

(2005) 09 KL CK 0035

In the High Court Of Kerala

Case No : Criminal Revision Petition No. 1919 of 2005

A.P. Aboobacker Musaliar

APPELLANT

Vs

Inspector of Police, CBI and Others

RESPONDENT

Date of Decision : 08-09-2005

Acts Referred:

Constitution of India, 1950 — Article 134

Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 161, 164, 173, 197

Penal Code, 1860 (IPC) — Section 120B, 201, 302, 364

Citation : (2006) CriLJ 491 : (2005) 4 ILR (Ker) 200

Hon'ble Judges : M. Sasidharan Nambiar, J

Bench : Single Bench

Advocate : V.N. Achutha Karup and O.V. Maniprasad, for the Appellant; S. Sreekumar, SC, K. Ramakumar, C.S. Manu, S.K. Premraj, B. Raman Pillai, R. Anil, Raju Radhakrishnan, Anil K. Mohammed, M.K. Damodaran and M.P. Prahanandan and Noorjee, Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

M. Sasidharan Nambiar, J.—Whether an order summoning a person who is not an accused to be tried along with the accused in a Sessions Case invoking the power under Sub-section (1) of Section 319 of the Code of Criminal Procedure is a revisable order. Whether a Court is to invoke the power u/s 319(1) as and when a witness during the course of his examination deposes the involvement of a person who is not an accused in the case. Whether the Court is competent to invoke the power u/s 319(1) of the Code on the evidence of a witness before permitting the accused to cross-examine that witness. These are mainly the points to be decided in the revision.

2. A brief factual, matrix of the case is necessary for deciding the questions involved in the revision. Charges were framed against eight accused by the special Judge, CBI, Ernakulam for the offences u/s 120B read with Sections 364, 302 and 201 of IPC. The charge against them is that they conspired together to murder Abdul Hassan alias Chekannur Moulavi and in pursuance of the criminal

conspiracy on 29-7-93 they kidnapped him and committed his murder and also buried the deadbody and thereby caused disappearance of the corpus delicti and committed the offences. When the chief examination of PW-1 was partly recorded and he deposed about revision petitioner, who is a leader of a religious sect, third respondent the widow of Chekannur Moulavi who was later examined as PW-3 filed a petition u/s 319 of the Code of Criminal Procedure, hereinafter called as the Code, praying the Court to invoke the power u/s 319 of the Code and make revision petitioner an accused to be tried along with other accused facing trial. The final report was submitted after investigation by Central Bureau of Investigation. They filed an objection contending that in spite of thorough investigation involvement of any other person including revision petitioner, than the accused in the commission of the offences was revealed. It was also contended that allegation against revision petitioner was investigated in detail, but there was absolutely no evidence to show his involvement and therefore, he is not to be arrayed as an accused. Respondents 4 to 12 the accused facing trial also filed an objection disputing the very maintainability of the petition and contending that there is no evidence compelling the Court to exercise the power u/s 319 of the Code. The special Judge considered the petition in detail in the light of the decisions of the Apex Court and found that third respondent has the locus standi to file a petition u/s 319(1) of the Code. But finding that Court must have a reasonable satisfaction from the evidence that the power u/s 319 of the Code has to be invoked, special Judge held that in his view it is too premature to consider whether there is evidence for invoking the power to add revision petitioner as an accused and the Court has to wait till the proper stage comes during the evidence to consider whether there is evidence within the meaning of Section 319 of the Code to entertain the prayer. The petition was kept alive holding that it will be taken up and considered at the appropriate stage. Two witnesses including the third respondent were examined thereafter. After completing the chief examination of the 4th prosecution witness and before the defence counsel cross examined him the learned special Judge passed an order dated 26-7-05 allowing the petition of the third respondent (Crl. M. P. 143/05) and summoned revision petitioner to be tried along with respondents 4 to 12. Revision petitioner was arrayed as 10th accused. That order is challenged in the revision.

3. Revision petitioner is challenging the order contending that having found that the power u/s 319(1) of the Code is to be exercised only to achieve criminal justice and the Court is not to turn against a person, whenever it comes across evidence connecting that person with the offence, it should not have invoked the power u/s 319 in the absence of sufficient and reasonable ground to proceed against revision petitioner. It is contended that the power u/s 319 is an extraordinary power which should be exercised sparingly and on the materials there is no reasonable or sufficient ground to proceed against him and the order is unsustainable.

4. Adv. Sri V.N. Achutha Kurup, senior counsel appearing for the revision

petitioner and Shri M. K. Damodaran, Senior counsel and Advocate Mr. Raman Pilla appearing for respondents 4 to 12 relying on the various decisions of the Apex Court argued that the order challenging the revision is illegal and is an abuse of the power vested in a Court u/s 319(1) of the Code and is unsustainable. It was argued that the learned special Judge did not consider the question in the proper perspective and the order does not reveal that there is any sufficient material to proceed against revision petitioner and for that sole reason the order is to be set aside. It was also argued that order of the Court below does not disclose how the revision petitioner was involved in the offence and as per the charge there was a criminal conspiracy involving only respondents 4 to 12 as co-conspirators and there is no evidence that revision petitioner was also one of the co-conspirators and there is not even an allegation to that effect and there is also no evidence that revision petitioner participated either in kidnapping the deceased or in committing his murder or in causing disappearance of the evidence and revision petitioner could not have been arrayed as an accused or directed to be tried along with respondents 4 to 12.

5. Adv. Sri. S. Sreekumar appearing for the first respondent took a different stand than what first respondent had taken before Court below. Though it was admitted that during investigation involvement of revision petitioner could not be detected, Advocate Sreekumar submitted that in view of the order of special Judge, CBI do not challenge as the finding was that from the evidence involvement of revision petitioner was disclosed and special Judge is empowered to proceed against him u/s 319(1) of the Code. Learned Counsel also contended that revision is not maintainable as it is only an interlocutory order and at best the order could only be challenged along with the final judgment in the case.

6. Advocate Sri K. Ramakumar, learned Counsel appearing for third respondent questioned the very maintainability of the revision contending that the order passed under Sub-section (1) of Section 319 is not a final order or an intermediate order; but only a pure and simple interlocutory order which is not amenable for revision by virtue of the bar u/s 397(2) of the Code. It is argued that by the impugned order the proceedings or trial before the Special Judge is not terminated and therefore, no revision can be entertained and for that sole reason revision is to be dismissed. It is further argued that evidence contemplated u/s 319(1) includes evidence in chief-examination untested by cross-examination and therefore, there is no procedural irregularity warranting interference in exercise of revisional power. Learned Counsel also argued that Special Judge did not invoke the power u/s 319(1) of the Code when PW-1 gave evidence on the involvement of revision petitioner and exercised the power only at the appropriate time and evidence already recorded unambiguously point out the involvement of the revision petitioner sufficient enough to invoke the power u/s 319(1) of the Code and the order is legal, regular and proper and cannot be interfered in exercise of the revisional power.

7. Section 319 of the Code deals with the power to proceed against other

persons appearing to be guilty of offence. Under sub-section (1) 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 an offence for which he could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed. Sub-section (2) enables the Court to arrest or summon any such person for the aforesaid purpose. Sub-section (3) enables the Court to detain such person for the purposes of the inquiry into or trial of the offence which he appears to have committed, if he is attending the Court although not under arrest or upon summons. Clause (a) of Sub-section (4) mandates that where the Court proceeds against any person under Sub-section (1), the proceedings in respect of such person shall be commenced afresh and the witnesses reheard. Clause (b) of Sub-section (4) provides that subject to the provisions of Clause (a), the case may be proceeded as if that person had been an accused person, when the Court took cognizance of the offences upon which the inquiry or trial was commenced. The learned Special Judge as per the order challenged invoked the power under Sub-section (1) having found that revision petitioner is to be arraigned as an accused and is to be tried together with the other accused.

8. If the order challenged is to be set aside, that would terminate the proceedings as against the revision petitioner as he would not be an accused who has to stand for trial before the Special Judge along with respondents 4 to 12 though the trial as against respondents 4 to 12 will continue.

9. The argument of Advocate Sri Ramakumar and Adv. Sr. Sreekumar is that by the impugned order petitioner is only made an accused and he is not convicted and is entitled to defend the case and even if the order is to be set aside the case pending before Special Judge will not be terminated and it will be terminated only on conviction or acquittal of the accused and therefore, the order is only interlocutory. Advocate Sri Ramakumar argued that as per the order Special Judge has only found that revision petitioner is involved in the case and is to be tried and petitioner has a right to seek an order of discharge and as that right is available the order of the Court below is not amenable for revision. The argument is that as long as revision petitioner has a right to get an order of discharge and any order passed rejecting the prayer for discharge is amenable for revision, the impugned order is not revisable. Senior counsel Sri Achuthakurup argued that if the revision is to be allowed and the impugned order is to be set aside, that would be final and the end of the proceedings as against revision petitioner and therefore, the order is not of a interlocutory order and even if it is not a final order it could be an intermediate order and therefore, revision is maintainable.

10. Sub-section (2) of Section 397 of the Code of Criminal Procedure mandates that the power of revision conferred under Sub-section (1) shall not be exercised in relation to any interlocutory order passed in an appeal, inquiry trial or other proceedings. Interlocutory order is not defined under the Code. Ordinarily and

generally the expression interlocutory order has been understood and taken to mean as converse of the term final order. This was a subject of controversy for decades. A judgment or order may be final for one purpose and interlocutory for another or final as to part and interlocutory as to part. The meaning of the two words must be considered separately in relation to the particular purpose for which it is required. An order which does not deal with the final rights of the parties but either is made before judgment and gives no final decision on the matters in dispute but is merely on a matter of procedure or is made after judgment and merely directs how the declarations of right already given in the final judgment are to be worked out is termed interlocutory orders in Halsbury's Laws of England 4th Edn. para 506. An interlocutory order even though not conclusive of the main dispute, may be conclusive as of the subordinate matter with which it deals. Lord Esher M. R. in *Salaman v. Warner* (1891) 1 QB 734 laid down the principle that if their decision, whichever way it is given will, if it stands, finally dispose of the matter in dispute for the purpose of these rules it is final. On the other hand, if their decision is given in one way will finally dispose of the matter in dispute but if given in the other way will allow the action to go on, then it is not final but interlocutory. Kania C. J. in AIR 1949 1 (Federal Court) quoting this decision and subsequent decisions on the point held that the test is that if the objection of the accused succeeded, the proceeding could have ended but not vice versa and the order can be said to be final only if in either event the action will be determined. In *Mohan Lal Magan Lal Thacker Vs. State of Gujarat*, after an analysis of all the earlier decisions, Apex Court held that an order directing filing of a complaint against the appellant was a final order. One of the tests applied was if the order in question is reversed would the action have to go on. Applying the test, it was held that if the plea of the appellant succeeded and the order of the Sessions Judge is reversed, the criminal proceedings as initiated and instituted against him cannot go on. The finding was that the finality of that order was not to be judged by co-relating that order with the controversy in that complaint namely whether appellant had committed the offence charged therein. The fact that controversy still remained alive is irrelevant. The majority decision in that case treating such an order as an order finally concluding the inquiry, started to find out whether a complaint should be lodged or not, taking the prosecution launched as a separate proceedings. In the celebrated decision in *Madhu Limaye Vs. The State of Maharashtra*, the Apex Court considered all these aspects in detail. It was held that an order rejecting the plea of the accused on a point which, when accepted, will conclude particular proceeding will surely be not an interlocutory order within the meaning of Section 397(2). "The Apex Court found it difficult to apply literally the test laid down in *Kuppuswami Rao's* case that an order being not a final order must be an interlocutory order which is not amenable for revision and held that there is an order which is neither the final order nor an interlocutory order but an intermediate order. It was held (para 13 of AIR, Cri LJ) :

Some kinds of order may fall in between the two. By a rule of harmonious

construction, we think that the bar in Sub-section (2) of Section 397 is not meant to be attracted to such kinds of intermediate orders. They may not be final orders for the purposes of Article 134 of the Constitution, yet it would not be correct to characterise them as merely interlocutory orders within the meaning of Section 397(2). It is neither advisable nor possible to make a catalogue of orders to demonstrate which kinds of orders would be merely, purely or simply interlocutory and which kinds of orders would be final, and then to prepare an exhaustive list of those types of orders which will fall in between the two. The first two kinds are well known and can be culled out from many decided cases. We may, however, indicate that the type of order with which we are concerned in this case, even though it may not be final in one sense, is surely not interlocutory so as to attract the bar of Sub-section (2) of Section 397. In our opinion it must be taken to be an order of the type falling in the middle course.

In *V.C. Shukla Vs. State through C.B.I.*, the Apex Court held that the term interlocutory order used in the Code has to be given a very liberal construction in favour of the accused in order to ensure complete fairness of trial and the revisional power of the High Court or the Sessions Judge could be attracted if the order was not purely interlocutory but intermediate. The Apex Court held :

This being the position of law, it would not be appropriate to hold that an order directing issuance of process is purely interlocutory and, therefore, the bar under Sub-section (2) of Section 397 would apply. On the other hand, it must be held to be intermediate or quasi final and, therefore, the revisional jurisdiction u/s 397 could be exercised against the same. The High Court, therefore, was not justified in coming to the conclusion that the Sessions Judge had no jurisdiction to interfere with the order in view of the bar under Sub-section (2) of Section 397 of the Code.

11. The maintainability of a revision against an order summoning the accused was considered by the Apex Court in *Amar Nath and Others Vs. State of Haryana and Another*, . In that case in the FIR names of several accused persons including the appellants before the Apex Court were mentioned alleging that all of them participated in the occurrence which resulted in the death of the deceased. After investigation a charge-sheet was submitted against the other persons except the appellants. As against the appellants, the investigating agency opined that no case was made out and there was no clear evidence about their participation in the offence. On perusing the report filed by the Police Judicial First Class Magistrate accepted the report as against the appellants and proceeded only against the accused. The complainant filed a revision before the Sessions Court which was dismissed. The informant filed a regular complaint before the Magistrate against the accused including appellants. The Magistrate after examining the complainant dismissed the complaint holding that no case as against the appellants were made out. It was challenged before Sessions Court and Sessions Judge remitted the case to the Magistrate. The Magistrate issued

summons to the appellants straightway. Appellants moved High Court under Sections 482 and 397 of the Code for quashing the order. The High Court dismissed the petition in limine and refused to entertain it on the ground that the order summoning the accused was an interlocutory order and a revision is barred under Sub-section (2) of Section 397 of the Code. The learned single Judge of the High Court held that as the revision was barred Section 482 of the Code also cannot be invoked. Apex Court considered the question whether the order impugned can be said to be an interlocutory order as held by the High Court. Finding that as far as appellants are concerned, the police had submitted its final report against them and they were released by the Magistrate and the revision filed by the complainant had failed it was held that by virtue of that order appellants secured a valuable right of not being put on trial unless a proper order was made against them and Sessions Judge in revision set aside the order dismissing the complaint and directed further enquiry and the Magistrate on receiving the order straightway summoned the appellants which meant that they were put on trial and it was only with the passing of the impugned order the proceedings started and the question of appellants being put up for trial arose for the same. The Apex Court held (Para 10 of AIR, Cri LJ) :

This was undoubtedly a valuable right which the appellants possessed and which was being denied to them by the impugned order. It cannot, therefore, be said that appellants were not at all prejudiced, or that any right of theirs was not involved by the impugned order. It is difficult to hold that the impugned order summoning the appellants straightway was merely an interlocutory order which could not be revised by the High Court under Sub-sections (1) and (2) of Section 397 of the 1973 Code.

XX XX XX XX XX XX If the appellants were not summoned, then they would not have faced the trial at all, but by compelling appellants to face a trial without proper application of mind cannot be held to be an interlocutory matter but one which decided a serious question as to the rights of the appellants to be put on trial.

The maintainability of a revision because of the embargo under Sub-section (2) of Section 397 against an order dismissing the petition for discharge was considered by the Apex Court in K.K. Patel and Another Vs. State of Gujarat and Another, . In that case a complaint was lodged by the appellant before the Magistrate alleging that his brother was kidnapped by some persons named in the complaint. Learned Magistrate forwarded the complaint to the police u/s 156(3) of the Code. The police registered an FIR on that basis. After investigation police submitted a final report holding that accused are untraceable and requested the Court to grant a summary which means the complaint could not be substantiated due to want of proof. The court passed an order granting B summary which means complaint was found false. The respondent filed the complaint thereafter. The metropolitan Magistrate after taking the sworn statement took cognizance of the offences and issued process to the appellants.

They appeared before the Magistrate and filed a petition for discharging them on the premise that no sanction was obtained. The Magistrate passed an order dismissing the petition holding that appropriate decision regarding prior sanction shall be taken on merits after considering the evidence that may be produced. Appellants challenged the order before the Sessions Court in a revision. The learned Sessions Judge upheld the objections and quashed the order issuing process. It was challenged before the High Court in revision moved by the respondent complainant. The order of the Sessions Judge was set aside mainly on the ground that the Sessions Court should not have entertained the revision. The matter was taken before the Supreme Court in the criminal appeal. The Apex Court held that the view of the learned single Judge of the High Court that no revision was maintainable on account of the bar contained in Section 397(2) of the Code is erroneous and in deciding the question whether an order challenged is interlocutory or not is not solely whether such order was passed during the interim stage. Honourable Mr. Justice Thomas speaking for the Bench held (para 12 of AIR, Cri LJ) :

The feasible test is whether by upholding the objections raised by a party, would it result in culminating the proceedings, if so any order passed on such objections would not be merely interlocutory in nature as envisaged in Section 397(2) of the Code. In the present case, if the objection raised by the appellants were upheld by the Court the entire prosecution proceedings would have been terminated. Hence as per the said standard, the order was revisable.

12. Applying the feasibility test, it can only be held that the impugned order is revisable. If the contention of the revision petitioner against the sustainability of the order is to be upheld, it will terminate the proceedings as against him and he will not be compelled to face the ordeal of a trial. As far as the revision petitioner is concerned, the order would be final, if his objection against the order is sustained. The question in that case is not whether the trial pending before the Special Judge against respondents 4 to 12 is terminated or not. Even if the trial as against them will not be terminated, the proceedings as against the revision will definitely be terminated. If the argument of the learned Counsel for respondents 1 and 3 is to be accepted, and the question of the revisability of an order is to be decided on the basis of the question whether the criminal trial pending before the special Judge will be terminated or not, Sub-section (1) of Section 397 would be made nugatory. For illustration take a case pending against several accused. Some of the accused filed a petition for discharge contending that the proceeding as against them is bad for want of a valid sanction as provided u/s 197 of the Code and they are to be discharged. An order rejecting the prayer for discharge of those accused was passed. If the contention is to be accepted, it can only be held that revision filed by those accused against the order is not maintainable because even if they are to be discharged, the trial against the other accused will stand. That cannot be the legal position. As far as those accused are concerned, if their objections that cognizance shall not be taken without a valid sanction as provided u/s 197 of the Code, is upheld it

would result in getting an order of discharge. The fact that even though those accused are discharged, the trial as against the remaining accused will continue and therefore the order rejecting the prayer for discharge is not amenable for revision is not the correct legal position. The question is not whether the proceeding against the entire accused would be terminated. On the other hand whether the proceeding as against those accused will be terminated or not is the relevant question. The position may be different, if the revision was filed by the other accused or prosecutor. In that case it could be said that even if the order is set aside, the trial will continue and therefore the order will not terminate the proceeding as against them. But that is not the case when a person who is not an accused is challenging the order making him an accused in the case. Though respondents 4 to 12 had challenged the order by preferring separate revisions, the revisions were already dismissed. As this revision is filed by a person, who is not an accused and the result of upholding the objections raised in his revision petition will terminate the proceedings as against him, the order cannot be said to be a pure and simple interlocutory order not amenable for revision. It is definitely an order affecting the rights of the revision petitioner and is at least an intermediate order, even if it is not a final order. The order is revisable u/s 397(1) and the bar under Sub-section (2) of Section 397 is not attracted. The revision is therefore maintainable.

13. Incidentally the question whether the revision petitioner is entitled to get an order of discharge from the learned special Judge was also argued by the learned Counsel appearing for the parties. But on the facts of this case and the decision to be taken, I do not find it necessary to decide that question in the revision.

14. It was argued by the learned Counsel appearing for revision petitioner and the counsel appearing for respondents 4 to 12 that though third respondent filed the petition to invoke the powers u/s 319(1) of the Code, learned special Judge as per order dated 18-7-05 found that evidence of PW-1 is insufficient to exercise the power and PW-2 who was examined thereafter turned hostile to the prosecution and the evidence of PW-3 is also insufficient as the learned special Judge did not invoke the power on her evidence and only the chief examination of PW-4 was recorded and the accused were not given an opportunity to discredit his evidence and instead power u/s 319(1) was invoked on the evidence of PW-4 which was not tested by cross-examination. The learned special Judge in the impugned order held that the evidence contemplated u/s 319 need not mean the evidence after completing the examination of a witness and it includes the evidence recorded in chief examination.

15. The legal position that a Court is competent to exercise the power under Sub-section (1) of Section 319 of the Code even on the chief examination of a witness is now no more res integra. The position was settled by the Apex Court in *Rakesh and Another Vs. State of Haryana*, . In that case a complaint was lodged by the father of the minor prosecutrix alleging that his minor daughter was kidnapped by three persons with the object of committing rape. After investigation police

laid a charge only against one of the three persons mentioned and charge was framed against him. PWs 1 to 3 were examined by the prosecution. The prosecutrix was examined as PW-4. When her cross-examination had begun, prosecutor moved an application for arraigning appellants as additional accused u/s 319 of the Code. The trial Judge as per the impugned order arrayed appellant as additional accused and summoned to stand for trial with the other accused. It was challenged before the High Court in a revision. Revision was dismissed. It was challenged before the Apex Court in the appeal. The question considered was whether statement of prosecution witness without the said witness having been cross examined whether constitute evidence within the meaning of Section 319 of the Code. Rejecting the contention of the appellants that the term evidence used in Section 319 would mean evidence which is tested by cross examination. Their Lordships held (para 13 of Cri LJ) :

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. 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.

In the light of the law as laid down by the Apex Court, it cannot be said that the chief examination of PW-4 recorded by the learned special Judge is not an evidence as contemplated u/s 319(1) of the Code and therefore the order cannot be challenged for the reason that the evidence of PW-4 was not tested by cross-examination.

16. Then the question is whether the order of the special Judge is legal, regular and proper. Adv. Sri Ramakumar relying on the decision of the Apex Court in Akalu Ahir and Others Vs. Ramdeo Ram, argued that the order passed under Sub-section (1) of Section 319 is based on the evidence and on satisfying that there is evidence prima facie to show the involvement of the revision petitioner and the discretion exercised by special Judge cannot be interfered in exercise of the revisional powers, unless there was glaring defect in the procedure or manifest error on point of law which resulted in flagrant miscarriage of justice. The Apex Court in Akalu Ahir's case was considering the scope of the revision against an order of acquittal by a private complainant. The Apex Court speaking through Honourable Justice K. K. Mathew adverting to the revisional powers of the High Court held that it is an extra ordinary discretionary power vested in the superior Court to be exercised in aid of justice to set right grave injustice. It was held (para 7 of AIR, Cri LJ) :

The High Court has been invested with this power to see that justice is done in accordance with the recognised rules of criminal jurisprudence and that the subordinate courts do not exceed their jurisdiction or abuse the power conferred on them by law. As a general rule, this power, in spite of the wide language of Sections 435 and 439, Cr.P.C. does not contemplate interference with the conclusions of fact in the absence of serious legal infirmity and failure of Justice. This power is certainly not intended to be so exercised as to make one portion of the Code of Criminal Procedure conflict with another, as would seem to be the case when in the garb of exercising revisional power, the High Court in effect exercises the power of appeal in face of statutory prohibition.

17. Section 319 of the Code reads thus :

(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 reheard.

(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.

It is an improved form of corresponding provision (Section 351) in the old Code of 1898. The subtitle change brought out to the Section was enumerated by the Apex Court in *Ranjit Singh Vs. State of Punjab*, as follows (para 7) :

It is, therefore, manifest that Section 319 of the Code is an improved version of Section 351 of the old Code; the changes having been introduced therein on the suggestion of the Law Commission to make it comprehensive so that even persons not attending the Court can be arrested or summoned as the circumstances of the case may require and by deleting the words of which such Court can take cognizance" and by adding Clause (b) it is clarified that the impleadment of a new person as an accused in the pending proceedings will not make any difference insofar as taking of cognizance is concerned.

18. Evidence envisaged in Section 319 is the evidence tendred during trial of the

case if the offence is triable by a Court of Session. The primary requirement for invoking Section 319 is that it should appear to the Court from the evidence collected during trial or in the inquiry that some other person who is not arraigned as an accused is that case has committed an offence and that person could be tried together with the accused already arraigned. It is not sufficient that the Court entertained some doubt about the involvement of another person in the offence who is not an accused, on the evidence tendered. On the evidence adduced before the Court, the Court should satisfy that the person who is not arraigned before him as an accused appeared to have committed the offence and also that he could be tried along with the accused already facing trial.

19. The Apex Court in Michael Machado and Another Vs. Central Bureau of Investigation and Another, made the position clear thus :

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 be tried along with the already arraigned accused.

Eventhough the Court is empowered to issue summons to a person who is not an accused to face trial with the other accused facing trial it does not mean that whenever a witness deposes the involvement of another person, the Court has to act upon that evidence and proceed against him. The evidence so adduced has to be appreciated in the proper perspective and the Court has to prima facie satisfy that there is evidence to proceed against that person. The power has to be exercised sparingly. It must be borne in mind that Court is not compelled to proceed against other person. The Apex Court in Michael Machado and Another Vs. Central Bureau of Investigation and Another, held:

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 other 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.

Advocate Sri. Ramakumar relying on the decision of the Apex Court in Mahant Amar Nath Vs. State of Haryana and Another, argued that when the special Judge on the evidence found that there is sufficient reason to proceed against revision petitioner, exercising the revisional power, this Court cannot appreciate the evidence as it has to be done at the end of the trial before pronouncing the

judgment. In Mahant Amarnath's case (supra) in the First Information Report lodged by one of the injured after investigation police submitted a final report u/s 173 against eight accused persons. The Police did not charge-sheet the appellant and three others whose names were shown in column (2) of the charge-sheet. Application was filed before the committal Court u/s 319 for a direction that appellant and three others shall also be arraigned as accused. The committal Court forwarded that application to the Sessions Court while committing the case to the Sessions Court. Before the Sessions Court another application was filed for pressing directions u/s 319. After recording the evidence of an injured eye witness, who gave sufficient details about the participation in the crime by appellant and others, Court passed an order directing that appellant and three other persons should be impleaded as accused and tried along with the 8 accused being tried before him. That order was challenged before the High Court in revision. The High Court confirmed the order passed by the Sessions Judge which was challenged by the appellant in Criminal Appeal before the Apex Court. The Apex Court found that though the statement made by the injured witness, recorded u/s 161 do not contain a statement against the appellant and others, there was sufficient material before the sessions Judge including the statement in the FIR as well as the statements of the other witnesses recorded u/s 161 of the Code implicating the appellants and others. The Apex Court on the facts held (Para 3 of AIR, Cri LJ) :

It was sought to be urged before us that the details given by Gobind Ram at the trial had not figured in his statement u/s 161 and, therefore, the Sessions Judge ought not to have given the impugned direction. But that aspect clearly falls within the domain of appreciation of evidence to be done finally at the end of the trial before pronouncing upon the guilt or otherwise of the concerned accused. It cannot be disputed that there was sufficient material before the learned sessions Court warranting the impugned direction.

20. The Apex Court in Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others, upholding the plea that 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 and the Court can take cognizance against them and try them along with the other accused, by exercising the power u/s 319(1) of the Code, it was held (Para 19 of Cri LJ) :

But, we would hasten to add that this is really an extra-ordinary 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.

The position has been reiterated in Krishnappa Vs. State of Karnataka, holding that the Court while examining an application u/s 319 has also to bear in mind that there is no compelling duty on the Court to proceed against other persons.

21. The legality of the impugned order passed by the learned special Judge has to be analysed in the light of the settled legal position. The learned special Judge as per the order dated 28-7-05 found that evidence of PW1 is not sufficient to invoke the power u/s 319 of the Code. PW2, who was examined later turned hostile to the prosecution. The learned special Judge has relied on his statement recorded u/s 164 of the Code the truthfulness of which was denied by him. That statement can only be used to contradict his evidence. But in the impugned order it was stated that it revealed that the names of the persons behind disappearance of Moulavi was revealed to him by the third accused. But evidence of PW 2 does not point out the involvement of revision petitioner or a conspiracy with revision petitioner. PW 3 is the third respondent. After completing the cross examination of that witnesses and finding that prosecutor did not ask her and the witness did not depose anything on the facts stated by her in her application filed u/s 319(1) of the Code learned special Judge on his own asked the witness as to what was the reason for her to file the petition. In answer to the Court question, PW 3 unveiled a case which she had not stated even in her petition filed before the special Judge. In cross-examination it was brought out that such a case was not recorded by the Investigators in any of her statement. First respondent, CBI has no case that she had made any such statement when her statements were recorded u/s 161 of the Code. What was claimed by PW 3 as revealed in answer to the Court question was that she was told about a conspiracy to do away with her husband. There is force in the argument of learned Counsel appearing for revision petitioner that if that case is true, atleast in the petition filed for invoking the powers u/s 319 of the Code she would have disclosed it. Whatever it be, even according to PW 3, she has no personal knowledge about the conspiracy or the involvement of the revision petitioner. As rightly argued by the senior counsel appearing for the revision petitioner even the special Judge who kept the petition to invoke the power at the appropriate stage did not act on the evidence and waited further. Evidence of PW 3 is insufficient to exercise the power to proceed against revision petitioner.

22. What remains is only the evidence of PW 4 in chief examination. Even if the evidence tendered in chief examination was accepted in toto, it does not reveal a conspiracy by revision petitioner with respondents 4 to 12. At best it could be said that revision petitioner had made a speech which was heard by the witness wherein he had criticized the deceased. It is not sufficient evidence to proceed against the revision petitioner invoking the exceptional power which has to be used only sparingly. On that evidence no Court could have taken a reasonable conclusion that revision petitioner appeared to have committed any of the offences. At the most it could be said that by the evidence a suspicion of instigation by the revision petitioner to his followers against the deceased were revealed. But it is insufficient to arrive at a prima facie finding that there was a conspiracy with revision petitioner and respondents 4 to 12. As rightly pointed out by the learned Counsel for the revision petitioner and respondents 4 to 12, there is no evidence that there was conspiracy by the revision petitioner along

with respondents 4 to 12. Even prosecution has no such case. There is no evidence with regard to the participation of revision petitioner, in any of the criminal offences alleged. As rightly pointed out, the conspiracy alleged is of respondents 4 to 12 as co-conspirators. If revision petitioner is to be included in the conspiracy, it can only be a new conspiracy. There was no evidence of such a conspiracy on record. At best it could be said that there is a hearsay evidence of a conspiracy at Markus, the head of the group of revision petitioner. Even if that is believed, it will not necessarily involve revision petitioner to proceed against him u/s 319 of the Code. A vague suspicion is insufficient to invoke the extraordinary power vested in the Court u/s 319 of the Code which is to be exercised sparingly. As there is no compelling reason for the Court to proceed against another person, who is not an accused, the learned special Judge should not have invoked Section 319 and proceeded against revision petitioner. As rightly pointed out there is no finding in the impugned order that prima facie there is evidence to show that there was a conspiracy by the revision petitioner along with other accused who are facing trial and that petitioner is to be tried along with them. The finding of the Court below is only that there are sufficient materials warranting an order directing summons to petitioner to be arrayed as 10th accused and to be tried along with the other accused. Court below arrived at that decision stating that PW 3 deposed that the son of the deceased had handed over some audio cassettes containing public speeches delivered by revision petitioner revealing the conspiracy to CBI and the Special Public Prosecutor produced 10 audio cassettes before the Court and the allegation against revision petitioner being one of conspiracy, if it is proved that in pursuance of the exhortations and instigations that his disciples would do away with the deceased for attaining purity or holiness in Islam, his disciples abducted the deceased who was not found thereafter and it would speak volumes on criminal conspiracy for abduction and murder and if he is not added as an accused and proceed against, it would be negation of criminal justice to PW 3. There is no separate criminal justice to PW 3. There cannot be a criminal justice for one individual. Even first respondent Investigating Agency, who produced the 10 audio cassettes stated in the order has no case that the audio cassettes reveal a conspiracy involving revision petitioner. The learned special Judge did not examine the contents of the audio cassettes. In such circumstance, it should not have found that the audio cassettes speak volumes on criminal conspiracy and abduction as well as murder. In any event those materials which were available at the time of taking cognizance, could not have been relied on without playing the audio and recording evidence on the contents of the cassettes. The materials definitely are insufficient to proceed against revision petitioner u/s 319 of the Code.

23. There was severe criticism on the procedure adopted by the learned special Judge in disposing the petition and invoking the power u/s 319(1) of the Code. On the facts and circumstances, the criticism cannot be said to be wholly unjustified. When chief examination of first prosecution witness was completed

Crl. M.P. 143/05 was filed by third respondent requesting the Court to exercise the power u/s 319 of the Code. The learned special Judge granted an opportunity to the investigating agency as well as accused to file objections to the petition and heard them and passed a very detailed order upholding the locus standi of the third respondent to file the petition. The special Judge specifically found that the powers conferred under the said section has to be sparingly used and that too in most compelling circumstances and the addition of an accused cannot be made for the mere asking and the evidence required in the section is not mere suspicion and suspicion however strong will not take the place of evidence and Court must have reasonable satisfaction from the evidence that the power u/s has to be invoked and that too to achieve criminal justice. The special Judge then found :

I am of the view that this stage is too premature to consider whether there is evidence within the meaning of Section 319(1) of Cr. P.C. for invoking the powers of this Court to add the person sought to be added as an accused.

As rightly argued by the learned Counsel appearing for revision petitioner and respondents 4 to 12 in view of that finding Court below should not have kept the petition pending waiting for an appropriate opportunity, to invite criticism that learned special Judge was not fair and was merely waiting for an opportunity to proceed against the petitioner. It is to be borne in mind that though the power u/s 319 of the Code could be exercised at the instance of even an accused as held by this Court in

Vasudevan Nair Vs. State of Kerala, the power is to be ultimately exercised by the Court which is a discretionary power and can be exercised only to achieve criminal justice. A party who files a petition u/s 319 of the Code is only inviting attention of the Court to the fact that Court should exercise the power to achieve criminal justice. The special Judge specifically found that at the time when the order dated 18-7-05 was passed, there is no evidence within the meaning of Section 319 to invoke the discretionary and exceptional power of the Court. If so, the special Judge should not have kept the petition pending and should have disposed the petition holding that the power cannot be exercised at that stage as sought for. If the Court has to exercise that power on the evidence later, it is not necessary that the petition has to be kept alive. At any stage, as provided u/s 319 of the Code, if the Court is satisfied that a person who is not an accused was involved in the offence and is to be tried as an accused along with the accused who are facing trial, the Court could have invoked the power u/s 319. For that purpose no petition by the prosecution or the defence or a third party is necessary. The procedure adopted by the learned special Judge was not transparent and it cannot be justified. The first order of the special Judge shows that there was no evidence to satisfy the Court that revision petitioner was involved in the offence. PW 2 was a hostile witness. At best what was available was his statement recorded u/s 164 of the Code, which cannot also be interpreted as an evidence contemplated u/s 319 sufficient enough to satisfy the

Court to invoke the power. PW 3 is the third respondent. From the fact that special Judge did not invoke the power u/s 319 even after completing the evidence of PW 3, it is clear that learned special Judge was not satisfied with that evidence also. What remained was only the evidence in chief examination of PW 4. Though chief examination by itself would be an evidence contemplated under the section, the Court could have afforded an opportunity to the accused to cross examine the witness, before implicating revision petitioner as an accused by exercising the power u/s 319 of the Code. There is substance in the argument of the learned Counsel appearing for the defence that the learned special Judge in the circumstance of the case could have waited atleast till PW 4 was cross-examined. It was not disputed that the version of PW 4 given in chief examination was absent in the statement of PW 4 recorded u/s 161 of the Code and cross-examination would have enabled the special Judge to appreciate the evidence in the proper perspective so that discretionary power u/s 319 of the Code could have been exercised legally and without inviting criticism. In the circumstances of the case, I do not find it necessary to go into that aspect further. Suffice to say that an experienced special Judge should have been more careful in these matters especially when the accused had approached this Court seeking transfer of the case attributing bias on the special Judge.

Criminal Revision Petition is allowed. The order of the Special Judge dated 26-7-05 in Crl. M.P. 143/05 in S. C. 309/03 summoning revision petitioner and arraigning him as accused is set aside. It is made clear that the dismissal of the petition does not mean that if sufficient evidence is adduced the learned special Judge is not entitled to proceed u/s 319(1) of the Code. It also does not mean that special Judge shall proceed u/s 319(1) of the Code. Send back the records to the Court below. Learned special Judge to proceed with the trial in accordance with law.