

MANI PUSHPAK JOSHI

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v.

STATE OF UTTARAKHAND & ANR.

(Criminal Appeal No. 1517 of 2019)

OCTOBER 17, 2019

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[L. NAGESWARA RAO AND HEMANT GUPTA, JJ.]

Code of Criminal Procedure, 1973 - s.319 and ss.161, 164 - FIR lodged by the father of prosecutrix (aged about 6 years) about sexual assault on her - Prosecutrix in her statement inter alia stated that after she returned to her classroom, two men came; one of them wore spectacles and the other did not, and took her out from there- She deposed that two men had touched her before also and assaulted her five times earlier secretly in the garden - Appellant is said to be the person who was wearing spectacles, as identified by the victim - Application filed to summon the appellant - On appeal, held: Prosecutrix is a small child - Initial version of the father of the prosecutrix and the prosecutrix herself, as disclosed by her father in the FIR, is assault by one person - It is parents of the child who took the photographs either from the website of the School or from the Facebook to introduce a person with spectacles as an accused- Obviously, the father of the child must have anger against the management of the School as his child was violated when she was studying in the School managed by the appellant - But, the anger of the father against the management of the School including the appellant is not sufficient to make him to stand trial for the offences punishable u/s.376(2), IPC r/w ss. 5/6 of the POCSO Act - No prima facie case of any active part on the part of the appellant is made out in violating the small child - It is suggestive role of the family which influences the mind of the child to indirectly implicate the appellant - Fact that the prosecution after investigations has found no material to charge the present appellant also cannot be ignored - Heinous crime committed should not be led into prosecuting a person only because he was part of the management of the School - Order passed by the Trial Court to summon the appellant u/s.319 of the Code is set aside - Penal Code, 1860 - s.376(2) - Protection of Children from Sexual Offences Act, 2012 - ss. 5, 6.

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A **Allowing the appeal, the Court**

HELD: 1.1 The order summoning the appellant for the offences under Section 376(2) of the Indian Penal Code, 1860 read with Sections 5/6 of the Protection of Children from Sexual Offences Act, 2012 is not sustainable in law. The prosecutrix is

- B a small child. It is parents of the child who have taken the photographs either from the website of the School or from the Facebook to introduce a person with spectacles as an accused. The initial version of the father of the prosecutrix and of the prosecutrix herself, as disclosed by her father in the FIR, is
- C assault by one person. But in view of statement of PW-11, the anger was directed against the Management of the School of which the appellant is a part. Even if the father of the child has basis to be angry with the Management of the School but, no *prima facie* case of any active part on the part of the appellant
- D is made out in violating the small child. The involvement of other persons on the statement of the child of impressionable age does not inspire confidence that the appellant is liable to be proceeded under Section 319 of the Code. In fact, it is suggestive role of the family which influences the mind of the child to indirectly implicate the appellant. Obviously, the father of the child must have anger against the Management of the School as his child was violated when she was studying in the School managed by the appellant but, the anger of the father against the Management of the School including the appellant is not sufficient to make him to stand trial for the offences
- F punishable under Section 376(2) of the IPC read with Sections 5/6 of the POCSO Act. [Paras 9, 13-15] [827-F-G; 828-A-D]

1.2 The statement of the child so as to involve a person wearing spectacles as an accused does not inspire confidence disclosing more than *prima facie* to make him to stand trial of the offences. Therefore, the order of summoning the appellant under Section 319 of the Code is not legal. The fact, that the prosecution after investigations has found no material to charge the present appellant is also cannot be ignored. The heinous crime committed should not be led into prosecuting a person

- H only because he was part of the Management of the School.

There is no prima facie case against the appellant, which warrants his trial for the offences pending before the Court. The order passed by the Trial Court to summon the appellant under Section 319 of the Code is set aside and the application is dismissed. [Paras 16-17] [828-E-G]

Hardeep Singh v. State of Punjab & Ors. (2014) 3 SCC 92 – followed.

Labhuji Amratji Thakor and Others v. State of Gujarat and Others AIR 2019 SC 734 – relied on.

Case Law Reference

(2014) 3 SCC 92	followed	Para 11	C
AIR 2019 SC 734	relied on	Para 12	

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1517 of 2019.

From the Judgment and Order dated 03.04.2019 of the High Court of Uttarakhand at Nainital in Criminal Revision No. 89 of 2019.

Naresh Kaushik, Manoj Joshi, Mrs. Lalita Kaushik, Sandeep Tiwari, Girish Chandra Joshi and Vardhman Kaushik, Advs. for the Appellant.

Kuldeep Parihar, Dy. A.G., Ms. Aishwarya Bhati, Sr. Adv., Jaswant Singh Rawat, Ms. Rachna Gandhi, Ajeet Pandey, Sanpreet Singh Ajmani, Varun Mishra, Ms. Chitrangada Rastravara, Manohar Pratap, Jugal Kishore Gupta, Kuldeep Rai and Ms. Manju Jetley, Advs. for the Respondents.

The Judgment of the Court was delivered by

HEMANT GUPTA, J.

1. The challenge in the present appeal is to an order passed by the High Court of Uttarakhand at Nainital on April 3, 2019 whereby, revision against an order of summoning of appellant under Section 319 of the Code of Criminal Procedure, 1973¹ remained unsuccessful.

2. An FIR was lodged by Harpreet Singh, father of prosecutrix (aged about 6 years), on April 19, 2017 at 1:23 p.m., about sexual assault on her daughter. The FIR reads as under:

¹ for short, 'Code'

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- A "My daughter xxxx who is 6 years old has been mentally and physically harassed for 4-5 months in her school Aurum the Global School Haldwani. My daughter was very upset mentally for several days and would cry bitterly when asked to go to School. On my asking several times, she told me and my wife that in her School a teacher touched her private parts deliberately. He would take her to the bathroom, close her eyes and then would insert a stick like object in her vagina. This teacher had frightened her and he had instigated her not to talk about this matter to anyone. My daughter even told me that, whenever she went to the bathroom, he would follow her, and molest her there. Today, we showed the picture of this teacher to our daughter by the medium of facebook, she recognized him, and as a result we came to know that the name of this teacher is Bablu Bisht. Sir, the owner of the School Ankit Joshi, Principal Gauri Vohra and Class Teacher Nameeta Joshi are equally guilty (at fault) in this case. It is there pleaded of you, to kindly take stern action against the culprits."

3. After FIR was lodged, the statement of the victim was recorded by the Investigating Officer under Section 161 of the Code on April 19, 2017. Some of the relevant extracts from the statement read as under:

E "When father enquired so I told my father about Bablu Uncle's incident, my mother was also there. Bablu Uncle did these things earlier also - 3 days earlier he did the same thing. Ever since, I came to class first, he has done the same thing thrice.

F Question: Do you recall any earlier instance when Bablu Uncle or somebody from house or school did something like this with you?

G Answer: Aunty when I study in lkg and ukg then also sometimes Bablu Uncle did these things with me, apart from this nobody else has ever done anything with me."

H 4. Later, another statement of the prosecutrix was recorded under Section 161 of the Code on April 22, 2017 wherein, she stated that after she returned from washroom, two Uncles came and picked her away. In response to another question, the child responded that these two persons work outside school. In respect of a question whether

she has seen these persons earlier, the answer was that they used to roam in the School. Relevant extract of the statement read as under: A

“On showing print photographs, which were taken from school website by the parents of the kid, the girl said yes to the photo of Bablu Bisht and pointed towards one more photograph of another person. When we asked her whether she has told to her madam about this incident, she replied that she has told four times.” B

5. It is thereafter, statement of the prosecutrix was recorded under Section 164 of the Code on April 24, 2017 where she deposed, for the first time, that after she returned to her classroom, two men came; one of them wore spectacles and other did not. They took her out from there. She deposed that two men had touched her before also. She also deposed that she has told her parents about the incident and that two persons assaulted her five times earlier secretly in the garden. The appellant is said to be the person who was wearing spectacles. On the basis of the evidence collected by the investigating team, charge sheet was filed against Bablu Bisht alias Balwant Singh. The prosecution has examined Harpreet Singh, father of the prosecutrix as PW-1 who has deposed as under: C

“When I asked her what had happened, she did not tell anything. After I took her in confidence and asked her what had happened, she asked me to promise that I would not take her to the school and on this she told me that in school one teacher uncle harassed her and touched her in her private parts (place of urination) and inserts and exerts a rod like object in my place of urination. Saying this, the witness said that I had nothing left to console her. I assured her that we would not be sending her to that school now. After this, I and my family wept for a long time. (stating the above matter, the witness wept in the court as well). F

After this, my wife took my daughter to a separate place, while I searched the profile of the male members of the school. Four male members were found. I enlarged these photos individually and showed it to my child; three of these people she refused and when the photo of Bablu Bisht was shown to her, she would not speak and become silent (quite). When I asked her again, she again insisted that she will not go to school, only then with fear she said that he harassed her. G

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- A After this I did not speak further to my daughter on this matter. I talked to her about other things to assure her that we would not send her to that school. After this I went to my brother Manpreet Singh's house and told him everything about the incident that had happened with Harleen. Then I registered a complaint report about the incident in Haldwani police station on 19.04.2017.
- B The witness on seeing the document no. 3A/2, a printed complaint, said that this report was prepared by me and I had submitted it in the police station after putting my signatures on this. The witness endorsed his signature on this document. This document was marked as exhibit A-1. After this, keeping her security in consideration we sent her to another school for her studies.
- C The witness himself stated today that the invigilator had asked him to bring the print out of the photographs taken out from the face book. On this, we extracted the picture of the teacher, owner and the principal, and showed them to the child, she said that the man wearing spectacles also held her hands and harassed her. The man in spectacles was the owner of the school."
- D 6. The prosecutrix appeared as PW-2. The witness identified two persons, one with spectacles when the photographs were shown to her.
- E 7. Supreet Kaur (PW-10), mother of the prosecutrix, stated that her daughter told her that two persons troubled her, one of them was wearing spectacles.
- F 8. Gauri Vohra (PW-11) is the Principal of the School in which the prosecutrix was the student. The extract from her statement relevant for the present controversy reads as under:
- G "I called the Grievance cell members, which is comprised of myself, Vice Principal Mrs. Ashu Pant and Priyanka. The Victim's family members asked us to call Balwant and other staff members. When I asked Pandeyji about Balwant then he replied that he was on leave that day. After this, I informed Mani Sir, who is the Manager of our School, about the entire incident over phone.
- H Just then, the victim's father entered the office and started shouting at us. Although I assured them that I would be the first person to file a report against Balwant. In response, the family members of the victim got furious alleging that we had helped

Balwant Singh to escape from there and wanted to speak to Mani Sir. A

I told them that Mani Sir was in Dehradun at that moment and was returning back from there. Meanwhile several people gathered in the School. Many of whom had come to take their children back home. The family members of the victim now started inciting these people. We requested them to let the children go back home safely. But the victim's family started shouting that we won't let the children go back home. Very soon, Deepak Balutia and Sumit Tikku came to the School. Soon after this, the victim's family members and the mob started breaking and vandalizing the school property." B

9. The father of the prosecutrix filed an application to summon the person who wears spectacles, as identified by the victim. Such application was allowed by the learned Trial Court on February 20, 2019 which order was not interfered with by the High Court in a revision petition. C

10. Learned counsel for the appellant argued that the prosecutrix has improved her statement time and again. The appellant is identified by the Spectacles from the photograph taken from the website of the School or from the Facebook though the appellant is not a member of the teaching faculty but part of the Management. The FIR has been lodged after the details of occurrence have been shared by the prosecutrix with her father. The allegations in the first version are against only one person. In the first statement recorded under Section 161 of the Code, again the allegations are against one person. In fact, the prosecutrix has stated categorically that except Bablu, nobody else has ever done anything to her. In the second statement under Section 161 of the Code, recorded after three days, the assailants became two and that both work outside the School. She identifies the photo of Bablu taken from the website of the School and points out one photograph of another person. It is thereafter in her statement under Section 164 of the Code recorded on April 24, 2017, the other person is said to be wearing spectacles. D

11. A Constitution Bench of this Court in *Hardeep Singh v. State of Punjab & Ors.*² while examining the scope of Section 319 of the Code, held as under:

² (2014) 3 SCC 92

- A "100. However, there is a series of cases wherein this Court while dealing with the provisions of Sections 227, 228, 239, 240, 241, 242 and 245 CrPC, has consistently held that the court at the stage of framing of the charge has to apply its mind to the question whether or not there is any ground for presuming the commission of an offence by the accused. The court has to see as to whether the material brought on record reasonably connect the accused with the offence. Nothing more is required to be enquired into. While dealing with the aforesaid provisions, the test of *prima facie* case is to be applied. The court has to find out whether the materials offered by the prosecution to be adduced as evidence are sufficient for the court to proceed against the accused further.

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- D 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.

- E 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."

12. In *Labhuji Amratji Thakor and Others v. State of Gujarat and Others*³, this Court held that the Court has to consider substance of the evidence, which has come before it and 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. It was held as under:-

"The High Court does not even record any satisfaction that the evidence on record as revealed by the statement of victim and her mother even makes out a prima facie case of offence against the appellants. The mere fact that Court has power under Section 319 Cr.P.C. to proceed against any person who is not named in the F.I.R. or in the Charge Sheet does not mean that whenever in a statement recorded before the Court, name of any person is taken, the Court has to mechanically issue process under Section 319 Cr.P.C. 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." Although, the High Court has not adverted to test laid down by the Constitution Bench nor has given any cogent reasons for exercise of power under Section 319 Cr.P.C., but for our satisfaction, we have looked into the evidence, which has come on record before the trial court The observations of the trial court while rejecting the application having that the application appears to be filed with mala fide intention, has not even been adverted by the High Court."

13. Having heard the learned counsel for the parties at some length, we find that the order summoning the appellant for the offences under Section 376(2) of the Indian Penal Code, 1860⁴ read with Sections 5/6 of the Protection of Children from Sexual Offences Act, 2012⁵ is not sustainable in law.

14. The prosecutrix is a small child. It is parents of the child who have taken the photographs either from the website of the School or

³ AIR 2019 SC 734

⁴ for short, 'IPC'

⁵ for short, 'POCSO Act'

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- A from the Facebook to introduce a person with spectacles as an accused. The initial version of the father of the prosecutrix and of the prosecutrix herself, as disclosed by her father in the FIR, is assault by one person. But in view of statement of Gauri Vohra (PW-11), the anger was directed against the Management of the School of which the appellant is a part. Even if the father of the child has basis to be angry with the Management of the School but, we find that no *prima facie* case of any active part on the part of the appellant is made out in violating the small child. The involvement of other persons on the statement of the child of impressionable age does not inspire confidence that the appellant is liable to be proceeded under Section 319 of the Code. In fact, it is suggestive role of the family which influences the mind of the child to indirectly implicate the appellant.

- 15. Obviously, the father of the child must have anger against the Management of the School as his child was violated when she was studying in the School managed by the appellant but, we find that the anger of the father against the Management of the School including the appellant is not sufficient to make him to stand trial for the offences punishable under Section 376(2) of the IPC read with Sections 5/6 of the POCSO Act.

- 16. The statement of the child so as to involve a person wearing spectacles as an accused does not inspire confidence disclosing more than *prima facie* to make him to stand trial of the offences. Therefore, we hold that the order of summoning the appellant under Section 319 of the Code is not legal. The fact, that the prosecution after investigations has found no material to charge the present appellant is also cannot be ignored. The heinous crime committed should not be led into prosecuting a person only because he was part of the Management of the School. We have extracted the evidence led by the prosecution only to find out if there is any *prima facie* case against the appellant. We are satisfied that there is no *prima facie* case against the appellant, which warrants his trial for the offences pending before the Court.

- 17. Consequently, the appeal is allowed. The order passed by the Trial Court to summon the appellant under Section 319 of the Code is set aside and the application is dismissed.