

(2019) 03 J&K CK 0018

In the Jammu And Kashmir High Court

Case No : Miscellaneous Criminal Cases (CRMC) No. 179 Of 2018, IA No. 01 Of 2018, Bail Application (B.A) No. 152 Of 2018

Mohd. Alyas And Another

APPELLANT

Vs

State Of Jammu & Kashmir

RESPONDENT

Date of Decision : 01-03-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 2(g), 6, 16, 161A, 164A, 319
Jammu And Kashmir State Ranbir Penal Code, 1989 — Section 376
Code Of Criminal Procedure, 1898 — Section 9, 351

Citation : (2019) 03 J&K CK 0018

Hon'ble Judges : Sanjay Kumar Gupta, J

Bench : Single Bench

Advocate : Murtaza A. Khan, Amit Gupta

Judgement

1. Heard.

2. Through the instant petition filed under Section 561-A Cr.P.C., petitioners seek quashment of order dated 20.03.2018 passed by the learned Sessions Judge, Poonch to array the petitioners as accused in a case titled, "State Vs. Mohd Habib" arising out of FIR No. 142/2017 Police Station, Mendhar under Section 376 RPC and consequent process issued against them, on the ground that the same is abuse of process of law.

3. The brief facts of the case are that on the basis of written complaint filed by the prosecutrix in due consultation of her policeman father and in presence of her mother on 11.08.2017; the respondent police lodged FIR No.142/2017 and started investigation of allegation of rape leveled against the sole accused named in the FIR. The investigation of the case was assigned to Sub-Inspector, Javed, who proceeded on spot, prepared the site plan, seized a rubber shoe of the prosecutrix, got her medically examined and recorded statements of some of the witnesses under Section 161-A Cr.P.C. It is submitted that the written complaint received by the police revealed that the accused named in the FIR as Mohd.

Habib, a driver by profession with a history of teasing the complainant, a class 12th student during her usual travelling in his public transport vehicle; forcibly entered into her rented accommodation during the night intervening 9th and 10th of August 2017 and committed rape on her during the course of the night, silenced her under threat and left in the morning. During the course of investigation, the aforementioned Investigating Officer also got the statement of prosecutrix recorded under Section 164-A Cr.P.C. To their utter surprise, the petitioners learnt that in her statement so recorded, prosecutrix had also roped in petitioner Nos.1 and 2 as accused leveling charges of attempted rape and rape respectively against them, besides making an allegation of rape against the accused named in the FIR. On coming to know about false and motivated statement having been made at the behest of the I.O. based on his animosity and ill-will against the petitioners, criminal proceedings initiated against him. The petitioners agitated the issue before this Court in a 561-A petition. The local SDPO constituted a five member Special Investigation Team (SIT) headed by the respondent SHO with two Sub-Inspectors and two ASIs as its members to carry out further investigation in the case by maintaining transparency.

4. During investigation, the SIT recorded the statements of sixteen (16) witnesses under Section 161-A Cr.P.C. While statements of four (4), more witnesses were recorded under Section 164-A Cr.P.C. Based on the forthcoming evidence in the form of statements of witnesses, expert opinion of the doctor and Call Detail Record, the SIT concluded that a case under Section 376 RPC was made out against accused, Mohd. Habib named in the FIR while the allegations leveled against the petitioners were found to be mala fide, baseless and motivated thus dropped. A challan was, accordingly, presented before the Competent Court.

5. It is further submitted that the SIT, while reaching at the conclusion of falsity of complainant's statement under Section 164-A Cr.P.C. and false implication of petitioners, elaborately dealt with the allegation, intention and motive of the prosecutrix and her family on the basis of cogent, plausible, natural and independent evidence in the form of statements of witnesses like her room-mate and documentary evidence. As soon as the case landed in the court of learned Sessions Judge, Poonch, the Public Prosecutor moved an application for arraying the petitioners as accused on the basis of statement of prosecutrix recorded under Section 164-A Cr.P.C. However, during the pendency of the aforementioned application, the statement of prosecutrix was recorded in the Court on 27.02.2018, wherein she retracted from her earlier statement against the accused-Habeeb to exonerate him but maintained her allegations against the petitioners. This statement, however, came about only as a consequence of an agreement between the complainant and accused families which was reduced in writing and registered with Notary Public at Mendhar on 19.02.2018. Pursuant to this agreement the accused family agreed to marry the prosecutrix and has paid a hefty amount of money as dower partially through cheque besides giving away a huge chunk of land and a house as dower to her. It is worthwhile to mention

here that the complainant's father has been sending feelers to the petitioners all along to compound the allegations by having her daughter depose favorably on payment of a hefty amount of money. Without looking into veracity, credibility and correctness of an apparently incredible, contradictory and unbelievable statement made by prosecutrix in sheer contrast the documentary evidence available on the file; and on the contrary version of nineteen old witnesses and documents proving innocence of the petitioners, the learned Sessions Judge rushed to pass order dated 20.03.2018, thereby arraying the petitioners as accused and issued the process.

6. The petitioners aggrieved by the aforesaid illegal, unreasoned, mechanical and arbitrary order passed to their detriment, the petitioners call into question the legality, propriety and correctness of the impugned order and consequence proceedings inter alia on the following grounds:

"(a)For that in, the absence of a prima facie case being made out for passing of the impugned order, issuing process, initiation and continuance of the proceedings being an abuse of the process of the court deserves to be set aside.

(b)For that the learned trial judge has based the impugned order solely on a retracted, contradictory, incredible and implausible statement of prosecutrix ignoring the credible documentary evidence to the contrary brought on record by none other than the prosecution itself.

(c)For that in the absence of any incriminating evidence coming on the file and in complete disregard to the whopping and voluminous oral and documentary evidence negating the false and mala fide allegations against the petitioners there was no occasion for the learned Session Judge to overturn the findings of Investigating Agency to the effect was the statement of prosecutrix made under 164-ACr.P.C. was an outcome of vengeance caused due to the petitioners? calling the police on the spot and exposing the complainant to what her family took as a cause of disrepute and shame.

(d)For that the learned Judge has been swayed by a bygone presumption of truthfulness of every victim of sexual harassment without looking into the veracity and credibility of her testimony specifically emphasized by the Apex Court of the country in its Judgment in cases like Vineet Kumar versus State of UP (2017), Prashant Bharti versus NCT of Delhi (2013), Sandeep Kumar @ Deepu versus NCT of Delhi (2009) etc.

(e)For that in the absence any evidence coming on the file leading even to mere suspicion warranting summoning of the petitioners as accused in heinous offence in a highly mechanical fashion is nothing but abuse of process of the court, hence the impugned order deserves to be set aside on this count along.

(f)For that learned Sessions Judge has failed to appreciate that the Investigating Agency while reaching at a definite conclusion of petitioners? innocence had rightly discarded the motivated 164-ACr.P.C. statement of prosecutrix and placed

no reliance on it in view of the cumulative evidence; but on the contrary the learned Judge proceeded in hot haste to rely on even a retracted statement rendering her testimony further doubtful.

(g)For that the learned trial Judge has lent undue, uncalled for, unreasonable credence to the retracted statement of the prosecutrix which glaringly contradicts the documentary evidence in the form of CDRs and expert opinion of the doctor.

(h)For that, the petitioners crave leave of this Court to alter or amend any of the foregoing grounds(s) or add to them during the currency of these proceedings.

7. I have considered the rival contentions of parties and gone through the law on the subject.

8. From the perusal of initial FIR, it is evident that on 11.8.2017 prosecutrix along with her mother gave a written complaint before SHO Mendhar against Mohd. Habib stating that she is student of 12th class; in the intervening night of 9/10.08.2017, she was alone in her room; said accused with criminal intention to commit rape on her threatened her and got opened the door of the room; he caught hold her and forcibly started trying sexual intercourse with her; he succeeded in committing rape on her. After that he threatened her that in case she will disclose this fact to anyone, she will be killed. Accused had kept a SUMO vehicle standing outside, in which he wanted to take her. She refused to go with him; on this he went away.

9. On this complaint, FIR no.142/2017 u/s 376 RPC was registered and investigation was commenced. During investigation statements of witnesses were recorded and as usual other proceedings were conducted during investigation. It further appears that during investigation statement of victim under section 164-A Cr.P.C. was recorded on 16.8.2017, where she stated that on 09.8.2017, she was reading holy Quran Pak in her room at Mendhar; suddenly one phone call from a boy was received; he asked her to come outside and listen him; the name of that boy was Mohd. Habib s/o Mohd Zubair r/o Kanati Mendhar; she refused and said that she will not come outside, but that boy forced her; meanwhile one Alyas s/o Mohd. Hussain (Petitioner No.1 herein) talked with her on same phone and asked her to come outside; Alyas has been residing in same vicinity where she has taken room; she went outside and saw three persons standing at gate and they were coming towards her; beside this Alyas, there was one more Alyas, whose father's name she does not know, however he was called as Fouji; on seeing them she tried to go inside; but Alyas caught hold her and kept his hands on her mouth and took her beneath a small Pulli (small bridge) and caught her from breast and kissed her and mis-behaved her; firstly Alyas committed rape with her and then Habib committed rape with her; thereafter Alyas (Fozi) also forcibly kissed her and tried to commit rape on her and also bite her; she made hue and cry and after listening hue and cry, many persons gathered there and on seeing them accused fled away. She came inside room and informed the parents on phone. Her parent came on next morning and she was asked not to go

outside room. Next morning she went to police station along with parents; she was not conscious at that time, so she does not know as to what she stated before police at that time. Prior to occurrence Alyas has threatened her that in case she will not talk with her, he will kidnap her.

10. Police accordingly registered FIR No.142/2017 under section 376 RPC against accused Mohd. Habib and investigation commenced. During investigation, police got conducted medical examination of the prosecutrix and report was obtained. Police also recorded the statement of prosecutrix and other witnesses under Section 161-A Cr.P.C. Accused Mohd. Habib accordingly was arrested on 11.08.2017 and his medical examination was conducted. Site plan was prepared. On 16.08.2017, statement of victim under section 164-A Cr.P.C. was recorded. The victim in her statement recorded under Section 164-A Cr.P.C. besides naming accused Mohd. Habib also named petitioners herein as accused persons. After recording of the statement of the victim under section 164-A Cr.P.C., the petitioners herein filed a petition before this Court and on 29.08.2017 this court restrained the police from filing challan. On the direction of higher officers, the investigation was transferred to Incharge Police Post Ari and during investigation police obtained call details of mobile number of victim and accused Mohd. Habeeb. Thereafter, on 22.09.2017 the investigation was transferred to SIT headed by Inspector Abid Hussain. SIT conducted the investigation and recorded the statements of Romesh Chander S/o Kaka; Mohd. Shafiq S/o Mohd. Akbar; Mohd. Mir S/o Mohd. Iqbal; Showkat Hussain S/o Mohd. Rafiq, who as per the statement of victim under section 164-A Cr.P.C., were present on spot. The Call details of accused persons namely Mohd. Alyas (Fouji) and Mohd. Ayas (SC) were also obtained. During the course of investigation, it was found that victim was a resident of Kalabanawa and was a student of 12th class. She was residing at her cousin's house in a rented room at Golad. Accused Mohd. Habib, who was a Sumo driver, had developed a relation with victim during travelling. He obtained the mobile number of victim on which he oftenly called her and told her that he will solemnize marriage with her. In the intervening night of 9/10.08.2017 accused Mohd. Habib made a phone call to victim at about 8.30 p.m. upto 10.45 p.m. and about 10.50 pm he asked her to come out of her room and come on the road side. Victim took holy Quran in her hand and came on the road side, which reveals that she wanted to swear in the name of holy Quran. Seeing the victim as well as the accused person in the late night by the eye witnesses of the village Golad, they went towards them and on seeing those eye witnesses, the accused person fled away; whereas victim hidden herself beneath the Pulli (small bridge). The petitioners herein against whom the allegations were leveled by the victim, were also present on spot, who thought that the victim may take adverse step, so they called the police. The Police came on spot and recovered victim beneath the Pulli. The victim was taken in the vehicle of Mohd. Alyas (Fouji) to the police station Mendhar and thereafter she was handed over to her legal heirs. It was found during investigation that victim had named petitioners herein in her statement recorded under Section 164-A Cr.P.C. because the victim thought that

the petitioners herein had informed the police and police took her to the police station. Due to taking of victim to the police station, the prestige of prosecutrix as well as her parents in the society has been ruined and she has been influenced by her parents to file the case against the petitioners also. Police also found during investigation that no other witness has verified the involvement of the petitioners in this case. Accused Mohd. Habeeb was arrested on 11.08.2017 and in the meanwhile High Court vacated stay of presentation of challan. Police accordingly filed the challan before the competent court of law against Mohd. Habeeb only. The accused Mohd. Habeeb was charge sheeted by the court below, who denied the accusation and prosecution was directed to produce the evidence. The statement of victim was recorded before Court wherein she stated on 27.02.2018 that she does not know accused present in court; she has never seen her; on 19.08.2017 at night 10 pm, she was reading Quran-Pak; suddenly she received one phone call from a unknown number; that caller asked her to come outside and listen him; she refused but he forcibly asked her to come outside; on this number SPO Alyas asked her to come outside and listen to him; she went outside at gate, where she saw three persons; out of three two were known to her and third was unknown to her and she saw him first time; out of two one was Alyas -Fozi and another was SPO Alyas; due to light she recognized them; she tried to run, but Alyas caught hold her and kept his hands on her mouth; all three took her beneath Pulli (small bridge); firstly Alyas committed rape on her, misbehaved her and kissed her; then another person whose name she does not know committed rape on her; she can recognize him if he is brought before her; then third person Alyas-Foji kissed her and tried to commit rape on her. Meanwhile she raised hue and cry then police came, she does not know as to who informed and called the police. She does not know as to whether she had seen all three of them or not. Accused on seeing police fled away and police took her to police station. However it was not police vehicle. Police neither asked anything from her nor recorded her statement. Her family came to know on next day; and she stated all the matter to him; her uncle is illiterate and police wrote the application and uncle put his signature. The application on which police asked her to put sign, was not read over to her. Police asked her that they knew the name of accused Habib and the name of rest of two accused have been mentioned in application. Police only asked her to put signature and there is no need to read the application. She on the asking of police put her signature. She has seen application in file; it bears her signature; police got recorded her statement before court; accused Alyas had already asked 2-3 times to talk with her and take his phone number. She refused and also insulted him; on this he has threatened her.

11. It is worthwhile to mention here that the main accused mentioned in FIR namely Habib, has already been granted bail by court below on the basis of statement of victim in court, as she categorically stated that she does not know him and she seeing him first time. But trial court in the meantime passed the impugned order on the application of PP, thereby arraying the petitioners as

accused and issued process against them on the basis of statement of victim recorded in court.

12. The impugned order dated 20.03.2018 reads as under:-

"Ld. PP for the State present. Accused present in custody. Counsel for the accused also present. On 04.01.2018 the Ld. PP has filed the application for arraying Mohd Alyas (SC) S/o Hassan Mohd R/oSalwah, at present Gholad Mendhar and Mohd Alyas (Foji) S/o Hassan Mohd R/o Salwah at present Gohlad, Tehsil Mendhar as accused in the case in the light of the statement of the prosecutrix recorded under Section 164-A Cr.P.C in which she has deposed against the above named persons. The counsel for the accused who is representing the present accused is directed to file the objections on the application moved by the Ld. PP for arraying the above named persons as accused who has filed the objections in which he resisted the application inter alia on the grounds that the police has dropped the above named persons during the investigation of the case and no doubt prosecutrix given the statement against these two persons under Section 164-A Cr.P.C in the Court of JMIC, Mendhar and the other witnesses have not given the statement against them and at this stage the police investigation in confusion and accused Mohd Habib be charge sheeted and if the prosecutrix will deposed against the above named persons then the accused can be arrayed at the stage of evidence.

On 07.02.2017 accused Habib has been charge sheeted for the commission of offence under Section 376 RPC. The accused denied the charges and claimed trial of the case, as such the prosecution was directed to lead its evidence and in the first instance the prosecution was directed to produce prosecutrix in the witness box. On 27.02.2018 the prosecutrix appeared in the case as witness and has categorically and candidly deposed against both the above mentioned persons for commission of rape with her. She has admitted the contents of her statement recorded under Section 164-A Cr.P.C before the Court of JMIC Mendhar in which she has also deposed against the accused persons.

It is trite law that in the commission of offence of rape it is the prosecutrix who is the star witness of the case and her statement at the stage of investigation has to be considered. Moreover, when she has appeared before the Judicial Magistrate and has very candidly unfolded all the events of the occurrence especially with regard to the commission of rape by the accused.

In view of the statement of the prosecutrix recorded before the court of JMIC Mendhar under Section 164-A Cr.P.C, this court in the case and the application made by the PP for arraying Mohd Alyas(SC) S/o Hassan Mohd R/oSalwah, at present Gholad Mendhar and Mohd Alyas (Foji) S/o Hassan Mohd R/o Salwah at present Gholad, Tehsil Mendhar as accused in the case is found appropriate and genuine. Therefore, I am of the considered opinion that both the accused are involved in the commission of offence and accordingly both the persons are arrayed as accused in the case. The application filed by the PP is disposed off

accordingly and shall form part of the main challan file.

Concerned clerk is directed to issued bail able warrants against the above named persons through SHO P/S Mendhar and in the meantime accused who is in custody be sent back to District Jail Poonch with the direction to produce him in the court on the next date of hearing i.e 29.03.2018."

13. From bare perusal of FIR, statement of victim under section 164-A Cr.P.C and that given during trial, it is evident that she has given three different versions. In FIR she has stated that, it is accused Mohd Habib committed rape with her in room; in her statement under section 164-A Cr.P.C, she has made material improvement and stated the petitioners herein were also there along with accused Mohd. Habib and committed rape on her; but in her statement before court during trial, she has stated nothing against Mohd. Habib, but has stated against petitioners who committed the offence of rape on her.

14. Section 351 of Cr.p.c reads as under:-

"351. Detention of offenders attending Court.- (I) Any person attending a criminal Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of inquiry into or trial of any offence of which such Court can take cognizance and, which, from the evidence, may appear to have been committed, and may be proceeded against as though he had been arrested or summoned.

(2) When the detention takes place after a trial has begun, the proceedings in respect of such person shall be commenced afresh, and the witnesses reheard."

15. From bare perusal of this section it is evident that court during trial has power to call any person as accused against whom evidence is produced, despite the fact that he has not been arrayed as accused in challan. Section 351 of State Cr.P.C. is pari-materia to section 319 of Central Cr.P.C.

16. Constitution Bench of Apex court in Hardeep Singh vs State of Punjab & Ors., on 10 January, 2014 (CRIMINAL APPEAL No. 1750 of 2008), has held as under:-

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

It is the duty of the Court to do justice by punishing the real culprit. Where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial. The question remains under what circumstances and at what stage should the court exercise its power as contemplated in Section 319 Cr.P.C.?

The submissions that were raised before us covered a very wide canvas and the learned counsel have taken us through various provisions of Cr.P.C. and the judgments that have been relied on for the said purpose. The controversy

centers around the stage at which such powers can be invoked by the court and the material on the basis whereof such powers can be exercised.

13. It would be necessary to put on record that the power conferred under Section 319 Cr.P.C. is only on the court.

This has to be understood in the context that Section 319 Cr.P.C. empowers only the court to proceed against such person. The word "court" in our hierarchy of criminal courts has been defined under Section 6 Cr.P.C., which includes the Courts of Sessions, Judicial Magistrates, Metropolitan Magistrates as well as Executive Magistrates. The Court of Sessions is defined in Section 9 Cr.P.C. and the Courts of Judicial Magistrates has been defined under Section 11 thereof. The Courts of Metropolitan Magistrates has been defined under Section 16 Cr.P.C. The courts which can try offences committed under the Indian Penal Code, 1860 or any offence under any other law, have been specified under Section 26 Cr.P.C. read with First Schedule. The explanatory note

(2) under the heading of "Classification of Offences" under the First Schedule specifies the expression "magistrate of first class" and "any magistrate" to include Metropolitan Magistrates who are empowered to try the offences under the said Schedule but excludes Executive Magistrates.

14. It is at this stage the comparison of the words used under Section 319 Cr.P.C. has to be understood distinctively from the word used under Section 2(g) defining an inquiry other than the trial by a magistrate or a court. Here the legislature has used two words, namely the magistrate or court, whereas under Section 319 Cr.P.C., as indicated above, only the word "court" has been recited. This has been done by the legislature to emphasise that the power under Section 319 Cr.P.C. is exercisable only by the court and not by any officer not acting as a court. Thus, the magistrate not functioning or exercising powers as a court can make an inquiry in particular proceeding other than a trial but the material so collected would not be by a court during the course of an inquiry or a trial. The conclusion therefore, in short, is that in order to invoke the power under Section 319 Cr.P.C., it is only a Court of Sessions or a Court of Magistrate performing the duties as a court under the Cr.P.C. that can utilise the material before it for the purpose of the said Section.

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

16. The legislature cannot be presumed to have imagined all the circumstances and, therefore, it is the duty of the court to give full effect to the words used by

the legislature so as to encompass any situation which the court may have to tackle while proceeding to try an offence and not allow a person who deserves to be tried to go scot free by being not arraigned in the trial in spite of possibility of his complicity which can be gathered from the documents presented by the prosecution.

17. The court is the sole repository of justice and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by manipulating the investigating and/or the prosecuting agency. The desire to avoid trial is so strong that an accused makes efforts at times to get himself absolved even at the stage of investigation or inquiry even though he may be connected with the commission of the offence."

17. Hon?ble Supreme Court, in Criminal Appeal No.763/2017 titled, "Brijendra Singh and ors. Vs. State of Rajasthan", decided on 27th April, 2017, reported in 2017 (7) SCC 706 has held as under:-

"12. The moot question, however, is the degree of satisfaction that is required for invoking the powers under Section 319 Cr.P.C. and the related question is as to in what situations this power should be exercised in respect of a person named in the FIR but not charge-sheeted. These two aspects were also specifically dealt with by the Constitution Bench in Hardeep Singh's case and answered in the following manner:

"95. At the time of taking cognizance, the court has to see whether a prima facie case is made out to proceed against the accused. Under Section 319 CrPC, though the test of prima facie case is the same, the degree of satisfaction that is required is much stricter. A two-Judge Bench of this Court in Vikas v. State of Rajasthan [(2014) 3 SCC 321], held that on the objective satisfaction of the court a person may be "arrested" or "summoned", as the circumstances of the case may require, if it appears from the evidence that any such person not being the accused has committed an offence for which such person could be tried together with the already arraigned accused persons.

xx xx xx

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

106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court, not necessarily tested on the anvil of cross-

examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes un rebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 CrPC. In Section 319 CrPC the purpose of providing if "it appears from the evidence that any person not being the accused has committed any offence" is clear from the words "for which such person could be tried together with the accused". The words used are not "for which such person could be convicted". There is, therefore, no scope for the court acting under Section 319 CrPC to form any opinion as to the guilt of the accused.

(emphasis supplied)"

13. In order to answer the question, some of the principles enunciated in Hardeep Singh's case may be recapitulated:

Power under Section 319 Cr.P.C. can be exercised by the trial court at any stage during the trial, i.e., before the conclusion of trial, to summon any person as an accused and face the trial in the ongoing case, once the trial court finds that there is some 'evidence' against such a person on the basis of which evidence it can be gathered that he appears to be guilty of offence. The 'evidence' herein means the material that is brought before the Court during trial. Insofar as the material/evidence collected by the IO at the stage of inquiry is concerned, it can be utilised for corroboration and to support the evidence recorded by the Court to invoke the power under Section 319 Cr.P.C. No doubt, such evidence that has surfaced in examination-in-chief, without cross-examination of witnesses, can also be taken into consideration. However, since it is a discretionary power given to the Court under Section 319 Cr.P.C. and is also an extraordinary one, same has to be exercised sparingly and only in those cases where the circumstances of the case so warrants. The degree of satisfaction is more than the degree which is warranted at the time of framing of the charges against others in respect of whom chargesheet was filed. Only where strong and cogent evidence occurs against a person from the evidence led before the Court that such power should be exercised. It is not to be exercised in a casual or a cavalier manner. The prima facie opinion which is to be formed requires stronger evidence than mere probability of his complicity.

14. When we translate the aforesaid principles with their application to the facts of this case, we gather an impression that the trial court acted in a casual and cavalier manner in passing the summoning order against the appellants. The appellants were named in the FIR. Investigation was carried out by the police. On the basis of material collected during investigation, which has been referred to by us above, the IO found that these appellants were in Jaipur city when the incident took place in Kanaur, at a distance of 175 kms. The complainant and others who supported the version in the FIR regarding alleged presence of the appellants at the place of incident had also made statements under Section

161Cr.P.C. to the same effect. Notwithstanding the same, the police investigation revealed that the statements of these persons regarding the presence of the appellants at the place of occurrence was doubtful and did not inspire confidence, in view of the documentary and other evidence collected during the investigation, which depicted another story and clinchingly showed that appellants plea of alibi was correct.

15. This record was before the trial court. Notwithstanding the same, the trial court went by the deposition of complainant and some other persons in their examination-in-chief, with no other material to support their so- called verbal/ocular version. Thus, the 'evidence' recorded during trial was nothing more than the statements which was already there under Section 161 Cr.P.C. recorded at the time of investigation of the case. No doubt, the trial court would be competent to exercise its power even on the basis of such statements recorded before it in examination-in-chief. However, in a case like the present where plethora of evidence was collected by the IO during investigation which suggested otherwise, the trial court was at least duty bound to look into the same while forming prima facie opinion and to see as to whether 'much stronger evidence than mere possibility of their (i.e. appellants) complicity has come on record. There is no satisfaction of this nature. Even if we presume that the trial court was not apprised of the same at the time when it passed the order (as the appellants were not on the scene at that time), what is more troubling is that even when this material on record was specifically brought to the notice of the High Court in the Revision Petition filed by the appellants, the High Court too blissfully ignored the said material. Except reproducing the discussion contained in the order of the trial court and expressing agreement therewith, nothing more has been done. Such orders cannot stand judicial scrutiny.

As a consequence, this appeal is allowed setting aside the order of summoning the appellants under Section 319 Cr.P.C."

18. While applying the above said principle of law, I am of the considered opinion, that order of trial court is not sustainable. Trial court has passed the order in a very casual manner without appreciating the statement of victim, who has given three different versions in the case. Trial court was, thus, obliged to ask the prosecution to produce more evidence in order to come to conclusion about prima facie evidence against these petitioners for being called under section 351 Cr.P.C. to stand trial in the case.

19. In view of above, the instant petition i.e. CRMC No.179/2018 is allowed. The order of calling the petitioners to stand trial in the case is set aside. Trial court shall ask the prosecution to produce more evidence, and only after prima facie satisfying itself that there is sufficient evidence and applying above law, then trial court shall pass such order afresh. The conduct of victim shall also be taken note while passing the order.

20. So far as Bail Application No.52/2018 is concerned, it has become

infructuous as applicant-Mohd. Habeeb has already been granted bail by Trial court on 16.08.2018. Disposed of as such.