
(2020) 03 UK CK 0043

In the Uttarakhand High Court

Case No : Criminal Miscellaneous Application No. 1091, 848 Of 2015

Gaurav @ Nilwa & Others

APPELLANT

Vs

State Of Uttarakhand & Another

RESPONDENT

Date of Decision : 13-03-2020

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 161, 200, 201, 202, 319, 319(1), 482
Indian Penal Code, 1860 — Section 34, 302
Evidence Act, 1872 — Section 3

Citation : (2020) 03 UK CK 0043

Hon'ble Judges : Manoj K. Tiwari, J

Bench : Single Bench

Advocate : Karan Anand, Saurabh Pande, Dinesh Chauhan

Final Decision : Dismissed

Judgement

Manoj K. Tiwari, J

1. These criminal miscellaneous applications under Section 482 Cr.P.C. have been filed for quashing of the order dated 05.06.2015 passed by Ist

Additional Sessions Judge, Dehradun. The said order was passed in exercise of powers under Section 319 Cr.P.C. on an application filed by the

prosecution, whereby the applicants were summoned to face trial for an offence punishable under Section 302 read with Section 34 IPC.

2. The facts leading to the present applications in a nutshell are as under:-

One Mr. Tarun Kumar (brother of the deceased) lodged an FIR on 02.02.2014 at Police Station Dalanwala, Sadar, Dehradun against six accused

including the applicants herein, for the offence punishable under Section 302 IPC. It was alleged that on 02.02.2014 at about 03:40 P.M., the accused

persons, namely, Manoj, Babloo, Ankit, Nilwa, Sandeep and Bunty had beaten up

the deceased Nitin Kumar near the river, when Nitin Kumar ran away to save his life then the accused persons stopped him at Ratan Chowk, Nala Pani Road and stabbed him in the chest. The complainant stated in the FIR that he witnessed the said incident. Mr. Tarun Kumar in his statement under Section 161 Cr.P.C. also named all the six persons as accused. However, the Investigating Officer submitted charge-sheet under Section 302 read with Section 34 IPC against only two persons, namely, Manoj Kumar and Ajay Verma @ Bunty and name of other accused persons were excluded.

3. During trial, Mr. Tarun Kumar (complainant) was examined as PW-1. In his examination-in-chief, Mr. Tarun Kumar categorically stated that all the six persons named in the FIR had beaten up his brother Nitin and further that applicants had surrounded his brother Nitin when Manoj stabbed him in his chest. In cross examination also, he reiterated that he had named all the six persons in the FIR.

4. Based on the statement of the complainant during trial, prosecution moved an application under Section 319 Cr.P.C. for summoning the applicants.

Learned Additional Sessions Judge allowed the said application vide order dated 05.06.2015. This order has been put to challenge in both these criminal miscellaneous applications.

5. Heard learned counsel for the parties and perused the record.

6. Section 319 Cr.P.C. is extracted below:-

319. Power to proceed against other persons appearing to be guilty of offence. (1) Where, in the course of any inquiry into, or trial of,

an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried

together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub-section (1) thenâ?

(a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced.â??

7. Section 319 Cr.P.C. springs out from the dictum *Judex Damnatur-Cum-Mocus Absolvitur* (Judge is condemned where a guilty is acquitted).

Section 319 is an enabling provision which can be invoked by the Court only if evidence surfaces in the course of an inquiry or trial disclosing the

complicity of a person or persons other than the person or persons already arraigned before it. Section 319 deals with only one situation, namely, the

complicity coming to light from the evidence taken and recorded in the course of an inquiry or trial. This may happen not merely in cases where

despite the name of a person figuring in the course of investigation the investigating agency does not send him up for trial but even in cases where the

complicity of such a person comes to light for the first time in the course of evidence recorded at the inquiry or trial. Once the purport of Section 319

is so understood it is obvious that the scope of its operation or the area of its play would also be limited to cases where after cognizance the

involvement of any person or persons in the commission of the crime comes to light in the course of evidence recorded at the inquiry or trial. Thus the

section does not apply to all situations and cannot be interpreted to be repository of all power for summoning such person or persons to stand trial

along with others arraigned before the Court, as held by Honâ??ble Supreme Court in the case of *Kishun Singh v. State of Bihar* reported in (1993) 2

SCC 16 .

8. In the case of *Dev Wati v. State of Haryana* reported in (2019) 4 SCC 329 Honâ??ble Supreme Court has put a note of caution for exercising

power under Section 319(1) Cr.P.C. It has been held that although only a *prima facie* case is to be established from the evidence led before the

Court, it requires much stronger evidence than a mere probability of the complicity of the persons against whom the deponent has deposed. The test

that has to be applied is of a degree of satisfaction which is more than that of a *prima facie* case as exercised at the time of framing of charge, but

short of satisfaction to an extent that evidence, if goes un rebutted, may be lead to conviction of the proposed accused.

9. A constitution Bench of Honâ??ble Supreme Court in the case of Hardeep Singh v. State of Punjab reported in (2014) 3 SCC 92, while

considering the scope of Section 319 Cr.P.C., has held as under:

â??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. There is yet another set of provisions which form part of inquiry relevant for the purposes of Section 319 CrPC i.e. provisions of Sections 200,

201, 202, etc. CrPC applicable in the case of complaint cases. As has been discussed herein, evidence means evidence adduced before the court.

Complaint case is a distinct category of criminal trial where some sort of evidence in the strict legal sense of Section 3 of the Evidence Act 1872

(hereinafter referred to as â??the Evidence Actâ??) comes before the court. There does not seem to be any restriction in the provisions of Section 319

CrPC so as to preclude such evidence as coming before the court in complaint cases even before charges have been framed or the process has been

issued. But at that stage as there is no accused before the court, such evidence

can be used only to corroborate the evidence recorded during the trial (sic or) for the purpose of Section 319 CrPC, if so required. 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.

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 CrPC indicate 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.

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."

10. From the law laid down by Hon'ble Apex Court in Hardeep Singh's case (supra), it emerges that- (i) the Court can exercise power under

Section 319 Cr.P.C. even on the basis of the statement made in examination-in-chief of witnesses concerned; and (ii) Court need not wait till the cross

examination of such a witness and the Court need not wait for the evidence against accused proposed to be summoned to be tested by cross

examination and to a person not named in the FIR or a person so named in the FIR, but, to have not been charge-sheeted or a person who has been

discharged can be summoned under Section 319 Cr.P.C., provided from the evidence it appears that such person can be tried along with accused

already facing trial.

11. 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 person

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

Cr.P.C. and even those persons named in the FIR, but not implicated in the charge-sheet can be summoned to face trial provided during trial, some

evidence surfaces against the proposed accused.

12. In the present case, it cannot be said that learned trial Court has summoned the applicants in the absence of sufficient evidence on record. Brother

of the deceased who is a eye witness of the incident and who himself lodged the FIR has stated in his deposition before the trial Court that besides the

two persons who have been charge-sheeted, applicants were also involved in the crime. This evidence is sufficient for the trial Court to arrive at the

satisfaction that applicants also appear to be guilty of the offence. Learned trial Court has given cogent reasons for summoning the applicants.

13. Applying the law laid down by Honâ??ble Supreme Court to the facts of the case in hand, this Court is of the considered opinion that in the facts

and circumstances of the case, learned trial Court has not committed any error in summoning the applicants herein to face the trial along with other

accused. As observed hereinabove, the applicants herein were also named in the FIR, however, they were not shown as accused in the charge-sheet.

In his deposition before the Court, PW-1 has specifically named the applicants and specific role has been attributed to them. Thus, the statement of

PW-1 before the Court can be said to be â??evidenceâ? during the trial consequently on the basis of said evidence applicants can be summoned to

face the trial.

14. In view of the above discussion, this Court finds no infirmity in the order dated 05.06.2015 passed by learned trial Court.

15. Accordingly, these criminal miscellaneous applications under Section 482 Cr.P.C. are dismissed.