RAJESH & ORS. A

v.

STATE OF HARYANA

(Criminal Appeal No. 813 of 2019)

MAY 01, 2019 B

[L. NAGESWARA RAO AND M.R. SHAH, JJ.]

Code of Criminal Procedure, 1973: s.319 – Scope and ambit of power of Magistrate under s.319 – Prosecution case was that on the fateful day, the accused persons, ten in number, arrived at the place where the complainant (PW-1), his son (PW-2) and victim-deceased were present – Accused persons were armed with swords, pistols, hockeys, iron bars and gandasi etc. and they attacked PW-2 and the victim-deceased and inflicted injuries with their respective weapons – When PW-1 raised alarm, accused persons fled away from place of occurrence – The injured were rushed to hospital where the deceased succumbed to injuries – Investigating officer submitted report against four accused only – According to him, the appellants were not present at the place of occurrence – Thereafter Investigating Agency conducted further investigation wherein also it found that the appellants were not present at the place of occurrence rather they were found on different places – Magistrate directed release of the appellants – Trial proceeded against other accused – Application filed by PW-1 under s.319 to summon the appellants categorically stating that the appellants were present at the time of the incident – Trial court summoned the appellant to face trial for the offences under ss.148, 149, 323, 325, 302, 307 and 506 of IPC – Revision petition challenging the order of trial court dismissed by High Court – On appeal, held: PW-1-first informant had specifically named ten persons as accused, including the appellants in the FIR – However, they were not shown as accused in the challan/charge-sheet – There was nothing on record to show that PW-1 was given an opportunity to submit the protest application against non-filing of the charge-sheet against the appellants – In the deposition before the Court, P.W.1 and P.W.2 specifically stated against the appellants and the specific role was attributed to them – Thus, the statements of P.W.1 and P.W.2 before the Court could be C D E F G H

A *said to be "evidence" during the trial and, therefore, on the basis of the same the persons against whom no charge-sheet was filed could be summoned to face the trial – Therefore, no error was committed by the Courts below to summon the appellants to face the trial in exercise of power under s.319.*

B *Code of Criminal Procedure, 1973: s.319 – Investigating Agency conducted investigation wherein it found that the appellants were not present at the place of occurrence – As the appellants were in custody, SHO filed applications before the Magistrate on 1.9.2016 and 28.10.2016 submitting that after investigation since*
C *no evidence was found against the appellants, therefore, they may be discharged/released – Magistrate directed release of the appellants – Application filed by complainant under s.319 to summon the appellants categorically stating that the appellants were present at the time of the incident – Trial court summoned the appellants to face trial – Submission that once the appellants were*
D *discharged by the Magistrate on an application submitted by the Investigating Officer/SHO, therefore, thereafter it was not open to the Magistrate to summon the accused to face the trial in exercise of power under s.319 – Held: The submission is not tenable – Orders dated 01.09.2016 and 28.10.2016 cannot be said to be the orders discharging the accused – If the applications submitted by the*
E *Investigating Officer/SHO and the orders passed thereon are considered, those were the applications to discharge/release the appellants from custody as at that stage the appellants were in judicial custody – Therefore, as such, those orders cannot be said to be the orders of discharge in* stricto sensu *– Those were the orders*
F *discharging the appellants from custody – Under the circumstances, the submission on behalf of the accused that as they were discharged by the Magistrate and therefore it was not open to the Magistrate to exercise the power under s.319 of the CrPC and to summon the appellants to face the trial, cannot be accepted.*

G *Code of Criminal Procedure, 1973: Closure report – Procedure to be followed before accepting closure report – Held: Before accepting the closure report, the Magistrate is bound to issue notice to the complainant/original informant and the complainant/ original informant is required to be given an opportunity to submit*

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the protest application and, thereafter, after giving an opportunity to the complainant/original informant, the Magistrate may either accept the closure report or may not accept the closure report and direct to proceed further against those persons for whom the closure report was submitted.

Dismissing the appeal, the Court

HELD: 1. During the trial, the depositions of P.W.1 and P.W.2 were recorded. In the deposition, they specifically stated the overacts by the appellants and the role played by them and categorically stated that at the time of the incident/commission of the offence, the appellants were also present and they participated in the commission of the offence. That, thereafter, on the application submitted by the original complainant submitted under Section 319 of the CrPC, the Magistrate found a *prima facie* case against the appellants and summoned the appellants to face the trial along with other co-accused. The said order was confirmed by the High Court. [Para 6.1] [197-D-F]

2. Before accepting the closure report, the Magistrate is bound to issue notice to the complainant and give an opportunity to submit the protest application. Even in a case where the stage of giving opportunity to the complainant to file a protest petition urging upon the trial Court to summon other persons as well who were named in the FIR but not implicated in the charge-sheet has gone, in that case also, the Court is still not powerless by virtue of Section 319 of the CrPC and even those persons named in the FIR but not implicated in the charge-sheet can be summoned to face the trial provided during the trial some evidence surfaces against the proposed accused. Nothing is on record whether at any point of time the complainant was given an opportunity to submit the protest application against non-filing of the charge-sheet against the appellants. In the deposition before the Court, P.W.1 and P.W.2 specifically stated against the appellants and the specific role is attributed to the accused-appellants. Thus, the statement of P.W.1 and P.W.2 before the Court can be said to be "evidence" during the trial and, therefore, on the basis of the same the persons against whom no charge-

A **sheet is filed can be summoned to face the trial. Therefore, no error was committed by the Courts below to summon the appellants to face the trial in exercise of power under Section 319 of the CrPC. The orders dated 01.09.2016 and 28.10.2016 cannot be said to be the orders discharging the accused. If the**
B **applications submitted by the Investigating Officer/SHO and the orders passed thereon are considered, those were the applications to discharge/release the appellants from custody as at that stage the appellants were in judicial custody. [Paras 6.1, 7.10, 8, 9] [197-B; 209-E-F; 210-A-C, E-F]**

C *Hardeep Singh v. State of Punjab* **(2014) 3 SCC 92 : [2014] 2 SCR 1 – followed.**

S. Mohammed Ispahani v. Yogendra Chandak **(2017) 16 SCC 226;** *Bhagwant Singh v. Commissioner of Police* **(1985) 2 SCC 537 : [2017] 3 SCR 374 – relied on.**

D *Bijendra Singh v. State of Rajasthan* **(2017) 7 SCC 706 – referred to**.

Case Law Reference

[2014] 2 SCR 1	**followed**	**Para 4.1**
E **(2017) 7 SCC 706**	**referred to**	**Para 4.5**
[2017] 3 SCR 374	**relied on**	**Para 5.1**
(2017) 16 SCC 226	**relied on**	**Para 7.9**

F CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 813 of 2019

From the Judgment and Order dated 19.12.2018 of the High Court of Punjab and Haryana at Chandigarh in Criminal Revision No. 521 of 2018

G R. Basant, Sr. Adv., Mrs. Rani Chhabra, Mrs. Neelam Kalsi, Advs. for the Appellants.

Amit Kumar, AAG, Vishwa Pal Singh, Adv. for the Respondent.

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The Judgment of the Court was delivered by

M. R. SHAH, J. 1. Leave granted.

2. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 19.12.2018 passed by the High Court of Punjab & Haryana at Chandigarh in Criminal Revision – CRR No. 521 of 2018 by which the High Court has dismissed the said revision petition preferred by the appellants herein and has confirmed the order dated 28.10.2017 passed by the learned Trial Court, by which the appellants herein were summoned to face the trial for the offences under Sections 148, 149, 323, 324, 325, 302, 307 and 506 of the IPC, the appellants herein have preferred the present appeal.

3. The facts leading to the present appeal in nutshell are as under:

That one Hukum Singh lodged one FIR No. 180 on 12.06.2016 at Police Station Sadar, Panipat against ten accused, including the appellants herein for the offences under Sections 148, 149, 323, 324, 325, 302, 307 and 506 of the IPC. It was alleged that on 12.06.2016 at about 1.30 pm, he along with his son Bhajji and Hari son of Parkash were going from Panipat to his village Chhajpur Khurd on his tractor. His son had parked his motorcycle in front of the shop of Nande at bus stand. Therefore, his son Bhajji and Hari son of Parkash alighted from the tractor to pick up the motorcycle. When his son picked up the motorcycle, in the meantime, Sunil son of Jagpal came on Splendor motorcycle. Ravit son of Ramesh and Vicky son of Jaswant were sitting on pillion behind him on motorcycle. Sheela son of Paras was on his motorcycle Pulsar and Sumit son of Jagdish, Rinku son of Rai Singh were sitting behind him on his motorcycle. Sunder son of Om Singh was on motorcycle Bullet and Rajesh son of Prem and Sanjay son of Bishni were sitting behind him on the said motorcycle. Ankush son of Rajinder was on his motorcycle make Splendor and Jagdish son of Devi Singh and Tejpal son of Nar Singh were sitting behind him. Joni son of Sahab Singh was on his motorcycle Bullet and Sachinson of Khilla was sitting behind him. They were armed with swards, pistols, hockeys, iron bars and gandasi etc. They attacked his son Bhajji and Hari son of Parkash. Ravit son of Ramesh was armed with a hockey, Vicky son of Jaswant was armed with wooden baton, Sheela son of Paras was armed with gandasi. Sumit son of Jagdish was armed with pistol, Rinky son of Rai Singh was armed

A with iron bar, Sunder son of Om Singh was armed with wooden baton, Rajesh son of Prem was armed with sword, Jagdish son of Devi Singh was armed with lathi, Tejpal son of Nar Singh was armed with iron bar, Joni son of Sahab Singh was armed with wooden handle of spade, Sachin son of Ruhla Ram was armed with sword and Joginder son of Sahi Ram was having gandasi with him. Rajesh son of Prem exhorted to kill both B of them because they were pressing hard for their ejectment from panchayat land. Pursuant to exhortation, accused inflicted injuries to his son and Hari son of Parkash with their respective weapons. When he raised alarm, accused sped away on their motorcycles threatening to kill them in case any action is taken against them. In the meantime, his C brother Mahender came there and they removed both the injured to Prem Hospital where Hari son of Parkash succumbed to his injuries on 14.06.2016 during treatment.

3.1 That all the accused named in the FIR were arrested. The Investigating Officer conducted the investigation and found ten persons D involved in the said incident. However, the Investigating Officer found that the appellants herein (six in numbers) were not present at the site of incident. That the Investigating Officer submitted his report under Section 173(2) of the CrPC against four accused only. That, thereafter the Investigating Agency conducted further investigation by Jagdeep Singh HPS, DSP, Panipat. It appears that a report under Section 173(8) E of the CrPC was also submitted. According to the Investigating Officer, on the date of the commission of the offence the appellants herein were not present at the place of occurrence, rather they were found on different places which have been found by the Investigating Agency also. It appears that thereafter, as the appellants herein were in custody, the F SHO, Police Station Sadar filed the applications before the Judicial Magistrate, First Class, Panipat on 01.09.2016 and 28.10.2016 submitting that after investigation no challan is filed against the appellants herein and no evidence is found against them and, therefore, they may be discharged/released. That the learned Magistrate directed to release the appellants. That, thereafter the trial proceeded further against the G remaining accused against whom the challan/charge-sheet was filed. The prosecution examined two witnesses – P.W.1, the original informant and P.W.2, Bhajji, the injured eye witness. Both of them corroborated the case of the prosecution and categorically stated that the appellants

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herein were also present at the time of incident. Both of them were cross-examined by the defence. That, thereafter the original informant P.W.1 submitted the application before the learned Magistrate under Section 319 of the CrPC to summon the appellants herein to face the trial for the offences under Sections 148, 149, 323, 324, 325, 302, 307 and 506 of the IPC. It was the case on behalf of the original informant that P.W.1 and P.W.2 who were examined during the course of the trial, in their depositions both of them have corroborated the case of the prosecution and the statements which they had made before the police have also been found corroborated and their statements before the Court are part of the application filed and, therefore the appellants herein who were named in the FIR are to be summoned to face the trial. That, by a detailed judgment and order, the learned Magistrate in exercise of powers under Section 319 of the CrPC has directed to issue summons against the appellants herein to face the trial along with the other co-accused for the offences under Sections 148, 149, 323, 324, 325, 302, 307 and 506 of the IPC

3.2 The order passed by the learned Magistrate has been confirmed in revision by the High Court by the impugned judgment and order. Hence the present appeal by the appellants herein who are issued the summons to face the trial in exercise of powers under Section 319 of the CrPC.

4. Shri R. Basant, learned Senior Advocate has appeared on behalf of the appellants herein.

4.1 Shri Basant, learned Senior Advocate appearing on behalf of the appellants has vehemently submitted that, in the facts and circumstances of the case, the learned Magistrate has erred in summoning the appellants herein to face the trial in exercise of powers under Section 319 of the CrPC.

4.2 It is vehemently submitted by Shri Basant, learned Senior Advocate appearing on behalf of the appellants that both, the High Court as well as the learned Trial Court have not properly appreciated the scope and ambit of the powers to be exercised under Section 319 of the CrPC. Relying upon the decision of this Court in the case of ***Hardeep Singh v. State of Punjab*** (2014) 3 SCC 92, it is submitted by the learned Senior Advocate appearing on behalf of the appellants that, as observed and held by this Court, the power under Section 319 of the CrPC is a

A discretionary and an extraordinary power and it is to be exercised sparingly and only in those cases where the circumstances of the case so warrant.

4.3 It is submitted by the learned Senior Advocate appearing on behalf of the appellants that the learned Magistrate has mechanically B passed the order despite the fact that there was no strong and cogent evidence on record even at the time of the trial.

4.4 It is further submitted by the learned Senior Advocate appearing on behalf of the appellants that, in the present case, as such, the investigating agency thoroughly investigated the case when all the C appellants were in judicial custody and after taking into account all the facts and evidence, came to the conclusion that all the appellants were innocent as they were not present at the place of incident and thereafter submitted the report under Section 173(2) of the CrPC and filed the challan only against four accused persons and did not file the challan against the appellants herein. It is submitted that not only that, even D thereafter also, further investigation was carried out by the DCP who submitted the report under Section 173(8) of the CrPC and in that report also all the appellants were found innocent. It is submitted that, therefore, the SHO, Police Station Sadar submitted the applications praying for discharge of the appellants specifically stating that the appellants are E innocent and the learned Magistrate allowed the said discharge applications, though opposed by the complainant. It is submitted that, therefore, once the learned Magistrate discharged the appellants on the applications submitted by the SHO, Police Station,Sadar, thereafter solely on the basis of depositions of P.W.1 and P.W.2 which was nothing but reiteration of what they stated in their statements before the police, the F learned Magistrate was not justified in summoning the appellants herein to face the trial in exercise of powers under Section 319 of the CrPC.

4.5 Relying upon the decision of this Court in the case of ***Bijendra Singh v. State of Rajasthan*** (2017) 7 SCC 706, it is vehemently submitted by Shri Basant, learned Senior Advocate appearing on behalf of the G appellants that, as observed by this Court, merely on the basis of the deposition of the complainant and some other persons, with no other material to support their so-called verbal/ocular version, no person can be arrayed as an accused in exercise of powers under Section 319 of the CrPC. It is submitted by the learned Senior Advocate appearing on

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behalf of the appellants that, as observed by this Court in the aforesaid decision, such an "evidence" recorded during the trial is nothing more than the statements which was already there under Section 161 of the CrPC recorded at the time of investigation of the case. Relying upon the aforesaid decision, it is vehemently submitted by the learned Senior Advocate appearing on behalf of the appellants that, in any case, the learned Magistrate was bound to look into the evidence collected by the investigating officer during investigation which suggested that the accused were not present at the time of commission of the offence. It is submitted that, in the present case, the learned Magistrate on the applications submitted by the SHO in fact discharged the accused-appellants herein and allowed the applications submitted by the SHO in which it was categorically stated that the appellants are innocent and that they were not present at the time of the incident. It is submitted that therefore the High Court has erred in dismissing the revision petition and confirming the order passed by the learned Magistrate in summoning the accused-appellants herein to face the trial for the offences under Sections 148, 149, 323, 324, 325, 302, 307 and 506 of the IPC, which was passed in exercise of powers under Section 319 of the CrPC.

5. Learned counsel appearing on behalf of the respondent-State of Haryana has supported the order passed by the learned Magistrate as well as the impugned judgment and order passed by the High Court. He has also relied upon some of the observations made by this Court in the case of ***Hardeep Singh*** (supra) and even some of the observations made by this Court in the case of ***Bijendra Singh*** (supra).

5.1 It is vehemently submitted by the learned counsel appearing on behalf of the State that it is not correct to state that the appellants herein were discharged by the learned Magistrate on the applications filed by the SHO, It is submitted that the SHO submitted the applications to discharge the appellants from the custody and to release them as they were in jail and those applications came to be allowed. It is submitted that therefore the orders dated 01.09.2016 and 28.10.2016 cannot be said to be the orders of discharge in *strictosensu*, as sought to be contended on behalf of the appellants.

5.2 It is submitted that, in the present case, even at the initial stage when the investigating officer submitted the report under Section 173(2) of the CrPC and the challan was filed only against four accused

persons, out of ten accused persons named in the FIR and the remaining six accused (appellants herein) were dropped, nothing is on record that the learned Magistrate accepted the report/closure report against the appellants and, that too, by following the procedure as required as per the decision of this Court in the case of ***Bhagwant Singh v. Commissioner of Police*** (1985) 2 SCC 537. It is submitted that, as per settled law, before even accepting the closure report, an opportunity is required to be given to the informant to submit the objections/protest and only thereafter the closure report can be accepted. It is submitted that, in the present case, no such procedure was followed. It is submitted that thereafter when in the examination-in-chief/cross-examination, P.W.1 and P.W.2, who are the informant and the injured eye witness respectively, categorically deposed that the appellants were also present at the time of the incident and they actively participated in commission of offence and, therefore, in the facts and circumstances of the case, the learned Magistrate was justified in issuing the summons against the appellants to face the trial along with the other co-accused. It is submitted that, therefore, the order passed by the learned Trial Court is rightly confirmed by the High Court by the impugned judgment and order.

5.3 Making the above submissions, it is prayed to dismiss the present appeal.

6. Heard learned counsel appearing on behalf of the respective parties at length. We have also perused and considered the orders passed by the High Court as well as the learned Trial Court in depth.

6.1 At the outset, it is required to be noted that, in the present case, what is under challenge is the impugned order passed by the High Court dismissing the revision application and confirming the order passed by the learned Trial Court summoning the accused in exercise of powers under Section 319 of the CrPC and to face the trial for the offences under Sections 148, 149, 323, 324, 325, 302, 307 and 506 of the IPC. It is required to be noted that, in the present case, the original complainant-first informant specifically named ten persons as accused, including the appellants herein. However, thereafter after the investigation, the investigating officer filed the charge-sheet/challan against four accused persons only and no challan/charge-sheet was filed against the appellants herein. Nothing is on record whether at that time any specific closure

report was submitted by the investigating officer or not. Nothing is on record whether at that stage an opportunity was given to the complainant/original informant to submit any protest application or not. Assuming that non-filing of the charge-sheet/challan against the remaining accused named in the FIR can be said to be a closure report, in that case also, as per the settled proposition of law and more particularly, the decision of this Court in the case of ***Bhagwant Singh*** (supra), before accepting the closure report, the Magistrate is bound to issue notice to the complainant/original informant and the complainant/original informant is required to be given an opportunity to submit the protest application and, thereafter, after giving an opportunity to the complainant/original informant, the Magistrate may either accept the closure report or may not accept the closure report and direct to proceed further against those persons for whom the closure report was submitted. In the present case, nothing is on record that such a procedure was followed by the learned Magistrate. That, thereafter the trial proceeded against the four accused persons against whom the charge-sheet/challan was filed. During the trial, the depositions of P.W.1 and P.W.2 were recorded. Both of them were even cross-examined. In the deposition, P.W.1 and P.W.2 specifically stated the overacts by the appellants herein and the role played by them and categorically stated that at the time of the incident/commission of the offence, the appellants herein were also present and they participated in the commission of the offence. That, thereafter, on the application submitted by the original complainant submitted under Section 319 of the CrPC, the learned Magistrate found a *prima facie* case against the appellants herein and summoned the appellants herein to face the trial along with other co-accused. The said order has been confirmed by the High Court. Therefore, the short question posed for the consideration of this Court is whether, in the facts and circumstances of the case, the Trial Court was justified in summoning the appellants herein to face the trial in exercise of powers under Section 319 of the CrPC?

7. While considering the aforesaid question/issue, few decisions of this Court are required to be referred to and considered.

7.1 The first decision which is required to be considered is a decision of the Constitution Bench of this Court in the case of ***Hardeep Singh*** (supra) which has been consistently followed by this Court in subsequent decisions.

A 7.2 In the case of ***Hardeep Singh*** (supra), this Court had the occasion to consider in detail the scope and ambit of the powers of the Magistrate under Section 319 of the CrPC; the object and purpose of Section 319 of the CrPC etc. In the said case, the following five questions fell for consideration before this Court:

B "(*i*) What is the stage at which power under Section 319 CrPC can be exercised?

(*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
C the basis of the statement made in the examination-in-chief of the witness concerned?

(*iii*) 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
D limited to the evidence recorded during trial?

(*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
E be convicted?

(*v*) Does the power under Section 319 CrPC extend to persons not named in the FIR or named in the FIR but not charged or who have been discharged?"

7.3 While considering the aforesaid questions, this Court observed
F and held as under:

"12. Section 319 CrPC springs out of the doctrine *judex damnatur cum nocensabsolvitur* (Judge is condemned when guilty is acquitted) and this doctrine must be used as a beacon light while explaining the ambit and the spirit underlying the
G enactment of Section 319 CrPC.

13. It is the duty of the court to do justice by punishing the real culprit. Where 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 question

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remains under what circumstances and at what stage should the court exercise its power as contemplated in Section 319 CrPC? A

14. The submissions that were raised before us covered a very wide canvas and the learned counsel have taken us through various provisions of CrPC and the judgments that have been relied on for the said purpose. The controversy centres around B the stage at which such powers can be invoked by the court and the material on the basis whereof such powers can be exercised.

17. Section 319 CrPC allows the court to proceed against any person who is not an accused in a case before it. Thus, the person against whom summons are issued in exercise of such C powers, has to necessarily not be an accused already facing trial. He can either be a person named in Column 2 of the charge-sheet filed under Section 173 CrPC or a person whose name has been disclosed in any material before the court that is to be considered for the purpose of trying the offence, but not D investigated. He has to be a person whose complicity may be indicated and connected with the commission of the offence.

18. The legislature cannot be presumed to have imagined all the circumstances and, therefore, it is the duty of the court to give full effect to the words used by the legislature so as to encompass E any situation which the court may have to tackle while proceeding to try an offence and not allow a person who deserves to be tried to go scot-free by being not arraigned in the trial in spite of the possibility of his complicity which can be gathered from the documents presented by the prosecution.

19. The court is the sole repository of justice and a duty is F cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency. The desire to avoid trial is so strong G 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.

22. In our opinion, Section 319 CrPC is an enabling provision empowering the court to take appropriate steps for proceeding H

against any person not being an accused for also having committed the offence under trial.....

47. 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, and therefore, the power under Section 319(1) CrPC can be exercised at any time after the charge-sheet is filed and before the pronouncement of judgment, except during the stage of Sections 207/208 CrPC, committal, etc. which is only a pre-trial stage, intended to put the process into motion. This stage cannot be said to be a judicial step in the true sense for it only requires an application of mind rather than a judicial application of mind. At this pre-trial stage, the Magistrate is required to perform acts in the nature of administrative work rather than judicial such as ensuring compliance with Sections 207 and 208 CrPC, and committing the matter if it is exclusively triable by the Sessions Court. Therefore, it would be legitimate for us to conclude that the Magistrate at the stage of Sections 207 to 209 CrPC is forbidden, by express provision of Section 319 CrPC, to apply his mind to the merits of the case and determine as to whether any accused needs to be added or subtracted to face trial before the Court of Session.

53. It is thus aptly clear that until and unless the case reaches the stage of inquiry or trial by the court, the power under Section 319 CrPC cannot be exercised. .....

54. In our opinion, the stage of inquiry does not contemplate any evidence in its strict legal sense, nor could the legislature have contemplated this inasmuch as the stage for evidence has not yet arrived. The only material that the court has before it is the material collected by the prosecution and the court at this stage prima facie can apply its mind to find out as to whether a person, who can be an accused, has been erroneously omitted from being arraigned or has been deliberately excluded by the prosecuting agencies. This is all the more necessary in order to ensure that the investigating and the prosecuting agencies have acted fairly in bringing before the court those persons who deserve to be tried and to prevent any person from being deliberately shielded when they ought to have been tried. This is necessary to

usher faith in the judicial system whereby the court should be empowered to exercise such powers even at the stage of inquiry and it is for this reason that the legislature has consciously used separate terms, namely, inquiry or trial in Section 319 CrPC.

55. Accordingly, we hold that the court can exercise the power under Section 319 CrPC only after the trial proceeds and commences with the recording of the evidence and also in exceptional circumstances as explained hereinabove.

56. ..... What is essential for the purpose of the section is that there should appear some evidence against a person not proceeded against and the stage of the proceedings is irrelevant. 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, Section 319 CrPC acts as an empowering provision enabling the court/Magistrate to initiate proceedings against such other persons. The purpose of Section 319 CrPC is to do complete justice and to ensure that persons who ought to have been tried as well are also tried. Therefore, there does not appear to be any difficulty in invoking powers of Section 319 CrPC at the stage of trial in a complaint case when the evidence of the complainant as well as his witnesses are being recorded."

7.4 While answering question No. (iii), namely whether the word "evidence" used in Section 319(1) of the 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, this Court, in the aforesaid decision has observed and held as under:

"58. To answer the questions and to resolve the impediment that is being faced by the trial courts in exercising of powers under Section 319 CrPC, the issue has to be investigated by examining the circumstances which give rise to a situation for the court to invoke such powers. The circumstances that lead to such inference being drawn up by the court for summoning a person arise out of the availability of the facts and material that come up before the court and are made the basis for summoning such a

person as an accomplice to the offence alleged to have been committed. The material should disclose the 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. The words as used in Section 319 CrPCindicate that the material has to be "where … it appears from the *evidence*" before the court.

59. Before we answer this issue, let us examine the meaning of the word "evidence". According to Section 3 of the Evidence Act, "evidence" means and includes:

> "**(1)** all statements which the court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry;
>
> such statements are called oral evidence;
>
> **(2)** all documents including electronic records produced for the inspection of the court;
>
> such documents are called documentary evidence."

78. It is, therefore, clear that the word "evidence" in Section 319 CrPC means only such evidence as is made before the court, in relation to statements, and as produced before the court, in relation to documents. It is only such evidence that can be taken into account by the Magistrate or the court to decide whether the power under Section 319 CrPC is to be exercised and not on the basis of material collected during the investigation.

82. This pre-trial stage is a stage where no adjudication on the evidence of the offences involved takes place and therefore, after the material along with the charge-sheet has been brought before the court, the same can be inquired into in order to effectively proceed with framing of charges. After the charges are framed, the prosecution is asked to lead evidence and till that is done, there is no evidence available in the strict legal sense of Section 3 of the Evidence Act. The actual trial of the offence by bringing the accused before the court has still not begun. What is available is the material that has been submitted before the court along with the charge-sheet. In such situation, the court only has

the preparatory material that has been placed before the court for its consideration in order to proceed with the trial by framing of charges.

83. It is, therefore, not any material that can be utilised, rather it is that material after cognizance is taken by a court, that is available to it while making an inquiry into or trying an offence, that the court can utilise or take into consideration for supporting reasons to summon any person on the basis of evidence adduced before the court, who may be on the basis of such material, treated to be an accomplice in the commission of the offence. The inference that can be drawn is 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. .....

84. The word "evidence" therefore has to be understood in its wider sense both at the stage of trial and, as discussed earlier, even at the stage of inquiry, as used under Section 319 CrPC. The court, therefore, should be understood to have the power to proceed against any person after summoning him on the basis of any such material as brought forth before it. The duty and obligation of the court becomes more onerous to invoke such powers cautiously on such material after evidence has been led during trial.

85. In view of the discussion made and the conclusion drawn hereinabove, the answer to the aforesaid question posed is that apart from evidence 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 CrPC. The "evidence" is thus, limited to the evidence recorded during trial."

7.5 While answering question No. (ii), namely whether the word "evidence" used in Section 319(1) of the CrPC means as arising in examination-in-chief or also together with cross-examination, in the aforesaid decision, this Court has observed and held as under:

A **"86.** The second question referred to herein is in relation to the word "evidence" as used under Section 319 CrPC, which leaves no room for doubt that the evidence as understood under Section 3 of the Evidence Act is the statement of the witnesses that are recorded during trial and the documentary evidence in accordance with the Evidence Act, which also includes the document and material evidence in the Evidence Act. Such evidence begins with the statement of the prosecution witnesses, therefore, is evidence which includes the statement during examination-in-chief. In *Rakesh* [(2001) 6 SCC 248 : 2001 SCC (Cri) 1090 : AIR 2001 SC 2521] , it was held that: (SCC p. 252, para 10)

> "*10.* … 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 the court's power under Section 319 CrPC. 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."

87. In *Ranjit Singh* [*Ranjit Singh* v. *State of Punjab*, (1998) 7 SCC 149 : 1998 SCC (Cri) 1554 : AIR 1998 SC 3148] , this Court held that: (SCC p. 156, para 20)

> "*20.* … it is not necessary for the court to wait until the entire evidence is collected for exercising the said powers."

88. In *Mohd. Shafi* [*Mohd. Shafi* v. *Mohd. Rafiq*, (2007) 14 SCC 544 : (2009) 1 SCC (Cri) 889 : AIR 2007 SC 1899] , it was held that the prerequisite for exercise of power under Section 319 CrPC is the satisfaction of the court to proceed against a person who is not an accused but against whom evidence occurs, for which the court can even *wait till the cross-examination is over* and that there would be no illegality in doing so. A similar view has been taken by a two-Judge Bench in *Harbhajan Singh* v. *State of Punjab* [(2009) 13 SCC 608 : (2010) 1 SCC (Cri) 1135] . This Court in *Hardeep Singh* [*Hardeep Singh* v. *State*

of Punjab, (2009) 16 SCC 785 : (2010) 2 SCC (Cri) 355] seems to have misread the judgment in *Mohd. Shafi* [*Mohd. Shafi* v. *Mohd. Rafiq*, (2007) 14 SCC 544 : (2009) 1 SCC (Cri) 889 : AIR 2007 SC 1899] , as it construed that the said judgment laid down that for the exercise of power under Section 319 CrPC, the court has to necessarily wait till the witness is cross-examined and on complete appreciation of evidence, come to the conclusion whether there is a need to proceed under Section 319 CrPC.

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 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* [*Mohd. Shafi* v. *Mohd. Rafiq*, (2007) 14 SCC 544 : (2009) 1 SCC (Cri) 889 : AIR 2007 SC 1899] and *Harbhajan Singh* [(2009) 13 SCC 608 : (2010) 1 SCC (Cri) 1135] , all that is required for the exercise of the power under Section 319 CrPC 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 prerequisite 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 straitjacket 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 the basis of evidence appearing in examination-in-chief, it can exercise the power under Section 319 CrPC 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 CrPC, 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.

91. Further, in our opinion, there does not seem to be any logic behind waiting till the cross-examination of the witness is over. It is to be kept in mind that at the time of exercise of power under Section 319 CrPC, the person sought to be arraigned as an accused, is in no way participating in the trial. Even if the cross-examination is to be taken into consideration, the person sought to be arraigned as an accused cannot cross-examine the witness(es) prior to passing of an order under Section 319 CrPC, as such a procedure is not contemplated by CrPC. Secondly, invariably the State would not oppose or object to naming of more persons as an accused as it would only help the prosecution in completing the chain of evidence, unless the witness(es) is obliterating the role of persons already facing trial. More so, Section 299 CrPC enables the court to record evidence in absence of the accused in the circumstances mentioned therein.

92. Thus, in view of the above, we hold 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 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 person(s), not facing the trial in the offence."

7.6 While answering question No. (iv), namely what is the degree of satisfaction required for invoking the power under Section 319 of the CrPC, this Court after considering various earlier decisions on the point, has observed and held as under:

> **105.** Power under Section 319 CrPC is a discretionary and an extraordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.
>
> **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."

7.7 While answering question No. (v), namely in what situations can the power under Section 319 of the CrPC be exercised: named in the FIR, but not charge-sheeted or has been discharged, this Court has observed and held as under:

> **"112.** However, there is a great difference with regard to a person who has been discharged. A person who has been

A 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. Generally, the stage of evidence in trial is merely proving the material collected during investigation and therefore, there is not much change as regards the material existing against the person so discharged. Therefore, there must exist compelling circumstances to exercise such power. The court should 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. The court 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 CrPC without resorting to the provision of Section 319 CrPC directly.

116. Thus, it is evident that power under Section 319 CrPC can be exercised against a person not subjected to investigation, or a person placed in Column 2 of the charge-sheet and against whom cognizance had not been taken, or a person who has been discharged. However, concerning a person who has been discharged, no proceedings can be commenced against him directly under Section 319 CrPC without taking recourse to provisions of Section 300(5) read with Section 398 CrPC."

7.8 Considering the law laid down by this Court in the case of ***Hardeep Singh*** (supra) and the observations and findings referred to and reproduced hereinabove, it emerges that (i) the Court can exercise the power under Section 319 of the CrPC even on the basis of the statement made in the examination-in-chief of the witness concerned and the Court need not wait till the cross-examination of such a witness and the Court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination; and (ii) 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 of the CrPC, provided from the evidence (may be on the basis of the evidence collected in the form of statement made in the examination-in-chief of the witness concerned), it appears that such person can be tried along with the accused already facing trial.

7.9 In the case of ***S. Mohammed Ispahani v. Yogendra Chandak***(2017) 16 SCC 226 in para 35, this Court has observed and held as under:

> **"35.** It needs to be highlighted that when a person is named in the FIR by the complainant, but police, after investigation, finds no role of that particular person and files the charge-sheet without implicating him, the Court is not powerless, and at the stage of summoning, if the trial court finds that a particular person should be summoned as accused, even though not named in the charge-sheet, it can do so. At that stage, chance is given to the complainant also to file a protest petition urging upon the trial court to summon other persons as well who were named in the FIR but not implicated in the charge-sheet. Once that stage has gone, the Court is still not powerless by virtue of Section 319 CrPC. However, this section gets triggered when during the trial some evidence surfaces against the proposed accused."

7.10 Thus, even in a case where the stage of giving opportunity to the complainant to file a protest petition urging upon the trial Court to summon other persons as well who were named in the FIR but not implicated in the charge-sheet has gone, in that case also, the Court is still not powerless by virtue of Section 319 of the CrPC and even those persons named in the FIR but not implicated in the charge-sheet can be summoned to face the trial provided during the trial some evidence surfaces against the proposed accused.

8. Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand, we are of the opinion that, in the facts and circumstances of the case, neither the learned Trial Court nor the High Court have committed any error in summoning the appellants herein to face the trial along with other co-accused. As observed hereinabove, the appellants herein were also named in the FIR. However,

they were not shown as accused in the challan/charge-sheet. As observed hereinabove, nothing is on record whether at any point of time the complainant was given an opportunity to submit the protest application against non-filing of the charge-sheet against the appellants. In the deposition before the Court, P.W.1 and P.W.2 have specifically stated against the appellants herein and the specific role is attributed to the accused-appellants herein. Thus, the statement of P.W.1 and P.W.2 before the Court can be said to be "evidence" during the trial and, therefore, on the basis of the same and as held by this Court in the case of ***Hardeep Singh*** (supra), the persons against whom no charge-sheet is filed can be summoned to face the trial. Therefore, we are of the opinion that no error has been committed by the Courts below to summon the appellants herein to face the trial in exercise of power under Section 319 of the CrPC.

9. Now, so far as the submissions made on behalf of the appellants herein relying upon the orders passed by the learned Magistrate dated 01.09.2016 and 28.10.2016 that once the appellants herein were discharged by the learned Magistrate on an application submitted by the Investigating Officer/SHO and, therefore, thereafter it was not open to the learned Magistrate to summon the accused to face the trial in exercise of power under Section 319 of the CrPC is concerned, it appears that there is some mis-conception on the part of the appellants. At the outset, it is required to be noted that the orders dated 01.09.2016 and 28.10.2016 cannot be said to be the orders discharging the accused. If the applications submitted by the Investigating Officer/SHO and the orders passed thereon are considered, those were the applications to discharge/release the appellants herein from custody as at that stage the appellants were in judicial custody. Therefore, as such, those orders cannot be said to be the orders of discharge in *strictosensu*. Those are the orders discharging the appellants from custody. Under the circumstances, the submission on behalf of the accused that as they were discharged by the learned Magistrate and therefore it was not open to the learned Magistrate to exercise the power under Section 319 of the CrPC and to summon the appellants to face the trial, cannot be accepted.

10. In view of the above and for the reasons stated above, we see no reason to interfere with the impugned judgment and order passed by the High Court confirming the order passed by the learned Magistrate

summoning the accused-appellants herein to face the trial in exercise of the power under Section 319 of the CrPC. We are in complete agreement with the view taken by the High Court. No interference is called for by this Court. In the facts and circumstance of the case and for the reasons stated hereinabove, the present appeal fails and deserves to be dismissed and is according dismissed.

Devika Gujral Appeal dismissed.