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VIKAS RATHI

v.

THE STATE OF U.P. & ANR.

(Criminal Appeal No. 644 of 2023)

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MARCH 01, 2023

[ABHAY S. OKA AND RAJESH BINDAL, JJ.]

- Code of Criminal Procedure, 1973 : s. 319 – Summoning of additional accused – Murder of a person working in the appellant's firm – Complaint by the brother of the deceased – FIR registered against unknown persons – However, after two months, complaint by the wife of the deceased against the appellant – Appellant listed as a prosecution witness – Application u/s. 319 by the complainant to summon the appellant as accused – Dismissed by the trial court – High Court quashed the order passed by trial court and remanded C the matter – On appeal, held: On consideration of the evidence already on record produced by the prosecution, it does not go beyond suspicion – There was no eye-witness to the occurrence – Material on record was not sufficient for summoning of an additional accused in exercise of power u/s. 319 to establish complicity of the appellant D in the crime – Also the charged accused have been acquitted – Furthermore, remand in such a matter would only result in prolonging the litigation – High Court only recorded that reasons assigned by the trial court for rejecting the application were not sufficient – To avoid delay, the proper exercise of power by the High Court would have been to consider the material and opine as E to whether a case was made out for summoning of additional accused – Thus, the order passed by the High Court is set aside – Application for summoning the appellant as an additional accused dismissed.*

G *Hardeep Singh and Ors. v. State of Punjab & Ors.*
(2014) 3 SCC 92 : [2014] 2 SCR 1 – relied on.

Mohd. Shafi v. Mohd. Rafiq (2007) 14 SCC 544 : [2007] 4 SCR 1023; Sagar v. State of U.P. and Anr. (2022) 6 SCC 389; Kailash v. State of Rajasthan and Anr. (2008) 14 SCC 51 : [2008] 3 SCR 702 – referred to.

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<u>Case Law Reference</u>			A
[2007] 4 SCR 1023	referred to	Para 5	
(2022) 6 SCC 389	referred to	Para 5	
[2008] 3 SCR 702	referred to	Para 5	
[2014] 2 SCR 1	relied on	Para 12	B

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 644 of 2023.

From the Judgment and Order dated 16.05.2017 of the High Court of Judicature at Allahabad in CRLR No. 1564 of 2017. C

N. K. Mody, Sr. Adv., Sarvam Ritam Khare, Ms. Meena Sehrawat, Prabuddha Singh Gour, Ms. Ishita M Puranik, Birendra Bikram, Advs. for the Appellant.

Sanjay Kumar Tyagi, Raj Singh Rana, Kamal Kumar Pandey, Pankaj Kumar Singh, Pawan Kumar Shukla, S. C. Tripathi, Mrs. Pragya Verma, Shailja Kant Dubey, Advs. for the Respondents. D

The Judgment of the Court was delivered by

RAJESH BINDAL, J.

1. The Order dated 16.05.2017 passed by the Allahabad High Court is under challenge before this Court. By the aforesaid order, Criminal Revision Petition was filed by the respondent No.2 challenging the order dated 15.03.2017 whereby the application filed under Section 319 Cr.P.C. for summoning the present appellant, was dismissed. E

2. The High Court, vide impugned order had quashed the Order dated 15.03.2017 and remanded the matter back to the Trial Court for fresh examination. F

3. Learned counsel for the appellant submitted that the appellant established his business of manufacture of tools in the year 2003. A complaint was filed by respondent no.2 regarding murder of his brother Bachchu Prasad. It was mentioned therein that he used to work in the appellant's firm. On the basis of the aforesaid complaint, FIR No. 480/2013 was registered against unknown persons. Nearly two months after the complaint, wife of the deceased gave a complaint to the Superintendent of Police, Ghaziabad making false allegations against G

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- A the appellant. The appellant was given notices by the Investigating Officer. Entire information sought was furnished by him. During investigation, the police found an eye witness namely Rajesh Kumar to the alleged murder whose statement was recorded under Section 164 of the Code of Criminal Procedure. The aforesaid fact was concealed by the complainant while making complaint against the appellant. After completion of investigation, the police filed chargesheet against two accused persons namely Pannelal @ Panna Lal and Ombeer Singh. The appellant was listed as a prosecution witness. During trial, statements of various witnesses were recorded. Even the appellant was examined as PW-6. None of the witnesses stated anything against the appellant.
- B After the statement of the appellant (PW-6) was recorded, the complainant filed an application under Section 319 of the Cr.P.C. to summon the appellant as accused solely on the basis of certain vague oral allegation by PW-1, PW-2 and PW-3. After hearing arguments, the Trial Court dismissed the aforesaid application vide order dated 15.03.2017. It is the aforesaid order, which is under challenge in the present appeal before this Court.
- 4. The argument raised by learned counsel for the appellant is that the approach of the High Court in sending matter back for examination afresh was not right as the material which was available in the form of statements of various witnesses could very well be appreciated to find out as to whether any case was made out against the appellant for summoning under Section 319 of the Cr.P.C. It is not mere suspicion on the basis of which an additional accused could be summoned. Only where strong and cogent evidence is available against a person from the evidence produced before the Court, which could lead to his conviction,
- E F that such a power could be exercised. It could not be exercised in a casual and cavalier manner.
- 5. In the absence thereof, the impugned order passed by the High Court deserves to be set aside and the order passed by the Trial Court, dismissing the application should be upheld. In support of his arguments, G reliance was placed on judgments of this Court in Hardeep Singh and Ors. Vs. State of Punjab & Ors., (2014) 3 SCC 92; Mohd. Shafi vs. Mohd. Rafiq, (2007) 14 SCC 544; Sagar vs. State of U.P. and Anr., (2022) 6 SCC 389; Kailash vs. State of Rajasthan and Anr., (2008) 14 SCC 51.

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6. He further submitted that the stage at which the application was filed by the complainant to summon the appellant as an additional accused, the trial was going to conclude as the entire evidence had been led. Vide judgment of the Trial Court dated 06.10.2017, even the accused against whom the chargesheet was filed, were also acquitted. It was on the basis of the sketchy evidence produced by the prosecution before the trial court that the appellant was sought to be summoned.

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7. On the other hand, learned counsel for the State and the complainant submitted that a clear case was made out against the appellant for summoning him as an additional accused. The trial court had failed to exercise the jurisdiction vested in it. No doubt, the High Court could have corrected it but the matter was remanded back. The material already on record could have been taken into account. Had it been so, the appellant would have also faced trial along with other accused or even could be tried separately. However, the fact that the accused persons against whom the chargesheet was filed were acquitted vide judgment dated 06.10.2017, has not been disputed.

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8. Heard learned counsel appearing for the parties and perused the paper book.

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9. The principles of law with reference to exercise of jurisdiction under 319 Cr.P.C. are well settled.

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10. The Constitution Bench in Hardeep Singh and Ors.'s case (supra), opined as under:

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"105. Power u/s 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 laid 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 laid before the court, not necessarily tested on the anvil of cross-examination, it requires much strong evidence that near probability of his

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- A *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 u/S 319 CrPC".*
- B *(emphasis supplied)*

11. In **Sagar's** case (supra), it is stated as under:

- C *"9. The Constitution Bench has given a caution that power under Section 319 of the Code is a discretionary and extraordinary power which should be exercised sparingly and only in those cases where the circumstances of the case so warrant and the crucial test as notice above 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...."*

- D 12. If the evidence already on record produced by the prosecution is considered on the touchstone of law laid down by the Constitution Bench of this Court in **Hardeep Singh & Ors.** case (supra), it does not go beyond suspicion. There is no eye-witness to the occurrence. All what has been stated by PW-2 (brother of the deceased) is that the deceased who was working with the appellant as Manager though claimed to be a partner by the complainant, that there was some dispute regarding money between the appellant and the deceased. Rajesh Sharma whose statement was got recorded by police under Section 164 of the Cr.P.C. also retracted therefrom while appearing in court as PW-5. He stated that it was recorded by the police under threat of involvement in some false case. He also did not raise any finger towards the appellant. Rather he was the first person to visit the house of the deceased after the murder and informed the appellant to reach there. He was working as part time cook with the family of the deceased. Without any material brought on record, the widow of the deceased merely stated that she is sure that the appellant had committed murder of her husband as there was no other enemy. One of the brothers of the deceased who appeared as PW-1, who was not present at the spot, did not utter a single word against the appellant.
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13. The aforesaid material was not sufficient if examined in the light of the law laid down by this Court for summoning of an additional accused in exercise of power under Section 319 of the Cr.P.C. to establish complicity of the appellant in the crime. A

14. After conclusion of the entire evidence and examination of the material produced on record even against the charged accused, the trial court had acquitted them *vide* judgment dated 15.03.2017. It shows that material produced on record was not even sufficient for conviction of the accused against whom chargesheet was filed. B

15. One of the arguments raised by learned counsel appearing for the parties was that in the case in hand, the High Court instead of appreciating the material placed on record by the parties in the form of evidence to find out as to whether a case was made out for summoning of the appellant as an additional accused, remitted the matter back to the trial court for consideration afresh. Remand in such a matter will only result in prolonging the litigation. The High Court only recorded that reasons assigned by the trial court for rejecting the application were not sufficient. To avoid delay, it would have been proper exercise of power in case the High Court would have considered the material and opine as to whether a case was made out for summoning of additional accused. Whatever reasons have been recorded by the trial court in the order so passed, may not have been happily worded to the satisfaction of the High Court, but that error could have been corrected in exercise of revisional power. C D E

16. For the reasons mentioned above, the present appeal is allowed. The impugned order passed by the High Court is set aside and the application filed by the complainant for summoning the appellant as an additional accused is dismissed. F

Nidhi Jain
(Assisted by : Mayank Batra and Tamana, LCRAs)

Appeal allowed.