

In Chamber

**Case :-** CRIMINAL REVISION No. - 2076 of 2019

**Revisionist :-** Sanju And 6 Others

**Opposite Party :-** State of U.P. and Another

**Counsel for Revisionist :-** Hari Prakash Mishra, Dharmendra Kumar Srivastava

**Counsel for Opposite Party :-** G.A., Chandra Prakash Pandey, Dur Vijay Singh

Hon'ble Ram Manohar Narayan Mishra, J.

1. Heard learned counsel for the revisionists, learned counsel for the respondent No.2 as well as Sri Deepak Kapoor learned A.G.A. for the State and perused the record.
2. Learned counsel for the revisionist submitted that report has been filed by trial judge on dated 06.10.2023, pursuant to order dated 19.09.2023 passed by this Court reads as under:-

*"Learned counsel for the opposite party referred to the affidavit enclosed in the counter affidavit that on 17.08.2019, an application was moved on behalf of the informant, Munni Devi, before the Court concern in S.T. 192A of 2012 (State of U.P. Vs. Sanju and others) that no such application under Section 319 Cr.P.C., to summon the revisionist to face the trial, was moved by her. This application was supported by the affidavit.*

*Learned trial court be directed to submit a report with regard to the status of the aforesaid application moved by the informant within three weeks.*

*List on 11.10.2023.*

*Interim order, if any, shall continue till the next date of listing".*

3. Learned trial judge has reported that informant Smt. Munni Devi has moved an application on 17.08.2019 in S.T. No.192A of 2012 (State of U.P. Vs. Sanju and others), photo copy of which is placed on record. The order is endorsed thereon to the effect that in S.T. No.192 A of 2012 the proceedings remain stayed by the order of Hon'ble High Court. Therefore, the said application cannot be placed on record and same is returned to the applicant.

4. The informant has stated in the said application that she is filing an affidavit with regard to true facts of the case, and said affidavit is placed on record alongwith application. It is stated therein that informant had not instructed her counsel Sri Satyendra Pathak to move this application on 03.04.2019 for summoning Sanju and others, if any application has been moved for summoning Sanju and others, the same is false.

5. Smt. Munni Devi was summoned before the Court in compliance of order dated 19.09.2023 and she has admitted to have filed an application to the effect that application and affidavit filed by her on 17.08.2019 before court below was submitted by her.

6. Instant Criminal Revision has been preferred against the order dated 02.05.2019 passed by Additional District and Session Judge, Court No.7, Farukhabad in Session Trial No.192 of 2012, State Vs. Kashmi Singh, under Section 319 of Cr.P.C. whereby revisionist are summoned to face trial under Sections 147, 148, 149 and 302 of I.P.C. together with the accused who are already facing trial.

7. The facts leading to filing of present revision are that the informant/defacto complainant Munni Devi had lodged an FIR on the basis of a written report at Police Station Mohammadabad, District Farukhabad with averments that on 03.02.2012 her husband Amar

Singh had gone to Mohammadabad market by riding a Hero Honda Motorcycle, bearing Registration No.UP76J8360 alongwith his friend Man Singh who was sitting on pillion of the motorcycle. She also went to market sitting on pillion of the motorcycle ridden by Tejram. Her husband was coming back from the market alongwith Man Singh and she was also coming back from the market on motorcycle ridden by her relative Dinesh. They came near Shekhpur village at around 06:30 PM, suddenly a white four wheeler came from behind of them, in which Sanju, Raju @ Raje, Ramu @ Ahab Pratap, Manjit Singh @ Bablu, Chandra Mohan, Sarvesh @ Pappu, Anil @ Karu were sitting, these persons stepped out from the car having armed with weapons, and stated that they were waiting for them for long period. One Dalganjan Singh had visited at her home one week ago and stated that he would kill her husband to take revenge of the murder of his brother. These persons killed her husband Amar Singh and his friend Man Singh acting under conspiracy on getting opportunity on said date and time in the presence of the informant and said Dinesh. Accused Sanju fired a shot at her husband by country made pistol and Raju alias Raje fired a shot at Man Singh by his fire arm, other persons assaulted the injured by butt of their guns. The injured became unconscious. On hearing the screams, co-villagers Shersingh, son of Ram Krishna, Vipin son of Rameshwar Singh reached there and had seen the incident. The assailants belonged to the same family, they escaped from the place after committing murder towards Mohammadabad . She could not visit the police station in the night, being scared by this incident. FIR was lodged against seven named accused persons under Sections 147, 148, 149 and 302 of IPC. Police investigated the case and recorded the statements of informant Smt. Munni Devi, Shersingh, Vipin Yadav, Dinesh and other witnesses.

8. The informant Munni Devi and Dinesh her said companion/eye witnesses at the time of incident supported the FIR version in their statement under Section 161 Cr.P.C. The Investigating Officer on 15.03.2012 recorded in Case Diary Parcha No.14 that CDR and tower location of Mobile No. 09554166555 of witness Dinesh has been collected, and on its analysis it is found that on 02.02.2012 at 09:34:25 hours its location was at Phakna and thereafter from 13:50:11 to 15:03:53 hours, it was within area of Mohammadabad tower and between 17:47:06 to 03.:02:12 hours from 17.04.2006 to next day up to 09:57:36 hours its location was detected at Pakhina Sirauli tower. Whereas the place of incident is lying within Mohammadabad tower, as probable time of incident is stated to be 18:30 hours on 02.02.2012.

9. According to Investigating Officer, the location of the witness Dinesh was not found at the place of incident at relevant date and time. Another witness Shersingh, who is named in FIR stated to him that he was not present on relevant time and place of incident, and next day he heard that two dead bodies are lying on the corner of railway line and then he visited the place at of occurrence around 08:00 AM and saw that dead body of co-villager Amar Singh, who was his relative was lying alongwith dead body of Man Singh, resident of Malwa Dhani. He and other villagers informed Smt. Munni Devi about the incident telephonically, who was at that time present at her parental place in village Shankarpur and she was called there, he had not seen any such incident. He could not know as to why his name is shown as witness in FIR, Smt. Munni Devi herself was not present at the time of the incident, as she had gone to her parental place, ten to fifteen days prior to the incident. He is not willing to depose falsely, the other witnesses Vipin Yadav has also not supported the FIR version and nor he was present on the spot at the time of incident, he heard next day on 03.03.2012 that his co-villagers Sanju, Raju @ Raje and others had

killed Amar Singh and Man Singh, but he did not see the occurrence. He admitted that he had gone to Mohammadabad market at around 6:30 pm on 02.02.2012 alongwith Shersingh riding a motorcycle; he operates a milk dairy and ice-cream factory at village Nadaura. However, he could not explain as to why Shersingh stated in his statement that he did not visit Mohammadabad on 02.02.2012 and did not hear anything about the occurrence. Witness Vipin Yadav also stated that he neither saw the incident nor firing, he also stated that he visited the place of incident on next day, where the dead body was lying at the corner or railway track. He admitted that there is a old enmity between family members and the witnesses of the accused persons.

10. The Investigating Officer collected further facts during investigation on the basis of evidence of witness Brijesh Yadav, Lekhpal Khateriya, Satyapal Singh Yadav and others. The deceased were shot at the temple by miscreants and informant Munni Devi was present at that time at her parental place village Shankarpur Bishnupur, District Kannauj. There was old family enmity between the deceased Amar Singh and Dalganjan Singh, the head of the family of accused persons. Deceased Amar Singh was accused in murder of Ramchander who was the brother of Dalganjan Singh. Deceased Amar Singh was awarded life imprisonment in said murder case by court and was released on bail during the pendency of appeal five years ago the incident. The mobile phones of deceased were also taken away by the killers; deceased were persons of criminal antecedents.

11. According to the observation of Investigating Officer Dalganjan Singh visited the dead bodies alongwith a nephew after knowing the incident. The FIR was lodged against son and nephews of Dalganjan Singh due to old enmities and litigations. The Investigating Officer

came to the conclusion, after investigation that the complicity of named accused persons was not found in double murder case and the informant and her relative Dinesh were not found to have witnessed the incident as their present was found else where on date and time of incident. The informant falsely named the present accused persons in FIR in view of old family dispute with Dalganjan Singh, while the mobile phone of deceased Amar Singh was recovered on 08.04.2012 from possession of one Rajpal @ Manishpal son of Kannaujiapal resident of Khimsepur Police Station Mohammadabad District Farukhabad, robbed by miscreants after committing murder of Amar Singh on 02.02.2012.

12. The complicity of Kashmir Pal, Nagendra Yadav, Kuldeep, Rahis Pal, Shekhar Pal, Rajpal and Sukhveer Yadav was found during investigation in the murder of deceased Man Singh and Amar Singh on account of their mobile phone location, statement of the witnesses and CDR and involvement of present revisionists who were named in the FIR was found false. Nagendra Yadav was inimical to deceased Amar Singh and Sukhvir Singh and wanted to kill Man Singh and all these chargesheeted accused hatched a conspiracy and killed the two to fulfill that.

13. Thus, the Investigating Officer dropped the name of all the seven named accused persons, and instead filed chargesheet against seven other persons whose complicity was found in the offence during investigation.

14. The court below recorded the evidence of as many as nine witnesses at the stage of trial, and thereafter an application under Section 319 Cr.P.C. was filed by the informant (PW1) in ST No.1927 of 20112 State Vs. Kashmir Pal to summon all the named accused persons in FIR as accused, who faced trial together with the accused persons

who are already facing trial. Nine witnesses are examined during trial out of whom PW1 Munni Devi, PW9 Dinesh are witnesses of fact. PW5 Ram Chandra is scribe of written report Ex.Ka.1.

15. Learned trial court after hearing the submissions of both the sides and taking into consideration the evidence on record during trial placed reliance on version of PW1 Munni Devi and PW9 Dinesh summoned the revisionists as accused in exercise of powers under Section 319 Cr.P.C. The newly added accused persons, being aggrieved by the impugned order dated 02.05.2019, preferred present revision before this Court. Two counter affidavits were filed by respondent No.2 one on 26.08.2019 through Advocate Sri Chandra Prakash Pandey and the other through Advocate Sri Durvijay Singh on 13.11.2019. In first affidavit respondent No.2 has countered the affidavit filed in support of the Revision and the other is supportive of the revisionists version. The respondent No.2 appeared before this Court and disowned first counter affidavit as well as application under Section 319 Cr.P.C. purportedly filed by her before the court below.

16. Learned counsel for the revisionists submitted that though it is true that P.W.1 Smt. Munni Devi, PW 9 Dinesh have testified in support of FIR version, they are only two witnesses examined during trial. The other witnesses of chargesheet have not been examined by prosecution during trial and on the basis of whose statement during investigation the complicity of the revisionists was not found in the offence and instead complicity of accused Kashmir Singh and others have been found, who are facing trial before the court below.

17. Learned counsel for revisionists further submitted that in the present case although strong motive as been attributed to revisionists who belonged to family of Dalganjan Singh in whose brother's murder case deceased Amar Pal was tried and convicted by the court and was

on bail during appeal. However, this fact is noticeable that causing fire arm injury to deceased persons is specifically attributed in FIR as well as in statement of witnesses namely Munni Devi and Dinesh Singh to accused Sanju and Raju @ Rajey. The other named accused persons are said to have assaulted the deceased persons by kicks, fists and butts of riffle, according to version of these witnesses. However, in postmortem report both the deceased are found to have suffered incised wound also apart from fire arm and other injuries, and these witnesses have nowhere stated that the named accused persons were armed with any sharp edged weapon. Their presence was not found by the investigating officer on the place of incident, whereas they have stated in their sworn testimony before the court that they had seen the incident.

18. The trial itself has reached at the advance stage of recording of statements of the accused persons under Section 313 Cr.P.C. Therefore, during trial only those witnesses were produced in support of prosecution case who have testified against the revisionists during investigation as well as during trial. Thus, in the entirety, it is submitted that there can be no strong satisfaction recorded by the learned trial court to summon the revisionists as additional accused to face trial in exercise of powers under Section 319 Cr.P.C. alongwith accused persons who are already facing trial. He further submitted that no strong satisfaction has been recorded by the learned court below with regard to prima-facie case against the revisionists as envisaged under Section 319 Cr.P.C. before passing the impugned order. The independent witnesses named in FIR are not examined during trial. PW1 is complainant and PW9 is a partisan and entrusted witnesses and is on inimical terms with accused side long before the incident.

19. Learned counsel for the respondent No.2 made request irrespective of the new stand of the informant Smt. Munni Devi at this

stage, the revision may be decided on merits of the case in light of law laid down by Hon'ble Apex Court in various recent judgments.

20. Learned A.G.A. for the State -respondent submitted that the name of actual assailants who are named in the FIR has been dropped by the Investigating Officer in chargesheet due to allurements and political pressure. The investigation was faulty and partial, it was not a fair investigation, otherwise there was no reason that family members of the deceased would have named wrong persons in FIR and concealed the name of actual assailants. It is further submitted that strangely, the names of all seven accused persons were dropped in the chargesheet with a view to screen the actual offenders and a new set of accused were chargesheeted. The subsequent application and affidavit of the complainant after passing of impugned order is insignificant. It is her "evidence" and not her affidavit which will be read in the matter in hand.

21. On the cumulative strength of above contentions, learned A.G.A. appearing on behalf of respondents vehemently contended that the present criminal revision is liable to be dismissed.

22. In the present case two persons Amar Singh, the husband of the informant and his friend Man Singh were killed on 02.02.2012 at around 06:30 pm, when they were coming from Mohammadabad market riding a motorcycle. In the FIR as many as seven accused persons are named as assailants and specific role of firing a shot at the deceased is attributed to accused Sanju and Raju alias Raje in the FIR as well as in the statements of the informant and her witness Dinesh in the statements under Section 161 Cr.P.C. and in their sworn testimony before the Court of PW 1 and PW9 respectively.

23. In the FIR it is stated that appellant No.1 Sanju had fired a shot at Amar Singh and Raju @ Raje appellant No.2 fired a shot at Man Singh and remaining persons assaulted the injured persons by butt of their guns badly till arrival of the witnesses. In the statement dated 04.02.2012 made under Section 161 Cr.P.C. the informant i.e. the next day of lodging the FIR has stated that after opening of fire on deceased persons by Sanju and Raju @ Raje the remaining accused persons assaulted these two injured persons by kicks, fits and butts of their guns badly, who died by fatal injuries suffered in their incident. The other two witnesses Sher Singh and Vipin who were named as eyewitness in the FIR have not supported the FIR version in their statement under Section 161 Cr.P.C.. However, the witness Dinesh has corroborated the FIR version and statement of the informant in his statement under Section 161 Cr.P.C. recorded at belated stage on 29.06.2012 by the Investigating Officer as well as in his sworn testimony before the court as PW9. PW1 and PW9 the witnesses of facts have categorically stated in their evidence during the cross examination that accused persons Nagendra and others who are facing trial at present were not assailants and the accused persons named in the FIR are real assailants. The new set seven accused have been introduced by Investigating Officer during investigation and chargesheeted namely Nagendra Yadav, Kuldeep, Rahish Pal, Shekhar Pal, Raja and Kashmir Pal. The witness Dinesh Singh has already stated in his statement under Section 161 Cr.P.C. and before the Court as PW9 that Sanju fired a shot at Amar Singh and Raju @ Raje fired a shot at Man Singh and remaining accused persons named in the FIR assaulted the injured by butts of their guns, kicks and fits. He fled from the place of incident taking Smt. Munni Devi his sister-in-law (bhabi) with him at village Nadaura, the parental place of Munni Devi where they stayed in the night, as stated in his evidence that he identified the accused in the light of their four wheeler and his motorcycle. The witness Dinesh Singh is named as accused in FIR

lodged as Crime No.Nil of 2002 under Sections 147, 148, 149, 307 and 504 I.P.C. alongwith his father and other accused for attempting to commit murder of the nephew of Dalganjan Singh on 18.02.2002 the present revisionists include sons, nephew and family members of Dalganjan Singh.

24. The postmortem report of deceased Amar Singh and Man Singh dated 03.02.2012 revealed that deceased Amar Singh received fire arm wound of entry on right temporal region. One incised wound 11cm x2.5 cm x bone deep over right side of mandible under-lying bone fractured, abraded contusion 12 cm x 7cm over right side of face, ligature mark 32 cm x 4 cm around the neck, on cut haematoma was present. Tracheal ring depressed, multiple contusion over front of right shoulder and upper part of chest. Linear abrasion 6 cm over right side of upper part buttuck. Thus six entries were found on his person.

25. In postmortem report of injured Man Singh also one fire arm wound of entry 2 cm x 5 cm on right temporal region and one wound on exit over left side of ear was found. Apart from that one lacerated wound 3 cm x 1 cm bonedeeep over left eyebrow, one incised wound 3.5 cm x 0.5 cm over the right shear involving lower eyelid and abraded contusion 11 cm x 1 cm on front of neck, middle part were found.

26. Thus, from the postmortem report of Amar Singh it appears that he received fire arm injuries, lacerated and abraded wounds as well as incised wounds. He also received injuries on his neck and on cut tracheal ring was depressed and haematoma was present beneath the injury, this shows that he was attributed to be strangulated. Some what similar nature of wounds were found in postmortem report of deceased Man Singh.

27. It needs to be highlighted that when a person is named in the FIR by the complainant, but police after investigation finds no role of that particular person and files a chargesheet without implicating him, the court is not powerless, and may exercise its jurisdiction to summon any person as accused whose complicity has been found in the offence on the basis of material collected during investigation at pre trial stage in exercise of powers under Sections 190 and 193 Cr.P.C. as recognized by the Apex Court in *Dharam Pal and Others Vs. State of Haryana and Another, (2014) 3 SCC 306 (Constitution Bench)* and the trial court need not wait for evidence to be recorded so that non chargesheeted accused could be summoned under Section 319 of Cr.P.C. Even on commencement of trial and recording of some evidence the court is empowered to exercise its powers under Section 319 Cr.P.C. to summon any other person who has not been chargesheeted by police officer after investigation, yet his complicity in the offence prima facie established during trial, and as such the newly added accused will be tried together with the accused persons who are already facing trial in the case.

28. **Section 319 Cr.P.C. is quoted hereunder:-**

*"319 Cr.P.C. -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-*

*(5) (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."*

29. *The Hon'ble Supreme Court in Constitutional Bench Judgment in **Hardeep Singh Vs. State of Punjab and Others, (2014) 3 SCC 92** held as under:-*

*"55. Accordingly, we hold that the court can exercise the power under Section 319 Cr.P.C. only after the trial proceeds and commences with the recording of the evidence and also in exceptional circumstances as explained herein above."*

*85. In view of the discussion made and the conclusion drawn herein above, the answer to the aforesaid question posed is that apart from evidence recorded during trial, any material that has been received by the court after cognizance is taken and before the trial commences, can be utilized only for corroboration and to support the evidence recorded by the court to invoke the power under Section 319 Cr.P.C. The 'evidence' is thus, limited to the evidence recorded during trial.*

*92. Thus, in view of the above, we hold that power under Section 319 Cr.P.C. can be exercised at the stage of completion of examination in chief and court does not need to wait till the said evidence is tested on*

*cross-examination for 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 the trial in the offence.*

95. In *Suresh v. State of Maharashtra*, AIR 2001 SC 1375, this Court after taking note of the earlier judgments in *Niranjan Singh Karam Singh Punjabi v. Jitendra Bhimraj Bijjaya*, AIR 1990 SC 1962 and *State of Maharashtra v. Priya Sharan Maharaj*, AIR 1997 SC 2041, held as under:

*“9.....at the stage of Sections 227 and 228 the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The Court may, for this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case. Therefore, at the stage of framing of the charge the Court has to consider the material with a view to find out if there is ground for presuming that the accused has committed the offence or that there is not sufficient ground for proceeding against him and not for the purpose of arriving at the conclusion that it is not likely to lead to a conviction.”*

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 Cr.P.C. In Section 319 Cr.P.C. 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 Cr.P.C. to form any opinion as to the guilt of the accused.*

116. Thus, it is evident that power under Section 319 Cr.P.C. can be exercised against a person not subjected to investigation, or a person placed in the Column 2 of the Charge-Sheet and against whom cognizance had not been taken, or a person who has been discharged. However, concerning a person who has been discharged, no proceedings can be commenced against him directly under Section 319 Cr.P.C. without taking recourse to provisions of Section 300(5) read with Section 398 Cr.P.C.

117.2. Section 319 Cr.P.C., significantly, uses two expressions that have to be taken note of i.e. (1) Inquiry (2) Trial. As a trial commences after framing of charge, an inquiry can only be understood to be a pre-trial inquiry. Inquiries under Sections 200, 201, 202 Cr.P.C.; and under Section 398 Cr.P.C. are species of the inquiry contemplated by Section 319 Cr.P.C. Materials coming before the Court in course of such enquiries can be used for corroboration of the evidence recorded in the court after the trial commences, for the exercise of power under Section 319 Cr.P.C., and also to add an accused whose name has been shown in Column 2 of the charge-sheet.

*117.3. In view of the above position the word 'evidence' in Section 319 Cr.P.C. has to be broadly understood and not literally i.e. as evidence brought during a trial.*

*The word evidence used in Section 319 of Cr.P.C. has been used in a comprehensive sense respondent does not include the evidence collected during investigation.*

30. In spite of above noted judgment, issue did not come to rest, but again cropped up for consideration in Brijendra Singh (supra) wherein Court considered the observations made in paragraphs 8, 12, 13, 19, 105 and 106 of Constitution Bench judgment in Hardeep Singh (Supra) and applying the ratio as mentioned in aforesaid paragraphs widened the scope of parameters regarding exercise of jurisdiction under section 319 Cr.P.C. In this case, Court was examining the summoning of a non-charge-sheeted accused in a Sessions Trial under Sections- 147, 148, 149, 323, 448, 302/149 I.P.C. and Section- 3 and 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989. Court went a step further. Having done so, Court summed up as follows in paragraphs 13, 14, 15:-

***"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 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/evidence collected by the I.O. 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, 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.*

*14. When we translate the aforesaid principles with their application 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, 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 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."*

31. In **Manjeet Singh (Supra)**, Court was considering the correctness of an order passed by High Court dismissing the revision preferred against an order passed by Sessions Judge allowing the application under Section 319 Cr.P.C. filed in a case under Sections 363, 366, 376 IPC and Sections 3/4 Protection of Children From Sexual Offences, (POCSO) Act, 2012 Court again examined the issue relating to parameters for exercise of jurisdiction under section 319 Cr.P.C. Court

took notice of the constitution Bench judgement in Hardeep Singh (Supra) and S. Mohammed Ispahani (Supra) and on basis of ratio laid down therein evolved the ambit and scope of powers of Court under section 319 Cr.P.C. in paragraphs 34 of judgement. Having done so, Court examined the testimony of P.W.1 Manjeet who is an injured witness and on basis thereof tested the veracity of orders passed by High Court as well as trial court whereby summoning of non charge sheeted accused was declined. Hon'ble Supreme Court upon evaluation of evidence on record disagreed with the view taken by High Court as well as trial court. Following disagreement was expressed by court in paragraphs 34, 35, 36, 37 and 38 of the judgement:

***"34. The ratio of the aforesaid decisions on the scope and ambit of the powers of the Court under Section 319 CrPC can be summarized as under:***

- (i) That while exercising the powers under Section 319 CrPC and to summon the persons not charge-sheeted, the entire effort is not to allow the real perpetrator of an offence to get away unpunished;*
- (ii) for the empowerment of the courts to ensure that the criminal administration of justice works properly;*
- (iii) the law has been properly codified and modified by the legislature under the CrPC indicating as to how the courts should proceed to ultimately find out the truth so that the innocent does not get punished but at the same time, the guilty are brought to book under the law;*
- (iv) to discharge duty of the court to find out the real truth and to ensure that the guilty does not go unpunished;*
- (v) 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;*
- (vi) Section 319 CrPC allows the court to proceed against any person who is not an accused in a case before it;*

- (vii) 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 real accused, at times, get away by manipulating the investigating and/or the prosecuting agency;*
- (viii) Section 319 CrPC is an enabling provision empowering the court to take appropriate steps for proceeding against any person not being an accused for also having committed the offence under trial;*
- (ix) the power under Section 319(1) CrPC can be exercised at any stage after the charge-sheet is filed and before the pronouncement of judgment, except during the stage of Sections 207/208 CrPC, committal, etc. which is only a pre-trial stage intended to put the process into motion;*
- (x) the court can exercise the power under Section 319 CrPC only after the trial proceeds and commences with the recording of the evidence;*
- (xi) the word "evidence" in Section 319 CrPC means only such evidence as is made before the court, in relation to statements, and as produced before the court, in relation to documents;*
- (xii) it is only such evidence that can be taken into account by the Magistrate or the court to decide whether the power under Section 319 CrPC is to be exercised and not on the basis of material collected during the investigation;*
- (xiii) if the Magistrate/court is convinced, even on the basis of evidence appearing in examination-in-chief, it can exercise the power under Section 319 CrPC and can proceed against such other person(s);*
- (xiv) If the Magistrate/court is convinced even on the basis of evidence appearing in examination-in-chief, powers under Section 319 CrPC can be exercised;*
- (xv) that power under Section 319 CrPC can be exercised even at the stage of completion of examination-in-chief and the court need not has to wait till the said evidence is tested on cross-examination;*

*(xvi) even in a case where the stage of giving opportunity to the complainant to file a protest petition urging upon the trial court to summon other persons as well who were named in FIR but not implicated in the charge-sheet has gone, in that case also, the Court is still not powerless by virtue of Section 319 CrPC and even those persons named in FIR but not implicated in the charge-sheet can be summoned to face the trial, provided during the trial some evidence surfaces against the proposed accused (may be in the form of examination-in-chief of the prosecution witnesses);*

*(xvii) while exercising the powers under Section 319 CrPC the Court is not required and/or justified in appreciating the deposition/evidence of the prosecution witnesses on merits which is required to be done during the trial.*

32. In the present case PW1 Munni Devi who is informant and wife of deceased Amar Singh. PW1 Munni Devi and PW9 Dinesh Singh were produced as a witnesses of fact, during trial of the present case, the other witnesses of facts are not examined, they have supported the FIR version in their sworn testimony before the Court. After recording the evidence of P.W1 and PW9 an application under Section 319 of Cr.P.C. was moved by the complainant Munni Devi before the trial court for summoning the named accused persons as additional accused to face trial in the case together with the accused persons who are already facing trial, and said application has been allowed by the trial court by the impugned order. The application under Section 319 Cr.P.C. was moved at a belated stage after conclusion of prosecution evidence. The leaned trial court by the impugned order has summoned all the named accused persons in FIR, in exercise of powers provided under Section 319 Cr.P.C. The accused persons summoned under Section 319 Cr.P.C. have filed present criminal revision, and this Court has stayed the effect and operation of impugned order dated 02.05.2019, till the

next date of listing vide interim order dated 24.05.2019, and said interim order has been extended from time to time.

33. During the pendency of present revision the applicant Munni Devi moved an application on 17.08.2019 before the trial court, wherein she has disowned the application under Section 319 Cr.P.C. dated 03.04.2019 and stated on affidavit that she never instructed her counsel Satyendra Kumar Pathak to move an application under Section 319 Cr.P.C., because she came to know that after her evidence before the court on 03.01.2017, the named accused persons Sanju and others were not involved in murder of her husband Amar Singh and his friend Man Singh and for that reason she stopped prosecuting the case after her evidence against Sanju and others. The opponents of Sanju and others misled her and obtained her thumb impression on a pre-written paper. She is an illiterate lady and she was depressed for longtime due to murder of her husband. This application was returned in original by the court below, as operation of the impugned order was stayed by orders of this Court.

34. The complainant Munni Devi, appeared before this Court and admitted to have filed this application dated 17.08.2019 accompanied with an affidavit before the court below. So far as the other facts of this case are concerned, two sets of accused persons have been introduced in this case for committing double murder of Amar Singh and Man Singh on fateful day time and place. One set of accused are named in the FIR lodged at the instance of PW1 Munni Devi who are present revisionists. However, their name was dropped in chargesheet and a new set of accused persons Kashmir Pal, Nagendra Yadav, Kuldeep, Rahis Pal, Shekhar Pal, Rajpal and Sukhveer Yadav surfaced during investigation and their complicity was found in the offences during investigation and they were ultimately chargesheeted and are facing

trial at present. Interestingly the witnesses of facts PW1 Munni Devi and PW9 Dinesh Singh have also not implicated the accused persons Nagendra Yadav and others who are already facing trial in their sworn testimony before the court, and have stated that they have not seen them on the scene of crime when it was committed. The complicity of the present revisionist was not found during investigation, instead a new set of accused persons Nagendra and others were chargesheeted on the basis of their mobile location and CDR of their mobile phone as well as on the basis of statement of independent witnesses. The witnesses named in the FIR namely Sher Singh and Vipin as independent witnesses have not been produced during trial and they have not supported the FIR version in the statement under Section 161 Cr.P.C.

35. The learned court below has not discussed the course of investigations, evidence collected during investigation, reasons behind exoneration of named accused persons and introduction of a new set of accused persons during investigation by the Investigating Officer.

36. Whereas Hon'ble Supreme Court in **Brijendra Singh Meena vs State Of Rajasthan And Ors. (supra)** held in paragraph 13 of the judgment that the 'evidence' herein means the material that is brought before the Court during trial. Insofar as the material/evidence collected by the I.O. at the stage of inquiry is concerned, it can be utilized for corroboration and to support the evidence recorded by the Court to invoke the power under Section 319 Cr.P.C.

37. Hon'ble Supreme Court also held in **Brijendra Singh's** case that 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. As Section 319 Cr.P.C. springs out of a legal

maxim “judge is condemned when guilty is acquitted” and this doctrine must be used as a beacon light while explaining the ambit and spirit underlying the enactment of Section 319 Cr.P.C. 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 the real culprits as an accused, the court is not powerless in calling the said accused to face trial. 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 real accused, at times, get away by manipulating the investigating and/or the prosecuting agency.

38. The Hon’ble Apex Court observed that in a case like the present where plethora of evidence was collected by the Investigating Officer during investigation which suggested otherwise, the trial court was at least duty bound to look into the same while forming prim-facie opinion and to see as to whether ‘much stronger evidence than mere possibility of their (appellants), complicity has come on record. There is no satisfaction of this nature. The police on investigation revealed that the statement 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.

39. With foregoing submissions at Bar and discussion, this Court is of the considered opinion that the learned court below has committed legal error while ignoring all together the course of investigation, the reason behind exoneration of the revisionists and filing of chargesheet against a new set of accused persons on the basis of evidence collected

during investigation. Although the evidence adduced during inquiry or trial is envisaged as “evidence” under Section 319 Cr.P.C., as settled in constitutional Bench Judgment the Hon’ble Apex Court in **Hardeep Singh Vs. State of Punjab and Others** (supra), but in subsequent judgment in **Brijendra Singh and Others Vs. State of Rajasthan** (supra) the Hon’ble Apex Court held that the evidence collected by IO at the stage of investigation should also be looked into as the same may be utilized for corroboration and to support the evidence recorded by the Court to invoke the power under Section 319 Cr.P.C. The impugned order is not sustainable under law and deserves to be set-aside.

40. The revision stands **allowed**. The impugned order dated 02.05.2019 passed by learned trial court is hereby set-aside and matter is remitted to the court below to hearing the application under Section 319 Cr.P.C. afresh and decide the same in accordance with law in the light of observations made in this order, after giving opportunity of hearing to the complainant and prosecution.

41. However, it is clarified that the observations made herein before are only for the purpose of deciding the present revision and have no bearing on the merits of the case for final adjudication.

**Order Date :- 23.01.2024**

Ashish/-