

SANDEEP KUMAR

v.

THE STATE OF HARYANA & ANR.

(Criminal Appeal No. 2195 of 2023)

JULY 28, 2023

[C. T. RAVIKUMAR AND SUDHANSHU DHULIA*, JJ.]

Code of Criminal Procedure, 1973 – s.319 – The appellant-informant (PW-9) moved an application u/s. 319 before the Trial Court to summon three additional accused persons, R, K and P, who were named in FIR but not in the charge-sheet and they were identified by the appellant as assailants in his examination-in-chief during trial – The trial Court allowed the application and summoned the three accused persons – However, the High Court set aside the said order in revision – The revision was allowed for the reasons that R was found innocent during investigation and that he never used the weapon and had actually fled from the spot – On appeal, held: Observations of the High Court were factually incorrect as can be seen from the examination-in-chief of PW-9 that the revisionist had fled the scene only after the commission of the crime by an “unlawful assembly” – For attracting the offence u/s. 149 IPC, one simply has to be a part of an unlawful assembly, any specific individual role or act is not material – High Court committed grave error – The reasoning given by the High Court, cannot be accepted at the stage of consideration of application u/s 319 Cr.PC – The merits of the evidence has to be appreciated only during the trial and not at the stage of s. 319 – Order of High Court set aside – Appeal allowed – Penal Code, 1860 – ss. 458, 460, 323, 302, 148, 149 and 285 – Arms Act, 1959 – s. 25.

Code of Criminal Procedure, 1973 – s.319 – At the stage of summoning an accused, there has to be a prima facie satisfaction of the Court – In the instant case, the evidence which was there before the Court was of an eye witness who has clearly stated before the Court that a crime has been committed, inter alia, by the revisionist – The Court need not cross-examine this witness – It can stop the trial at that stage itself if such application had been moved u/s. 319.

* Author

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Hardeep Singh v. State of Punjab and Others (2014) 3 SCC 92 : [2004] SCR 913 – relied on.

Manjeet Singh v. State of Haryana & Ors. 2021 SCC OnLine SC 632; Yunis alias Kariya v. State of Madhya Pradesh AIR 2003 SC 539 – referred to.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.2195 of 2023.

From the Judgment and Order dated 02.03.2022 of the High Court of Punjab & Haryana at Chandigarh in CRR No.452 of 2021.

Ram Naresh Yadav, Suryavir, Advs. for the Appellant.

Vishal Mahajan, DAG, Dr. Monika Gusain, Shreeyash Uday Lalit, Abhinav Aggarwal, Ishaan George, Advs. for the Respondents.

The Judgment of the Court was delivered by

SUDHANSHU DHULIA, J.

Leave granted.

2. Heard Shri Ram Naresh Yadav learned Counsel for the appellant/complainant, Shri Vishal Mahajan, Deputy Advocate General for the State/Respondent No.1 and Shri Shreeyash U. Lalit learned Counsel for Respondent No.2.
3. The appellant before this Court was the informant in the case and was a prosecution witness (PW-9), in Sessions Trial No.8/2018, which is being held before the Additional Sessions Judge, Sirsa, Haryana, under Sections 458, 460, 323, 302, 148, 149 and 285 of IPC, 1860 read with Section 25 of Arms Act, 1959. The incident is of 12:30 mid night dated 07.09.2017 which occurred at Sirsa, Haryana. The First Information Report reveals that there were in total fifteen assailants which had broke open the complainant's house, in the middle of the night and had come in order to assault the inmates of the house. Out of these assailants seven have been named who were armed with lathi and three of the named assailants/accused namely Ramesh Gandhi, Kalu Jakhar and Pawan were armed with gun and pistols respectively. Police after investigation had filed chargesheet against nine persons, but not against Ramesh Gandhi, Kalu Jakhar or Pawan

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whose names were placed in column 2 of the chargesheet. After the trial had commenced and the complainant was being examined as PW-9, he disclosed the entire event as an eye witness in his examination-in-chief, where he has unambiguously assigned the roles to these three assailants as well, who were named in the FIR but not made accused in the chargesheet, that is, Ramesh Gandhi (respondent No.2), Kalu Jakhar and Pawan.

4. Immediately thereafter an application was moved before the Court by the Appellant under Section 319 Code of Criminal Procedure, for summoning these three persons Ramesh Gandhi, Kalu Jakhar and Pawan as accused so that they may also face the trial. This application as we have already stated was allowed, but the order was set aside by the High Court in Revision.

Before we examine the scope of Section 319 of Code of Criminal Procedure, it would be relevant to go through the statement given by PW-9, complainant, in his examination in chief as that forms the basis for summoning the three persons. PW-9 states in his examination-in-chief that on 07.09.2017, he along with his younger brother Pradeep Kumar and his cousin Bijender was sleeping in the court yard of their house, after having dinner. His father, Hanuman (deceased), was also sleeping in the court yard. The main gate of the house was bolted. His uncle Subhash, Jaibir and Raj Kumar were also sleeping in their houses. At about 12:30 i.e. in the middle of the night fifteen persons entered their house having 'lathi' and 'danda' in their hands, from the adjacent room by breaking the chain. Two were having pistols in their hand which could be seen in the light of the bulb. He then goes on to say that while Ramesh Gandhi was having a gun, Kalu Jakhar and Pawan were armed with pistols and remaining were having lathis and dandas. They first exhorted and then started beating all of them and threatened that today they will teach them a lesson, for selling liquor. When they were inflicting blows on the three of them his father Hanuman came to their rescue, to whom Subhash gave a blow from his lathi. He then states that all the accused were inflicting injuries on his father, and when they finally left the house, they left after firing from their weapons. These are the essential details of his slightly longer narration.

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Section 319 of Cr.PC 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 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.*
- (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 detained 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 the 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.”*

Sub-section (1) of Section 319 leaves it to the judicial discretion of the Court, where the trial is proceeding to summon a person as an accused (who is so far not an accused in trial), if evidence has appeared before the Court that such a person has committed an offence for which he should be tried together with the other accused. This judicial discretion is extremely limited by the circumstances which have been stated in sub-section (1) of Section 319. We have already referred to the statement given by PW-9, (an eye-witness) in his examination-in-chief. To our mind the Court had no alternative here but to summon the accused persons, considering that now it had an evidence before it in the form of the statement of PW-9.

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Pursuant to the summoning order out of the three accused who have been summoned only one of them, i.e., Ramesh Gandhi who is Respondent No. 2 had filed a Revision before the Punjab & Haryana High Court which was allowed by order dated 02.03.2022

In our considered opinion the High Court has not appreciated the matter in the true perspective of Section 319 Cr.P.C. The revision of Shri Ramesh Gandhi (one of the three accused who were summoned), was allowed for the reasons that he was found innocent during investigation and that he never used the gun and had actually fled from the spot. These observations are even factually incorrect, from what we have just seen in the examination-in-chief of PW-9, the revisionist had fled the scene only after the commission of the crime by an “unlawful assembly”. In his statement (PW-9), it has further come that while leaving the house firing was also done. Further, totally uncalled for presumption has been made by the High Court in favour of the revisionist, declaring him to be innocent.

The High Court has reasoned as follows :-

“The petitioner was found innocent during investigation. It could not even be established on record whether the petitioner was attributed any injury and even as per the version of the complainant himself, the petitioner had allegedly fled away from the spot. Thus, the material on record, does not make it a fit case to summon the petitioner as an additional accused.

The matter can be looked from another angle. It is the case of the complainant that the petitioner armed with a gun had come to the place of occurrence along with other co-accused. However, it does not seem to the common prudence that a person coming with a premeditated mind at the spot with a gun, would flee without even firing or attempt a shot. This clearly points towards a false implication of the petitioner.”

In our opinion, whereas the trial court was absolutely correct to have summoned the accused based on the evidence of PW-9, the High Court committed a grave error in allowing the revision of the accused. Under the facts and circumstances of the case and on the powers of the Court under Section 319 and based on the evidence of PW-9, it was absolutely

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necessary for the trial court to have summoned the three accused, including the revisionist.

The reasoning given by the High Court, cannot be accepted at the stage of consideration of application under Section 319 Cr.PC. The merits of the evidence has to be appreciated only during the trial, by cross examination of the witnesses and scrutiny of the Court. This is not to be done at the stage of Section 319, though this is precisely what the High Court has done in the present case. Moreover, the High Court did not appreciate the important fact that the charges being faced by the accused were under Sections 458, 460, 323, 285, 302, 148 and 149 of IPC. Thus, one of the charges being Section 149, which is of being a member of an unlawful assembly, for attracting the offence under Section 149 IPC, one simply has to be a part of an unlawful assembly. Any specific individual role or act is not material. [See : 2021 SCC OnLine SC 632-**Manjeet Singh v. State of Haryana & Ors.**, Para 38].

A plain reading of Section 149 IPC (read with Section 141 IPC), makes it clear that no overt act needs to be assigned to a member of an unlawful assembly. *“Even if no overt act is imputed to a particular person when the charge is under Section 149 IPC, the presence of the accused as part of an unlawful assembly is sufficient for conviction”*. [See : **Yunis alias Kariya v. State of Madhya Pradesh**, AIR 2003 SC 539]

The entire purpose of criminal trial is to go to the truth of the matter. Once there is satisfaction of the Court that there is evidence before it that an accused has committed an offence, the court can proceed against such a person. At the stage of summoning an accused, there has to be a *prima facie* satisfaction of the Court. The evidence which was there before the Court was of an eye witness who has clearly stated before the Court that a crime has been committed, *inter alia*, by the revisionist. The Court need not cross-examine this witness. It can stop the trial at that stage itself if such application had been moved under Section 319. The detail examination of the witness and other witnesses is a subject matter of the trial which has to begin afresh. The scope and ambit of Section 319 CrPC has been discussed and dealt with in detail in the Constitution Bench judgment of **Hardeep Singh v. State of Punjab and Others reported in (2014) 3 SCC 92** where it said:

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*“12. Section 319 CrPC springs out of the doctrine *judex damnatur 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 Cr. PC.*

13. It is the duty of the court to do justice by punishing the real 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.”

5. In **Hardeep Singh** (supra), this court further said that the Court only has to see at the state of Section 319, whether a *prima facie* case is made out although the degree of satisfaction has to be much higher.

*“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. A two-Judge Bench of this Court in *Vikas v. State of Rajasthan*, 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 be tried together with the already arraigned accused persons.*

In Para 106 it stated as under:

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”

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it 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.”

In our considered opinion, the prosecution had fully made out its case for summoning the three as accused under Section 319, Cr.PC, so that they may also face trial.

6. Under these circumstances, the appeal is allowed and the order of the High Court dated 02.03.2022, is hereby set aside. It is further directed that the trial shall proceed now in accordance with law, as expeditiously as possible.

Headnotes prepared by: Ankit Gyan
(Assisted by : Aarsh Choudhary, LCRA)

Result of the case: Appeal allowed.