

SHIV PRAKASH MISHRA

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v.

STATE OF UTTAR PRADESH AND ANOTHER

(Criminal Appeal No.1105 of 2019)

JULY 23, 2019

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[R. BANUMATHI AND A.S. BOPANNA, JJ.]

Code of Criminal Procedure, 1973 – s.319 – Power under – Exercise of – Complaint lodged that respondent no.2-SCS along with other accused viz. SaS, DS, LKS and RS formed themselves into an unlawful assembly and came to the house of the appellant-complainant and started abusing him due to old enmity – Elder brothers of the appellant, SLM and SKM tried to forbade the accused from abusing – On this, accused SaS fired from the pistol with intention to kill SKM – Second respondent was alleged to have attacked SLM on his head with the butt of home made pistol – SLM succumbed to injuries – Charge sheet filed only against three accused persons namely SaS, DS and LKS – Upon further investigation, supplementary charge sheet filed against accused RS – Appellant filed petition u/s.319, CrPC to implead the second respondent as an accused – Dismissed – Revision petition before the High Court – Dismissed – On appeal, held: Power u/s.319 CrPC can be exercised by the trial court at any stage during trial to summon any person as an accused to face the trial if it appears from the evidence that such person has committed any offence for which such person could be tried together with the accused – Standard of proof employed for summoning a person as an accused person u/s.319 Cr.P.C. is higher than the standard of proof employed for framing a charge against the accused person – Power u/s.319 Cr.P.C. should be exercised sparingly – In the instant case, though the name of second respondent was mentioned in the FIR, during investigation, it was found that he was not present at the place of incident and on the basis of said findings of the IO, he was not charge sheeted – Appellant did not file any protest petition then and there – Further, though, in his chief-examination the appellant stated about the presence of the second respondent, however, in cross-examination he stated that the second respondent was on duty at that time –

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- A *Appellant made contradictory statements – Evidence brought on record does not prima facie show the complicity of respondent no.2 in the occurrence – Courts below were right in refusing to summon him as an accused – No substantial ground made out warranting interference – Penal Code, 1860 – ss.147, 148, 149, 302, 307, 323 and 504 .*

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Dismissing the appeal, the Court

- HELD:1.1** The power under Section 319, Cr.P.C. can be exercised by the trial court at any stage during trial to summon any person as an accused to face the trial if it appears from the evidence that such person has committed any offence for which such person could be tried together with the accused. The standard of proof employed for summoning a person as an accused person under Section 319 Cr.P.C. is higher than the standard of proof employed for framing a charge against the accused person. The power under Section 319 Cr.P.C. should be exercised sparingly. [Paras 8, 9] [547-C-D]
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- 1.2** Having regard to the contradictory statements of the witnesses and other circumstances, the trial court and the High Court rightly held that respondent No.2 cannot be summoned as an accused. The FIR was registered on 06.09.2013 at 18.15 hours. The name of second respondent is no doubt mentioned in the FIR and overt act is attributed to him. During the course of investigation, the Investigating Officer recorded the statements of witnesses who stated that respondent No.2 was not present at the place of occurrence at the time of the incident. The Investigating Officer also recorded the statement of one SKG and SG working in the same office in which respondent No.2 was employed who had stated that respondent No.2 was in the office at the time of incident. Accordingly, the name of respondent No.2 was dropped when the first charge sheet was filed on 19.09.2014. The supplementary charge sheet was filed against RS on 15.10.2014. Though the name of second respondent was mentioned in the FIR, during investigation, it was thus found that the second respondent was not present in the place of incident and on the basis of the findings of the Investigating Officer, he was not charge sheeted. The appellant has not filed any protest
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petition then and there. The courts below were right in refusing to summon respondent No.2 as an accused. Though, in his chief-examination on 22.10.2016, PW-1 stated about the presence of the second respondent and attributing overt act to him that he had beaten the deceased SLM with butt of home made pistol, on 28.02.2017, PW-1 in his cross-examination stated that respondent No.2 was on duty at that time. [Paras 12, 13] [548-H; 549-A-H]

1.3 The evidence brought on record during trial does not *prima facie* show the complicity of respondent No.2 in the occurrence and the High Court was justified in refusing to summon respondent No.2 as an accused. The High Court and the trial court concurrently held that the materials brought on record are not sufficient to summon the second respondent as an accused in the present case. No substantial ground is made out warranting interference. The trial court shall proceed with the trial in S.T. No.26 of 2015 in accordance with law. The findings of Supreme Court in this appeal and the High Court in the revision shall be construed only for the purpose of consideration of the appeal and revision respectively and the same shall not be construed as expression of opinion on the merits of the main case. [Paras 14-16] [550-D-F]

Hardeep Singh v. State of Punjab and Others (2014) 3 SCC 92 : [2014] 2 SCR 1 – followed.

Brijendra Singh and Others v. State of Rajasthan (2017) 7 SCC 706 : [2017] 3 SCR 374; *Kailash v. State of Rajasthan and Another* (2008) 14 SCC 51 : [2008] 3 SCR 702 – relied on.

Case Law Reference

[2017] 3 SCR 374	relied on	Para 4	
[2014] 2 SCR 1	followed	Para 6	
[2008] 3 SCR 702	relied on	Para 9	G

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal
No. 1105 of 2019

From the Judgment and Order dated 04.12.2018 of the High Court of Judicature at Allahabad in Application U/s 482 No. 36010 of 2018

A Arvind Kumar Shukla, Ms. Reetu Sharma, Nihal Ahmad, Kunal Yadav, Ms. Neena Shukla, Advs. for the Appellant.

Ardhendumauli Kumar Prasad, Nikilesh R., Aakash Choudhary, Manish Sharma, Advs. for the Respondents.

B The Judgment of the Court was delivered by

R. BANUMATHI, J.

1. Leave granted.

2. This appeal arises out of the order dated 04.12.2018 passed by the High Court of Judicature at Allahabad in Application No.36010 of 2018 in and by which the High Court has affirmed the order passed by the trial court thereby declining to summon the second respondent Subhash Chandra Shukla under Section 319 Cr.P.C. as an accused.

3. Brief facts which led to filing of this appeal are as under:-

D As per the complaint lodged by complainant-Shiv Prakash Mishra (PW-1), on 06.09.2013 at about 09.00 am, respondent No.2-Subhash Chandra Shukla along with other accused viz. Sashendra Shukla, Devender Shukla, Lakshmi Kant Shukla and Rahul Shukla formed themselves into an unlawful assembly and came to the house of complainant and started abusing him due to old enmity. The elder brothers of the complainant namely Sangam Lal Mishra and Sunil Kumar Mishra who were living in the opposite house came out and tried to forbade the accused from abusing. On this, accused Sashendra Shukla fired from the pistol in his hand with intention to kill Sunil Kumar Mishra. Other accused beat Sangam Lal Mishra with *lathi* and *dandas* while the second respondent is alleged to have strongly attacked the deceased Sangam Lal Mishra on his head with the butt of home made pistol (*katta*). Deceased Sangam Lal Mishra and Sunil Kumar Mishra sustained injuries and fell down. During treatment, Sangam Lal Mishra succumbed to injuries. The incident was witnessed by PW-2-Anand Kumar Mishra, Dev Narain Mishra and the complainant. Shiv Kumar Mishra-complainant (PW-1) lodged the complaint before the Police Station, Meja at 18.15 hours on the same day i.e. 06.09.2013. Based on the complaint, FIR No.275/2013 was registered in Case Crime No.328A/2013 against five accused persons viz. Subhash Chandra Shukla, Sashendra Shukla, Rahul Shukla, Lakshmi Kant Shukla and Devender Shukla under Sections 147, 148, 149, 302, 307, 323 and 504 IPC. Investigation of the case was

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taken up by the police of the concerned police station. As per the government order, the investigation of the case was transferred to C.B.C.I.D. C.B.C.I.D. which took up the investigation, examined number of persons at the office of second respondent and filed charge sheet No.13/2014 on 19.09.2014 only against three accused persons namely Sashendra Shukla, Devender Shukla and Laxmi Kant Shukla. Upon further investigation, subsequently on 15.10.2014, a supplementary charge sheet No.13A/2014 was filed against accused Rahul Shukla.

4. Case was committed to the Sessions Court and charges were framed in Sessions Trial No.1329/2014. The trial was commenced in or about August, 2016. The witnesses namely Shiv Prakash Mishra (PW-1), Anand Kumar Mishra (PW-2) and Sunil Kumar Mishra (PW-3) were examined. On 03.10.2017, PW-1-Shiv Prakash Mishra filed a petition under Section 319 Cr.P.C. to implead the second respondent-Subhash Chandra Shukla as an accused. The trial court vide order dated 28.08.2018 dismissed the application filed under Section 319 Cr.P.C. observing that there are contradictions in the statement of Shiv Prakash Mishra (PW-1) and the statement of Anand Kumar Mishra (PW-2) as to the role of the second respondent. The trial court held that the presence of the proposed accused Subhash Chandra Shukla at the place of work at District Mirzapur has been verified and the same has also been corroborated with the statement of the complainant and presence of the second respondent in the scene of occurrence is highly doubtful. The trial court placed reliance upon *Brijendra Singh and others v. State of Rajasthan (2017) 7 SCC 706*. The revision petition preferred by the complainant before the High Court was also dismissed on the ground that there are no materials on record to summon respondent No.2 as an accused. Being aggrieved, the complainant is before us.

5. The learned counsel for the appellant-complainant has submitted that the complainant has clearly named all the five accused persons and the name of second respondent is clearly mentioned in the FIR in Case Crime No.328A/2013. It was submitted that despite there being positive direct version of the prosecution witnesses with regard to the attack by respondent No.2 on the person of deceased, the Investigating Officer has expunged his name from the charge sheet on the basis of the statement of the accused who is working as Junior Engineer in the office of Setu Nigam, Mirzapur. It was submitted that the High Court erred in not considering the statement of witnesses PWs 1 to 3 who in their evidence

A has specifically attributed the overt act to respondent No.2. It was contended that the High Court failed to appreciate that the distance of place where the second respondent was working was only about 30 Kms. and while so, the High Court erred in placing reliance upon *Bijendra Singh*.

B 6. The learned counsel appearing for the first respondent-State of Uttar Pradesh has submitted that after proper investigation, C.B.C.I.D. has filed the charge sheet against three accused persons namely Sashendra Shukla, Devender Shukla and Laxmi Kant Shukla on 19.09.2014 and supplementary charge sheet was filed against Rahul Shukla on 15.10.2014. The learned counsel submitted that during the investigation, C from the examination of number of witnesses employed in the office of respondent No.2, the Investigating Officer found that respondent No.2 was not involved in the incident and therefore, charge sheet was filed against other accused and case against the second respondent was dropped. Placing reliance upon *Hardeep Singh v. State of Punjab* D and others (2014) 3 SCC 92 and *Brijendra Singh v. State of Rajasthan* (2017) 7 SCC 706, it was submitted that the power under Section 319 Cr.P.C. has to be exercised sparingly only on the existence of compelling reasons. It was further submitted that an order under Section 319 Cr.P.C. would not be made merely on the ground that some evidence has come on record implicating the person sought to be E summoned.

7. We have carefully considered the submissions and perused the impugned order and other materials on record.

F 8. Before considering the merits of the contention, it is necessary to refer to Section 319 Cr.P.C. which reads as under:-

G “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.

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(4) Where the Court proceeds against any person under sub- A
section (1), then-

- (a) the proceedings in respect of such person shall be commenced a fresh, 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 B
when the Court took cognizance of the offence upon which the inquiry or trial was commenced.”

By reading of Section 319 Cr.P.C., it is clear that the power under Section 319 Cr.P.C. can be exercised by the trial court at any stage during trial to summon any person as an accused to face the trial if it appears from the evidence that such person has committed any offence C
for which such person could be tried together with the accused.

9. The standard of proof employed for summoning a person as an accused person under Section 319 Cr.P.C. is higher than the standard of proof employed for framing a charge against the accused person. The power under Section 319 Cr.P.C. should be exercised sparingly. As held in *Kailash v. State of Rajasthan and another (2008) 14 SCC 51*, “the power of summoning an additional accused under Section 319 Cr.P.C. should be exercised sparingly. The key words in Section are “it appears from the evidence” “any person” “has committed any offence”. It is not, therefore, that merely because some witnesses have mentioned the name of such person or that there is some material against that person, the discretion under Section 319 Cr.P.C. would be used by the court.” D
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10. As held by the Constitution Bench in para (105) in *Hardeep Singh*, the power under Section 319 Cr.P.C. is discretionary and is to be exercised sparingly which reads as under:- F

“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 G

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A 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 CrPC. In Section 319 CrPC the purpose of providing if “it appears from the evidence that any person not being the accused has committed any offence” is clear from the words “*for which such person could be tried together with the accused*”. The words used are not “for which such person could be convicted”. There is, therefore, no scope for the court acting under Section 319 CrPC to form any opinion as to the guilt of the accused.”

11. The above view was followed in *Brijendra Singh* as under:-

“13. In order to answer the question, some of the principles enunciated in *Hardeep Singh case* (2014) 3 SCC 92 may be recapitulated: However, since it is a discretionary power given to the court under Section 319 CrPC and is also an extraordinary one, same has to be exercised sparingly and only in those cases where the circumstances of the case so warrant. 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 charge-sheet 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.”

12. In the light of the above principles, considering the present case, having regard to the contradictory statements of the witnesses and other circumstances, in our view, the trial court and the High Court rightly held that respondent No.2 cannot be summoned as an accused.

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The FIR in Case Crime No.328A/2013 was registered on 06.09.2013 at 18.15 hours. The name of second respondent is no doubt mentioned in the FIR and overt act is attributed to him. It is clear from the record that during the course of investigation, the Investigating Officer recorded the statements of witnesses namely Rajesh Kumar, Nizamuddin, Nand Kishore, Tribhuwan Singh, Bintu Rai and Nageshwar Kumar and other seven witnesses who have stated that respondent No.2 was not present at the place of occurrence at the time of the incident. The Investigating Officer has also recorded the statement of one Shiv Kumar Gupta and Sandeep Gupta who are working in the same office in which respondent No.2 was employed who had stated that respondent No.2 was in the office at the time of incident. Based on the statements recorded from the witnesses, the Investigating Officer found that the second respondent was posted on the post of Junior Engineer in the Bridge Construction Unit of Bridge Corporation, Lucknow and he usually resided there and on 06.09.2013, he was present at his workplace and discharging his official duties. Based on the materials collected during the investigation, the Investigating Officer recorded the finding that on the date and time of incident, Subhash Chandra Shukla was not present at the place of occurrence. Accordingly, the name of Subhash Chandra Shukla was dropped when the first charge sheet was filed on 19.09.2014. The supplementary charge sheet was filed against Rahul Shukla on 15.10.2014. Though the name of second respondent was mentioned in the FIR, during investigation, it was thus found that the second respondent was not present in the place of incident and on the basis of the findings of the Investigating Officer, he was not charge sheeted. Be it noted that the appellant-complainant has not filed any protest petition then and there. During investigation, when it was found that the accused was not present at the place of incident, the courts below were right in refusing to summon respondent No.2 as an accused.

13. As pointed out by the trial court, PW-1 was examined on various dates from 22.10.2016 to 02.08.2017 and examined on nine hearing dates. Though, in his chief-examination on 22.10.2016, PW-1 has stated about the presence of Subhash Chandra Shukla and attributing overt act to him that he had beaten the deceased Sangam Lal Mishra with butt of home made pistol, on 28.02.2017, PW-1 in his cross-examination stated that Subhash Chandra Shukla was on duty at that time. The relevant portion of the statement of PW-1 reads as under:-

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A “.....Subhash Chandra Shukla does not live in the house. He does service/job. At the same time in Jigna Police Station District Mirjapur he was making bridge and due to this reason, he was on duty there.....”

B As pointed out by the trial court and the High Court, PW-1 has made contradictory statements in the course of his examination in connection with the presence of Subhash Chandra Shukla.

C 14. Anand Kumar Mishra (PW-2) has been examined who is stated to be the eye witness. PW-2 has been working as Assistant Teacher (Shiksha Mitra). His duty time is from 07.00 am till 12.00 noon. PW-2 though stated that he was on leave on the date of occurrence i.e. 06.09.2013, the trial court expressed doubts about his presence at the time of occurrence. Considering the fact that PW-2 is working as a teacher and that PW-2 is a co-accused in the cross case, the trial court and the High Court expressed doubts about the evidence of PW-2 as to the presence of the second respondent. The evidence brought on record during trial does not *prima facie* show the complicity of respondent No.2 in the occurrence and the High Court was justified in refusing to summon respondent No.2 as an accused.

E 15. The High Court and the trial court concurrently held that the materials brought on record are not sufficient to summon the second respondent as an accused in the present case. No substantial ground is made out warranting interference and the appeal is liable to be dismissed.

F 16. In the result, the appeal is dismissed. The trial court shall proceed with the trial in S.T. No.26 of 2015 in accordance with law. We make it clear that the findings of this Court in this appeal and the High Court in the revision shall be construed only for the purpose of consideration of the appeal and revision respectively and the same shall not be construed as expression of opinion on the merits of the main case.

G Divya Pandey

Appeal dismissed.