

PERIYASAMI AND ORS. A

v.

S. NALLASAMY

(Criminal Appeal No. 456 of 2019)

MARCH 14, 2019 B

[DR. DHANANJAYA Y CHANDRACHUD AND  
HEMANT GUPTA, JJ.]

*Code of Criminal Procedure, 1973:*

s. 319 – Power to proceed against other persons appearing to be guilty of offence – Application u/s. 319, to summon accused named in the application as additional accused – Rejected by the magistrate, however, allowed by the High Court – On appeal, held: U/s. 319 additional accused can be summoned only if there is more than prima facie case as is required at the time of framing of charge but which is less than the satisfaction required at the time of conclusion of the trial convicting the accused – On facts, in FIR or in the statements recorded u/s. 161, the names of the appellants or any other description not given so as to identify them – Allegations in the FIR are vague – No strong or cogent evidence to make the appellants stand the trial for the offences u/ss 147, 448, 294(b) and 506 IPC – Additional accused cannot be summoned u/s. 319 in casual and cavalier manner in the absence of strong and cogent evidence – Thus, the High Court erred in setting aside the order passed by the magistrate only on the basis of the statements of some of the witnesses examined by the complainant – Order passed by the High Court set aside and that of the trial court is restored. C D E F

**Allowing the appeal, the Court**

**HELD:** 1.1 The instant case is basically a matrimonial dispute wherein, the husband who is the complainant has levelled allegations against the wife and her other family members. Though in the FIR, the complainant has mentioned that 15 women and 35 men came by vehicles but the names of 11 persons alone were disclosed in the FIR. [Para 12][1012-A-B] G

1.2 In the statements recorded under Section 161 of the Code of Criminal Procedure, during the course of investigation, the complainant and his witnesses have not disclosed any other H

- A name except the 11 persons named in the FIR. Thus, the complainant has sought to cast net wide so as to include numerous other persons while moving an application under Section 319 of the Code without there being primary evidence about their role in house trespass or of threatening the complainant. Large number of people will not come to the house of the complainant and would return without causing any injury as they were said to be armed with weapons like crowbar, knife and ripper etc. [Para 13][1012-C-D]
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- 1.3 In the First Information Report or in the statements recorded under Section 161 of the Code, the names of the appellants or any other description have not been given so as to identify them. The allegations in the FIR are vague and can be used any time to include any person in the absence of description in the First Information Report to identify such person. There is no assertion in respect of the villages to which the additional accused belong. Therefore, there is no strong or cogent evidence to make the appellants stand the trial for the offences under Sections 147, 448, 294(b) and 506 IPC. The additional accused cannot be summoned under Section 319 of the Code in casual and cavalier manner in the absence of strong and cogent evidence.**
- C Under Section 319 of the Code additional accused can be summoned only if there is more than *prima facie* case as is required at the time of framing of charge but which is less than the satisfaction required at the time of conclusion of the trial convicting the accused. [Para 14][1012-E-G]
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- 1.4 The High Court set aside the order passed by the magistrate only on the basis of the statements of some of the witnesses examined by the complainant. Mere disclosing the names of the appellants cannot be said to be strong and cogent evidence to make them to stand trial for the offence under Section 319 of the Code, especially when the complainant is a husband and has initiated criminal proceedings against family of his in-laws and when their names or other identity were not disclosed at the first opportunity. The order passed by the High Court is not sustainable in law and is set aside and that of the trial court is restored and the application under Section 319 of the Code is dismissed. [Paras 15, 16][1012-G, H; 1013-A, B]**
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*Hardeep Singh v. State of Punjab (2014) 3 SCC 92* A  
**: [2014] 2 SCR 1 – relied on.**

*Labhuji Amratji Thakor & Ors. v. The State of Gujarat & Anr. 2019 AIR 734 - referred to.*

<u>Case Law Reference</u>		
<b>[2014] 2 SCR 1</b>	<b>relied on</b>	<b>Para 10</b>
<b>2019 AIR 734</b>	<b>referred to</b>	<b>Para 11</b>

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 456 of 2019.

From the Judgment and Order dated 28.08.2018 of the High Court of Judicature at Madras in Criminal R.C. No. 346 of 2015.

S. Nagamuthu, Sr. Adv., M. P. Parthiban, A. S. Vairawan, R. Sudhakaran, Advs. for the Appellants.

M. A. Chinnasamy, Ms. C. Rubavathi, Ms. Leela Sarveshwar, S. D Peer Mohammad, P. Raja Ram, Advs. for the Respondent.

The Judgment of the Court was delivered by

**HEMANT GUPTA, J.**

1. The present appeal is directed against an order passed by the High Court of Judicature at Madras on 28.08.2018 whereby an order passed by the District Munsif cum Judicial Magistrate<sup>1</sup> on 27.02.2015 dismissing an application under Section 319 of the Code of Criminal Procedure, 1973<sup>2</sup> was set aside and the appellants were ordered to be impleaded as accused and to be proceeded against in accordance with law.

2. A First Information Report for the offences under Sections 147, 448, 294(b) and 506 of IPC was registered on 29.05.2011 in pursuance of an order passed by the High Court of Judicature at Madras on 26.05.2011 in a writ petition filed by S. Nallasamy<sup>3</sup> giving direction to register the First Information Report.

3. The Complainant married to Thangamani in the year 1998. It is alleged that the wife of the Complainant would remain in her father's

<sup>1</sup>Magistrate

<sup>2</sup>Code

<sup>3</sup>Complainant

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- A house generally and occasionally she would come to Saanarpalayam. They have a daughter named Loganithya. It is also mentioned that his wife filed a partition suit which was dismissed in view of compromise when his wife and daughter came to his house. But still, his wife used to pick up quarrel every day. The daughter was admitted in P.K.P. Swamy Matriculation School, Kalanipuram but the wife did not permit the daughter to write examination and left for Ellapayalayam. His mother-in-law, father-in-law and brother-in-law threatened that their daughter will not live with him and demanded Rs. 30 lakhs towards maintenance otherwise they will lodge a dowry case against him and his mother.
- B 4. On 05.05.2011 at about 11.00 AM, when he was in the house at Nanjappangoundanur, his father-in-law Ramalingam, mother-in-law Lakshmi, brother-in-law Senthilkumar, wife Thangamani and other relatives (15 women and 35 men) came by vehicles namely Maruti Van bearing Registration No. TN-33-AS-5695, TATA ACE TN-33-AT-4640 and TATA 407 TAE-9996 and forcibly entered his house and scolded him. The men folk were having weapons like crowbar, knife and ripper etc. They demanded Rs. 30 lakhs towards maintenance. One of the persons in the group exhorted them not to talk but to kill. The persons came running towards them with sickles and sticks. All the accused shouted to lock the house and took away turmeric bundles in the tempo van.
- C 5. On the basis of such FIR, the Investigating Officer recorded the statement of Complainant on 29.05.2011. But none of the appellants in the present appeal were referred to in the said statement. Even in the statements of other witnesses associated during the course of investigation, names of the appellants were not disclosed as the persons who were part of the group, said to have assaulted the Complainant and trespassed into his house. After completion of investigation, report under Section 173 of the Code was filed against 11 accused on 09.11.2011.
- D 6. The Complainant filed application before the learned trial court for further investigations under Section 173(8) of the Code. Such request was resisted by the accused inter alia on the ground that the future investigations can be sought only by the Investigating Officer and not by the Complainant. Such application was dismissed on 30.07.2013. Thereafter, the Complainant appeared as PW1 on 26.12.2013 disclosing the names of the appellants as part of the group who barged into his
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house and also attacked him. The prosecution also examined PW2 Loganayagi (mother of the Complainant), PW3 Murugaiyan and PW4 Jagadeesan (neighbours of the Complainant). A

7. It is thereafter, an application was filed under Section 319 of the Code to summon the 20 accused persons named in the application as additional accused. Such application was resisted inter alia on the ground that similar relief claimed by the Complainant in Criminal O.P. No. 1680 of 2012 filed before the High Court of Madras was dismissed on 21.02.2012. Thereafter, the Complainant has filed a petition under Section 173 (8) of the Code which was dismissed on 30.07.2013. It is also pointed out that names of the proposed accused were not disclosed in the First Information Report nor came to light during investigation. It is on the said basis the learned Magistrate passed an order on 27.02.2015 declining to summon the appellants as additional accused. B

8. The learned trial court found that the proposed accused are from different villages and that how the public prosecutor has given the fathers' name and addresses of the 20 proposed accused has not been disclosed. It was held as under: C

“6.... Also in the complaint itself the 11 members whose name was in the final order and other 15 ladies and 35 men and 3 vehicles and two wheelers have been mentioned. Based on that under Section 147, 448, 294(b), 506(2) the final order has been produced. Also there is no complaint regarding stealing of turmeric bundles. Only on 11 members the final report has been produced. Totally 6 witnesses along with the petitioner has been enquired. In all their statements only those 11 members names were mentioned. So till the date of submission of final report, no details or information regarding the other 20 members have been found. E

7.... Also under Section 319 of Cr.PC when the case is under progress and a person is accused with proper evidence or witness the court can order to add the person to the accused list and order to arrest the person and enquiry. But in order to add a person as an accused in a case just stating the name and details of the person is not enough, but what crime he has committed has to be mentioned definitely. Based on doubt the court cannot add the person in the accused list.” F

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- A 9. The said order was challenged by the Complainant by way of a Revision Petition before the High Court. The High Court accepted the Revision Petition, *inter-alia*, holding as under:
- “8. During trial, the defacto complainant /P.W.1, categorically stated that apart from the 11 named accused persons shown in C.C. No. 123 of 2011, 20 other persons also involved in the offence and he clearly named all the 20 more persons. P.W.2 has stated that along with 11 named persons, 20 more persons also came to the scene of occurrence however, she did not mention their names. P.W.3 has stated that other than the accused persons, 5 other persons also came to the scene of occurrence however, he has not stated their names. P.W.4 has mentioned some of the names of the persons who committed offence.
9. From the evidence of P.Ws. 1 to 4, it is very clear that apart from the 11 named accused, some other persons also committed offence and the District Munsif cum Judicial Magistrate, Kodumudi, failed to consider the evidence and also the scope of Section 319 Cr.PC. Hence, apart from the present accused persons in C.C. No. 123 of 2011, 20 more persons /proposed accused also involved in the case and hence, they have to be arrayed as accused. Under these circumstances, the judgment in (2017) 4 Supreme Court Cases 177, *Amrutbhai Shambhubhai Patel vs. Sumanbhai Kantibhai Patel and others* upon which reliance has been placed by the learned counsel for the respondents is not applicable to the facts of the present case.”
10. Learned counsel for the appellants relies upon a Constitution Bench judgment of this Court in **Hardeep Singh v. State of Punjab**<sup>4</sup> to contend that satisfaction required to invoke the power under Section 319 of the Code to arraign an accused is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is only where strong and cogent evidence occurs against a person from the evidence laid before the court, such power should be exercised and not in a casual and cavalier manner. The Court held as under:

“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.

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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 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.”

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11. Learned counsel for the appellants also refers to a recent order of this Court in **Labhuji Amratji Thakor & Ors. v. The State of Gujarat & Anr.**<sup>5</sup>, where, the order of summoning the additional accused on the basis of the statements of some of the witnesses in witness box was set aside for the reason that there is not even suggestion of any act done by the appellants amounting to an offence under Sections 3 and 4 of the Protection of Children from Sexual Offences Act, 2012. It was held as under:

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“....The Court has to consider substance of the evidence, which has come before it and as laid down by the Constitution Bench in Hardeep Singh (supra) has to apply the test, i.e., “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”....”

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<sup>5</sup>Criminal Appeal No. 1349 of 2018, decided on 13.11.2018

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- A 12. We have heard learned counsel for the parties and find that the order passed by the High Court is not sustainable in law. The present case is basically a matrimonial dispute wherein, the husband who is the Complainant has levelled allegations against the wife and her other family members. Though in the FIR, Complainant has mentioned that 15 women and 35 men came by vehicles but the names of 11 persons alone were disclosed in the First Information Report.
- B 13. In the statements recorded under Section 161 of the Code during the course of investigation, the Complainant and his witnesses have not disclosed any other name except the 11 persons named in the FIR. Thus, the Complainant has sought to cast net wide so as to include numerous other persons while moving an application under Section 319 of the Code without there being primary evidence about their role in house trespass or of threatening the Complainant. Large number of people will not come to the house of the Complainant and would return without causing any injury as they were said to be armed with weapons like crowbar, knife and ripper etc.
- C 14. In the First Information Report or in the statements recorded under Section 161 of the Code, the names of the appellants or any other description have not been given so as to identify them. The allegations in the FIR are vague and can be used any time to include any person in
- D the absence of description in the First Information Report to identify such person. There is no assertion in respect of the villages to which the additional accused belong. Therefore, there is no strong or cogent evidence to make the appellants stand the trial for the offences under Sections 147, 448, 294(b) and 506 of IPC in view of the judgment in **Hardeep Singh case (supra)**. The additional accused cannot be summoned under Section 319 of the Code in casual and cavalier manner in the absence of strong and cogent evidence. Under Section 319 of the Code additional accused can be summoned only if there is more than *prima facie* case as is required at the time of framing of charge but which is less than the satisfaction required at the time of conclusion of
- E the trial convicting the accused.
- F 15. The High Court has set aside the order passed by the learned Magistrate only on the basis of the statements of some of the witnesses examined by the Complainant. Mere disclosing the names of the appellants cannot be said to be strong and cogent evidence to make them to stand trial for the offence under Section 319 of the Code, especially when the
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Complainant is a husband and has initiated criminal proceedings against A  
family of his in-laws and when their names or other identity were not  
disclosed at the first opportunity.

16. Consequently, the order passed by the learned High Court is  
set aside and that of the trial court is restored and the application under  
Section 319 of the Code is dismissed. The appeal is allowed. B

Nidhi Jain

Appeal allowed.