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**(2016) 10 SHI CK 0058**

**High Court of Himachal Pradesh**

**Case No:** Cr.MMO No. 38 of 2016

Bhavak Parasher

APPELLANT

Vs

State of Himachal  
Pradesh

RESPONDENT

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**Date of Decision:** Oct. 5, 2016

**Acts Referred:**

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

**Citation:** (2017) 169 AIC 489 : (2016) sup HimLR 2995

**Hon'ble Judges:** Mr. Dharam Chand Chaudhary, J.

**Bench:** Single Bench

**Advocate:** Mr. Ranjan Lakhanpal, Advocate with Mr. Susheel Gautam, Advocate, for the Petitioner; Mr. Tara Singh Chauhan, Advocate, for the Respondent No. 2; Mr. Virender Verma, Addl. AG, for the Respondents No. 1

**Final Decision:** Dismissed

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**Judgement**

Dharam Chand Chaudhary, J. (Oral) - In this order the legality and validity of the order dated 1.2.2016 Annexure P-11 passed by learned Sessions Judge, Una in an application under Section 319 of the Code of Criminal Procedure registered as application No. 223/2015 (Sessions case No. 12 of 2015, titled State of H.P. v. Ram Prakash Singh alias Moni) has been challenged by Bhavak Parasher, the petitioner at whose instance FIR No.260/14 under Sections 302 331, read with Section 34 of the Indian Penal Code has been registered in Police Station Sadar, Una, against aforesaid Ram Prakash Singh @ Moni, accused respondent No.2, herein is under challenge.

2. Since vide impugned order learned Sessions Judge has dismissed the application, therefore, the petitioner complainant has challenged the legality and validity thereof on the grounds inter alia that the involvement of One Indu Bala wife of accused Ram Prakash Singh alias Moni (respondent No. 2 herein) and also Rakesh, Rajiv and Sanjiv (brothers-in-law of complainant-petitioner Bhavak Parasher) is established in the

commission of the offence from the evidence recorded by learned trial Court in the case, hence they should have been summoned as accused and cognizance of the offence taken against them. Learned trial Court however, has erroneously dismissed the application. The application Annexure P-3 moved by the petitioner for reinvestigation of the case was also dismissed by the trial Court illegally vide order Annexure P-4. Not only this, but the application Annexure P-5 filed under Section 193 of the code of Criminal Procedure also stands dismissed. The revision Annexure P-6 filed in this Court also stands dismissed vide order Annexure P-7. Not only this, but he moved another application Annexure P-8 before the competent authority for further investigation of the case. On the said application, SIT was formed to reinvestigate the matter. During reinvestigation phone calls detail Annexure P-9 was taken in possession which form part of the police record. The present being a case of conspiracy and motive writ large on the face of the record the police has chosen not to file challen against aforesaid Indu Bala, Rakesh, Rajiv and Sanjiv. No reasons therefor have been assigned. The police, as per further allegation in the petition, is stated to be siding with aforesaid Indu Bala and others, proposed to be arrayed as accused. It is pointed out that the principal accused, respondent No. 2 had a motive to kill Aditya Parasher son of the petitioner because mother-in-law of the petitioner had bequeathed her property in the name of the deceased and as his brothers-in-law (wife's brother), Rakesh Rajiv and Sanjiv aforesaid were not in favour of deceased Aditya Parasher to share the property of their mother (maternal grand mother of deceased Aditya Parasher) and as the principal accused Ram Prakash Singh, husband of Indu Bala aforesaid tenant of aforesaid brothers-in-law of the petitioner was in possession of part of the property in the capacity of tenant and interested to acquire the same and as it is deceased Aditya Parasher to whom the property was bequeathed by his maternal grand mother, being a hurdle in their way the principal accused had stabbed the deceased brutally and killed him in connivance with Indu Bala and brothers-in-law of the petitioner.

3. It has been argued that irrespective of cogent and reliable evidence suggesting the involvement of the said accused has come on record by way of the testimony of the prosecution witnesses including that of the petitioner who is complainant in the case, learned trial Court has erroneously refused to take cognizance against Indu Bala Rakesh, Rajiv and Sanjiv who allegedly conspired with principal accused-respondent No. 2 and murdered Aditya Parasher, the son of the petitioner.

4. The facts as disclosed from the record in a nutshell are that FIR No. 260 of 2014 was registered against second respondent under Section 302, 341 read with Section 34 of the Indian penal code on 2.9.2014 in Police Station, Sadar Una at the instance of the petitioner herein. The allegations in a nutshell against respondent No. 2 were that he assaulted Aditya Prashar son of the petitioner on railway bridge Una at such a time when they were coming back after paying obeisance in the temple of Baba Kumbh Dass. Accused-respondent No. 2 appeared there in white coloured Fortuner car. The front seat adjoining to the driver's seat was occupied by his wife Smt. Indu Bala. The accused

stopped the vehicle without any provocation and prevented the petitioner and other occupants of his car from proceeding ahead. He alighted from his car in a ferocious mood and started hurling abuses to the petitioner as well as his deceased son Aditya Parasher. On this the petitioner also alighted from his car. The accused started fighting with him. Deceased Aditya Parasher and three workers working in the swimming pool of the petitioner and occupying the rear seat of the car of the petitioner also alighted therefrom and came to his rescue. Hot exchanges took place between both parties. The deceased and the workers accompanying the petitioner have boarded their car. Since deceased Aditya Parasher wanted to leave that place, therefore, he occupied the driver's seat and when about to drive the car ahead, the accused on seeing that the petitioner and other occupants of his car are leaving that place went to his car parked nearby and taken out a knife there from. He opened the door of driver's side window of the car of the petitioner and stabbed the deceased at his chest in left side. The injury inflicted by the accused on the chest of the deceased started profusely bleeding. On seeing all this, the petitioner came out of his car and administered beating to the accused with kicks and fisticuffs. He also snatched a Danda which was in the hands of Indu Bala his wife and beaten up the accused with Danda also. The petitioner finding his son badly injured removed him to hospital, however, before leaving the place of occurrence he hit the car of the accused with his car twice and thrice to ensure that some defect is developed and the accused is not able to flee away from that place. The deceased though was removed to hospital, however he succumbed to the injuries he received in the occurrence.

5. It is seen that accused-respondent No. 2 herein has also registered a cross case vide FIR No. 273/2014 against the petitioner herein and other occupants of his car under Sections 147, 149, 325, 201 and 504 of the Indian penal Code in Police Station, Sadar Una on the same day with the allegation that on 2.9.2014 on an information received from his nephew Karan Singh that some one is breaking open lock of his showroom, he accompanied by his wife Smt. Indu Bala rushed to the spot. There only one glass was found broken and shutter of the showroom was in-order. Since his wife was suffering from throat infection, therefore, they went to market in his vehicle PB- 10-ER-Temp 4032 for bringing medicine for her from medical store. Around 10:25 P.M. when they were crossing railway bridge near Shani Dev temple. He noticed an Indica car being driven in a high speed coming from Malahat road side. On seeing the said car, he stopped his car. The moment he alighted from his car the petitioner herein started hurling filthy abuses to him. The other occupants of the car also alighted there from and started beating him. He was beaten by them with sticks and fisticuffs and on account of which he received injuries in his right leg and on his face below right side eye as well as his head. The investigation in FIR No. 273 of 2014 is also complete and the challan stand filed against the petitioner and his co-accused. The same is also pending disposal in the Court of learned Sessions Judge, Una being cross-case. Charge against the petitioner and his co-accused also stands framed under Sections 147, 149, 325, 201 and 504 of the Indian Penal Code.

6. Be it stated that the petitioner herein had approached this Court by filing Cr.MMO No. 200 of 2015 for quashing criminal proceedings initiated against him consequent upon FIR No. 273/14 registered at the instance of respondent No. 2 herein, however, the said petition stand dismissed vide judgment dated August 16, 2016. Therefore, the petitioner herein along with his co-accused is also facing trial in the cross case registered at the instance of respondent No. 2 herein.

7. The fate of this petition has to be decided in the light of this backdrop. However, before that it is desirable to point out at the outset as to under what circumstances a person who has not been named as an accused in the FIR nor arrayed as an accused in the challan filed in the case. The law on this point is no more res integra because the Apex Court in Hardeep Singh v. State of Punjab and others, (2014) 3 Supreme Court cases 92 after taking into consideration the law laid down in various judicial pronouncements has held that at the time of taking cognizance against the person who is not an accused the Court has to see as to whether a prima facie case is made out to array such person as accused. The only test is the existence of prima facie case against such person of course the degree of satisfaction of the Court must be higher i.e. if the evidence appears against such person goes unrebutted would lead to his conviction. This judgment reads as follows:-

"106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the Court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 CrPC. In Section 319 CrPC the purpose of providing if "it appears from the evidence that any person not being the accused has committed any offence" is clear from the words "for which such person could be tried together with the accused". The words used are not "for which such person could be convicted". There is, therefore, no scope for the court acting under Section 319 CrPC to form any opinion as to the guilt of the accused."

8. Similar is the ratio of the judgment of the apex Court in Babubhai Bhimabhai Bokhiria and another v. State of Gujarat and others, (2014) 5 Supreme Court Cases 568 which reads as follows:

"8. Section 319 of the Code confers power on the trial court to find out whether a person who ought to have been added as an accused has erroneously been omitted or has deliberately been excluded by the investigating agency and that satisfaction has to be arrived at on the basis of the evidence so led during the trial. On the degree of satisfaction for invoking power under Section 319 of the Code, this Court observed that though the test of prima facie case being made out is same as that when the cognizance of the offence is taken and process issued, the degree of satisfaction under Section 319

of the Code is much higher."

9. It is seen from the impugned order that learned trial Judge has not only taken into consideration the given facts and circumstances but also the entire case law including the judgment supra of the Apex Court. Learned trial Judge has also taken notice of the judgment of the Apex Court in Joginder Yadav & Ors. v. State of Bihar and Anr. (2015) Cr.L.J. 4186 in which the legal principle that extra ordinary power vested in the Court under Section 319 of the Code of Criminal Procedure can be exercised only if a strong and cogent evidence appears during the course of trial against the person who is not arrayed as an accused and that the standard of proof required for summoning such person as an accused under Section 319 Cr.P.C. is higher than the standard of proof required for framing charge against the accused.

10. Analysing the grievances brought to this Court in the present petition in the light of the legal position discussed herein above and also the given facts, the FIR Annexure P-1 registered at the instance of the petitioner against accusedrespondent No.2 reveals that the wife of accused Smt. Indu Bala was also with him at the time of occurrence. Besides, while reporting the motive behind the murder of his son Aditya Parasher, the same is stated to be in pending Civil Litigation with his brothers-in-law Sanjiv Kumar and Rakesh Kumar with them. Also that, the accused-respondent has killed the deceased because he is in league with the above said brothers-in-law of the petitioner. It is on account of the enmity of the accused respondent, he and his wife killed deceased Aditya Parasher. It is seen that the FIR only discloses the presence of Indu Bala on the spot and not attributes any overt and covert act towards her. Even if it is believed that Danda was in her hand, though it has come on record that the Danda has been recovered from the own car of the petitioner herein, in that event also mere holding of Danda by Indu Bala in her hand without any overt and covert act on her part, is not sufficient to infer that she is also an accused and should have been added as accused in the pending criminal case.

11. Without lamenting much on the merits and elaboration of the case as put forth by both parties in cross cases registered at their instance as in that event prejudice is likely to be caused to their case, suffice would it to say that as per own case of the petitioner in FIR No.274/2014, he was accompanied not only by his son deceased Aditya Parasher, but also three workers, he deployed in his swimming pool. The explanation though is that they were coming after paying obeisance to Baba Kumbh Dass, however, was it a coincidence that respondent-accused, his wife and the petitioner and his companion met with each other at the place of occurrence would establish after holding full trial. However, the fact remains that the petitioner was accompanied by three labourers and his son the deceased whereas respondent-accused and his wife were alone. Enmity of the petitioner or his deceased son, if any, was with his brothers-in-law. Whether respondent No.2 was in league with brothers-inlaw of the petitioner or not is also a fact, which may substantiate on record during the course of trial. However, mere presence of Indu Bala at the place of occurrence cannot be taken to assume that she having conspired with her husband, respondent No.2 joined hand with him in the commission of offence and as such should

have been added as an accused in this case. The possibility of she was suffering from throat infection and coming with her husband to market for buying medicine cannot be ruled out. When the petitioner-complainant in FIR Annexure P-1 has not attributed any allegations except that he had snatched Danda from her hand, it lies ill in his mouth to claim that she has also joined hand with her husband to kill deceased Aditya Parasher.

12. There may be litigation going on between deceased Aditya Parasher, son of the petitioner and his wife and his brothers-in-law Sanjiv, Rajiv and Rakesh and his mother-in-law may also have filed a civil suit against deceased Aditya Parasher pertaining to some property dispute, however, such pending litigation cannot be made basis to array aforesaid Rakesh, Sanjiv and Rajiv, brothers-in-law of the petitioner also as accused nor on the basis of such allegations, if taken as it is, are sufficient to bring guilt home to them.

13. As already pointed out spura, the mere presence of Smt. Indu Bala, the wife of accused respondent on the spot can not be made basis to hold her guilty for the commission of the offence. Even if the petitioner's claim is believed to be true, she was not fighting with the complainant party. It is rather the complainant party and her husband respondent No.2 were fighting with each other. Therefore, she cannot also be added as an accused in the case.

14. The present, therefore, is a case where the involvement of either Indu Bala or brothers-in-law of the petitioner has not been established even prima facie what to speak of the satisfaction to an extent that the evidence which has been pressed into service against them, if goes un-rebutted would lead to their conviction. The test in terms of the ratio of the judgment in Hardeep Singh's case supra to be applied at the stage of arraying a person as an accused, who has not been named in the FIR nor challan filed against him is, therefore, not satisfied in this case.

15. Learned Sessions Judge, therefore, has not committed any illegality or irregularity while dismissing the application under Section 319 of the Code of Criminal Procedure filed by the petitioner with a prayer to summon Smt. Indu Bala, wife of the respondent-accused and his brothers-in-law, Rakesh, Rajiv and Sanjiv as accused in the case and to take cognizance of offence against each of them. The order under challenge as such cannot be termed as legally and factually sustainable.

16. For all the reasons herein above, there is no merit in this petition and the same is accordingly dismissed.