

RAKESH AND ANR.
v.
STATE OF HARYANA

JULY 25, 2001

[M.B. SHAH AND S.N. VARIAVA, JJ.]

Code of Criminal Procedure, 1973 :

Section 319—Other persons—Not mentioned as accused in charge-sheet—Power to proceed against—Statement of witness during trial revealed involvement of some persons in the crime—Trial court arraigned these persons as accused without cross-examining the said witness—Correctness of—Held : Once deposition of witness is recorded it is prima facie material to exercise power under S.319—The word 'evidence' in S.319 is not evidence which is tested by cross-examination—Hence, there is no question of cross-examining the witness prior to adding such a person as accused.

Words and Phrases :

"Evidence"—Meaning of—In the context of S.319(1) of the Code of Criminal Procedure, 1973.

The father of the prosecutrix lodged a complaint that she was taken away by three persons including the appellants with the object of committing rape. However, the police found that the appellants were not involved in the case. Therefore, charges were framed only against one person. After the prosecutrix was examined and her cross-examination had begun the public prosecutor moved an application under Section 319 of the Code of Criminal Procedure, 1973 for arraigning the appellants as additional accused. The trial court allowed the application. The appellants' criminal Revision Petition was dismissed by the High Court. Hence this appeal.

The following question arose before this Court :-

Whether the statement of a prosecution witness without the said witness having been cross-examined, constitutes 'evidence' within the meaning of Section 319 of the Code of Criminal Procedure, 1973?

A Dismissing the appeal, the Court

HELD : 1. Once the Sessions Court records a statement of the witness it would be part of the evidence. It is true that finally at the time of trial the accused is to be given an opportunity to cross-examine the witness to test its truthfulness. But that stage would not arise while exercising court's power under Section 319 of the Code of Criminal Procedure, 1973. Once the deposition is recorded, no doubt there being no cross-examination, it would be a *Prima facie* material which would enable the sessions court to decide whether powers under Section 319 should be exercised or not. [6-C-D]

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C *State of H.P. v. Surinder Mohan*, [2000] 2 SCC 396 and *Ranjit Singh v. State of Punjab*, [1998] 7 SCC 149, relied on.

Joginder Singh v. State of Punjab, [1979] 1 SCC 345, held inapplicable.

D *State v. Kishori*, [1999] 1 RCR 200 (Del); *Chanan v. State of Punjab*, (1999) 1 RCR 371 (P and H) and *Ram Gopal v. State of U.P.*, (1999) 2 RCR 534 (All), approved.

Balvinder Singh v. State of Haryana, [1996] 3 RCR 231 (P and H); *Joginder Singh v. State of Punjab*, [1999] 1 RCR 562 (P&H) and *Rakesh Batra v. State of Haryana*, (P and H), overruled.

E *Halsbury's Laws of India*, 1st Edn., Vol. 15, para 145.242, referred to.

F 2. It is not possible to accept the contention of the appellant that the term 'evidence' as used in Section 319 Cr.P.C. 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. Section 319 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

G Section 319(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 person not arraigned before it is involved in the commission of the crime. [7-F-H]

H 3. The power under Section 319 is to be sparingly used. But that would

not mean that when a prosecutrix names three persons who were involved in the serious crime they are not to be added as accused by exercise of such power. [8-A-B] A

MCD v. Ram Kishan Rothagi, [1983] 1 SCC 1, referred to.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 744 of 2001. B

From the Judgment and Order dated 21.11.2000 of the Punjab and Haryana High Court in Crl. Rev. No. 1016/2000.

Ranjit Kumar, K.K. Lahiri, Ejaz Maqbool, B.K. Mishra, Ms. Shefali Shukla, Arjun K. Bobde for Maqbool Misra and Co. for the Appellants. C

Mahabir Singh and Mrs. S.R. Sharma for the Respondent.

The Judgment of the Court was delivered by D

SHAH, J. Leave granted.

For deciding the question involved, facts are - on 16.3.1998, Shri Sat Pal, father of the prosecutrix Manju Bala lodged an FIR at police station Gharaunda, District Karnal, Haryana under Sections 363, 366 and 376 IPC on the allegation that his minor daughter Manju Bala aged about 16 years had gone from the house on March 15, 1998 about 7.30 p.m. at 'Bara' (the place where cattles are tethered), but did not return thereafter. He complained that his daughter was taken away by Prem Chand, Rakesh and Jai Bhagwan due to previous enmity with the object of committing rape. On 17.3.1998, the girl and accused Prem Chand were found in Noida by the police. After investigation, the police found that the appellants Rakesh and Jai Bhagwan were not involved in the case. Therefore on August 11, 1998, charges were framed only against Prem Chand. On April 15, 1999, PWs 1, 2 and 3 were examined by the prosecution. On May 20, 1999, the prosecutrix was examined as PW 4 and her cross-examination had begun, when the Public Prosecutor moved an application under section 319 of the Cr.P.C. for arraigning the appellants as additional accused. The learned trial Judge, by an order dated July 15, 2000 arraigned the appellants as additional accused and summoned them to stand trial. The appellants preferred Criminal Revision Petition No.1016 of 2000 before the High Court which was dismissed. Hence the present appeal. E F G H

A The question involved in this case is—whether the statement of a prosecution witness without the said witness having been cross-examined, constitutes ‘evidence’ within the meaning of Section 319 of Cr.P.C., 1973.

B Learned senior counsel Mr. Ranjit Kumar submitted that the High Court materially erred in dismissing the revision application filed by the appellants and submitted that the term ‘evidence’ mentioned in Section 319 in reference would mean examination-in-chief and cross examination of the witnesses. It is his contention that in a case where the name of the accused is mentioned in the FIR and after investigation in the report submitted by the Investigating Officer, the said person is not added as accused and the case is committed to the Sessions Court, before adding that person as an accused, the sessions Court ought to have permitted cross examination of the witnesses. He referred to Halsbury’s Laws of India, 1st Edition, Volume 15, in paragraph 145.242, wherein it has been stated:

D “The mere statement of the plaintiff’s witnesses cannot constitute the plaintiff’s evidence in the case unless and until it is tested by cross-examination. The right of the defence to cross-examine the plaintiff’s witnesses can, therefore, be looked upon not as a part of its own strategy of defence but *rather as a requirement without which the plaintiff’s evidence cannot be acted upon.*” (emphasis supplied).

E At the time of hearing of this matter, the learned counsel for the parties submitted that High Courts have taken conflicting views on this point. The High Court of Punjab and Haryana in the cases of *Balvinder Singh v. State of Haryana*, [1996] 3 RCR 231, *Joginder Singh v. State of Punjab*, [1999] 1 RCR 562, *Dharam Pal v. Hardial Singh*, [1999] 2 RCR 165 and *Rakesh Batra v. State of Haryana*, [2000] 4 RCR 10 has arrived at the conclusion that statement of the complainant without cross-examination is not admissible in evidence and, therefore, the order of the Sessions Judge exercising powers under Section 319 of the Criminal Procedure Code summoning additional persons as accused on the basis of the said statement was not lawful. The Court arrived at the conclusion that the word ‘evidence’ used in Section 319 of the Code means admissible evidence and the statement of a witness when he is yet to be cross-examined cannot be treated as evidence in the eyes of law.

H As against this, the High Court of Delhi in *State v. Kishori etc.*, [1999] 1 RCR 200, High Court of Punjab and Haryana in *Chanan v. State of Punjab*, [1999] 1 RCR 371 and the High Court of Allahabad in *Ram Gopal*

v. *State of U.P.*, [1999] 2 RCR 534 have taken a contrary view and have held that the term 'evidence' in Section 319 Cr.P.C. does not contemplate cross-examination by persons who are to be summoned as accused to join trial. It does not contemplate of creating of additional stage of cross-examination of prosecution witnesses by those persons who are to be summoned and added as accused.

For appreciating the contention, it is necessary to refer Section 319 of the Criminal Procedure Code which reads as under

"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 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."

Sub-section (4) envisages that once a person is added as an accused, then the proceedings against him are required to be commenced afresh. At that stage, he would have full opportunity of testing the evidence of witness by cross-examination. Prior to summoning such person to face trial, there would not be any question of calling him to cross-examine the witness. Section also does not contemplate that type of additional stage in the trial.

A Further; Section 3 of the Evidence Act defines 'evidence' to mean and include:

(1) *all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry;*

B (2) all documents produced for the inspection of the Court; such documents are called documentary evidence."

Hence, once the Sessions Court records a statement of the witness it would be part of the evidence. It is true that finally at the time of trial the accused is to be given an opportunity to cross-examine the witness to test its truthfulness. But that stage would not arise while exercising court's power under Section 319 Cr. P.C. Once the deposition is recorded, no doubt there being no cross-examination, it would be a *prima facie* material which would enable the sessions court to decide whether powers under Section 319 should be exercised or not. Sub-section (1) of Section 319 itself provides that in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any persons 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 persons for the offence for which he appears to have committed. Further in case of inquiry there may not be any question of cross-examining the witness. In *State of H.P. v. Surinder Mohan and Ors.*, [2000] 2 SCC 396, this Court dealt with the contention that before granting pardon under Section 306 of the Cr.P.C., accused should be permitted to cross examine such person whose evidence is recorded by the Magistrate. The Court negated the said contention by holding that at the time of investigation or inquiry into an offence, the accused cannot claim any right under law to cross-examine the witness. The right cross-examine would arise only at the time of trial. During the course of investigation by the police, the question of cross-examination by the accused does not arise. Similarly, under Section 200 Cr.P.C. when the Magistrate before taking cognizance of the offence, that is before issuing process holds the inquiry, the accused has no right to be heard, and, therefore, the question of cross-examination does not rise. Further, the person to whom pardon is granted, is examined but is not offered for cross-examination and thereafter during trial if he is examined and cross-examined then there is no question of any prejudice caused to the accused. In such cases, at the most the accused may lose the chance to cross-examine the approver twice, that is to say, once before committal and the other at the time of trial. Similar would be the position under Section 319 Cr.P.C.

In support of his contention, learned senior counsel Mr. Ranjit Kumar referred to the decision of this Court in *Joginder Singh v. State of Punjab and Anr.*, [1979] 1 SCC 345. In our view, this decision nowhere lays down that before a person is added as accused in a session trial case, he should be permitted to cross-examine the witnesses whose evidence is recorded. On the contrary, it lays down that once the Sessions Court is seized of the matter as a result of the committal order against some accused the power under Section 319(1) can come into play and Court can add any person, not an accused before it, as an accused and direct him to be tried alongwith other accused. The Court has further observed that the very purpose of enacting Section 319(1) clearly shows that even persons who have been dropped by the police during investigation but against whom evidence showing their involvement in the offence comes before the criminal court are included in the expression "any person not being the accused".

Further, the scope of Section 319 was considered by this Court in *Ranjit Singh v. State of Punjab*, [1998] 7 SCC 149. In paragraph 10, the Court held that sub-section (1) of Section 319 contemplates existence of some evidence appearing in the course of trial wherefrom the Court can *prima facie* conclude that the person not arraigned before it is also involved in the commission of the crime for which he can be tried with those already named by the police. The Court has also clarified that:

"Of course it is not necessary for the court to wait until the entire evidence is collected for exercising the said powers."

Hence, it is difficult to accept the contention of the learned counsel for the appellants that the term 'evidence' as used in Section 319 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. 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. Word "evidence" occurring in sub-section is used in 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 person not arraigned before it is involved in the commission of the crime.

A Lastly, learned counsel further submitted that power under Section 319 is an extraordinary power and should be used very sparingly and only for some compelling reasons for taking cognizance of other persons against whom action has not been taken. For this purpose, he referred to *MCD v. Ram Kishan Rohtagi*, [1983] 1 SCC 1. In our view, there cannot be a dispute that power under Section 319 is to be sparingly used. But that would not mean that when a prosecutrix names three persons who were involved in the serious crime are not to be added as accused by exercise of such power.

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In the result, the appeal is dismissed.

V.S.S.

Appeal dismissed.