

**Asim Akhtar**  
v.  
**The State of West Bengal & Anr.**  
(Criminal Appeal No. 4247 of 2024)  
18 October 2024  
[Vikram Nath\* and Prasanna B. Varale, JJ.]

**Issue for Consideration**

Whether there is a mandate to decide the application u/s. 319 CrPC before cross-examination of other witnesses.

**Headnotes<sup>†</sup>**

**Code of Criminal Procedure, 1973 – s.319 – During the trial, the examination-in-chief of the victim (respondent no.2)-PW-1, her mother (PW-2) and her father (PW-3) was recorded – Respondent no.2 filed an application u/s.319 CrPC for summoning the father and mother of the accused-appellant – Thereafter, the above three prosecuting witnesses did not appear before the trial Court for cross-examination and insisted for deciding application u/s.319 CrPC first – Trial Court acquitted accused u/s.232 CrPC and rejected application u/s.319 CrPC for the want of admissible evidence – However, the High Court in the impugned judgment relied upon the case of Hardeep Singh vs. State of Punjab & Ors and directed that the trial Court to first decide the application u/s.319 CrPC – Propriety:**

**Held:** The judgment in the case of Hardeep Singh does not provide that it is mandatory to decide the application u/s.319 Cr.P.C. before conducting cross-examination and only on the basis of examination-in-chief – It merely clarifies that even examination-in-chief is part of evidence and record and thus can be relied upon to decide an application u/s.319 CrPC – The judgment does not take away the discretion of the Trial Court to wait for the cross-examination to take place before deciding the application u/s.319 CrPC – It merely provides that consideration of such an application should not be a mini trial – It is for the Trial Court to decide whether the application should be decided without waiting for the

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cross-examination to take place or to wait for it – The same would depend upon the satisfaction of the Trial Court on the basis of the material placed on record – The complicity of any person sought to be arrayed as an accused can be decided with or without conducting cross-examination of the complainant and other prosecution witnesses, and there is no mandate to decide the application u/s.319 CrPC before cross-examination of other witnesses – In the instant case, the Trial Court having tried its best to ensure that the prosecution witnesses nos.1, 2 and 3 present themselves for cross-examination and thereafter it would decide the application u/s.319 CrPC, the prosecution witnesses repeatedly continued to either absent themselves or file adjournment applications and only insisted for deciding the application u/s.319 CrPC first and only thereafter the trial could proceed – The complainant has no such mandatory right to insist that an application be decided in such a manner – Therefore, the Trial Court was correct in proceeding u/s.232 CrPC and accordingly acquitting the appellant-accused, treating it to be a case of no evidence – The Trial court was also correct in rejecting the application u/s. 319 CrPC for want of admissible evidence on part of the prosecution – Therefore, the impugned order of the High Court is set aside and that of Trial Court restored. [Paras 14, 15, 17, 18, 19]

### Case Law Cited

*Hardeep Singh vs. State of Punjab & Ors.* [\[2014\] 2 SCR 1 : \(2014\) 3 SCC 92 – followed.](#)

### List of Acts

Code of Criminal Procedure, 1973; Penal Code, 1860; Arms Act, 1950.

### List of Keywords

Section 319 of Code of Criminal Procedure, 1973; Examination-in-chief; Cross-Examination.

### Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 4247 of 2024

From the Judgment and Order dated 11.08.2022 of the High Court at Calcutta in CRA No. 222 of 2020

**Asim Akhtar v. The State of West Bengal & Anr.****Appearances for Parties**

Sarad Kumar Singhania, Mrs. Rashmi Singhania, Advs. for the Appellant.

Ms. Madhumita Bhattacharjee, Adv. for the Respondents.

**Judgment / Order of the Supreme Court****Judgment****Vikram Nath, J.**

1. Leave granted.
2. By means of this appeal, the accused has assailed the correctness of the judgment and order dated 11.08.2022 passed by the Calcutta High Court in CRA No.222/2020 whereby the High Court allowed the appeal filed by the complainant (respondent no.2) and after setting aside the acquittal recorded by the Trial Court on 31.09.2020, remanded the case to proceed in a manner whereby the Trial Court would first decide the application under Section 319 of the Code of Criminal Procedure, 1973<sup>1</sup> and thereafter proceed to decide the trial.

Brief facts relating to the present case are:

3. That the First Information Report<sup>2</sup> was lodged by respondent no.2 alleging that the appellant had tried to kidnap him which was registered under sections 366/323/506(II) of the Indian Penal Code, 1860<sup>3</sup> with section 25(1)(B)(a) of the Arms Act, 1950 as FIR No. 125 on 11.10.2017. After investigation, a charge-sheet was submitted on 08.02.2019 under the aforesaid sections.
4. During the trial the Examination-in-Chief of the victim (respondent no.2) PW1, her mother Sabiya Rahaman (PW 2) and her father Aslam Shaikh (PW 3) were recorded. However, their cross-examination was deferred on an application made by the accused-appellant. The Examination-in-Chief was conducted on 29.02.2020. On 07.03.2020 an application under section 319 CrPC was filed by respondent no.2 for further summoning the father and mother of the accused-appellant. Thereafter it appears that the above three prosecution witnesses did

1 CrPC

2 FIR

3 IPC

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not appear before the Trial Court for their cross-examination despite having received the summons. On 14.09.2020 again an adjournment was sought on behalf of PWs 1, 2 and 3 whereupon the Trial Court recorded that despite the specific repeated orders, the prosecution witnesses are not coming forward for cross-examination and that the witnesses as such are wilfully disobeying the orders of the Court. The Trial Court directed that the cross-examination of the witnesses is fixed for the next date and orders would be passed on the application under section 319 CrPC after the examination of all the witnesses are over. The order dated 14.09.2020 is reproduced hereunder:

“Today is fixed for cross-examination of PW 1, PW2 and PW 3. Sole accused Asim Akhtar is present by filing hazira. SR of summons are received after service. On behalf of the defacto complainant a petition has been filed praying for disposal of the application under section 319 CrPC with affidavit. Copy is seen by the PP in charge.

On behalf of the PW 1 PW 2 and PW 3 a petition has been filed for an adjournment with xerox copy of prescription Copy is also seen by the PP in charge.

Perused the petition. Heard both sides.

Admittedly, the petition has been filed by the *de facto* complainant with an affidavit. The affidavit is sworn at Sealdah Court on 14.09.2020 before the Notary Public Sarbani Mitra but the said witness failed to appear before the court. That factum goes to show that the said witness wilfully disobeyed the order of court. The application under section 319 CrPC is heard in presence of both sides. The order will be passed after the examination of all the witnesses are over.

Tomorrow for examination and cross examination of all the witnesses and order to respect the application under section 319 CrPC.”

5. On 15.09.2020 again the witnesses remained absent and filed an application for adjournment. They also moved an application seeking four weeks' time to bring appropriate orders from the High Court regarding no adverse orders being passed in case of non-appearance of parties owing to the Covid-19 pandemic. Yet another application

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was filed for giving a direction to the concerned authority to issue urgent certified copy of the order passed by the High Court.

6. The Trial Court recorded in detail the past conduct of the PWs 1, 2 and 3 that despite the service of summons, they had not been appearing for cross-examination. It was also recorded that PW 1 – the complainant had come to the Court with a sworn affidavit in her application under section 319 CrPC but did not care to attend the trial proceedings and present herself for cross-examination.
7. The Trial Court further proceeded to record that although the complainant wants the trial to proceed but is not coming forward for being cross-examined and has only filed an application to the effect that the application under section 319 CrPC may be heard and decided before the cross-examination. Even the Public Prosecutor had opposed the application filed by the *de facto* complainant for hearing of the 319 CrPC application. He also stated that other witnesses are coming and returning because of the repeated absence of PWs 1,2 and 3. The Trial Court thus fixed 29.09.2020 for cross-examination and also recorded its displeasure and inclination to execute the bailable warrants of arrest against the witnesses. It directed the Public Prosecutor to ensure presence of the witnesses and also directed the Investigating Officer to remain present with the witnesses.
8. Again on 21.09.2020 the sole accused – appellant was present. An application was filed by the complainant-respondent no.2 stating that aggrieved by the orders dated 14.09.2020 and 15.09.2020 she had preferred CRR No.1357/2020 and CRAN No.1/2020 which is likely to be taken up on 23.09.2020, as such the matter be adjourned for two more weeks. Respondent no.2 further filed an application for offences under Section 354 and 354B of the IPC which required to be added along with existing sections. Once again PWs 1 and 3 were present but the counsel for the complainant again insisted that they are ready to face the cross-examination, however, the application under section 319 CrPC may be disposed of first.
9. The Trial Court recorded their stand that they would not face cross-examination until the application under Section 319 CrPC is decided. The counsel for the accused-appellant was ready to cross-examine but could not proceed as the prosecution witnesses did not agree and continued to insist that the application under section 319 CrPC be decided first.

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10. The Trial Court recorded all the facts, the contentions and also the conduct of the parties during the trial and ultimately proceeded to close the evidence of the prosecution. The Trial Court further went on to decide the application under section 319 CrPC and held that the evidence recorded so far was not admissible as the witnesses had failed to present themselves for cross-examination as such there was no justification for summoning the parents of the accused-appellant on the basis of inadmissible evidence. Accordingly, the same was rejected. The Trial Court further proceeded to hold that it was a case of no evidence under Section 232 CrPC and thereby acquitted the accused-appellant.
11. Aggrieved by the same, respondent no.2 preferred an appeal before the High Court which has since been allowed by the impugned judgment and order, giving rise to the present appeal.
12. We have heard learned counsel for the appellant and for the respondent no.1 -State of West Bengal. Despite service of notice, no one has put in appearance on behalf of respondent no.2-Complainant.
13. The High Court in paragraph 15 of the impugned judgment relied upon a paragraph of the Constitution Bench judgment in the case of **Hardeep Singh vs. State of Punjab & Ors.**<sup>4</sup> wherein it was held that “....power under section 319 CrPC can be exercised at the stage of completion of examination-in-chief and the court does not need to wait till the said evidence is tested in 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 person(s) not facing the trial in the offence.”

The said view of the Constitution Bench has been taken as a mandate by the High Court that application under section 319 CrPC must be necessarily decided even if the cross-examination has not been conducted, only on the basis of Examination-in-Chief. Relying upon the same, the High Court has set aside the order of the acquittal passed by the Trial Court and has remanded the matter to the Trial Court with the direction to first decide the application under section 319 CrPC and thereafter proceed with the sessions trial expeditiously.

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14. The judgment in the case of [Hardeep Singh](#) (supra) does not provide that it is mandatory to decide the application under section 319 CrPC before conducting cross-examination and only on the basis of examination-in-chief. It merely clarifies that even examination-in-chief is part of evidence and record and thus can be relied upon to decide an application under section 319 CrPC.
15. The judgment does not take away the discretion of the Trial Court to wait for the cross-examination to take place before deciding the application under section 319 CrPC. It merely provides that consideration of such an application should not be a mini trial. It is for the Trial Court to decide whether the application should be decided without waiting for the cross-examination to take place or to wait for it. The same would depend upon the satisfaction of the Trial Court on the basis of the material placed on record.
16. The five-Judges Bench in [Hardeep Singh](#) (supra) concluded the following:

“89. We have given our thoughtful consideration to the diverse views expressed in the aforementioned cases. Once examination-in chief is conducted, the statement becomes part of the record. It is evidence as per law and in the true sense, for at best, it may be rebuttable. An evidence being rebutted or controverted becomes a matter of consideration, relevance and belief, which is the stage of 5 Page 56 judgment by the court. Yet it is evidence and it is material on the basis whereof the court can come to a *prima facie* opinion as to complicity of some other person who may be connected with the offence.

90. As held in Mohd. Shafi (Supra) and Harbhajan Singh (Supra), all that is required for the exercise of the power under Section 319 Cr.P.C. is that, it must appear to the court that some other person also who is not facing the trial, may also have been involved in the offence. The pre-requisite for the exercise of this power is similar to the *prima facie* view which the magistrate must come to in order to take cognizance of the offence. Therefore, no straight-jacket formula can and should be laid with respect to conditions precedent for arriving at such an opinion and, if the Magistrate/Court is convinced even on

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the basis of evidence appearing in Examination-in-Chief, it can exercise the power under Section 319 Cr.P.C. and can proceed against such other person(s). It is essential to note that the Section also uses the words ‘such person could be tried’ instead of should be tried. Hence, what is required is not to have a mini-trial at this stage by having examination and cross-examination and thereafter rendering a decision on the overt act of such person sought to be added. In fact, it is this mini-trial that would affect the right of the person sought to be arraigned as an accused rather than not having any cross-examination at all, for in light of sub-section 4 of Section 319 Cr.P.C., the person would be entitled to a fresh trial where he would have all the rights including the right to cross examine prosecution witnesses and examine defence witnesses and advance his arguments upon the same. Therefore, even on the basis of Examination-in-Chief, the Court or the Magistrate can proceed against a person as long as the court is satisfied that the evidence appearing against such person is such that it *prima facie* necessitates bringing such person to face trial. In fact, Examination-in-Chief untested by Cross Examination, undoubtedly in itself, is an evidence.”

17. Therefore, the complicity of any person sought to be arrayed as an accused can be decided with or without conducting cross-examination of the complainant and other prosecution witnesses, and there is no mandate to decide the application under section 319 CrPC before cross-examination of other witnesses.
18. In the present case, we find that the Trial Court having tried its best to ensure that the prosecution witnesses nos.1, 2 and 3 present themselves for cross-examination and thereafter it would decide the application under section 319 CrPC, the prosecution witnesses repeatedly continued to either absent themselves or file adjournment applications and only insisted for deciding the application under section 319 CrPC first and only thereafter the trial could proceed. The complainant has no such mandatory right to insist that an application be decided in such a manner. Even the Public Prosecutor had not supported the complainant’s counsel in filing of the application under section 319 CrPC. The role of the complainant in a trial does not permit it to act as a Public Prosecutor on behalf of the State. The

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complainant and its counsel have a limited role in a sessions trial in a State case. The High Court failed to take into consideration all these aspects. Why the prosecution witnesses were shying from facing the cross-examination is not understood. Their only insistence was that the parents of the accused should be summoned and dragged into the trial and to somehow or the other keep the trial pending.

19. In view of the facts and circumstances of the case, we are of the view that the Trial Court was correct in proceeding under section 232 CrPC and accordingly acquitting the appellant-accused, treating it to be a case of no evidence. The Trial court was also correct in rejecting the application under section 319 CrPC for want of admissible evidence on part of the prosecution.
20. For all the reasons recorded above, the appeal is allowed, the impugned order of the High Court is set aside and that of the Trial Court is restored.

*Result of the case:* Appeal allowed.

<sup>†</sup>*Headnotes prepared by:* Ankit Gyan