Shanu Warsi vs State Of U.P. And Another on 1 April, 2025

HIGH COURT OF JUDICATURE AT ALLAHABAD

?Neutral Citation No. - 2025:AHC:44236

Reserved On : 18.11.2024

Delivered On: 01.04.2025

In Chamber

Case :- CRIMINAL REVISION No. - 3568 of 2024

Revisionist :- Shanu Warsi

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

Counsel for Revisionist :- Bharat Singh

Counsel for Opposite Party :- G.A.

Hon'ble Ram Manohar Narayan Mishra,J.

1. Instant criminal revision has been preferred against the impugned summoning order dated 17.5.2024 passed by the learned Additional Sessions Judge/Special Judge, POCSO Act, Sambhal at Chandausi in Session Trial No. 343 of 2021 arising out of Case Crime No. 246 of 2021 under sections 147, 148, 149, 452, 307, 504, 506 I.P.C. whereby learned trial court has summoned the revisionist to face trial in exercise of powers under section 319 Cr.P.C. together with other named accused persons who are already facing trial in the case.

2. Heard Sri Manish Tiwari, learned Senior Counsel assisted by Sri Bharat Singh, learned counsel for the revisionist, Sri Rijwan Ahmad, learned counsel for the opposite party no. 2 and learned AGA for the State.

3. The factual matrix of the case in brief is that the informant Faimida wife of late Aslam lodged an F.I.R. at P.S. Chandausi, District Sambhal on 15.5.2021 with the allegation that Shanu Warsi was

exerting pressure on her son, namely, Tohid for last three months to live with him when her son did not visit him, on 15.5.2021 at around 3.30 P.M. Shanu Warsi accompanied with six other named accused persons trespassed into the house of the informant by hurling abuses and started firing in the house. Shanu Warsi fired a shot on the chest of her son by which her son fell on the ground into pool of blood and Nazim, Parvej Ousama and some other villagers came on the spot by hearing of sound of firing. On seeing them accused person left from the spot by hurling threats to the injured and opening fire.

4. He next submitted that injuries of injured Tohid were found simple in nature in supplementary report prepared by the doctor after receiving x-ray reports. He further submitted that the witness named in the F.I.R. have not stated that they had seen the occurrence. He also submitted that during course of investigation witnesses of locality, namely, Dilshad, Mohd. Asif, Durgesh, Saleem, Najar Mohammad and Mohammad Jaki had filed their affidavits which is addressed to the District Police Superintendent in which they have stated that Shanu Warsi was not present on the spot and the name of the revisionist has been falsely dragged in the present case. These witnesses have also reiterated their version in affidavits in the statements recorded under section 161 Cr.P.C. The investigating officer filed charge sheet against six named accused persons finding their complicity in the offence under sections 147, 148, 149, 452, 307, 504, 506 I.P.C. but dropped the name of the revisionist in investigation on the ground that his complicity in the F.I.R. was found false. Learned court below has not considered the statements of independent witnesses recorded by investigating officer on the basis of which the investigating officer dropped the name of the revisionist at the fag in the investigation.

5. He further submitted that after recording evidence of P.W. 1 Faimida Begam (first informant) and P.W. 2 Tohid (injured witness), the prosecution filed application on 15.11.2022 under section 319 Cr.P.C. praying therein since complicity of named but not charge sheeted accused person, namely, Shanu Warsi is also established in the offence in question on the strength of P.W. 1 and P.W. 2, therefore, he also may be summoned as accused to face trial in Session Trial No. 343 of 2021. This application 20Kha was rejected by the learned court below.

6. The informant Faimida preferred a criminal revision against said order which is registered as Criminal Revision No. 1185 of 2023 and same was allowed by this court vide order dated 12.3.2024. The matter was remanded to learned court below to pass a fresh order in the light of law laid down by Hon'ble Apex Court in Hardeep Singh vs. State of Punjab and others (2014) 3 SCC 92. Learned court below heard application 20 B under section 319 Cr.P.C. a fresh after remand of the application by order of this court and allowed the same vide order dated 17.5.2024. He also submitted that investigating officer has excluded the name of the revisionist from the charge sheet after collection of evidence which dispelled the complicity of the revisionist in the offence. Learned court below has not considered this aspect and summoned the revisionist placing reliance on bald statement of complainant and injured. This is nothing but reiteration of their version of F.I.R. and statement recorded under section 161 Cr.P.C.

7. The investigating officer on 16.6.2021, reached at the house of the revisionist where wife of the revisionist, namely, Isra was present and on being enquired by the Investigating Officer, wife of the

revisionist has stated that on 15.5.2021 her husband i.e. Shanu Warsi was not feeling well and for that reason he visited the hospital on 13.15 P.M. which is the hospital of Dr. C.P. Singh at Moradabad. She also stated to investigating officer that on that day, there was altercation in mohalla Qureshiyan and the name of her husband was wrongly mentioned in the F.I.R. and the wife of the revisionist has also shown the fee receipt along with medical prescriptions of her husband. Thereafter, the Investigating Officer visited the hospital of Dr. C.P. Singh situated at Gandhi Nagar, Moradabad. The investigating officer had shown said medical slip to doctor C.P. Singh to acknowledge that he had prescribed medicine in this prescription. The lady staff sitting at counter also confirmed that slip was given by her but learned court below has not given any finding on these submissions and documents even witness Mohd Faisal who informed about the alleged incident the dial 112 to police has not deposed anything against the revisionist and has stated that he was inside the home with his wife when the firing broke out in his mohalla.

8. Per contra, learned AGA for the State as well as learned counsel for the respondent no. 2 submitted that revisionist has been shown as assailant in the F.I.R. as well as in the statement of informant and injured recorded under section 161 Cr.P.C. The injured suffered fire arm injury on the vital part of the body in the incident. The revisionist has been assigned specific role in the offence as author of injury received by injured Tohid. After recording statement of informant and injured, some witnesses were acting at the behest of the revisionist with a view to save him from prosecution by filing their affidavits before S.P. Sambhal with averment that he was not present at the spot at the time when incident took place on 15.5.2021 at around 3.30 P.M. The medical papers filed as annexure no. 11 to the affidavit were bearing date 15.5.2021 but no time is mentioned therein, therefore, no reliance can be placed on them at the stage of summoning under section 319 Cr.P.C.

9. This Court had allowed revision preferred by the respondent no.2 against dismissal of application under section 319 Cr.P.C. initially vide order dated 12.3.2024 and the matter was remanded to court below for decision a fresh on application under section 319 Cr.P.C. This court held in said revisional order that reason assigned by the learned court below that P.W. 1 and P.W. 2 are interested witnesses and statement of independent witnesses is yet to be recorded cannot be sustained. No finding has been recorded as to whether on the basis of statement of P.W. 1 and P.W. 2, opposite party 2 who is named but non charge sheeted accused could be summoned or not. As such, the learned court below has failed to exercise its jurisdiction diligently.

10. In present case, F.I.R. has been promptly lodged by the informant (Faimida) the mother of the injured within one and 3/4 hours of the incident which strengthen reliability of contents of the F.I.R. The revisionist is named in the F.I.R. as assailant and other named accused persons are alleged to have accompanied him and opened firing while leaving the place which did not hit any person. This is a case where investigating officer, placing reliance on some so called independent witnesses and some medical papers produced by the wife of the revisionist, dropped his name in the investigation on the ground that his naming in the F.I.R. was found false. The informant has consistently supported the F.I.R. version in her statement under section 161 Cr.P.C. as well as in her sworn testimony before the court regarding the complicity of the revisionist as main assailant similarly injured Tohid has also attributed the role of firing and causing injuries to revisionist in his statement under section 161 Cr.P.C. and his evidence as P.W. 2 before the Court.

11. The medico logical examination of the injured was prepared on 15.5.2021 at 5:20 P.M. at CHC Chandausi at Sambhal. Five injuries in the nature of abrasion were found on his head, upper arm, left shoulder and chest. This is also stated in injury report that no bone injury was present. An x-ray of skull, left upper arm and chest was conducted on advice of the doctor and in x-ray report rodoopogoc shadow of metallic density were seen in skull 2 one on left side and are on right side forehead over the scalp bone in soft tissue one in near on left side soft tissue. Total 12 multiple well defined small rounded off deformed. In the opinion of doctor injuries were caused by firearm but are simple in nature.

12. Learned counsel for the revisionist placed reliance on judgement of Supreme Court passed in Brijendra Singh and others. vs. State of Rajasthan, 2017 0 Supreme (SC) 411 wherein Hon'ble Supreme Court observed as under:-

> "9. Powers of the Court to proceed underSection 319Cr.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. A Constitution Bench of this Court inHardeep Singh v. State of Punjab & Ors., (2014) 3 SCC 92, explained the aforesaid purpose behind this provision in the following manner:
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> "8.The constitutional mandate underArticles 20and21of the Constitution of India provides a protective umbrella for the smooth administration of justice making adequate provisions to ensure a fair and efficacious trial so that the accused does not get prejudiced after the law has been put into motion to try him for the offence but at the same time also gives equal protection to victims and to society at large to ensure that the guilty does not get away from the clutches of law. For the empowerment of the courts to ensure that the criminal administration of justice works properly, the law was appropriately codified and modified by the legislature underCrPCindicating as to how the courts should proceed in order to ultimately find out the truth so that an innocent does not get punished but at the same time, the guilty are brought to book under the law. It is these ideals as enshrined under the Constitution and our laws that have led to several decisions, whereby innovating methods and progressive tools have been forged to find out the real truth and to ensure that the guilty does not go unpunished.
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> 12.Section 319CrPC springs out of the doctrinejudex 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 ofSection 319CrPC.
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> 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. The question remains under what circumstances and at what stage should the court

exercise its power as contemplated inSection 319CrPC?

19.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. The desire to avoid trial is so strong that an accused makes efforts at times to get himself absolved even at the stage of investigation or inquiry even though he may be connected with the commission of the offence."

10. It also goes without saying thatSection 319Cr.P.C., which is an enabling provision empowering the Court to take appropriate steps for proceeding against any person, not being an accused, can be exercised at any time after the charge-sheet is filed and before the pronouncement of the judgment, except during the stage ofSection 207/208Cr.P.C., the committal etc., which is only a pre-trial stage intended to put the process into motion.

11. In Hardeep Singh's case, the Constitution Bench has also settled the controversy on the issue as to whether the word 'evidence' used inSection 319(1)Cr.P.C. has been used in a comprehensive sense and indicates the evidence collected during investigation or the word 'evidence' is limited to the evidence recorded during trial. It is held that it is that material, after cognizance is taken by the Court, that is available to it while making an inquiry into or trying an offence, which the court can utilise or take into consideration for supporting reasons to summon any person on the basis of evidence adduced before the Court. The word 'evidence' has to be understood in its wider sense, both at the stage of trial and even at the stage of inquiry. It means that the power to proceed against any person after summoning him can be exercised on the basis of any such material as brought forth before it. At the same time, this Court cautioned that the duty and obligation of the Court becomes more onerous to invoke such powers consciously on such material after evidence has been led during trial. The Court also clarified that 'evidence' underSection 319Cr.P.C. could even be examination-in-chief and the Court is not required to wait till such evidence is tested on cross-examination, as 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 trial in the offence.

12. The moot question, however, is the degree of satisfaction that is required for invoking the powers underSection 319Cr.P.C. and the related question is as to in what situations this power should be exercised in respect of a person named in the FIR but not charge-sheeted. These two aspects were also specifically dealt with by the Constitution Bench in Hardeep Singh's case and answered in the following manner:

"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. UnderSection 319CrPC, 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 inVikasv.State of Rajasthan[(2014) 3 SCC 321] , held that on theobjective satisfactionof 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.
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> 105. Power underSection 319CrPC 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.
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> 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 unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power underSection 319CrPC. InSection 319CrPC 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 underSection 319CrPC to form any opinion as to the guilt of the accused."

13. In order to answer the question, some of the principles enunciated in Hardeep Singh's case may be recapitulated:

> Power underSection 319Cr.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 IO 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 underSection 319Cr.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 underSection 319Cr.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.

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 underSection 161Cr.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."

13. In present case, although learned court below has not discussed the material collected during investigation and passed the impugned order on placing reliance on evidence of the informant P.W. 1 and injured P.W. 2 recorded during trial. It is settled law that evidence of a natural witness cannot be discorded only on the ground that he is an interested witness. The evidence of injured is placed on higher pedestal than any other witness in case of physical assault. The informant is mother and is a natural witness. The name of the revisionist has surfaced as main assailant in F.I.R. as well as in evidence of the informant and injured. The plea of alibi taken by the revisionist is not so glaring that without its due proof the sworn testimony of witness recorded during trial can be discorded at this stage.

14. In instant, prima facie case exists for summoning the revisionist under section 319 Cr.P.C. which is more than prima facie case as existing at the time of framing of charge. Therefore, I find no illegality, perversity and irregularity in the impugned order passed by the learned trial court.

15. The revision is devoid of merits and deserves to be dismissed. Consequently, interim order is vacated.

16. The revision is dismissed.

Order Date :- 1.4.2025/SY