
(2019) 04 UK CK 0026

In the Uttarakhand High Court

Case No : Criminal Revision (CRLR No. 89 Of 2019)

Mani Pushpak Joshi

APPELLANT

Vs

State Of Uttarakhand

RESPONDENT

Date of Decision : 03-04-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 161, 164, 225, 301, 301(2), 302, 307, 319, 319(1), 372(2), 482
Indian Penal Code, 1860 — Section 120B, 302, 304B, 363, 366, 376(2)
Protection Of Children From Sexual Offences Act, 2012 — Section 3, 4, 5, 6, 33(1)

Citation : (2019) 04 UK CK 0026

Hon'ble Judges : Sharad Kumar Sharma, J

Bench : Single Bench

Advocate : Ramji Srivastava, A.K. Sah, Sachin Panwar

Final Decision : Dismissed

Judgement

Sharad Kumar Sharma, J

1. This is a Criminal Revision, which has been preferred by the revisionist as being aggrieved against the order dated 20.02.2019, as rendered by the Fast Tract Court/Additional Sessions Judge, POCSO, Haldwani, whereby the learned Sessions Judge while exercising his powers under Section 319 of the Code of Criminal Procedure, has summoned the revisionist for his alleged involvement in the commission of an offence under Section 376(2) of IPC to be read with Section 5/6 POCSO Act. Before going into the controversy and as argued by the learned counsel for the revisionist, certain essential facts are required to be dealt with so as to come to a logical conclusion with regard to the propriety of the summoning order under challenge dated 20.02.2019.

2. Briefly put, the case of the revisionist was that a FIR being FIR No. 138/2017 was registered under Section 376(2) IPC read with Section 5/6 POCSO Act was registered at Thana Haldwani, District Nainital as against one - Bablu Bisht, a teacher in the School, owned by revisionist, who is said to have been involved in

commission of an offence as referred above. As per the narration of the set of allegations levelled in the said FIR, it was alleged therein that Bablu Bisht, who was a teacher, working in a school, being run and managed by Ankit Joshi are said to have been involved in physically molesting a minor girl student of only 5½ years age, of the school run under the name and style of "Aurum The Global School, Haldwani".

3. The complainant to the said FIR i.e. Harpreet Singh, who is the father of the victim, had lodged an FIR alleging therein that for couple of months together, the accused - Bablu Bisht, was alleged in the FIR with allegation to be involved in commission of an offence under Section 376(2) with his minor daughter of the complainant, who was a student of Class-I. In terms of the FIR, as lodged on 19.04.2017, in the FIR, it was alleged that the daughter of the complainant named as Harlin Kaur, who was of only 5½ years of age and student of class I, has been mentally and physically exploited by the accused persons, named in the FIR, and particularly, as per the set of allegation which has been levelled it was against the teacher, who used to forcefully touched the private parts of the minor daughter of the complainant, and by taking her in the bathroom, he is accused of having committed the offence under Section 376(2) upon her. Not only this, the accused are also said to have threatened the victim and the complainant not to divulge the said incident to anyone, otherwise they would take severe action against the daughter of the complainant.

4. When the trial was proceeding, during the course of trial, a statement was recorded of the victim under Section 161 Cr.P.C. on 22.04.2017, which is reproduced hereunder:

"???? ?????? ????? ??? ?????? ?????? ?????? ?????? R/O ????? PWD ?????? ??
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? ??? ?? (??0 18/04/17 ??) ?? ?????? ?????? ?????? ??? ?????? ?????? ?????? ??? ?????? ?????
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????????? ?????? ?????? (????????) ?????? ?????? ?? ??? ?? ?????? ?? ?????? ?????????? ?? ?????? ?
? ?????? ??? ?????????? ?????? ?????? ?????? ?????? ??, ??? ???, ??? ?? ??? ?????? ??? ??? ??? ?
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?????? ?????? ???, ?????????? ?????????? ?????? ?????? ?? ??? ?????????? ?? ??? ?????? ?????? ?????
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????? ?? ? ?????? ?????? ??? ?? ?????? ?? ?????? ?????? ??? ? ?????? ?????? ?? ??? ?????? ?????????
?? ?????? ??? ?? ?? ??????, ?????????? ??? ??? ?????? ?????? ?????? ?????? ??? ?????? ?????? ??
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??? ??? ??? ?? ?????? ?? ??? ??? ?????? ?? ?????????? ??? ?? ?????? ?? ?? ?? ?????????? ??????
??? ??? ??? ??? ?????? ??? ?? ?????? ?"

Wherein, in her statement, she has submitted that she is a student of class-1 and she has stated that the said incident of physical exploitation had been

continued on her by the accused persons for couple of months together. The statement of victim was also recorded under Section 164 of Cr.P.C. as recorded before the learned Magistrate on 24.04.2017 which is reproduced hereunder:-

"?? ???? ???? ?? ??? ?????? ??????? ???? ??? ???? ???? ???? ???? ???? ???? ???? ????
?? ??? ?????? ?????? ??? ??? ???? ???? ?? ??? "Mam Can I go to washroom?" ??? ???
?????? ???? ??? ?????????? ?? ??? ??? ??? ??? ?????????? ??? ???? ??? ?? ?????? ??? ??
? ????? ???? ???? ???? ? ? ???? ?? ???? specs ???? ?? ?? ??
specs ???? ??? ?? ?????? ???? ?? ???? touch ???? ????
specs ???? ?? ???? ??? ??? ?? ?????? ??? ???? specs ???? ?? ???? touch ?????? ????
specs ???? ???? ???? touch ???? ???? ???? ???? ??-?? (private parts) ?? ???
touch ?????? ???? frock ???? ?? ??-?? ?? ??? touch ?????? ???? specs ???? ?? ??? ???
?? ??? ?? ?????? ???? ??-?? ?? ??? ?? ?????? ?????? ???? ???? ???? ???? ????
? ?? ?????? frock ?????? ??? ???? specs ???? ?? ???? Belt ?????? ??? ????
specs ???? ?? ???? Buttons ??? ?? T-Shirt ?????? ?? ???? press ?????? (Demeanour
- while stating above, the girl was pointing towards her chest/breast and showed
how the concerned person was pressing her chest, basically nipples
area.) ??? ????? specs ???? ?? ??-?? ???? ??? ?? ???? ?? touch ?????? ??? ??? ???? ?
?? ?? ???? ?? ???? ??? ? ???? ??? ?? ?????? ?? ?? ???? ??? ???? ?? ???? ????
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Help! ?????? ??? ??? ??? ???? ???? ???? ???? ???? ???? ???? ???? THREE DAYS L
ION ?? ??? ?????? ?? ???? ?? ?? ?? ???? ???? ???, ??? ???? ??? ?? ??? ??? ???? ??
? ???? ?? ???? ???? ???? ???? ???? ???? touch ???? ??? ????
specs ???? ?? ?????? ?? ?? ?????? (Fingers) ?? ??-?? ???? ??? ?? ?????? ???? ??? ????
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times ??? ???? ??? ???? ???? ??? ???-?? ?? ???? ????
Ground ??? ??? ?? ???? ??? ???? specs ???? ?? ???? eyes ??? ???? ??? ????
fingers ?????? ???? ???? ???? ???? ???? ???? ?????? rod ?? ?????? ???? ??" She
has reiterated the nature of allegations and the offences as narrated in the FIR,
as well as in her statement recorded under Section 161 Cr.P.C. Her statement
under Section 164 was certified by Court concerned. However, this Court on
reading the statement of the victim under Section 161 Cr.P.C. and under Section
164 Cr.P.C. there had been no inconsistency about the set of allegation levelled
by her against the accused persons.

5. The Investigating Officer, after investigation had submitted a detailed chargesheet being Chargesheet No. 175 of 2017 dated 09.07.2017 and as per the chargesheet, the offence was shown to have been made out as against the prime accused - Bablu Bisht who was said to have been established by evidence, which had come across during investigation. However, while conducting the investigation, the Investigating Officer has also recorded some strong findings against the Management of the Institution and their involvement in the commission of the offence. Consequently, on submission of the chargesheet by the Investigating Officer, the case was registered as Sessions Trial No. 17 of 2017, State Vs. Bablu Bisht @ Balwant Singh, which is at present pending trial before the Court of Fast Tract Court/Additional District and Sessions Judge/

Special Judge POCSO, Haldwani.

6. While the trial was proceeding, the prime accused - Bablu Bisht is said to have filed an application on 04.09.2017 by invoking the provisions contained under Section 319 Cr.P.C. read with Section 33(1) of the POCSO Act, wherein he had sought a prayer for summoning the other accused person namely Mani Pushpak Joshi, for the reasons detailed as under i.e. revisionist herein for he being tried for the commission of the aforesaid offence, the same is reproduced hereunder:-

"i. The IO deliberately did not conduct the TI Parade.

ii. The other accused person namely Mani Pushpak Joshi was left scot-free, which enabled him to tamper with the evidence.

iii. The IO have already disclosed that the other accused person namely Mani Pushpak Joshi was not present in the school on the date of incident i.e. 19.04.2017, whereas the crime took place with the child for about 4-5 months prior to the date of lodging the FIR.

iv. No reason was assigned by the IO for not arresting the other accused person namely Mani Pushpak Joshi, who was named in the FIR and whose photographs were identified by the victim at the time of recording of the statement u/s 161 Cr.P.C.

v. Not only this. The IO deliberately did not got the photographs of Mani Pushpak Joshi identified by the victim at the time of recording of the statement u/s 164 Cr.P.C. but despite that the victim have demonstrated the identity of the Mani Pushpak Joshi by denoting him as 'specs wala'.

vi. Despite statement of the victim u/s 164 Cr.P.C. regarding Mani Pushpak Joshi, he was not arrested.

vii. To the contrary, the victim was humiliated by the IO by confronting her with the other accused person namely Bablu Bisht at Hospital, which is not permissible under the POCSO Act also."

7. What is important herein is that the revisionist had in support of the application had placed reliance on the statement recorded by the victim under Section 161 Cr.P.C and under Section 164 Cr.P.C. wherein the prime accused - Bablu Bisht, has submitted that in accordance to the statement as deposed by the victim, she has also disclosed the presence of another person who was putting on the specs (sun glass), who too is said to have been involved in the commission of the offence. Even in the statement under Section 164 Cr.P.C., the victim has stated that there were two persons and the one, who was putting on the specs, was too involved in commission of the said offence.

8. In his application submitted before the learned Sessions Court, he has submitted that the Investigating Officer has not conducted the investigation in a fair manner and the Investigating Officer has deliberately tried to save the owner of the School, namely Mani Pushpak Joshi because once in the statement under

Section 161 and 164 Cr.P.C. recorded of the victim, once she has disclosed the presence of another person in the commission of the crime, the other person who was putting on specs, it was incumbent on the Investigation Officer to have conducted a TI parade which was not conducted in the present case before submission of the chargesheet.

9. According to the applicant/accused of the application under Section 319 of Code of Criminal Procedure, the entire allegation has been shifted upon the applicant/accused and the other person, who was equally responsible in the commission of an offence has been left scot-free. The complainant has in his application further expressed a doubt with regard to the report of the Investigating Officer, who has submitted that on the date of commission of the incident on 19.04.2017, the Investigating Officer has recorded that the present revisionist was not present though the set of allegation shows that at the time of occurrence the offence which was a continued offence which was carried out for a couple of months altogether the presence of second accused was consistently there.

10. In the application thus filed under Section 319, a reference has been made by the accused/applicant that for the purposes of prosecuting the accused persons, shown to be involved in the commission of an offence under Section 376(2) I.P.C. the sole testimony of the minor victim itself is sufficient to try the other accused for commission of said offence so as to arrive at a rightful conclusion so that complete justice be done, and all other accused who irrespective of they being influential person may not succeed to escape trial and hence he had submitted that the Court has been bestowed with sufficient powers under Section 319 of the Code of Criminal Procedure, wherein the Court, after going through the material on record, if the Court comes to a conclusion that there has been even remotest possibility of involvement of another person who can be equally responsible for the commission of offence, though may not have been named in the FIR or may not have been charge sheeted he too could be summoned by the Court.

"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-selection (1), then -
- (a) the proceedings in respect of such person shall be commenced afresh, and 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."

11. On a simple reading of the provisions contained under Section 319 of the Cr.P.C., it gives enough power to the trial Court to summon the accused or any other person who is not named in the FIR or not named in the chargesheet and when on scrutiny of the evidence and on placement of other material and on its consideration, which is placed before the trial Court. If the Court comes to a conclusion and is satisfied of the possibility of the involvement of the another person in the commission of an offence, it is always that after the satisfaction being recorded by the Court, it may proceed against such person by summoning him under Section 319 of Cr.P.C. so as to do complete justice, though Section 319 of the Cr.P.C. may be circumscribed with certain restrictions.

12. This Court is of the view that, what is relevant for the said purposes is that, it is exclusively within the domain of the Court to be satisfied that for the purposes of coming to a logical and justifiable conclusion pertaining to the commission of a crime and for dispensing complete justice. The presence of the unnamed accused and the necessity for him being tried is exclusively at the prerogative of the Court so as to hold a complete and a fair trial.

13. In the present case, when the trial was proceeding after the submission of the chargesheet on 17.07.2017, an Application under Section 319 of Cr.P.C. was filed by the accused/applicant, praying for that the revisionist may be summoned by invoking the provisions contained under Section 319 read with Sections 33 (1) of the POCSO Act. The accused/ applicant to the application had submitted that in the light of set of allegations which could be reflected from the statement of the victim under Section 161, as well as under Section 164 before the Magistrate as recorded on 24.04.2017, it apparently shows and discloses a relevant fact to the effect that there is an involvement and presence of a second person in the commission of the crime and no action has been proceeded against him and as per the statement of victim made under Section 164, it reflects the involvement of the revisionist. Hence, on account of various reasons which have been given in the application though not relevant for the present revision, the accused/ applicant had submitted that the Court can always invoke its powers under Section 319 from the view point that for a complete criminal administration of justice, it is a procedural in nature and lays on the parameters under which the Court should proceed in order to ultimately ventured and find out the involvement of the actual accused persons so that the truth may prevail and the accused persons may not escape trial due to their social influence which they exercise.

14. The basic purpose and legislative intent behind the provisions contained under Section 319 of Cr.P.C., where it vests the power with the Court to summon a person, the legislature has its intention behind that an actual accused should not be let out and an innocent person should not get punished. Hence the basic ideal and purpose behind which has been enshrined for incorporating Section 319, it acts as an innovative method and progressive tool with the Court can adopted for reasons to recorded to reach to the actual accused person and punished the guilty. This is the ratio which has been propounded by the constitution Bench of Hon'ble Apex Court in the case of Hardeep Singh Vs. State of Punjab and others as reported in AIR 2014 (3) SCC 92.

"105. Power under Section 319 Code of Criminal Procedure is a discretionary and an extra-ordinary 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 un rebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Code of Criminal Procedure In Section 319 Code of Criminal Procedure 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 Code of Criminal Procedure to form any opinion as to the guilt of the accused.

Q.(v) In what situations can the power under this section be exercised: Not named in FIR; Named in the FIR but not charge-sheeted or has been discharged?"

15. The learned counsel for the revisionist had placed reliance on a judgement as reported in (1999) 7 Supreme Court Cases 467, Shiv Kumar v. Hukam Chand and Another, wherein he has sought to place reliance on paras 2, 12, 13 and 14 of the judgement which are quoted hereunder:-

"2. In this case, appellant is aggrieved because a counsel engaged by him was not allowed by the High Court to conduct prosecution in spite of obtaining a consent from the Public Prosecutor concerned. First respondent was the accused in the sessions trial wherein appellant wanted his counsel's active role to be

played. Appellant and respondent are advocates practicing at the same station. The grievance of the appellant developed in the following fact situation:

Appellant is the brother of five sisters, and the youngest among them, Suman, had secured creditable academic laurels. She was given in marriage to Dr. Dinesh Kumar Gupta (the son of the respondent). But about 4 months after her marriage she met with a tragic death by burns. On a complaint lodged by the appellant, FIR under Section 302 and 120-B of the Indian Penal Code (IPC) was registered by the local police against the respondent. But after completion of the investigation a charge-sheet was laid against him for the offence under Section 304-B of the Indian Penal Code.

12. In the backdrop of the above provisions we have to understand the purport of Section 301 of the Code. Unlike its succeeding provision in the Code, the application of which is confined to magistrate courts, this particular section is applicable to all the courts of criminal jurisdiction. This distinction can be discerned from employment of the words "any court" in Section 301. In view of the provision made in the succeeding section as for magistrate Courts the insistence contained in Section 301(2) must be understood as applicable to all other courts without any exception. The first sub-section empowers the Public Prosecutor to plead in the court without any written authority, provided he is in charge of the case. The second sub-section, which is sought to be invoked by the appellant, imposes the curb on a counsel engaged by any private party. It limits his role to act in the court during such prosecution "under the directions of the Public Prosecutor". The only other liberty which he can possibly exercise is to submit written arguments after the closure of evidence in the trial, but that too can be done only if the Court permits him to do so.

13. From the scheme of the Code the legislative intention is manifestly clear that prosecution in a Sessions Court cannot be conducted by any one other than the Public Prosecutor. The legislature reminds the State that the policy must strictly conform to fairness in the trial of an accused in a Sessions Court. A Public Prosecutor is not expected to show a thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts involved in the case. The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the Court and to the investigating agencies but to the accused as well. If an accused is entitled to any legitimate benefit during trial the Public Prosecutor should not scuttle/conceal it. On the contrary, it is the duty of the Public Prosecutor to winch it to the force and make it available to the accused. Even if the defence counsel overlooked it, Public Prosecutor has the added responsibility to bring it to the notice of the Court if it comes to his knowledge, A private counsel, if allowed free hand to conduct prosecution would focus on bringing the case to conviction even if it is not a fit case to be so convicted. That is the reason why Parliament applied a bridle on him and subjected his role strictly to the instructions given by the Public Prosecutor.

14. It is not merely an overall supervision which the Public Prosecutor is expected to perform in such cases when a privately engaged counsel is permitted to act on his behalf. The role which a private counsel in such a situation can play is, perhaps, comparable with that of a junior advocate conducting the case of his senior in a court. The private counsel is to act on behalf of the Public Prosecutor albeit the fact he is engaged in the case by a private party. If the role of the Public Prosecutor is allowed to shrink to a mere supervisory role the trial would become a combat between the private party and the accused which would render the legislative mandate in Section 225 of the Code a dead letter."

16. If the said judgement is read in its totality and the foundation on which the issue was considered by the Hon'ble Apex Court, in fact, has been dealt in para 2 of the said judgement and it was a situation where the appellant's counsel had questioned the order passed by the High Court, which engaged a question as to whether the private counsel could be engaged by the prosecution in spite of obtaining the consent from the public prosecutor conducting the case.

17. In the said case, the accused before the Sessions Trial i.e. appellant therein, in fact, wanted to engage a private counsel to prosecute the opponents. The said judgement was considering the impact of the intention and the purpose of provisions of Sections 307 and 302 of the Cr.P.C. with regard to the entitlement and the scope of public prosecutors and their appearances and to plead before the Court. The Hon'ble Apex Court was also dealing with the issue pertaining to the impact of Section 302 where the permission to conduct the prosecution was mandatorily required to be taken from the Magistrate, who may depending upon the circumstances of the each case can permit the prosecution to be conducted by any other person other than the police officer, below the rank of Inspector in the said case or a public prosecutor may also avail the assistance but with the leave of the Court. That is why, in the conclusion, which has been drawn by the Hon'ble Apex Court in the case of Shiv Kumar (Supra) and as reported in its para 13 and 14 which are referred above, the Hon' Apex Court has held that if a private counsel is allowed to have free hand to conduct the prosecution it may result into a situation which would focus on bringing the case of conviction, if it is not a fit case to be so convicted. It is because of the aforesaid reasons, the law has imposed the restrictions of the prosecution being conducted by a private counsel but that too it was not an absolute bar in view of the provisions contained under Section 302 of the Code of Criminal Procedure. That is why, in the reasoning assigned by the Hon'ble Apex Court in para 14 of the said judgement, it has been held that if the private prosecutor is expected to conduct the case when a privately engaged counsel is permitted to act on his behalf. But despite of the permission, the public prosecutor will have the prime role in conducting the prosecution.

18. The ratio, as propounded in para 13 and 14 of the said judgement is not at all applicable in the present set of the circumstances of the case for the reason that in the case at hand the issue which was under consideration before the

Court was to the effect that as to whether the accused/applicant, who was facing the trial can draw the attention of the trial Court for the purposes of invoking the provisions contained under Section 319 of the Code of Criminal Procedure for summoning a person, who as per the contention of the applicant/accused also had a role to play in the commission of an offence. The law does not specifically create a bar that such type of an application cannot be moved at the behest of the complainant rather when such an application is moved its exclusively the prerogative to the Court to apply its mind and to assign the reasoning for issuing summons to other person not named in the chargesheet for prosecuting him. Thus, this judgement will not apply in the case at hand.

19. The learned counsel for the revisionist has made reference to the judgement as reported by the High Court of Judicature at Madras in the matters of Murugesan and others v. Malathi and others decided on 26.07.2017 in CrI. R.C. No. 1164 of 2010. In the said judgement, which was rendered by the Madras High Court on 26.07.2017 yet again the petitioner in the said application had suo moto filed a petition, seeking permission of the Court to assist the prosecution. While doing so, the respondents have filed their counter affidavit opposing the application on the ground that such an application for seeking permission for assist the prosecution would not be maintainable. Hence, questioning the said aspect, the matter traveled before the Hon'ble High Court and the High Court while deciding the judgement on 29.04.2010 had issued a direction to proceed in accordance with the process contemplated under Section 319 of the Cr.P.C. keeping in mind the direction as contained in the order of the Court.

20. The learned counsel for the revisionist in the present case had made a specific reference to para 9 of the aforesaid judgement which is quoted hereunder:-

"9. Following the rationale of judgments of Supreme Court extracted herein above and expressing our agreement with the view informed in the decision reported in 2001 CrI. LJ 4370, this Court would direct as follows:

(i) The order of learned Judicial Magistrate IV Salem, passed in C.M.P.No.2423 of 2010 in CC.No.161 of 2009 on 14.10.2010, is set aside.

(ii) It would be open to first respondent/de facto complainant to move a petition u/s.301 Cr.P.C. to assist the prosecution. Such application shall be considered by Court below on merits.

(iii) In the event of first respondent/de facto complainant being permitted to assist the prosecution, it would be open to her to bring to the notice of the Public Prosecutor the need for moving a petition u/s.319 Cr.P.C. It would then be for the Public Prosecutor to move such petition. In the event of the Public Prosecutor being of the view that it is not a fit case for moving a petition u/s.319 Cr.P.C., the remedy for respondent/de facto complainant would be by way of filing a petition u/s.482 Cr.P.C.informing her grievance.

(iv) If and when Court below decides to exercise powers u/s.319 Cr.P.C. on petition made before it or suo motu, it would be duty bound to follow the procedure informed therein."

21. The stress which has been made by the learned counsel for the revisionist in support of his contention was derived from sub clause (iii) of para 9 of the judgement rendered by the Hon'ble Madras High Court. In fact, as per the ratio propounded therein, yet it could be said that there was not an absolute bar because on moving of an application by the accused, in fact, would be pressed upon in an event if the public prosecutor being of the view that it is not a fit case for moving an application under Section 319 Cr.P.C. Rather if the said paragraph is read in view of the law as propounded therein, it was dealing with an issue where the public prosecutor arrives with a view that the application under Section 319, if it is dismissed the remedy for the respondents/de-facto complainant would be by way of filing of C482 application. In fact, this judgement too was not dealing with the issue and the ratio as involved in the present case with regard to the entitlement of the accused/applicant for filing of an application under Section 319 of Cr.P.C. which was altogether based on different facts as involved in the instant case.

22. Lastly, the learned counsel for the revisionist has placed reliance on a judgement rendered by Hon'ble Allahabad High Court in Criminal Revision No. 2300 of 2013, Pankaj Kumar Ra v. State of U.P. and Another. Specific reference which has been made by the learned counsel for the revisionist was to the contents of para 6, 7 and 15 of the said judgement which are quoted hereunder:-

"6. Firstly, he has contended that no permission was taken by the private counsel from the court to move an application under Section 319 Cr.P.C. which is violation of the provisions of section 301 Cr.P.C. and for this reliance has been placed upon the Judgment of Dhariwal Industries Limited Vs. Kishore Wadhwani and others 2017 (1) SCC (Cri) 116.

7. Secondly, it is contended that the jurisdiction under Section 319 Cr.P.C. has to be exercised sparingly, the same being of extra-ordinary nature not to be exercised in routine manner. For this he has relied upon the law laid down in Ram Singh and Others Vs. Ram Niwas and Another (2010) 1 SCC (Cri) 1278; Brijendra Singh and Others Vs. State of Rajasthan 2017 (100) ACC 601; and Smt. Bhagwati and Others Vs. State of U.P. and another 2017 (101) ACC 601.

15. By a bare reading of this provision, it is apparent that, if any, private person instructs his pleader/counsel to prosecute any person in any court, he shall act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor and not directly. In the above citation relied upon by the learned counsel for the revisionists, it is made clear that role of the complainant is limited under Section 301 of the Code. He cannot be allowed to take over control of the prosecution by directly addressing the Court, but he shall act under the direction of A.P.O., in-charge of the case. There is no denying the fact that in

Sessions Trial Cases, the Government Advocate is known as D.G.C. (Crl.) who conducts the prosecution and in case, the complainant of the case wants to engage a private counsel, such a counsel will have right to proceed in the case only through the learned D.G.C. (Crl.) and not directly. In the estimation of this Court, this position of law is affirmed by the above citation relied upon by the learned counsel."

23. In fact, in para 6 of the said judgement, the learned Single Judge of Allahabad High Court was considering the impact of an application filed under Section 319 by a private counsel without taking permission of the Court, which has been held by the Allahabad High Court being in violation of provisions contained under Section 301 of the Cr.P.C. because such an application by a private counsel could only be moved after seeking permission from the Court.

24. Another ratio, which has been laid down in para 7 of the said judgement was pertaining to the scope of Section 319 of Cr.P.C. wherein it has been held that the powers under Section 319 has to be sparingly exercised by the trial Court for summoning the accused or a person probably to be guilty of the commission of an offence while invoking Section 319 of the Act. The only precaution which has been propounded by in para 7 of said judgement on which the reliance has been placed was that the Court has to exercise its extreme caution and would not in a routine fashion entertain an application under Section 319 of Cr.P.C. The said ratio was laid down while considering the impact of the judgements referred therein in the paragraphs 7 of the said judgement.

Even if para 7 of the said judgement is taken into consideration, yet too it could be inferred that it is not create an absolute bar in entertaining the application under Section 319 but only lays down certain parameters which are to be followed by the trial Court for summoning of any person whom during the course of the trial and based on the evidence and material on record comes to the conclusion that there is a probability of conviction of the person so sought to be summoned in a particular case. If the rational of the para 7 of the said judgement is made applicable in the light of the surrounding circumstances of the present case, when the accused applicant moved an application for summoning the revisionist whose presence was shown to have been depicted by the victim in her statement under Sections 161 and 164 Cr.P.C. it is not that the Court has straightaway considered the application and had passed the impugned order. Rather to the contrary, records reveal that the Court has placed the application under Section 319 pending to be considered for passing of an appropriate order only after the appraisal of the evidence on record and their necessity to summon the person. Meaning thereby, that here too the Court had apply its mind, considered the evidence and the circumstances and in particular, the statement of victim, who was a small girl of 5½ years of age, who has, in her statement consistently maintained her stand that the present revisionist too was present at the time when the offence under Section 372(2) was committed on her. Hence also, the impugned order do not suffer from the defect pertaining to

taking of cognizance of an application under Section 319 filed by the accused/applicant because this Court is of the view that the source of the information would not be relevant in order to arrive at a logical conclusion and in order to meet the intention of the legislature that any person who could be convicted for commission of an offence should not be left scot-free. Hence, summoning the revisionist by the trial Court cannot be faulted with. Hence, this ratio as propounded in para 7 of the said judgement is of no assistance for the revisionist.

25. The reference to para 15 of the aforesaid judgment rendered by Hon'ble Allahabad High Court, the Allahabad High Court was dealing with the circumstances where the role of the complainant was being dealt with in the light of the provisions contained under Section 301 of the Code of Civil Procedure which intended that he cannot be permitted to takeover the control of the prosecution by directly addressing the Court but rather it had laid down the ratio that he shall act under the directions of Assistant Prosecuting Officer or the Prosecuting Officer himself and not otherwise.

26. If the reasoning of para 15 is read with the fact involved in the said case as referred in para 13 of the said judgement, it was from the view point that what would be the scope of filing of an application by the complainant under Section 319 of the Cr.P.C. by engaging a private counsel. This judgement too will not be applicable in the present circumstances of the case because here though the application was filed by the accused applicant but it was later on when the Court considered after appraising the evidences about the probability of the involvement of the present revisionist he was summoned, hence the Court does not find any error in the aforesaid judgement, consequently, this judgement too does not assist the reasoning of argument as extended by the learned counsel for the revisionist.

27. Looking to the circumstances which prevails in the instant case and which has direct nexus and relates to the commission of an offence under Section 376(2), it has been settled that for the purposes of trying an accused for his alleged involvement in the commission of said offence at the stage when trial Court is exercising powers under Section 319 of the Code of Criminal Procedure, the Court need not to venture into a detailed scrutiny of the evidences for summoning an accused as conviction or acquittal of an accused who is summoned under Section 319 would always be subject to the complete procedure of trial to be conducted by the Court, and that too only on establishment of the case. In view of the ratio which has been laid down by the Delhi High Court on which the reliance was placed by accused/applicant, in his Application under Section 319 read with Section 33(1) of the POCSO Act, was from the view point that at the stage when the Application under Section 319 is being considered, the sole testimony of the victim as recorded under Section 164, before the Magistrate itself is sufficient for the Courts to exercises the powers under Section 319 of the Cr.P.C.

28. It has postulated that until and unless there are compelling reasons and

circumstances which necessitates looking to the corroborations of the statement of the victim, there ought not to be any difficulty for the Courts to believe in the testimony of the victim who has been sexually assaulted and which ought to be taken as to be sufficient for summoning an accused, particularly when the victim is an innocent girl of 5½ years of age and student of 1st standard.

29. On the application thus filed by the applicant/complainant on 04.09.2017, the learned trial Court on considering the said application had passed an order to the effect that the said application and its propriety would be considered at the time when the Court ventures into the trial and then Court would consider the application at an appropriate stage. This order of the trial Court to consider the application under Section 319 of Code of Criminal Procedure at an appropriate stage had not be challenged or questioned by the revisionist as would be apparent from the impugned order dated 20.02.2019. The Court has recorded a finding that the applicant to the application under Section 319 had rather preferred a writ petition being WPCRL No. 833/2017, Harpreet Singh v. State of Uttarakhand and others before this Court being dissatisfied by the nature of investigation which was being carried out by the Investigating Officer, wherein he has filed a writ petition praying for entrusting the investigation to the CBI or CID. The said writ petition was disposed of as having rendered infructuous because in the meantime, during its pendency the investigation was completed by the investigating officer and the chargesheet was submitted against the accused/applicant of the application under Section 319 of Cr.P.C.

30. According to the finding which has been recorded in the impugned order certain glaring facts which has come on record is that as per the statement of PW-2 i.e. the victim, who had in her statement reiterated the presence of two persons and their involvement in the commission of an offence and also as per the statement of the father of the victim i.e. PW-1 who while referring on the statement of the victim under Section 164, has also supported the stand with regard to the presence of the second person who was putting on the specs and he has submitted that he was the owner of the School i.e. present revisionist. The learned trial Court, while considering the statements of PW-1 and PW-2 i.e. the victim and the complainant, in fact, had before passing any order on the application under Section 319 had considered the statement to the effect of the victim herself and has identified the present revisionist through his photographs which were placed on record.

31. What is relevant that the Court for the purposes of exercising powers under Section 319 of Cr.P.C. had recorded a finding that on the basis of statement of the victim PW-2 regards identification and of the presence of the present revisionist, the defence has perhaps not raised any question in their cross-examination in that regard. However, the application under Section 319 of Cr.P.C. filed by the complainant/applicant/accused was opposed by the counsel for the prosecution, but the learned trial Court has recorded a finding that so far as the tenability of the application and the necessity to summon a person who could

supposedly be involved in the commission of the offence it is absolutely within the domain of the trial Court to come to conclusion rationally after going through the material available before it and the accused either named in the FIR or in the chargesheet or anyone else is necessary for a complete trial thus the prosecution is not entitled to oppose the said application.

32. The learned trial Court considered the paper No. 19 Ka/58 which were the photographs which on being presented before the victim she has identified the revisionist as to be one of the person involved in the commission of the offence along with principal accused. On an overall scrutiny of the judgement under challenge the opinion expressed by the Court for the necessity to summon the revisionist cannot be faulted, because this Court is of the view that the learned trial court has got all wisdom and power under Section 319 that for a conclusion of a logical trial it has right to call upon any person whom the Court feels that there could be a possibility, and could be a person guilty of the commission of an offence, source of information would obviously depend on the material placed before the Court, which is quite apparent in the present case that from the finding recorded that there were sufficient material before the trial Court which were considered in quite detail and with reasons, to exercise its power under Section 319 of Code of Criminal Procedure. To controvert and to question the validity of the judgement impugned in the revision, the learned counsel for the revisionist has submitted that so far as the language under Section 319 is concerned for the purposes of the initiation of the proceedings for summoning of an accused not named in the chargesheet and for being tried for an offence it cannot be initiated on the basis of an application filed by the complainant/accused for summoning the accused who is not named in the FIR or in the chargesheet.

33. The principal intention and the ratio which was being argued by the learned counsel for the revisionist was that the said power has been exclusively vested with the trial Court only and the inception of proceedings under Section 319 cannot be at the behest of an application filed by the accused/applicant who himself is facing trial. In support of his contention, he has placed reliance on the judgement rendered by the Hon'ble Apex Court as reported in 2018 SCC Online 2547, Labhuji Amratji Thakor v. State of Gujarat. The Hon'ble Apex Court in the aforesaid judgement in its para 6 and 7 this Court is of the view that the Hon'ble Apex Court, while dealing with the aforesaid proposition has, in fact, held that in view of the judgement of the constitution bench rendered in Hardeep Singh's case (supra), wherever it appears to the Court, 'irrespective of the source of information', that any other person though not being an accused apparently seems to have committed an offence, he could be summoned by the Court based on the evidence which is produced before the Court.

34. On a scrutiny of the aforesaid ratio it could be inferred that the powers of the trial Court under Section 319, are the extraordinary powers which are to be exercised exclusively at the discretion of the Court so as to arrive at a rightful

conclusion, the source of information and the circumstances to exercise the power by the trial Court would always be based on scrutiny of evidence and material which are placed on record. The source of the information or the knowledge of an involvement of a person to the trial Court for exercising its extraordinary powers under Section 319, is immaterial for dispensation of justice, though not named in the chargesheet for the commission of an offence but he could always be summoned under Section 319 of the Cr.P.C. Particularly, a reference may be had to paras 6, 7, 9 and 12 of Labhuji Amratji Thakor (Supra), on which the reliance has been placed are quoted hereunder:-

"6. Section 319 Cr.P.C. provides that 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. The Court, thus, during the trial on the basis of any evidence is fully empowered to proceed against any person, whose name was not even included in the F.I.R. or the Charge Sheet. The parameters of exercise of power under Section 319 Cr.P.C has been explained by this Court time and again. It is sufficient to refer to Constitution Bench judgment in Hardeep Singh (supra), where this Court had considered the following issue amongst others:-

"6.4. (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 be convicted?"

7. The Constitution Bench judgment in the above judgment has held that under Section 319 Cr.P.C. Court can proceed against any person, who is not an accused in a case before it. The Constitution Bench, however, has held that the person against whom the Court decides to proceed, "has to be a person whose complicity may be indicated and connected with the commission of the offence".

9. The Constitution Bench has given a caution that power Under Section 319 Code of Criminal Procedure is a discretionary and extraordinary power, which should be exercised sparingly and only in those cases where the circumstances of the case so warrant. The crucial test, which has been laid down as noted above is "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 un rebutted, would lead to conviction." The present is a case, where the trial court had rejected the application filed by the prosecution Under Section 319 Code of Criminal Procedure Further, in the present case, the complainant in the F.I.R. has not taken the names of the Appellants and after investigation in which the statement of victim was also recorded, the names of the Appellants did not figure. After carrying investigation, the Charge Sheet was submitted in which the Appellants names were also not mentioned as Accused. In the statement recorded before the Police, the victim has named only Natuji

with whom she admitted having physical relations and who took her and with whom she went out of the house in the night and lived with him on several places. The mother of victim in her statement before the Court herself has stated that victim girl returned to the house after one and a half months. In the statement, before the Court, victim has narrated the entire sequence of events. She has stated in her statement that Accused Natuji used to visit her Uncle's house Vishnuji, where she met Natuji. She, however, stated that it was Natuji, who had given her mobile phone. Her parents came to know about she having been given mobile phone by Natuji, then they went to the house of Natuji and threatened Natuji. After one month, Natuji gave another mobile phone to the victim, who had taken it. She stated that in the night at 12 'o' clock, Natuji alongwith his three friends had taken her to Morbi in a jeep. She further stated that she and Natuji stayed for three days at the said place and Natuji had intercourse with her at the said place. When Natuji came to know about lodging of complaint, he took her to Modasa in the jeep. The jeep was given by Labhuji and other two Appellants were also in the jeep. She further stated that Labhuji, Shashikant and Jituji came in the jeep and took her and Natuji to the Police Station, where the police interrogated her and she recorded her statement. Natuji was charged with Sections 363 and 366 Indian Penal Code and Sections 3 and 4 of the POCSO Act.

12. The High Court does not even record any satisfaction that the evidence on record as revealed by the statement of victim and her mother even makes out a prima facie case of offence against the Appellants. The mere fact that Court has power Under Section 319 Code of Criminal Procedure to proceed against any person who is not named in the F.I.R. or in the Charge Sheet does not mean that whenever in a statement recorded before the Court, name of any person is taken, the Court has to mechanically issue process Under Section 319 Code of Criminal Procedure. The Court has to consider substance of the evidence, which has come before it and as laid down by the Constitution Bench in Hardeep Singh (supra) has to apply the test, i.e., "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 un rebutted, would lead to conviction." Although, the High Court has not adverted to test laid down by the Constitution Bench nor has given any cogent reasons for exercise of power Under Section 319 Code of Criminal Procedure, but for our satisfaction, we have looked into the evidence, which has come on record before the trial court as statements of PW3 and PW4. PW3 is mother of the victim, who has clearly stated that her daughter has informed that she was abducted by Appellants and Natuji, who had taken her to the Morbi in the vehicle of Labhuji. The statement of mother of the victim was an hearsay statement and could not have been relied for proceeding against the Appellants. Now, coming to the statement of victim, PW4, she has only stated that Natuji, the Accused had come along with his three friends, i.e. Appellants and she was taken in the jeep to Morbi. She does not even alleged complicity of the Appellants in the offence. Her further statement was that she was taken to Morbi

in the jeep driven by Labhuji and subsequently was taken to Modasa from Morbi in the jeep of Labhuji which also could not furnish any basis to proceed against the Appellants. The mere fact that the jeep, in which she was taken to Modasa, the Appellants were also present cannot be treated to be any allegation of complicity of the Appellants in the offence. The observations of the trial court while rejecting the application having that the application appears to be filed with mala fide intention, has not even been adverted by the High Court."

35. On reading of the judgement in its totality, it rather shows that its not an absolute bar that a probable accused cannot be summoned before the Court on the basis of the information which has been supplied to the Court by some any other source because the basic purpose of Section 319 is to have a fair trial and to punish the accused, who could actually be subsequently proved after trial to be involved in the commission of an offence thus the manner in which the learned counsel for the revisionist has made reference to the judgement in the case of Labhuji Amratji Thakor (Supra) altogether gives a different complexion and the interpretation to the provisions contained under Section 319 of the Cr.P.C.

36. Accordingly, this Court is of the view that the learned trial Court has not committed any mistake or error apparent which would call for interference in the present revision, hence this revision fails and is accordingly dismissed.