

(2009) 08 P&H CK 0213

High Court Of Punjab And Haryana At Chandigarh

Case No: Criminal Miscellaneous No. M-27561 of 2008

Gurmeet Kaur

APPELLANT

Vs

State of Punjab and Another

RESPONDENT

Date of Decision: Aug. 10, 2009

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 161, 227, 319

Citation: (2009) 31 CriminalCC 858

Hon'ble Judges: Augustine George Masih, J

Bench: Single Bench

Advocate: S.S. Swaich, for the Appellant; Amandeep Singh Rai, AAG, Punjab for State and Mr. Arun Luthra, for the Respondent

Final Decision: Allowed

Judgement

Augustine George Masih, J.

This petition has been preferred by Gurmeet Kaur challenging the order dated 04.06.2008 (Annexure P4) passed by the Chief Judicial Magistrate, Fatehgarh Sahib on an application moved u/s 319 Cr.P.C. by the prosecution, whereby the petitioner has been summoned to face trial along with other co-accused.

2. Counsel for the petitioner contends that the order, quashing whereof has been prayed by the petitioner in the present petition, summoning the petitioner as an additional accused, is without any application of mind and has been passed in a mechanical manner and in total disregard of the requirement of Section 319 Cr. P.C. He submits that the petitioner has been summoned merely on the basis of a statement made by Yadwinder Singh PW1, wherein the petitioner has been named in his statement before the trial Court. He submits that in the FIR and in the statement recorded u/s 161 Cr. P.C. the name of the petitioner was mentioned, however, after investigation, no challan was presented against her. Even at the stage of framing of charge, no charge was framed against the petitioner and

nothing new has come in evidence which would call for exercise of powers by the trial Court u/s 319 Cr.P.C. He further submits that even the statement of Yadwinder Singh PW1 i.e. the Examination-in-Chief has not yet been completed, what to say about his cross-examination, but the trial Court, on this incomplete statement, has proceeded to summon the petitioner. He relies upon the judgment of the Hon"ble Supreme Court in the case of Mohd. Shafi v. Mohd. Rafiq and Another, 2007 (3) CCC 211 (S.C.) : 2007 (2) RCR (Cri) 762 to contend that before the completion of the statement of the witness, the same could not have been taken into consideration for exercise of powers u/s 319 Cr.P.C. He further submits that powers u/s 319 Cr.P.C. can be exercised only after the Court arrives at a satisfaction that there exists possibility that the accused, so summoned, is likely to be convicted. In this case such satisfaction having not been arrived at by the trial Court, the order of summoning is not sustainable. He relies upon the judgment of this Court in the case of Rupinder Kaur v. State of Punjab, 2008 (4) RCR (Cri) 235 in support of his contention.

3. On the other hand, counsel for respondent No. 2 submits that the requirement of Section 319 Cr.P.C. is that if it appears from the evidence during the trial that any person, who is not an accused, has committed any offence, for which such person can be tried together with other accused, the said person can be summoned as an additional accused. He submits that it is primarily the satisfaction of the Court and the stage of the statement of the witness is not important and relevant, the basic requirement is the prima facie conclusion by the Court that a person to be summoned appears to have been committed that offence. He relies upon the judgment of the Hon"ble Supreme Court in Ranjit Singh v. State of Punjab, 1999 (1) ACJ 176 (S.C.) : 1998 (4) RCR (Cri) 552 in support of this contention.

4. I have heard the counsel for the parties and have gone through the records of the case.

5. For deciding this case, the mandate of Section 319 Cr.P.C. is required to be understood so that proper decision can be reached. Section 319 Cr.P.C. reads as follows:

319. Power to proceed against other persons appearing to be guilty of offence.-

(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.

(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.

(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 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.

6. The Hon"ble Supreme Court has, while explaining the provisions of Section 319 Cr. P.C. stated in *Kailash v. State of Rajasthan & Anr.*, 2008 (2) ACJ 162 (S.C.) : 2008 (2) CCC 610 (S.C.) : 2008 (2) RCR (Cri) 200 as follows:-

A glance at these provisions would suggest that during the trial it has to appear from the evidence that a person not being an accused has committed any offence for which such person could be tried together with the accused who are also being tried.

The key words in this Section are "it appears from the evidence"..."any person"..."has committed any offence". It is not, therefore, that merely because some witnesses have mentioned the name of such person or that there is some material against that person, the discretion u/s 319 Cr.P.C. would be used by the Court. This is apart from the fact that such person against whom such discretion is used, should be a person who could be tried together with the accused against whom the trial is already going on. this Court has, time and again, declared that the discretion u/s 319 Cr.P.C. has to be exercised very sparingly and with caution and only when the concerned Court is satisfied that some offence has been committed by such person. This power has to be essentially exercised only on the basis of the evidence. It could, therefore, be used only after the legal evidence comes on record and from that evidence it appears that the concerned person has committed an offence. The words "it appears" are not to be read lightly. In that the Court would have to be circumspect while exercising this power and would have to apply the caution which the language of the Section demands.

7. While dealing with the term "evidence" as has been used in Section 319 Cr. P.C. the Hon"ble Supreme Court has, in *Rakesh v. State of Haryana*, 2001 (3) RCR (Cri) 681, held as follows:-

13. Hence, it is difficult to accept the contention of the Learned Counsel for the appellants that the term "evidence" as used in Section 319 of the Criminal Procedure Code would mean evidence which is tested by cross-examination. The question of testing the evidence by cross-examination would arise only after addition of the accused. There is no question of cross-examining the witness prior to adding such person as accused. The Section does not contemplate an additional stage of first summoning the person and giving him an opportunity of cross-examining the witness who has deposed against him and thereafter deciding whether such person

is to be added as accused or not. The word "evidence" occurring in sub-section (1) is used in a comprehensive and broad sense which would also include the material collected by the investigating officer and the material or evidence which comes before the court and from which the court can prima facie conclude that the person not arraigned before it is involved in the commission of the crime.

8. The Hon'ble Supreme Court on the scope and the extent of powers of the Court to summon persons as additional accused in the case of *Municipal Corporation of Delhi v. Ram Kishan Rastogi and Others*, 1983 (1) RCR (Cri) 73 has held as follows:-

19. In these circumstances, therefore, if the prosecution can at any stage produce evidence which satisfies the court that the other accused or those who have not been arrayed as accused against whom proceedings have been quashed have also committed the offence the court can take cognizance against them and try them along with the other accused. But, we would hasten to add that this is really an extraordinary power which is conferred on the court and should be used very sparingly and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken.

x x x x

9. Dealing with the powers of the Court under S. 319 of the Code of Criminal Procedure, the Hon'ble Supreme Court in the case of *Michael Machado & Anr. v. Central Bureau of Investigation & Anr.*, 2000 (1) ACJ 404 (S.C.) : 2000 (2) RCR (Cri) 75, held as follows in paras 11, 12, 14 and 16:-

11. The basic requirements for invoking the above Section is that it should appear to the Court from the evidence collected during trial or in the inquiry that some other person, which is not arraigned as an accused in that case, has committed an offence for which that person could be tried together with the accused already arraigned. It is not enough that the Court entertained some doubt, from the evidence, about the involvement of another person in the offence. In other words, the Court must have reasonable satisfaction from the evidence already collected regarding two aspects. First is that the other person has committed an offence. Second is that for such offence that other person could as well as tried along with the already arraigned accused.

12. But even then, what is conferred on the Court is only a discretion as could be discerned from the words "the Court may proceed against such person". The discretionary power so conferred should be exercised only to achieve criminal justice. It is not that the Court should turn against another person whenever it comes across evidence connecting that another person also with the offence. A judicial exercise is called for, keeping a conspectus of the case, including the stage at which the trial has proceeded already and the quantum of evidence collected till then, and also the amount of time which the Court had spent for collecting such evidence. It must be remembered that there is no compelling duty on the Court to

proceed against other persons.

xxxx

xxxx

14. The Court while deciding whether to invoke the power u/s 319 of the Code, must address itself about the other constraints imposed by the first limb of sub-section (4), that proceedings in respect of newly added persons shall be commenced afresh and the witnesses re-examined. The whole proceedings must be re-commenced from the beginning of the trial, summon the witnesses once again and examine them and cross-examine them in order to reach the stage where it had reached earlier. If the witnesses already examined are quite large in number the Court must seriously consider whether the objects sought to be achieved by such exercise is worth wasting the whole labour already undertaken. Unless the Court is hopeful that there is reasonable prospect of the case as against the newly brought accused ending in conviction of the offence concerned we would say that the Court should refrain from adopting such a course of action.

xxxx

xxxx

16. The statements of those three witnesses were placed before us. No doubt the statements may create some suspicion against the appellants. But suspicion is not sufficient to hold that there is reasonable prospect of convicting the appellants of the offence of criminal conspiracy.

10. In Mohd. Shafi v. Mohd. Rafiq and Another, 2007 (3) CCC 211 (S.C.) : 2007 (2) RCR(Cri) 762, the Hon"ble Supreme Court has held as follows:-

7. Before, thus, a trial court seeks to take recourse to the said provision, the requisite ingredients therefore must be fulfilled. Commission of an offence by a person not facing trial, must, therefore, appear to the court concerned. It cannot be ipse dixit on the part of the court. Discretion in this behalf must be judicially exercised. It is incumbent that the Court must arrive at its satisfaction in this behalf.

11. This judgment of Mohd. Shafi (supra) was explained by the Hon"ble Supreme Court in the case of Lal Suraj @ Suraj Singh & Anr. v. State of Jharkhand, 2009 (2) ACJ 194 (S.C.) : 2009 (2) CCC 597 (S.C.) : 2009 (1) RCR (Cri) 504 holding therein:-

...The principle of strong suspicion may be a criterion at the stage of framing of charge as all the materials brought during investigation were required to be taken into consideration, but, for the purpose of summoning a person, who did not figure as accused, a different legal principle is required to be applied. A court framing a charge would have before it all the materials on record which were required to be proved by the prosecution. In a case where, however, the court exercises its jurisdiction u/s 319 of the Code, the power has to be exercised on the basis of the

fresh evidence brought before the court. There lies a fine but clear distinction.

12. Considering some of the judgments, which have been referred to above and after considering the various judgments of the Hon"ble Supreme Court culled out the conclusions with regard to the powers u/s 319 Cr.P.C. in paras 16, 17 and 18 in the judgment *Sarabjit Singh & Anr. v. State of Punjab & Anr.*, 2009 (3) RCR (Cri) 388 as follows:-

16. We have noticed hereinbefore that Mohd. Shafi (supra) has been explained in *Lal Suraj* (supra) holding that a power u/s 319 of the Code can be exercised only on the basis of fresh evidence brought before it and not on the basis of the materials which had been collected during investigation particularly when a final form was submitted and the same had been accepted by the Magistrate concerned. There is no gainsaying that the power u/s 319 of the Code is an extraordinary power which in terms of the decision of this Court in *Municipal Corporation of Delhi* (supra) is required to be exercised sparingly and if compelling reasons exist for taking cognizance against whom action has not been taken.

17. The provision of Section 319 of the Code, on a plain reading, provides that such an extraordinary case has been made out must appear to the court. Has the criterion laid down by this Court in *Municipal Corporation of Delhi* (supra) been satisfied is the question? Indisputably, before an additional accused can be summoned for standing trial, the nature of the evidence should be such which would make out grounds for exercise of extraordinary power. The materials brought before the court must also be such which would satisfy the court that it is one of those cases where its jurisdiction should be exercised sparingly.

We may notice that in [Y. Saraba Reddy Vs. Puthur Rami Reddy and Another](#), this Court opined:

...Undisputedly, it is an extraordinary power which is conferred on the Court and should be used very sparingly and only if compelling reasons exist for taking action against a person against whom action had not been taken earlier. The word "evidence" in Section 319 contemplates that evidence of witnesses given in Court....

An order u/s 319 of the Code, therefore, should not be passed only because the first informant or one of the witnesses seeks to implicate other person(s). Sufficient and cogent reasons are required to be assigned by the court so as to satisfy the ingredients of the provisions. Mere ipse dixit would not serve the purpose. Such an evidence must be convincing one at least for the purpose of exercise of the extraordinary jurisdiction.

For the aforementioned purpose, the courts are required to apply stringent tests; one of the tests being whether evidence on record is such which would reasonably lead to conviction of the person sought to be summoned.

18. The observation of this Court in Municipal Corporation of Delhi (supra) and other decisions following the same is that mere existence of a prima facie case may not serve the purpose. Different standards are required to be applied at different stages. Whereas the test of prima facie case may be sufficient for taking cognizance of an offence at the stage of framing of charge, the court must be satisfied that there exists a strong suspicion. While framing charge in terms of Section 227 of the Code, the court must consider the entire materials on record to form an opinion that the evidence if un-rebutted would lead to a judgment of conviction. Whether a higher standard be set up for the purpose of invoking the jurisdiction u/s 319 of the Code is the question. The answer to these questions should be rendered in the affirmative. Unless a higher standard for the purpose of forming an opinion to summon a person as an additional accused is laid down, the ingredients thereof, viz., (i) an extraordinary case and (ii) a case for sparingly exercise of jurisdiction, would not be satisfied.

Now let us proceed to apply these principles to the case in hand.

13. The impugned order dated 04.06.2008 passed by the Chief Judicial Magistrate, Fatehgarh Sahib, reads as follows:-

Present: APP for the State. Accused on bail.

Ld. A.P.P., has moved an application u/s.319 of Cr.P.C. for summoning of accused Gurmeet Kaur wife of Gurcharan Singh of Village Sampla, Police Station, Bassi Pathana.

It is alleged that PW1 Yadwinder Singh while appearing in the witness box named Gurmeet Kaur wife of Gurcharan Singh of Village Sampla as one of the co-accused. It is alleged that she is also liable for the offence along with other accused. Hence the present application.

I have heard Ld. A.P.P., for the State and gone through the record of the case very carefully. Perusal of FIR No. 45 dated 05.04.2006 reveals that name of accused Gurmeet Kaur also mentioned in it. Further in the statement of PW1 Yadwinder Singh, the name of above said accused Gurmeet Kaur is specifically named by him that she was involved in the commission of offence. Therefore, the perusal of FIR" and statement of PW1 Yadwinder Singh recorded in the Court and other documents, a prima facie case to proceed against the accused is made out. As such present application is allowed and accused Gurmeet Kaur is ordered to be summoned for 05.09.2008.

14. A perusal of the order hereinabove does not fulfill the requirement of exercise of extraordinary powers conferred on the Court, which is required to be used very sparingly u/s 319 Cr.P.C. Mere existence of prima facie case against the accused does not fulfill the requirement of higher standard set up for the purpose of invoking the jurisdiction u/s 319 Cr.P.C. by the trial Court. The test of prima facie

case to proceed against the accused may be sufficient for taking cognizance of the offence at the stage of framing of charge in terms of Section 227 of the Code of Criminal Procedure and for summoning persons who may have been kept in Column No. 2 of the challan at that stage but that would not be enough to summon a person as an additional accused while exercising jurisdiction u/s 319 Cr.P.C. Merely because the accused have been named in the FIR, in the statement u/s 161 Cr.P.C. and thereafter before the trial Court by the prosecution witness and some involvement in the commission of offence is shown, would not give jurisdiction to the Court to invoke its powers u/s 319 Cr.P.C. What is further required is that the material, which is brought before the Court, must be of such a nature as would satisfy the Court that it would reasonably lead to conviction of the person sought to be summoned. No satisfaction in this regard has been recorded by the trial Court, which would justify the exercise of powers u/s 319 Cr.P.C. invoked by the Court. The order, therefore, passed by the trial Court cannot be sustained and deserves to be quashed.

15. The contention raised by the counsel for the petitioner that the trial Court has invoked its powers u/s 319 Cr. P.C. without even completing the examination-in-chief what to say the cross-examination at all of PW1 Yadwinder Singh. This contention of the counsel for the petitioner cannot be accepted. The requirement of law is the satisfaction of the Court when it finds that evidence on record is such as would lead to conviction of person sought to be summoned, the stage of evidence or the case would not be relevant.

16. The Hon"ble Supreme Court in the case of Rakesh v. State of Haryana (supra) has held that it would be difficult to accept the contention that the term "evidence" as used in Section 319 Cr.P.C. would mean evidence, which is tested by cross-examination. The relevant portion has been reproduced above, which makes it abundantly clear that it is primarily the satisfaction of the Court which would be the determinative factor for exercising the powers of Section 319 Cr.P.C. Of course such exercise of powers needs to fulfill the tests as have been laid down by the Hon"ble Supreme Court in its various decisions.

17. this Court, in the case of Kartar Singh v. State of Punjab, 2008 (1) Law Herald (Punjab and Haryana) 237 while considering this position in law, has come to a conclusion that there is no legal requirement to wait conclusion of cross-examination of the witness before considering the aspect of summoning a person as an additional accused. What is required is the satisfaction of the Court with regard to reasonable prospect of his conviction for an offence, which he appears to have committed.

18. The Hon"ble Supreme Court in its latest judgment in the case of Harbhajan Singh & Anr v. State of Punjab & Anr. 2009 (4) CCC 934 (S.C.) : 2009 (5) RAJ 19 in para 14 has held as follows:-

14. Even if what is contended by the Learned Counsel is correct, it is not for us to go into the said question at this stage; herein cross-examination of the witnesses had taken place. The court had taken into consideration the materials available to it for the purpose of arriving at a satisfaction that a case for exercise of jurisdiction u/s 319 of the Code was made out. Only because the correctness of a portion of the judgment in the case of Mohd. Shaft (supra) has been doubted by another Bench, the same would not mean that we should wait for the decision of the Larger Bench, particularly when the same instead of assisting the appellants runs counter to their contention.

We may, however, incidentally place on record that in Mohd. Shafi (supra), the trial Court refused to exercise its discretion and postponed passing of an order till cross-examination was over. It at that stage, the Court was not satisfied about existence of any other material which would satisfy it to exercise the jurisdiction which as per the decision of this Court in the case of Municipal Corporation of Delhi v. Ram Kishan Rohtagi & Ors. (supra) should be used very sparingly, this Court should not have passed a favorable order at that stage itself. It was merely held that the High Court should not have interfered with as the said provision conferred an extraordinary power. Each case must be decided on its own facts.

If a judicious discretion exercised by the Court had led it to pass an order u/s 319 of the Code, the High Court exercising a revisional jurisdiction would interfere therewith, inter alia, in a case where legal principles laid down by this Court had not been satisfied. The decision of this Court in the case of Mohd. Shafi (supra), therefore, in our opinion, is not an authority for the proposition that in each and every case the Court must wait till the cross-examination is over.

19. The contention of the counsel for the petitioner that the Court could not have exercised its powers u/s 319 Cr.P.C. before the cross-examination of the witness i.e. PW1 Yadwinder Singh had been completed is, therefore, rejected. In view of the above, the present petition is allowed.

20. The impugned order dated 04.06.2008 (Annexure P4) passed by the Chief Judicial Magistrate, Fatehgarh Sahib u/s 319 Cr.P.C. summoning the petitioner as an additional accused, is hereby quashed.