Yashodhan Singh vs The State Of Uttar Pradesh on 18 July, 2023

Author: B.V. Nagarathna

Bench: B.V. Nagarathna

2023 INSC 652

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.2186 OF 2023
(@ SPECIAL LEAVE PETITION (CRL.) NO. 6262/2023)

YASHODHAN SINGH & ORS. .

VERSUS

THE STATE OF UTTAR PRADESH & ANR.

J U D G M E N T

Leave granted.

2. This appeal arises out of an Order dated 03.01.2023 passed by the High Court at Allahabad in Criminal Revision No.4235 of 2022.

3. Briefly stated, the facts of the case according to the Complainant-Respondent No.2 herein are that he got registered an FIR bearing No.186/2018 on 09.06.2018 at around 21.45 at P.S. Hathras Junction District Hathras Uttar Pradesh under Sections 147, 148, 149, 302, 452 307, 504 of the Indian Penal Code (for short, "IPC") against the appellants herein alleging that appellant Nos. 1-7 (summoned accused) went to the Complainant-Respondent No.2's house and started hurling abuses and firing, which consequently resulted in the Complainant's injuries and the death of his two brothers. A charge sheet was filed against the accused persons but the names of the appellants were not mentioned in it as their role was still under investigation.

4. The Complainant filed an application before the Additional Sessions Judge Court No.1, Hathras in Case Crime No.186 of 2018 under Section 319 Cr.P.C. to summon the appellants herein on the basis of his evidence pursuant to which the Additional Sessions Judge passed an Order dated 23.09.2022 summoning the accused to join the trial.

5. Aggrieved by the said Order of the Additional Sessions Judge Court No.1, Hathras, the appellants approached the High Court of Judicature at Allahabad by way of Criminal Revision No.4235 of 2022. The High Court by way of the impugned Order dated 03.01.2023 dismissed the same and affirmed the Order passed by the Additional Sessions Judge Court No.1, Hathras in Case Crime No.186 of 2018 dated 23.09.2022, to summon the appellants.

6. Hence, this appeal.

7. We have heard Shri S. Nagamuthu, learned senior counsel for the appellants and Dr. Sushil Balwada, learned counsel for appellant Nos. 1, 3 and 4; Shri Ratnakar Dash, learned senior counsel for the State and Shri Yatharth Singh, learned counsel for the complainant, at length.

8. Vide Order dated 08.05.2023, this Court issued notice and the matter was directed to be listed in the second week of July, 2023. For the sake of immediate reference, the said Order is extracted as under -

“We have heard Mr. S. Nagamuthu, learned senior counsel appearing for the petitioners.

Delay condoned.

This is a case where by the impugned order the High Court has dismissed the revision challenging the order passed under Section 319 of the Cr.P.C. summoning the petitioners.

In the course of his submission, Mr. Nagamuthu drew our attention to the judgment of this Court in the case of Jogendra Yadav and Ors. vs. State of Bihar and Anr., reported in (2015) 9 SCC 244. Therein, he pointed out that this Court has found that since a person who is added under Section 319 Cr.P.C. is necessarily heard before he was so added and often gets a further hearing if he challenges the summoning order he cannot avail the remedy of discharge.

This Court may not have been inclined to interfere with the impugned order but would have been inclined to reserve the remedy of seeking discharge, if so advised at the appropriate stage.

We have the benefit of hearing Mr. Yatharth Singh, learned counsel appearing on behalf of the respondent no.2-complaint on caveat.

We are of the view that this aspect must be gone into if the court is to take a view which is at variance with the view taken in the judgment of Jogendra Yadav and Ors. (supra).

Issue notice.

The petitioners may serve dasti also to the standing counsel for the State of Uttar Pradesh.

List the matter in the second week of July 2023.” On a reading of the same, it is evident that this Court was inclined to issue notice to the respondent(s) having regard to the submission made by

Shri S. Nagamuthu, learned senior counsel in the context of the judgment of this Court in the case of Jogendra Yadav and Ors. vs. State of Bihar and Anr., reported in (2015) 9 SCC 244 ('Jogendra Yadav').

9. Shri S. Nagamuthu, learned senior counsel, at the outset submitted that paragraph 9 of Jogendra Yadav has categorically recorded that when an accused is summoned in exercise of the power under Section 319 of the Criminal Procedure Code, 1973 (`Cr.P.C' for short), such an accused has to be heard before being added as an accused to face trial; that such an accused has a further right of hearing if he challenges the summoning order before the High Court and further before this court. In light of the observations of this Court in Jogendra Yadav, the right of an accused, who is summoned to be heard before being added as an accused has been recognised by this Court; that in the instant case because there was no such hearing that was provided to the appellants, who were added as accused, in light of the aforesaid judgment, the impugned order may be set aside and the matter may be remanded to the Sessions Court for giving an opportunity to the appellants of being heard before being added as accused.

10. In this context, learned senior counsel drew our attention to another Order of this Court in the case of Ram Janam Yadav & Ors. V/s. State of U.P. & Anr. in SLP (Crl.) No.3199/2021('Ram Janam Yadav'), wherein this Court had directed that an Amicus Curiae be appointed to consider the question which emanated from the judgment in Jogendra Yadav and to refer the matter to a larger Bench, to decide: (1) as to, whether, an accused, who is impleaded under Section 319 of the Cr.P.C., is entitled to file an application for discharge and (2) whether, a person before being impleaded as an accused is entitled to prior hearing or not. Of course, it was also pointed out that ultimately the said matter was not referred to answer the said questions as this Court found that in the said case the accused had, in fact, been given an opportunity of hearing and, therefore, held that the issues raised would be purely academic in nature.

11. Emphasising the importance of the principles of natural justice in a criminal trial, learned senior counsel Sri Nagamuthu, submitted that if such a hearing is not provided to the accused then the rights of the persons summoned to be added as an accused would be jeopardised. In this regard, learned Senior Counsel also submitted that the invocation of power under Section 319 of the Cr.P.C. is one to proceed with the trial on the basis of the evidence already recorded and that the satisfaction of the Sessions Court/Trial Court in such a case would be an objective satisfaction and not a subjective one and, therefore, in order to ensure that the right of the persons summoned to be added as an accused is enforced, it is necessary that such a person is heard before his addition as an accused to be tried along with other accused already facing trial.

12. It was next contended that if ultimately the person summoned is not given a right to seek discharge which he is also entitled to seek, it becomes all the more crucial that on notice being issued to the person to be added as an accused, he is heard in the first instance and, thereafter, an order is passed on his addition to the list of accused to be tried along with other accused.

According to him, though Section 319 Cr.P.C. is silent as to opportunity of hearing before being added as an accused, the same has to be read into the provision which would be in compliance to the

principle of natural justices. In this connection, he has referred to the development of law regarding filing of protest petition against a closure report.

13. Learned counsel appearing for the other appellants also submitted that in the instant case, the appellants were named in the FIR but in the final report, their names were not mentioned. No protest petition was filed as against the said final report. It is only at the stage of trial that the summoning order was passed by the Sessions Court, which could not have invoked Section 319 of the Cr.P.C. to summon the appellants herein to be added to the list of accused when their names did not figure in the final report.

14. Therefore, it was contented on behalf of the appellants that either the judgment in Jogendra Yadav be complied with by granting an opportunity of hearing to the appellants herein or the matter may be referred to a larger Bench in case this Bench is not inclined to follow the said judgment.

15. Per contra, learned senior counsel appearing for the State and also learned counsel appearing for the complainant contended that the observations of this Court in Jogendra Yadav as well as the observations of this Court in Ram Janam Yadav have to be construed only from the perspective of the peculiar facts of the said cases.

16. Learned senior counsel appearing for the State drew our attention to paragraph 2 of Jogendra Yadav to contend that in the said case, the Additional Sessions Judge had in fact issued notice to the appellants therein to show cause as to why they should not be added as accused. After giving an opportunity to the appellants therein to file a reply, the Additional Sessions Judge summoned the appellants as accused for being added to the proceedings. Therefore, it was a case where the accused therein had been heard before such summons was issued. It was contended that it is in the aforesaid context, that this Court had observed that the persons to be summoned as an accused would be heard before being added. The said observations of this Court in paragraph 9 must be read in the context of the facts of the said case and not taken out of its context and blown out of proportion.

In order to buttress this submission, it was pointed out that in the order passed by this Court subsequently in the case of Ram Janam Yadav, the reference to a larger Bench was not taken forward by noticing that in the said case, it was not necessary to refer the questions of law to a larger Bench as in that case also, the persons who had been summoned as accused were in fact, given an opportunity of being heard and hence, the aforesaid two cases would turn on their own peculiar facts. In other words, what was sought to be contended was that an opportunity of being heard to the persons summoned under Sections 319 of the Cr.P.C. was on the facts of those cases and that cannot be made a rule or principle, which is applicable to all cases having regard to the object and purpose of Section 319 of the Cr.P.C.

17. Learned counsel appearing for the complainant also supported the arguments of the learned senior counsel appearing for the State and contended that if the submissions of learned senior counsel for the appellants are to be accepted, then the entire trial of the accused would be disrupted and there would be a trial within the trial, a concentric circle, and there can be no conclusion of a trial on a timely basis which would vitiate the salutary principle of speedy trial which is recognized

under Article 21 of the Constitution of India as well as the right of the victims to get justice. According to the learned Counsel, if the submissions of learned Counsel for the appellants is to be accepted by this Court, it would not only jeopardise a criminal trial but also prejudice the rights of the accused already facing trial and who possibly may be in custody during their trial. In other words, the persons who are to be added as an accused and summoned under Section 319 of the Cr.P.C. may come out with their own pleas and contentions which would have to be first considered by the Trial Court/Sessions Court and this would not only cause delay in the progress of the main trial. It was submitted that Section 319 of the Cr.P.C. is a wholesome provision which has to be invoked by the Sessions Court having regard to the evidence that has emerged in the trial and on the satisfaction derived by the trial court as has been envisaged by this Court in the case of Hardeep Singh V/s. State of Punjab & Ors. (2014) 3 SCC 92 ("Hardeep Singh"). Therefore, the said contentions of the learned counsel for the appellants may not be accepted was the joint plea of learned counsel for the respondents.

18. Having heard learned senior counsel and learned counsel for the respective parties, at the outset, we would refer to the Order dated 8.5.2023 passed by this Court and the context in which notice was issued to the respondent(s) herein. The said context can be clearly discerned by the fact that Mr. Nagamuthu, learned senior counsel contended that in paragraph 9 of the judgment in Jogendra Yadav, it is clearly indicated that the right of hearing must be afforded to a person summoned before being added as an accused in the trial, and therefore, the impugned order stood vitiated.

19. Before we proceed, we would refer to Sections 227 and 319 of the Cr.P.C., which are extracted as under:

> "227. Discharge.- If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.
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> "319. Power to proceed against other persons appearing to be guilty of offence. -
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> (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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> (2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.
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> (3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

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

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

20. Section 227 Cr.P.C. provides for discharge of an accused if the court finds that there is no sufficient grounds or reasons for proceeding against him. Consequently, the proceeding against discharged person is dropped. On the other hand, under Section 319 Cr.P.C., a person who has not been named as an accused is summoned to be tried along with other accused while section 227 Cr.P.C. results in conclusion of proceedings against a person who is an accused on his discharge. On the other hand, a person who is not an accused is summoned to be tried along with other accused under Section 319 Cr.P.C.

21. A reading of the said Section would clearly indicate that power is given to the Court to proceed against any other person appearing to be guilty of an offence. The expression `proceed' as appearing in Section 319 Cr.P.C. is of significance. The exercise of power under Section 319 Cr.P.C. is not at the initial stage where cognizance is taken of the offence and the summoning order is passed before committal of the matter to the Sessions Court. That power exercised under Section 190 of the Cr.P.C. is quite distinct from the power exercised by the Trial Court/Sessions Court under Section 319 of the Cr.P.C. In our view, much significance turns on the expression `proceed' in Section 319 Cr.P.C. The said Section came up for consideration before this Court in innumerable cases. However, it is of relevance to mention Constitution Bench judgments in Hardeep Singh; Sukhpal Singh Khair vs. State of Punjab, (2023) 1 SCC 289, ("Sukhpal Singh Khair") and in Brijendra Singh & Ors. v/s. State of Rajasthan (2017) 7 SCC 706, ("Brijendra Singh").

22. The relevant paragraphs in Hardeep Singh can be crystallised as under: –

(i) The Constitution Bench of this Court was concerned with three aspects: firstly, the stage at which powers under Section 319 Cr.P.C. can be invoked; secondly, the materials on the basis whereof the invoking of powers under Section 319 Cr.P.C. can be justified; and thirdly, the manner in which powers under Section 319 Cr.P.C. have to be exercised. While answering the five questions referred to the Constitution Bench in paragraph 117, it was concluded as under:

"117. We accordingly sum up our conclusions as follows:

Questions (i) and (iii) — What is the stage at which power under Section 319 CrPC can be exercised?

AND — Whether the word "evidence" used in Section 319(1) CrPC has been used in a comprehensive sense and includes the evidence collected during investigation or the

word “evidence” is limited to the evidence recorded during trial?

Answer 117.1. In Dharam Pal case [Dharam Pal v. State of Haryana, (2014) 3 SCC 306 : AIR 2013 SC 3018] , the Constitution Bench has already held that after committal, cognizance of an offence can be taken against a person not named as an accused but against whom materials are available from the papers filed by the police after completion of the investigation. Such cognizance can be taken under Section 193 CrPC and the Sessions Judge need not wait till “evidence” under Section 319 CrPC becomes available for summoning an additional accused.

117.2. Section 319 CrPC, significantly, uses two expressions that have to be taken note of i.e. (1) inquiry (2) trial. As a trial commences after framing of charge, an inquiry can only be understood to be a pre-trial inquiry. Inquiries under Sections 200, 201, 202 CrPC, and under Section 398 CrPC are species of the inquiry contemplated by Section 319 CrPC. Materials coming before the court in course of such inquiries can be used for corroboration of the evidence recorded in the court after the trial commences, for the exercise of power under Section 319 CrPC, and also to add an accused whose name has been shown in Column 2 of the charge-sheet.

117.3. In view of the above position the word “evidence” in Section 319 CrPC has to be broadly understood and not literally i.e. as evidence brought during a trial. Question (ii)—Whether the word “evidence” used in Section 319(1) CrPC could only mean evidence tested by cross- examination or the court can exercise the power under the said provision even on the basis of the statement made in the examination-in-chief of the witness concerned? Answer 117.4. Considering the fact that under Section 319 CrPC a person against whom material is disclosed is only summoned to face the trial and in such an event under Section 319(4) CrPC the proceeding against such person is to commence from the stage of taking of cognizance, the court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination.

Question (iv)—What is the nature of the satisfaction required to invoke the power under Section 319 CrPC to arraign an accused? Whether the power under Section 319(1) CrPC can be exercised only if the court is satisfied that the accused summoned will in all likelihood be convicted? Answer 117.5. Though under Section 319(4)(b) CrPC the accused subsequently impleaded is to be treated as if he had been an accused when the court initially took cognizance of the offence, the degree of satisfaction that will be required for summoning a person under Section 319 CrPC would be the same as for framing a charge [Ed. : The conclusion of law as stated in para 106, p. 138c-d, may be compared:“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”. See also especially in para 100 at p. 136f-g.] . The difference in the degree of satisfaction for summoning the original accused and a subsequent accused is on account of the fact that the trial may have already commenced against the original accused and it is in the course of such trial that materials are disclosed against the newly summoned accused. Fresh summoning of an accused will result in delay

of the trial therefore the degree of satisfaction for summoning the accused (original and subsequent) has to be different.

Question (v)—Does the power under Section 319 CrPC extend to persons not named in the FIR or named in the FIR but not charge-sheeted or who have been discharged?

Answer 117.6. A person not named in the FIR or a person though named in the FIR but has not been charge-sheeted or a person who has been discharged can be summoned under Section 319 CrPC provided from the evidence it appears that such person can be tried along with the accused already facing trial. However, insofar as an accused who has been discharged is concerned the requirement of Sections 300 and 398 CrPC has to be complied with before he can be summoned afresh.

(ii) While answering the questions aforesaid, this Court observed in Hardeep Singh that if 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 entire effort, therefore, is not to allow the real perpetrator of an offence to get away unpunished. It is with the said object in mind that a constructive and purposive interpretation should be adopted that advances the cause of justice and does not dilute the intention of the statute conferring powers on the court to carry out the avowed object and purpose to try the person to the satisfaction of the court as an accomplice in the commission of the offence that is the subject matter of trial. It was pertinently observed by this Court that 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.

(iii) While distinguishing a trial from an enquiry, it was observed by this Court that trial follows an inquiry and the purpose of the trial is to fasten the responsibility upon a person on the basis of facts presented and evidence led. Emphasising on the word “course” used in Section 319 Cr.P.C., it was observed that the said power can be invoked under the said provision against any person from the initial stage of inquiry by the court up to the stage of conclusion of the trial. Since after the filing of the charge-sheet, the court reaches the stage of inquiry and as soon as the court frames the charges, the trial commences. Thus, the power under Section 319(1) Cr.P.C. can be exercised at any time after the charge-sheet is filed before the pronouncement of judgment, except during the stage of Sections 207/208 Cr.P.C., committal, etc.

(iv) Elaborating the nuances of Section 319 Cr.P.C., it was further observed in Hardeep Singh that what is essential for the purpose of Section 319 Cr.P.C. is that there should appear some evidence against a person not proceeded against; the stage of the proceedings is irrelevant. Section 319 Cr.P.C. is an empowering provision particularly where the complainant is circumspect in proceeding against several persons, but the court is of the opinion that there appears to be some evidence pointing to the complicity of some other persons as well.

(v) It was further observed that circumstances which lead to the inference being drawn up by the court for summoning a person under Section 319 arise out of the availability of the facts and material that come up before the court. The material should disclose complicity of the person in the

commission of the offence which has to be the material that appears from the evidence during the course of any inquiry into or trial of offence.

(vi) It was also observed by this Court in Hardeep Singh that apart from evidence in the strict legal sense recorded during trial, any material that has been received by the court after cognizance is taken and before the trial commences, can be utilised only for corroboration and to support the evidence recorded by the court to invoke the power under Section 319 Cr.P.C. Holding that the expression "evidence" must be given a broad meaning, it was observed that material which is not exactly evidence recorded before the court, but is a material collected by the court, can be utilised to corroborate evidence already recorded for the purpose of summoning any other person, other than the accused. Such material would be supportive in nature to facilitate the exposition of any other accomplice whose complicity in the offence may have been suppressed or had escaped the notice of the court. Therefore, any material brought before the court even prior to the trial can be read within the meaning of the expression "evidence" for the purpose of Section 319 Cr.P.C. While considering the evidence that emanates during the trial, it was observed by this Court that evidence recorded by way of examination-in-chief and which is untested by cross-examination is nevertheless evidence which can be considered by the court for the exercise of power under Section 319 Cr.P.C. so long as, it would appear to the court that some other person who is not facing the trial, may also have been involved in the offence.

(vii) Further, Section 319 Cr.P.C. also uses the words "such person could be tried", which means not to have a mini-trial at the stage of Section 319 Cr.P.C. by having examination and cross-examination and thereafter coming to a prima facie conclusion on the overt act of such person sought to be added. Such a mini-trial will affect the right of the person sought to be arraigned as an accused rather than not having any cross-examination at all. As under Section 319 (4) Cr.P.C., such a person has the right to cross-examine the prosecution witnesses and examine the defence witnesses and advance his arguments. It was further observed that the power under Section 319 Cr.P.C. can be exercised even after completion of examination- in-chief and the court does not have to wait till the said evidence is tested on cross-examination, for 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 persons, not facing the trial in the offence.

(viii) 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. Therefore, such satisfaction is sina qua non for exercise of power under Section 319 Cr.P.C. Ultimately, the exercise of power is for the trial of such persons summoned together with the accused already on trial and not for conviction with the accused. Therefore, at that stage, the court need not form any definite opinion as to the guilt of the accused.

(ix) This Court further observed that the difference in the degree of satisfaction for summoning the original accused and a subsequent accused is on account of the fact that the trial may have already commenced against the original accused and it is in the course of such trial that materials are disclosed against the newly summoned accused. Hence, the degree of satisfaction for summoning the original accused and the accused summoned subsequently during the course of trial is different.

(x) It was further observed by this Court that a person, whose name does not appear even in the FIR or in the charge-sheet or whose name appears in the FIR and not in the main part of the charge-sheet but in Column 2 and has not been summoned as an accused in exercise of the powers under Section 193 Cr.P.C. can still be summoned by the court, provided the court is satisfied that the conditions provided in the said statutory provisions stand fulfilled. However, a person who has already been discharged stands on a different footing than a person who was never subjected to investigation or if subjected to, but not charge-sheeted. Such a person has stood the stage of inquiry before the court and upon judicial examination of the material collected during investigation, the court had come to the conclusion that there is not even a prima facie case to proceed against such person. Therefore, the court must keep in mind that the witness when giving evidence against the person so discharged, is not doing so merely to seek revenge or is naming him at the behest of someone or for such other extraneous considerations.

(xi) This Court further observed that it has to be circumspect in treating such evidence and try to separate the chaff from the grain. If after such careful examination of the evidence, the court is of the opinion that there does exist evidence to proceed against the person so discharged, it may take steps but only in accordance with Section 398 Cr.P.C. without resorting to the provision of Section 319 Cr.P.C. directly. Section 398 Cr.P.C. is in the nature of a revisional power which can be exercised only by the High Court or the Sessions Judge, as the case may be. However, a person discharged can also be arraigned again as an accused but only after an inquiry as contemplated by Sections 300(5) and 398 Cr.P.C. If during or after such inquiry, there appears to be an evidence against such person, power under Section 319 Cr.P.C. can be exercised.

23. From the aforesaid observations of the Constitution Bench of this Court in Hardeep Singh, it is noted that an inquiry is contemplated as against a person who has been discharged prior to the commencement of the trial in terms of Section 227 Cr.P.C. as extracted above but on an inquiry, if it appears that there is evidence against such a discharged person, then power under Section 319 Cr.P.C. can be exercised against such a discharged person. This clearly would mean that when a person who is not discharged but is to be summoned as per Section 319 Cr.P.C. on the basis of satisfaction derived by the court on the evidence on record, no inquiry or hearing is contemplated. This would clearly indicate that principle of natural justice and an opportunity of hearing a person summoned under 319 Cr.P.C. are not at all contemplated. Such a right of inquiry would accrue only to a person who is already discharged in the very same proceeding prior to the commencement of the trial. This is different from holding that a person who has been summoned as per Section 319 Cr.P.C. has a right of being heard in accordance with the principles of natural justice before being added as an accused to be tried along with other accused.

24. Further, when a person is summoned as an accused under Section 319 Cr.P.C. which is based on the satisfaction recorded by the Trial Court on the evidence that has emerged during the course of trial so as to try the person summoned as an accused along with the other accused, the summoned accused cannot seek discharge. It is necessary to state that discharge as contemplated under Section 227 Cr.P.C. is at a stage prior to the commencement of the trial and immediately after framing of charge but when power is exercised the under Section 319 Cr.P.C. to summon a person to be added as an accused in the trial to be tried along with other accused, such a person cannot seek discharge

as the court would have exercised the power under Section 319 Cr.P.C. based on a satisfaction derived from the evidence that has emerged during the evidence recorded in the course of trial and such satisfaction is of a higher degree than the satisfaction which is derived by the court at the time of framing of charge.

25. Learned senior counsel Sri S. Nagamuthu strenuously contended that a person summoned in exercise of power under Section 319 Cr.P.C. must be given an opportunity of being heard before being added as an accused to the trial to be tried along with the other accused and that such person must have an opportunity of filing an application seeking discharge. The same are clearly not envisaged in view of the judgment in Hardeep Singh and hence the said contentions are rejected.

Moreover, there is no finality attached to Section 319 Cr.P.C. It only indicates commencement of trial qua the added accused. The rationale is that a person need not be heard before being added on arrayed as an accused. Reference to and reliance placed upon opportunity of hearing to a complainant in the form of protest petition when a closure report is filed in wholly misplaced because there is finality in a closure report; therefore the complainant is given an opportunity.

26. In Sukhpal Singh Khair, a Constitution Bench of this Court of which one of us was a member (Nagarathna, J.), adumbrated on the meaning of the expression "conclusion of trial" in the context of Section 319 read with other allied Sections of the Cr.P.C. and after referring to several decisions of this Court including Hardeep Singh (supra) answered the question referred to as under:

> "39.(I) Whether the trial court has the power under Section 319CrPC for summoning additional accused when the trial with respect to other co-accused has ended and the judgment of conviction rendered on the same date before pronouncing the summoning order?
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> The power under Section 319CrPC is to be invoked and exercised before the pronouncement of the order of sentence where there is a judgment of conviction of the accused. In the case of acquittal, the power should be exercised before the order of acquittal is pronounced. Hence, the summoning order has to precede the conclusion of trial by imposition of sentence in the case of conviction. If the order is passed on the same day, it will have to be examined on the facts and circumstances of each case and if such summoning order is passed either after the order of acquittal or imposing sentence in the case of conviction, the same will not be sustainable.
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> 40.(II) Whether the trial court has the power under Section 319CrPC for summoning additional accused when the trial in respect of certain other absconding accused (whose presence is subsequently secured) is ongoing/pending, having been bifurcated from the main trial?

The trial court has the power to summon additional accused when the trial is proceeded in respect of the absconding accused after securing his presence, subject to the evidence recorded in the split-up (bifurcated) trial pointing to the involvement of the accused sought to be summoned. But the

evidence recorded in the main concluded trial cannot be the basis of the summoning order if such power has not been exercised in the main trial till its conclusion.

41.(III) What are the guidelines that the competent court must follow while exercising power under Section 319CrPC?

41.1. If the competent court finds evidence or if application under Section 319CrPC is filed regarding involvement of any other person in committing the offence based on evidence recorded at any stage in the trial before passing of the order on acquittal or sentence, it shall pause the trial at that stage.

41.2. The court shall thereupon first decide the need or otherwise to summon the additional accused and pass orders thereon.

41.3. If the decision of the court is to exercise the power under Section 319CrPC and summon the accused, such summoning order shall be passed before proceeding further with the trial in the main case.

41.4. If the summoning order of additional accused is passed, depending on the stage at which it is passed, the court shall also apply its mind to the fact as to whether such summoned accused is to be tried along with the other accused or separately.

41.5. If the decision is for joint trial, the fresh trial shall be commenced only after securing the presence of the summoned accused.

41.6. If the decision is that the summoned accused can be tried separately, on such order being made, there will be no impediment for the court to continue and conclude the trial against the accused who were being proceeded with. 41.7. If the proceeding paused as in para 41.1 above, is in a case where the accused who were tried are to be acquitted, and the decision is that the summoned accused can be tried afresh separately, there will be no impediment to pass the judgment of acquittal in the main case. 41.8. If the power is not invoked or exercised in the main trial till its conclusion and if there is a split-up (bifurcated) case, the power under Section 319CrPC can be invoked or exercised only if there is evidence to that effect, pointing to the involvement of the additional accused to be summoned in the split-up (bifurcated) trial. 41.9. If, after arguments are heard and the case is reserved for judgment the occasion arises for the Court to invoke and exercise the power under Section 319CrPC, the appropriate course for the court is to set it down for re- hearing.

41.10. On setting it down for re-hearing, the above laid down procedure to decide about summoning; holding of joint trial or otherwise shall be decided and proceeded with accordingly.

41.11. Even in such a case, at that stage, if the decision is to summon additional accused and hold a joint trial the trial shall be conducted afresh and de novo proceedings be held.

41.12. If, in that circumstance, the decision is to hold a separate trial in case of the summoned accused as indicated earlier:

(a) The main case may be decided by pronouncing the conviction and sentence and then proceed afresh against summoned accused.

(b) In the case of acquittal the order shall be passed to that effect in the main case and then proceed afresh against summoned accused.

27. In Brijendra Singh, after referring to Hardeep Singh, this Court considered the question as to the degree of satisfaction that is required for invoking the powers under Section 319 Cr.P.C. and the related question, namely, as to, in what situations, this power should be exercised in respect of a person named in the FIR but not charge-sheeted. This Court held that once the trial court finds that there is some "evidence" against such a person on the basis of which it can be gathered that he appears to be guilty of the offence, there can be exercise of power under Section 319 Cr.P.C. It was observed that the evidence in this context means the material that is brought before the court during trial. Insofar as the material or evidence collected by the Investigating Officer (IO) at the stage of inquiry is concerned, it can be utilised for corroboration and to support the evidence recorded by court to invoke the power under Section 319 Cr.P.C. This Court distinguished between the degree of satisfaction arrived at while exercising power under Section 319 Cr.P.C. which is greater than the degree which is warranted at the time of framing of 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. Such power should not 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 a person's complicity were the observations of this Court.

Holding that in the said case there was no satisfaction, the order passed under Section 319 Cr.P.C. summoning the appellant therein was set aside by this Court.

28. It is in light of the aforesaid judgments, we have to consider the judgment of this Court in Jogendra Yadav which is the basis of the arguments of Sri Nagamuthu, learned senior counsel appearing for the appellants. As already noted, in the said case, the Additional Sessions Judge had issued notice to the appellants therein under Section 319 of the Cr.P.C. to show cause as to why they should not be added as accused and an opportunity was provided to the appellants therein to file their reply and after being heard, the summoned appellants therein were added as accused to the proceedings. It was nobody's case that they were not heard before such summoning order was passed. Despite that, the said order was challenged and ultimately the matter came up before this Court. This Court in the course of its judgment referred to the object and purpose of Section 319 of the Cr.P.C. and distinguished it from Section 227, which provides for discharge by observing as under – "6. On a perusal of Section 319 of the Cr.P.C., it is apparent that a person who is not an accused may be added as an accused only when it appears from the evidence that he has committed any offence for which he could be tried together with the accused. The Section says that in such an eventuality, the Court "may proceed against such person" for the offence which he appears to have committed. In other words, a person who is not an accused becomes liable to be added where he appears to have committed an offence. Thereupon, the effect is that the Court may proceed against such a person.

7. Section 227 of the Cr.P.C. on the other hand, provides that an accused may be discharged if the Judge construes that there is no sufficient ground for the proceedings against him. In other words, if the Judge is of the view that there are no sufficient grounds for the proceedings against the accused, he may be discharged, whereupon the proceedings against him are dropped.

8. It is apparent that both these provisions, in essence, have the opposite effect. The power under Section 319 of the Cr.P.C. results in the summoning and consequent commencement of the proceedings against a person who was hitherto not an accused and the power under Section 227 of the Cr.P.C., results in termination of proceedings against the person who is an accused."

29. The sheet anchor of the arguments advanced on behalf of the appellants is what has been observed by this Court in the said judgment in paragraph 9, which reads as under – "9. It was, however, urged by learned counsel for the appellants that in order to avail of the remedies of discharge under Section 227 of the Cr.P.C., the only qualification necessary is that the person should be accused. Learned counsel submitted that there is no difference between an accused since inception and accused who has been added as such under Section 319 of the Cr.P.C. It is, however, not possible to accept this submission since there is a material difference between the two. An accused since inception is not necessarily heard before he is added as an accused. However, a person who is added as an accused under Section 319 of the Cr.P.C., is necessarily heard before being so added. Often he gets a further hearing if he challenges the summoning order before the High Court and further. It seems incongruous and indeed anomalous if the two sections are construed to mean that a person who is added as an accused by the court after considering the evidence against him can avail remedy of discharge on the ground that there is no sufficient material against him. Moreover, it is settled that the extraordinary power under Section 319 of the Cr.P.C., can be exercised only if very strong and cogent evidence occurs against a person from the evidence led before the Court." (emphasis by us) Much emphasis has been laid on the expression "a person who is added as an accused under Section 319 of the Cr.P.C. is necessarily heard before being so added" as extracted supra. Therefore, it was contended on behalf of appellants that in the instant case, there being no opportunity to the appellants herein of being heard, the summoning order itself was vitiated and, therefore, the impugned order of the High Court may be set aside as also the order passed by the Sessions Court summoning the accused.

30. It is necessary to consider the contentions of the learned counsel for the appellants in the light of what has been observed in paragraph 9 extracted above and in light of what has been observed by this Court in the subsequent paragraphs and having regard to the earlier judgments of this Court referred to above in detail.

31. In paragraph 13 of Jogendra Yadav, it has been observed that the exercise of power under Section 319 of the Cr.P.C. must be placed on a higher pedestal. Needless to say, the accused summoned under Section 319 of the Cr.P.C. are entitled to invoke the remedy under law against an illegal or improper exercise of power under Section 319 of the Cr.P.C. but that cannot have the effect of the order being undone by seeking a discharge under Section 227 of the Cr.P.C. Therefore, this Court categorically held that a person, who is summoned under Section 319 of the Cr.P.C. cannot avail the remedy of discharge under Section 227 of the Cr.P.C. In that context, this Court, as already

noted, discussed the difference between Sections 227 and 319 of the Cr.P.C, as extracted above. This Court in the subsequent paras of the said judgment has also not stated that if a person is to be summoned under Section 319 of the Cr.P.C. to be added as an accused, then an opportunity must be given to such a person and only after hearing him, he could be added as an accused in the trial. We do not find that the ratio of Jogendra Yadav turns on the said aspect. However, it is contented by learned Senior counsel Shri Nagamuthu that what has been observed in paragraph 9 of the said judgment will make it a necessary mandate or a rule that a person who is to be summoned under Section 319 of the Cr.P.C. to be added as an accused will necessarily be heard before being so added. Paragraph 9 cannot be considered to be the ratio of the said judgment. Further, the context in which the observations are made in paragraph must relate to the facts of the said case where an opportunity was in fact provided to the persons summoned therein.

Similarly, in the case of Ram Janam Yadav, on facts, it was noticed that the person summoned was, in fact, provided an opportunity of hearing.

32. Merely because in certain proceedings the persons summoned had been provided an opportunity of being heard cannot be the same thing as stating that it is a mandatory requirement or a pre- condition that at the time of summoning a person under Section 319 of the Cr.P.C., he should be given an opportunity of being heard. That is not the mandate of law inasmuch as Section 319 clearly uses the expression “to proceed” which means to proceed with the trial and not to jeopardise the trial at the instance of the person(s) summoned by conducting a mini trial or a trial within a trial thereby derailing the main trial of the case and particularly against the accused who are already facing trail and who may be in custody. A person who is summoned in exercise of the power under Section 319 Cr.P.C. cannot hijack the trial so to say and deviate from its focus and take it to a tangent in order to bolster his own case in a bid to escape trial. All that is contemplated when a person is summoned to appear is to ascertain that he is the very person who was summoned and if any summoned person fails to appear on the given date. On the appearance of the summoned person, no procedure of an inquiry or opportunity of being heard is envisaged before been added as an accused to the list of accused already facing trial unless such a summoned person had already been discharged, in which event, an inquiry is contemplated as discussed above. Thus, the contention that a summoned person must be given an opportunity of being heard before being added as an accused to face the trial is clearly not contemplated under Section 319 Cr.P.C. It is also observed by this Court in Hardeep Singh that such a summoned person can assail a summoning order before a superior Court and will also have the right of cross examining the witnesses as well as can let in his defence evidence, if any.

33. Thus, the lateral entry of a person summoned in exercise of power under Section 319 Cr.P.C. is only to face the trial along with other accused. This, being a salutary provision in order to meet the ends of justice, the same cannot be diluted by importing within the scope of Section 319 Cr.P.C. principles of natural justice which in any case would be followed during the trial.

It is well settled that principles of natural justice cannot be applied in strait-jacket formula and they would depend upon the facts of each case and the object and purpose to be achieved under a provision of law.

34. In view of the aforesaid discussion, we do not think that the judgment in Jogendra Yadav calls for any re-consideration and the said observation in paragraph 9 as extracted supra is relatable only to the facts of the said case. Thus, the principle of hearing a person who is summoned cannot be read into Section 319 Cr.P.C. Such a procedure is not at all contemplated therein. In the circumstances, we do not accept the contentions of the appellants herein.

35. At this stage, learned senior counsel and learned counsel for the appellants submitted that the appellants would appear before the Sessions Court on the next date of hearing, i.e., 31.07.2023 and would seek all remedies available to them in law.

The submissions of learned senior counsel and learned counsel for the appellants are placed on record.

Thus, we find no merit in the appeal which is accordingly dismissed.

Pending application(s) shall stand disposed of.

……J. [B.V. NAGARATHNA] ……J. [UJJAL BHUYAN] NEW DELHI JULY 18, 2023