

8. A perusal of the judgment of the High Court indicates that the High Court did not examine the correctness of the order dated 17.08.2019 by which the appellants were summoned by Additional District Judge under Section 319 Cr.P.C., rather has dismissed the Criminal Revision on basis of a subsequent fact i.e. order dated 18.09.2019 by which notice has been issued under Section 446 Cr.P.C. The High Court further took the view that since the proceedings in pursuance of Section 319 Cr.P.C. have already been initiated and that no simultaneous challenge to the impugned order dated 17.08.2019 summoning the revisionists under Section 319 Cr.P.C. would be tenable before the High Court till the order dated 18.09.2019 passed in proceedings at the behest of revisionist subsist.

9. We may now notice the nature of the proceedings subsequent to the order dated 17.08.2019 by which the appellants were summoned. The appellant has brought on record the order sheet of the Court along with the application for additional documents. The order sheet indicates that although the summons was served on the appellants but they have not appeared, hence, bailable warrant of Rs.10,000/- was issued against the appellants. Order dated 05.09.2019 is to the following effect:-

"

Sd/- illegible Arun Kumar Chandrapal Singh Jitender Gautam	**05.09.2019** Record is produced. Accused Sandeep appearance dispensed through his counsel Kashim Ansari. Allowed. Remaining accused Arun, Chandrapal, Jitender and Gautam are present. Summon is duly served on accused Jyoti and Bittu. Accused Jyoti and Bittu are absent. The bailable warrant of Rs.10,000/- be issue against Jyoti and Bittu for 18.09.2019. Sd/- illegible Ambika Pant Additional Session Judge Laksar, District Haridwar."

10. Subsequently on 18.09.2019 the case was again taken by the Additional District Judge and following order was passed:-

Sd/- illegible Arun Kumar Chandrapal Singh Jitender Gautam	**18.09.2019** The file is produced. Accused Chandrapal Gautam, Jitender and Sandeep are present. The Bailable warrants issued against accused Jyoti and Bittu are returned after being served. Accused Jyoti and Bittu are absent even after service of Bailable warrants. Therefore, non bailable warrants are issued against Jyoti and Bittu to ensure their presence. Accused Jyoti and Bittu are not being produced before the Court inspite of sureties given by the guarantors. The surety of accused Bittu is Accused Arun Kumar and the surety of accused Jyoti is her father accused Chandrapal and the another surety is accused Arun. Both of them are present in the Court.

	Therefore, the Bail bonds executed by them are forfeited for not producing Accused Bittu and Jyoti before the Court. Therefore, notice under section 446 CrPC is being issued with the intent that why the amount if surety be not realized from them. The case be produced for appearance of accused Jyoti and Bittu and for the explanation by the guarantors on 30.09.2019. Sd/- illegible Ambika Pant Additional Session Judge Laksar, District Haridwar."

11. The proceedings which were taken on 05.09.2019 and 18.09.2019 are proceedings consequent to and subsequent to the order dated 17.08.2019. The subsequent proceeding in no manner can be a ground to not consider the correctness and validity of order dated 17.08.2019. We are of the considered opinion that the High Court completely erred in refusing to consider the correctness of the order dated 17.08.2019 on the ground that on 18.09.2019 notice under Section 446 Cr.P.C. has been issued. As and when it is found that order dated 17.08.2019 could not have been passed in exercise of jurisdiction under Section 319 Cr.P.C., all subsequent proceedings thereto shall automatically come to an end.

12. The view of the High Court which is recorded in following words:-

"…this court is of the view that no simultaneous challenge to the impugned order dated 17.08.2019 summoning the revisionists under Section 319 of Cr.P.C. would be tenable before this Court till the order dated 18.09.2019, passed in the proceedings at the behest of present revisionist, subsist."

cannot be said to be correct view.

13. The order dated 18.09.2019 by which the Court has directed appearance of the accused appellant is to be taken to its logical end but that order cannot provide a shield of protection to earlier order dated 17.08.2019 by which appellant has been summoned.

14. The subsequent proceedings of the court which have been brought on record indicate that the appellant no.2 and 1 have appeared before the Court and have also been granted bail. .

15. One of the grounds taken in this appeal is that appellant No.1 is Juvenile at the date of incident, his Date of Birth being 01.04.2000. The above ground also needs to be considered by the High Court.

16. We thus are of the view that the impugned judgment of the High Court dated 27.09.2019 is unsustainable and deserves to be set aside. We order accordingly. The Criminal Revision of the appellants be considered afresh by the High Court in accordance with the law. The appeal is allowed.

Headnotes prepared by: Kalpana K. Tripathy

Result of the case: Appeal allowed.