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NISAR AND ANR

v.

STATE OF U.P

NOVEMBER 9, 1994

B

[DR. A.S ANAND AND M.K. MUKHERJEE, JJ.]

Criminal Procedure Code, 1973 : Section 193- Summoning of persons— Absence of order of committal against them— Whether Court of Session could summon them in exercise of power u/s 193— Held, yes.

C

Section 319 (1)—Applicability of—Power u/s 319 (1) can be exercised at a stage when evidence was led.

D

Deceased met with an unnatural death in her matrimonial home. A First Information Report was lodged that her husband, grand mother-in-law and the two appellants being the brother-in-law and sister-in-law were responsible for her death. A case was registered u/ss 304-B and 306 of Indian Penal Code against all of them. On completion of investigation the police submitted charge sheet u/s 306 IPC only against the deceased's husband and grand mother-in-law. The case was committed to the Court of Session under Section 209 Cr.P.C.

E

When the matter came up for hearing, an application was moved that though during investigation sufficient materials were furnished to prove that the two appellants had also demanded a scooter as dowry and physically tortured and ill treated the deceased, no chargesheet was submitted against them and praying for invoking the provisions of Section 193 of the Code to summon them.

F

The two appellants were summoned holding that a *prima facie* case was made out against them and Section 193 of the Code empowered the Court to summon them. Revision filed against the impugned order was rejected by High Court. It was held that under Section 319 Cr. P.C even on the basis of existing material person appearing to be guilty might be summoned.

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This appeal had been filed against the Judgment of the High Court. It was submitted by the appellants that neither the provisions of Section 193 nor those of Section 319 of the Code empowered the Court of Session to pass the impugned order and in absence of any order

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committing the appellants to the Court of Session, the Judge could not have issued process against the appellants to stand trial by invoking Section 193 of the Code; and that having regard to the fact that Section 319 of the Code could be invoked only at a stage when evidence was led, the High Court was not justified in upholding the order relying upon the provision, as that stage was yet to be reached. A

Dismissing the appeal, this Court B

HELD 1.1 In view of the plain and unambiguous language of Section 319 of the Code of Criminal Procedure, the power u/s 319 (1) can be exercised only in those cases where involvement of persons other than those arraigned in the charge sheet comes to light in the course of evidence recorded during the inquiry of trial. In the instant case as that stage has not yet reached the appellants could not have been summoned invoking Section 319 of the Code. (371-F) C

2. On the plain reading of Section 193 of the Code of Criminal Procedure, once the case is committed to the Court of Session by a Magistrate under the Code, the restriction placed on the power of the Court of Session to take cognizance of an offence as a Court of original jurisdiction gets lifted. On the Magistrate committing the case under Section 209 to the Court of Session the bar of Section 193 is lifted thereby investing the Court of Session complete and unfettered jurisdiction of the Court of original jurisdiction to take cognizance of the offence which would include the summoning of the person or persons whose complicity in the commission of the crime can *prima facie* be gathered from the material available on record. (371-G, H, 372-A) D E

Kishan Singh v. State of Bihar, [1993] 2 SCC 16, relied on. F

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 769 of 1994.

From the Judgment and Order dated 28.7.94 of the Allahabad High Court in R. No.1088 of 1994. G

Anis Ahmed Khan for Appellants.

A.S. Pundir for the Respondent.

The Judgment of the Court was delivered by H

A M.K. MUKHERJEE. J. Special Leave Granted.

B The appellant No.1 is the brother-in-law of Shakvin who met with an unnatural death in her matrimonial home on June 22, 1991. The appellant no.2 is his wife. On the following day i.e. on June 23, 1991 Noor Mohammad, father of the deceased lodged a First Information Report alleging that her husband, grand mother-in-law and the two appellants were responsible for her death. On the information a case was registered under sections 304 B and 306 of the India Penal Code (IPC for short) against all of them and on completion of investigation the police submitted charge sheet under section 306 IPC only against the deceased's husband and grand mother-in-law. In due course the case was committed to the Court of Session by the Chief Judicial Magistrate, Orai, Magistrate for short in accordance with section 209 of the Criminal Procedure Code (Code for short).

D When the matter came up for hearing before an Additional Session Judge of Orai, an application was moved on behalf of Noor Mohammad alleging that though during investigation sufficient materials were furnished to prove that the two appellants had also demanded a scooter as dowry and physically tortured and ill treated the deceased the Investigating agency did not submit charge sheet against them and praying for invoking the provisions of section 193 of the Code to summon them. The application was opposed on behalf of the appellants on the ground that in absence of any order of their committal in accordance with section 209 of the Code the Court of Session could not summon them in exercise of power under section 193 of the Code.

F After hearing the parties and going through the statements recorded under section 161 of the Code the learned Judge summoned the two appellants as according to the learned Judge, a *prima facie* case was made out against them and section 193 of the Code empowered him to summon them.

G Aggrieved by the above order the appellants moved the High Court in revision which was rejected with the following order :

H "learned counsel for the applicants has submitted that the learned Judge has exercised his power under Section 193 Cr.P.C and not 319 Cr.P.C. which could not be exercised as no evidence has yet led in the case.

In my opinion, the submission is not correct. Under Section 319 Cr.P.C even on the basis of existing material person appearing to be guilty may be summoned. The learned Sessions Judge has perused the material and has found that there are allegations against the applicants. Merely because Section 193 has been mentioned by the Court below. It will not invalidate the order."

Hence this appeal.

It was submitted on behalf of the appellants that neither the provisions of section 193 nor those of 319 of the Code empowered the Court of Session to pass the impugned order. According to the learned counsel for the appellants in absence of any order committing the appellants to the Court of Session, the learned Judge could not have issued process against the appellants to stand trial by invoking section 193 of the Code. The learned counsel next submitted that having regard to the fact that Section 319 of the Code could be invoked only at a stage when evidence was led, the High Court was not justified in upholding the order of the learned Judge relying upon the said section, as admittedly that stage was yet to be reached.

As regards the second contention of the appellants it must be said that in view of the plain and unambiguous language of section 319 of the Code, the earlier quoted reason which weighed with the High Court in sustaining the order of the learned Judge is patently incorrect. The power under section 319 (1) can be exercised only in those cases where involvement of persons other than those arraigned in the charge sheet comes to light in the course of evidence recorded during the enquiry or trial. As that stage has not yet reached the appellants could not have been summoned invoking section 319 of the Code.

As regards the other contention of appellants we may mention that this Court has in *Kishan Singh v. State of Bihar*, [1993] 2 SCC 16 categorically rejected a similar contention with the following observations:

"Thus on a plain reading of Section 193, as it presently stands once the case is committed to the Court of Session by a Magistrate under the Code the restriction placed on the power of the Court of Session to take cognizance of an offence as a court of original jurisdiction gets lifted. On the Magistrate committing the case under Section 209 to the Court of Session the bar of Section 193 is lifted thereby

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investing the Court of Session complete and unfettered jurisdiction of the court of original jurisdiction to take cognizance of the offence which would include the summoning of the person or persons whose complicity in the commission of the crime can *prima facie* be gathered from the material available on records."

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Since we are in respectful agreement with the principle so laid down the contention of the appellants in this regards must be rejected. The appeal is, therefore, dismissed.

A.G.

Appeal dismissed.