REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 998 OF 2009
[Arising out of SLP (Crl.) No. 5781 of 2006]

Sarabjit Singh & Anr. …Appellant

JUDGMENT

Versus

State of Punjab & Anr. …Respondents

WITH

CRIMINAL APPEAL NO. 999 OF 2009
[Arising out of SLP (Crl.) No. 19 of 2007]

J U D G M E N T

S.B. SINHA, J :

1. Leave granted.

2. Interpretation and/ or application of the provisions of Section 319 of the Code of Criminal Procedure, 1973 (for short "the Code") is in question in these appeals. They arise out of a judgment and order dated 12.10.2006 passed by a learned Single Judge of the Punjab and Haryana High Court in Crl. Rev. No. 2073 of 2006 dismissing the revision petition filed by the appellants herein from an order dated 28.09.2006 passed by the Additional Sessions Judge, Gurdaspur whereby application of prosecution under Section 319 of the Code was allowed and the appellants were summoned to face trial for offences under Section 148/302 read with Section 149 of the Indian Penal Code.

3. A First Information Report was lodged by Balwant Singh (PW-1) alleging that while working on the fields at about 11.30 a.m. on 02.05.2005, he found Rajwinder Singh alias Raju being surrounded by the accused. He was attacked by them by their respective weapons in their hands, till they became sure of his death. After the accused left the place of occurrence,

PW-1 went near Raju and made him drink water. Sarabjit Singh and Saroop Singh, appellants herein, while standing near the village, shouted that Raju had not died whereupon Gurdip Singh, appellant in Criminal Appeal arising out of SLP (Crl.) No.19 of 2007, Hira Singh and Bhagwant Masih again came near him and caused further physical injuries to him. They thereafter fled away.

4. Contention of the accused, however, in that case is that the deceased Raju was a vagabond having numerous criminal cases registered against him and a large number of proceedings were initiated. He was catched by a mob of villagers being fed up with his activities. Allegations against the appellants have been levelled because of political rivalry.

5. The investigating officer upon completion of the investigation filed a chargesheet against ten persons and filed a final report against the appellants herein. The accused persons were standing their trial.

6. Before the learned Sessions Judge, Balwant Singh (PW-1) was examined. He repeated the allegations contained in the First Information Report.

7. Relying only on or on the basis of the said statements made by PW-1, an application for summoning the appellants in terms of Section 319 of the Code was filed.

8. On the basis of the said statements alone, the application filed by the first informant under Section 319 of the Code was allowed, stating:

> "7. In view of the specific attribution to Gurdip Singh, Sarabjit Singh and Sarup Singh, it is prima facie established that they were members of an unlawful assembly having the common object to kill Rajwinder Singh and they are liable to face the trial u/s 148, 302 read with Section 149 I.P.C. Hence, accused Gurdip Singh son of Sohan Singh, Sarabjit Singh son of Nazir Singh and Sarup Singh son of Mohan Singh, residents of village Kaile Kalan be summoned through non-bailable warrant, of arrest for 17.10.06 to face trial u/s 148, 302 read with Section 149 I.P.C. alongwith the other accused. Singh accused Gurpreet Singh alias Gopi is already facing the trial, therefore, there is no need to issue process against him. With this, the application u/s 319 Cr. P.C. is disposed of accordingly. Papers be attached with the trial file."

As indicated hereinbefore, appellants' revision application thereagainst before the High Court was dismissed.

9. Mr. Jasbir Singh Malik, learned counsel appearing on behalf of the appellants, would contend that the power of a court under Section 319 of the Code being exceptional in nature, the courts below must be held to have committed a manifest error in summoning the appellants for standing trial as additional accused although they were found to be innocent during investigation.

10. Mr. A.K. Mehta, learned counsel appearing on behalf of respondents, on the other hand, supported the impugned judgment.

11. Section 319 of the Code 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 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."

12. The extent of the power of a Sessions Judge to summon persons other than the accused to stand trial in a pending case came up for consideration before this Court in Municipal Corporation of Delhi v. Ram Kishan Rastogi [(1983) 1 SCC 1]. Therein, this Court while holding that the provision confers a discretionary jurisdiction on the court added "this is really an extraordinary power which is conferred on the Court and should be used very sparingly and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken".

13. Interpretation of the aforementioned provision, in the light of the said decision, came up for consideration before various courts from time to time. We may take note of some of them.

In Shashikant Singh v. Tarkeshwar Singh [(2002) 5 SCC 738], this Court held:

"9. The intention of the provision here is that where in the course of any enquiry into, or trial of, an offence, it appears to the court from the evidence that any person not being the accused has committed any offence, the court may proceed against him for the offence which he appears to have committed. At that stage, the court would consider that such a person could be tried together with the accused who is already before the court facing the trial. The safeguard provided in respect of such person is that, the proceedings right from the beginning have mandatorily to be commenced afresh and the witnesses reheard. In short, there has to be a de novo trial against him. The provision of de novo trial is mandatory. It vitally affects the rights of a person so brought before the court. It would not be sufficient to only tender the witnesses for the cross-examination of such a person. They have to be examined afresh. Fresh examination-in-chief and not only their presentation for the purpose of the cross-examination of the newly added accused is the mandate of Section 319(4). The words "could be tried together with the accused" in Section 319(1), appear to be only directory. "Could be" cannot under these circumstances be held to be "must be". The provision cannot be interpreted to mean that since the trial in respect of a person who was before the court has concluded with the result that the newly added person cannot be tried together with the accused who was before the court when order under Section 319(1) was passed, the order would become ineffective and inoperative, nullifying the opinion earlier formed by the court on the basis of the evidence before it that the newly added person appears to have committed the offence resulting in an order for his being brought before the court."

It was furthermore held:

> "14. A Magistrate is empowered to take cognizance of an offence in the manner provided under Section 190 of the Code. Section 209 enjoins upon a Magistrate to commit the case to the Court of Session when it appears to the Magistrate that the offence is triable exclusively by the Court of Session. Section 193 provides for the power of the Court of Session to take cognizance of any offence. It uses the expression "cognizance of any offence" and not that of "offender". These three provisions read with Section 319 make it clear that the words "could be tried together with the accused" in Section 319 are only for the purpose of finding out whether such a person could be put on trial for the offence…"

In Rakesh v. State of Haryana [(2001) 6 SCC 248], this Court held:

> "13. Hence, it is difficult to accept the contention of the learned counsel for the appellants that the term "evidence" as used in Section 319 of the Criminal Procedure Code would mean evidence which is tested by cross-examination. The question of testing the evidence by cross-examination would arise only after addition of the accused. There is no question of cross-examining the witness prior to adding such person as accused. The section does not contemplate an additional stage of first summoning the person and giving him an opportunity of cross-examining the witness who has deposed against him and

> thereafter deciding whether such person is to be added as accused or not. The word "evidence" occurring in sub-section (1) is used in a comprehensive and broad sense which would also include the material collected by the investigating officer and the material or evidence which comes before the court and from which the court can prima facie conclude that the person not arraigned before it is involved in the commission of the crime."

In Ranjit Singh v. State of Punjab [(1998) 7 SCC 149], this Court opined:

> "20. Thus, once the Sessions Court takes cognizance of the offence pursuant to the committal order, the only other stage when the court is empowered to add any other person to the array of the accused is after reaching evidence collection when powers under Section 319 of the Code can be invoked. We are unable to find any other power for the Sessions Court to permit addition of new person or persons to the array of the accused. Of course it is not necessary for the court to wait until the entire evidence is collected for exercising the said powers.
> 21. But then one more question may survive. In a situation where the Sessions Judge notices from the materials produced but before any evidence is taken, that any other person should also have necessarily been made an accused (without which the framing of the charge would be defective or that it might lead to a miscarriage of justice), is the Sessions Court completely powerless to deal with such a contingency? One such situation is cited by

> the learned Judges through an illustration narrated in Kishun Singh case1 as follows: (SCC pp. 29-30, para 15)
> "[W]here two persons A and B attack and kill X and it is found from the material placed before the Judge that the fatal blow was given by A whereas the blow inflicted by B had fallen on a non-vital part of the body of X. If A is not challaned by the police, the Judge may find it difficult to charge B for the murder of X with the aid of Section 34 IPC. If he cannot summon A, how does he frame the charge against B?"
> 22. Another instance can be this. All the materials produced by the investigating agency would clearly show the positive involvement of a person who was not shown in the array of the accused due to some inadvertence or omission. Should the court wait until evidence is collected to get that person arraigned in the case?
> 23. Though such situations may arise only in extremely rare cases, the Sessions Court is not altogether powerless to deal with such situations to prevent a miscarriage of justice. It is then open to the Sessions Court to send a report to the High Court detailing the situation so that the High Court can in its inherent powers or revisional powers direct the committing Magistrate to rectify the committal order by issuing process to such left-out accused. But we hasten to add that the said procedure need be resorted to only for rectifying or correcting such grave mistakes.

This Court in Lok Pal v. Nihal Singh [(2006) 10 SCC 192] observed:

> "…The court, while examining an application under Section 319 of the Code, has also to bear in mind that there is no compelling duty on the court

> to proceed against other persons. In a nutshell, for exercise of discretion under Section 319 of the Code all relevant factors, including those noticed above, have to be kept in view and an order is not required to be made mechanically merely on the ground that some evidence had come on record implicating the person sought to be added as an accused.

It was furthermore observed:

> "19. In these circumstances, therefore, if the prosecution can at any stage produce evidence which satisfies the court that the other accused or those who have not been arrayed as accused against whom proceedings have been quashed have also committed the offence the court can take cognizance against them and try them along with the other accused. But, we would hasten to add that this is really an extraordinary power which is conferred on the court and should be used very sparingly and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken…"

In Mohd. Shafi v. Mohd. Rafiq & Anr. [2007 (5) SCALE 611], this Court held:

> "7. Before, thus, a trial court seeks to take recourse to the said provision, the requisite ingredients therefore must be fulfilled. Commission of an offence by a person not facing trial, must, therefore, appears to the court concerned. It cannot be ipse dixit on the part of the court. Discretion in this behalf must be judicially exercised. It is

> incumbent that the court must arrive at its satisfaction in this behalf.
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> 12. The Trial Judge, as noticed by us, in terms of Section 319 of the Code of Criminal Procedure was required to arrive at his satisfaction. If he thought that the matter should receive his due consideration only after the cross-examination of the witnesses is over, no exception thereto could be taken far less at the instance of a witness and when the State was not aggrieved by the same."

The decision of this Court in Mohd. Shafi (supra), however, has been explained in Lal Suraj @ Suraj Singh and Anr. v. State of Jharkhand [2008 (16) SCALE 276], stating:

> "…The principle of strong suspicion may be a criterion at the stage of framing of charge as all the materials brought during investigation were required to be taken into consideration, but, for the purpose of summoning a person, who did not figure as accused, a different legal principle is required to be applied. A court framing a charge would have before it all the materials on record which were required to be proved by the prosecution. In a case where, however, the court exercises its jurisdiction under Section 319 of the Code, the power has to be exercised on the basis of the fresh evidence brought before the court. There lies a fine but clear distinction."

14. Our attention, however, has been drawn to a Two-Judge Bench decision of this Court in Hardeep Singh v. State of Punjab & Ors. [JT 2008 (12) SC 7] wherein doubting the correctness of Mohd. Shafi (supra), two questions have been referred to a larger Bench, which are as under:

> "(1) When the power under Sub-section (1) of Section 319 of the Code of addition of accused can be exercised by a Court? Whether application under Section 319 is not maintainable unless the cross-examination of the witness is complete?
> (2) What is the test and what are the guidelines of exercising power under Sub-section (1) of Section 319 of the Code? Whether such power can be exercised only if the Court is satisfied that the accused summoned in all likelihood would be convicted?"

Mr. Mehta would also draw our attention to Bholu Ram v. State of Punjab & Anr. [JT 2008 (9) SC 504].

Whereas Hardeep Singh (supra) is not a judgment in that sense of the term; in Bholu Ram (supra) the principal question which arose for consideration of this Court was as to whether an order passed under Section 319 of the Code can be recalled which was answered in the negative.

15. For the purpose of this case, it is not necessary to proceed on the basis that the decision in Mohd. Shafi (supra) should be applied in all fours.

16. We have noticed hereinbefore that Mohd. Shafi (supra) has been explained in Lal Suraj (supra) holding that a power under Section 319 of the Code can be exercised only on the basis of fresh evidence brought before it and not on the basis of the materials which had been collected during investigation particularly when a final form was submitted and the same had been accepted by the Magistrate concerned. There is no gainsaying that the power under Section 319 of the Code is an extraordinary power which in terms of the decision of this Court in Municipal Corporation of Delhi (supra) is required to be exercised sparingly and if compelling reasons exist for taking cognizance against whom action has not been taken.

17. The provision of Section 319 of the Code, on a plain reading, provides that such an extraordinary case has been made out must appear to the court. Has the criterion laid down by this Court in Municipal Corporation of Delhi (supra) been satisfied is the question? Indisputably, before an additional accused can be summoned for standing trial, the nature of the evidence should be such which would make out grounds for exercise of extraordinary power. The materials brought before the court must also be such which would satisfy the court that it is one of those cases where its jurisdiction should be exercised sparingly.

We may notice that in Y. Saraba Reddy v. Puthur Rami Reddy and Anr. [JT 2007 (6) SC 460], this Court opined:

> "…Undisputedly, it is an extraordinary power which is conferred on the Court and should be used very sparingly and only if compelling reasons exist for taking action against a person against whom action had not been taken earlier. The word "evidence" in Section 319 contemplates that evidence of witnesses given in Court…"

An order under Section 319 of the Code, therefore, should not be passed only because the first informant or one of the witnesses seeks to implicate other person(s). Sufficient and cogent reasons are required to be assigned by the court so as to satisfy the ingredients of the provisions. Mere *ipse dixit* would not serve the purpose. Such an evidence must be convincing one at least for the purpose of exercise of the extraordinary jurisdiction.

For the aforementioned purpose, the courts are required to apply stringent tests; one of the tests being whether evidence on record is such which would reasonably lead to conviction of the person sought to be summoned.

18. The observation of this Court in Municipal Corporation of Delhi (supra) and other decisions following the same is that mere existence of a prima facie case may not serve the purpose. Different standards are required to be applied at different stages. Whereas the test of prima facie case may be sufficient for taking cognizance of an offence at the stage of framing of charge, the court must be satisfied that there exists a strong suspicion. While framing charge in terms of Section 227 of the Code, the court must consider the entire materials on record to form an opinion that the evidence if unrebutted would lead to a judgment of conviction. Whether a higher standard be set up for the purpose of invoking the jurisdiction under Section 319 of the Code is the question. The answer to these questions should be rendered in the affirmative. Unless a higher standard for the purpose of forming an opinion to summon a person as an additional accused is laid down, the ingredients thereof, viz., (i) an extraordinary case and (ii) a case for sparingly exercise of jurisdiction, would not be satisfied.

19. We, therefore, are of the opinion that the impugned judgment cannot be sustained which is set aside accordingly and the matter is remitted to the learned Sessions Judge for consideration of the matter afresh.

20. The appeals are allowed with the aforementioned directions.

……J.
[S.B. Sinha]

……J.
[P. Sathasivam]

New Delhi;
May 12, 2009