

(2015) 03 GUJ CK 0015
In the Gujarat High Court

Case No : Special Criminal Application No. 2272 of 2011

Shankrabhai Kalabhai Rabari

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 30-03-2015

Acts Referred:

Constitution of India, 1950 — Article 21, 227

Criminal Procedure Code, 1973 (CrPC) — Section 161, 169, 173(2), 193, 200

Penal Code, 1860 (IPC) — Section 302, 307

Citation : (2015) 03 GUJ CK 0015

Hon'ble Judges : J.B. Pardiwala, J.

Bench : Single Bench

Advocate : P.P. Majmudar, for the Appellant; N.J. Shah, APP, Advocates for the Respondent

Final Decision : Allowed

Judgement

J.B. Pardiwala, J.—Rule. Mr. N.J. Shah, the learned APP waives service of Notice of Rule for and on behalf of the respondent No. 1-State of Gujarat. Mr. Ankit Bachani, the learned advocate waives service of Notice of Rule for and on behalf of the respondents Nos. 2 and 3-original accused.

2. By this application under Article 227 of the Constitution of India, the applicant an injured witness calls in question the legality and validity of the order dated 25th August, 2011 passed by the learned 4th (Ad-hoc) Additional Sessions Judge, Deesa Camp, Deodar below Exhibit-28 in Sessions Case No. 41 of 2010 by which the learned Judge rejected the application filed by the applicant herein under Section 319 of the Code of Criminal Procedure, 1973, praying to arraign the respondent No. 3 herein as an accused.

3. The facts giving rise to this application may be summarized as under:-

3.1 The respondents Nos. 2 and 3 are son and father. On 29th June, 2009, a First Information Report came to be registered with the Tharad Police Station, District:

Banaskantha vide C.R. No. I-79 of 2009 of the offence punishable under Sections 302 and 307 of the Indian Penal Code. The first informant is one Shri Bhembhai Rabari. To put it briefly, the case of the prosecution is that the original first informant, his wife and the applicant herein heard a commotion at the house of the respondent No. 2. On hearing the commotion they went at the house of the respondent No. 2. They saw that the respondent No. 2 had a knife in his hand and he threatened all the three persons that they dare not enter the compound of his house. The respondent No. 2-original accused further informed the first informant that his brother namely Kumpabhai had come at the house of the accused and the accused had inflicted injuries and had killed him. The respondent No. 2 also stated that he had also inflicted injuries with a knife on the body of the wife of the deceased namely Satiben.

4. It appears that thereafter the First Information Report came to be registered at the Police Station referred to above regarding the incident. On 1st July, 2009, the applicant herein preferred a representation addressed to the Inspector General of Police, Bhuj Range, Bhuj bringing it to his notice that the F.I.R. was not registered in accordance with and what was actually dictated by the first informant about the incident. It was pointed out that it was not only the respondent No. 2-original accused who was involved in the crime but his father namely Bhembhai was also armed with an axe and had inflicted injuries on the body of the deceased. In the representation, the applicant pointed out that for some unknown reasons the father of the original accused namely Bhembhai Rabari was not arraigned as an accused in the crime.

5. On conclusion of the investigation charge-sheet came to be filed only against the respondent No. 2 as an accused. The case was committed to the Court of the Sessions which came to be registered as the Sessions Case No. 41 of 2010.

6. It appears that thereafter on 10th June, 2010 charge came to be framed against the respondent No. 2 of the offence under Sections 302 and 307 of the Indian Penal Code. The recording of the oral evidence thereafter commenced. The first informant Vihabhai Hemabhai was examined by the prosecution as P.W. -6 and his evidence got concluded on 23rd February, 2011. Sankrabhai Kalabhai Rabari was examined as P.W. 7 and his evidence came to be concluded on 20th April, 2011. Satiben was examined as P.W.-8 and her evidence got concluded on 16th May, 2011. Mafabhai Rabari was examined as P.W. -9 and his evidence came to be concluded on 16th May, 2011.

7. In the deposition of all the four witnesses referred to above there is a reference of the respondent No. 3 having participated in the crime armed with an axe. All the four eye witnesses have deposed before the trial Court that along with Keshabhai, his father Hemabhai was also present at the time of incident armed with an axe and had inflicted injuries on the deceased. Of course, in their cross-examination they admitted that so far as the involvement of the respondent No. 3 was concerned there is no reference about the same in their statements recorded by the Police under Section 161 of the Code including the

First Information Report.

8. In such circumstances, the applicant one of the eye witnesses to the incident filed an application Exhibit-28 before the trial Court under Section 319 of the Code and prayed that the respondent No. 3 also be arraigned as an accused as there was sufficient evidence to put him to trial along with his son.

9. The trial Court adjudicated the application and thought fit to reject the same vide order dated 25th August, 2011.

10. Being dissatisfied the applicant has came up with the present application.

11. Mr. P.P. Majmudar, the learned advocate appearing for the applicant submitted that the trial Court committed a serious error in rejecting the application filed under Section 319 of the Code.

12. Mr. Majmudar submitted that from day one the case of the applicant and other eye witnesses is that the respondent No. 3 was also present at the time of the incident armed with an axe and had participated in the alleged crime. Mr. Majmudar submitted that for any reason the respondent No. 3 was dropped and no charge-sheet came to be filed against him. Mr. Majmudar submitted that in fact although he was named before the Police Officer yet the Police for some reason did not record the F.I.R. as narrated by the first informant. Mr. Majmudar submitted that even the Inspector General of Police, Bhuj Range, Bhuj did not act pursuant to the representation filed by the applicant in that regard.

13. Mr. Majmudar submitted that the trial Court under Section 319 has undoubted jurisdiction to add any person not being an accused before it to face the trial alongwith the other accused persons, if the Court is satisfied at any stage of the proceeding on the evidence adduced that the persons should be arrayed as accused to face the trial. According to Mr. Majmudar the only reason assigned by the learned trial Judge while rejecting the application is that in the Police statements as well as in the F.I.R. there is no reference of the respondent No. 3 and the name of the respondent No. 3 was being disclosed for the first time in the course of the recording of the oral evidence of the witnesses.

14. In such circumstances referred to above, Mr. Majmudar prays that there being merit in this application the same be considered and the impugned order be quashed.

15. This application has been vehemently opposed by Mr. Ankit Bachani, the learned advocate appearing on behalf of the respondent No. 3. He submitted that the trial Court committed no error in rejecting the application not to speak of any error of law. Mr. Bachani, submitted that the power under Section 319 of the Code to add any person not being an accused before the Court to face the trial is an extraordinary power and should be used very sparingly and only if compelling reasons exists for taking action against the person against whom action had not been taken earlier.

16. Mr. Bachani submitted that the evidence should be much stronger than the mere probability of complicity of a particular person sought to be added as an accused. He submitted that the first informant in his First Information Report has not said a word about the complicity of the respondent No. 3 and in the same manner the other witnesses have also not said a word about the complicity of the respondent No. 3 in their Police statements recorded under Section 161 of the Code. Mr. Bachani submitted that there is no plausible explanation given by the witnesses as regards the omission to name the respondent No. 3.

17. In such circumstances referred to above Mr. Bachani prays that there being no merit in this application the same be rejected.

18. This application has also been opposed by the learned APP, Mr. Shah appearing for the State. He submitted that the evidence of the witnesses does not inspire any confidence. According to the learned APP, the trial Court rightly rejected the application and no interference is warranted in exercise of the supervisory jurisdiction of this Court under Article 227 of the Constitution of India.

19. Having heard the learned counsel appearing for the parties and having gone through the materials on record the only question that falls for my consideration is whether the trial Court committed any error in passing the impugned order.

20. Section 319 of the Cr.P.C. insofar as it is relevant for the purpose of the present case reads as follows:-

"Section 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." The Section authorizes the Court making any inquiry into or conducting the trial of an offence to "proceed" against any person (other than the accused facing trial) subject to two conditions (1) that from the "evidence" it appears to the Court that such a person "has committed any offence", and (2) that such a person "could be tried together with the accused."

21. In Michael Machado and Another Vs. Central Bureau of Investigation and Another, construing the words "the court may proceed against such person" in Section 319 of the Code, the Supreme Court held that the power is discretionary and should be exercised only to achieve the criminal justice and that the court should not turn against another person whenever it comes across evidence connecting that other person also with the offence. The Supreme Court further held that a judicial exercise is called for, keeping a conspectus of the case, including the stage at which the trial has proceeded already and the quantum of evidence collected till then, and also the amount of time which the court had spent for collecting such evidence. The Supreme court, while examining an application under Section 319 of the Code, has also to bear in mind that there is

no compelling duty on the court to proceed against other persons. In a nutshell, for exercise of discretion under Section 319 of the Code all relevant factors including those noticed above, have to be kept in view and an order is not required to be made mechanically merely on the ground that some evidence had come on record implicating the person sought to be added as an accused.

22. The above principles were highlighted in *Krishnappa Vs. State of Karnataka*,

23. The scope and ambit of Sec. 319 of the Code have been elucidated in several decisions of the Supreme Court. In *Joginder Singh and Another Vs. State of Punjab and Another*, , it was observed:

"6. A plain reading of Sec. 319(1) which occurs in Chapter XXIV dealing with general provisions as to inquiries and trials, clearly shows that it applies to all the Courts including a Sessions Court and as such a Sessions Court will have the power to add any person, not being the accused before it, but against whom there appears during trial sufficient evidence indicating his involvement in the offence, as an accused and direct him to be tried along with the other accused....." 24. It was further observed in paragraph 9:

"9. As regards the contention that the phrase "any person not being the accused" occurred in Sec. 319 excludes from its operation an accused who has been released by the police under Sec. 169 of the Code and has been shown in column No. 2 of the charge-sheet, the contention has merely to be stated to be rejected. The said expression clearly covers any person who is not being tried already by the Court and the very purpose of enacting such a provision like Sec. 319(1) clearly shows that even persons who have been dropped by the police during investigation but against whom evidence showing their involvement in the offence comes before the Criminal Court are included in the said expression." 25. In *Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others*, after referring to the decision in *Joginder Singh's* case (supra), it was observed:

"19. In these circumstances, therefore, if the prosecution can at any stage produce evidence which satisfies the Court that the other accused or those who have not been arrayed as accused against whom proceedings have been quashed have also committed the offence the Court can take cognizance against them and try them along with the other accused. But, we would hasten to add that this is really an extraordinary power which is conferred on the Court and should be used very sparingly and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken. More than this we would not like to say anything further at this stage. We leave the entire matter to the discretion of the Court concerned so that it may act according to law. We would, however, make it plain that the mere fact that the proceedings have been quashed against respondent Nos. 2 to 5 will not prevent the court from exercising its discretion if it is fully satisfied that a case for taking cognizance against them has been made out on the additional evidence led before it." 26. I may quote with profit a decision of the Supreme Court in the

case of Sarabjit Singh and Another Vs. State of Punjab and Another, the observations made by the Supreme Court in paragraphs Nos. 17 and 17 are important:-

"17. The provision of Section 319 of the Code, on a plain reading, provides that such an extraordinary case has been made out must appear to the court. Has the criterion laid down by this Court in Municipal Corporation of Delhi (supra) been satisfied is the question? Indisputably, before an additional accused can be summoned for standing trial, the nature of the evidence should be such which would make out grounds for exercise of extraordinary power. The materials brought before the court must also be such which would satisfy the court that it is one of those cases where its jurisdiction should be exercised sparingly. We may notice that in Y. Saraba Reddy Vs. Puthur Rami Reddy and Another, , this Court opined:

"...Undisputedly, it is an extraordinary power which is conferred on the Court and should be used very sparingly and only if compelling reasons exist for taking action against a person against whom action had not been taken earlier. The word "evidence" in Section 319 contemplates that evidence of witnesses given in Court..."

An order under Section 319 of the Code, therefore, should not be passed only because the first informant or one of the witnesses seeks to implicate other person(s). Sufficient and cogent reasons are required to be assigned by the court so as to satisfy the ingredients of the provisions. Mere ipse dixit would not serve the purpose. Such an evidence must be convincing one at least for the purpose of exercise of the extraordinary jurisdiction. For the aforementioned purpose, the courts are required to apply stringent tests; one of the tests being whether evidence on record is such which would reasonably lead to conviction of the person sought to be summoned.

18. The observation of this Court in Municipal Corporation of Delhi (supra) and other decisions following the same is that mere existence of a prima facie case may not serve the purpose. Different standards are required to be applied at different stages. Whereas the test of prima facie case may be sufficient for taking cognizance of an offence at the stage of framing of charge, the court must be satisfied that there exists a strong suspicion. While framing charge in terms of Section 227 of the Code, the court must consider the entire materials on record to form an opinion that the evidence if unrebutted would lead to a judgment of conviction. Whether a higher standard be set up for the purpose of invoking the jurisdiction under Section 319 of the Code is the question. The answer to these questions should be rendered in the affirmative. Unless a higher standard for the purpose of forming an opinion to summon a person as an additional accused is laid down, the ingredients thereof, viz., (i) an extraordinary case, and (ii) a case for sparingly exercise of jurisdiction, would not be satisfied."

27. On a careful reading of Section 319 of the Code as well as the decisions of

the Supreme Court referred to above, it becomes clear that the trial Court has undoubted jurisdiction to add any person not being the accused before it to face the trial alongwith the other co-accused persons, if the Court is satisfied at any stage of the proceeding on the evidence adduced that the persons who have not been arrayed as an accused should face the trial. It is further evident that such person even though had initially been not named in the F.I.R. or named in the F.I.R. as an accused, but not charge-sheeted, can also be added to face the trial. The Trial Court can take such a step to add such persons as accused only on the basis of the evidence adduced before it and not on the basis of the materials available in the charge-sheet or the case diary, because such materials contained in the charge-sheet or the case diary do not constitute evidence.

28. The Power under Section 319 of the Code can be exercised by the Court suo motu or on an application by someone including the accused already before it. If it is satisfied that any person other than the accused had committed an offence he is to be tried together with the accused. The power is discretionary and such discretion must be exercised judicially having regard to the facts and circumstances of the case. Indisputably, it is an extraordinary power which is conferred on the Court and should be used very sparingly and only if compelling reason exist for taking action against a person against whom action had not been taken earlier. The word "evidence" in Section 319 contemplates that evidence of the witnesses given in the Court. Under sub-section (4)(1)(b) of the aforesaid provision, it is specifically made clear that it will be presumed that the newly added person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced. That would show that by virtue of sub-section (4)(1)(b) a legal fiction is created that cognizance would be presumed to have been taken so far as the newly added accused is concerned.

29. In the aforesaid context, I may quote with profit a recent pronouncement of the Supreme Court delivered by the Constitution Bench in the case of Hardeep Singh Vs. State of Punjab and Others etc. etc., .

30. The Constitution Bench of the Supreme Court answered a reference on the scope and extent of the powers of the courts under the criminal justice system to arraign any person as an accused during the course of inquiry or trial as contemplated under Section 319 of the Code.

31. A two-Judge Bench of the Supreme Court in Hardeep Singh Vs. State of Punjab and Others, , noticing the conflict between the judgments in Rakesh and Another Vs. State of Haryana, , and Mohd. Shafi, (2007) 14 SCC 544 expressed a doubt about the correctness of the view in the Mohd. Shafi Case. On consideration of the reference, a three-Judge Bench by order dated 8-12-2011 in Hardeep Singh, (2013) 4 SCC 277 opined that in view of the reference already made in Dharam Pal and Another Vs. State of Haryana and Another, , the issue involved being identical in nature, the same should be resolved by a Bench consisting of at least five Judges. The reference made in Dharam Pal and

Another Vs. State of Haryana and Another, came to be answered in relation to the power of a Court of Session to invoke Section 319 Cr.P.C. at the stage of committal of the case to a Court of Session. The said reference was answered by a five-Judge Bench in Dharam Pal and Others Vs. State of Haryana and Another, wherein it was held that a Court of Session can with the aid of Section 193 Cr.P.C. proceed to arraign any other person and summon him for being tried even if the provisions of Section 319 Cr.P.C. could not be pressed in service at the stage of committal.

32. The Constitutional Bench answered the following questions:-

- (i) What is the stage at which power under Section 319 Cr.P.C. can be exercised?
- (ii) Whether the word "evidence" used in Section 319(1) Cr.P.C. could only mean evidence tested by cross-examination or the court can exercise the power under the said provision even on the basis of the statement made in the examination-in-chief of the witness concerned?
- (iii) Whether the word "evidence" used in Section 319(1) Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?
- (iv) What is the nature of the satisfaction required to invoke the power under Section 319 Cr.P.C. can be exercised only if the court is satisfied that the accused summoned will in all likelihood be convicted?
- (v) Does the power under Section 319 Cr.P.C. extend to persons not named in the F.I.R. or named in the F.I.R. but not charged or who have been discharged?

33. In paragraph No. 117 of the judgment, the conclusions were summed up as follows:-

Question (i) and (ii)

--What is the stage at which power under Section 319 Cr.P.C. can be exercised?

AND

--Whether the word "evidence" used in Section 319(1) Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?

Answer

1. In Dharam Pal case, the Constitution Bench has already held that after committal, cognizance of an offence can be taken against a person not named as an accused but against whom materials are available from the papers filed by the police after completion of the investigation. Such cognizance can be taken under Section 193 Cr.P.C. and the Sessions Judge need not wait till "evidence" under Section 319 Cr.P.C. becomes available for summoning an additional accused.

2. Section 319 Cr.P.C., significantly, uses two expressions that have to be taken note of i.e. (1) inquiry (2) trial. As a trial commences after framing of charge, an inquiry can only be understood to be a pre-trial inquiry. Inquiries under Sections 200, 201, 202 Cr.P.C., and under Section 398 Cr.P.C. are species of the inquiry contemplated by Section 319 Cr.P.C. Materials coming before the court in course of such inquiries can be used for corroboration of evidence recorded in the court after the trial commences, for the exercise of power under Section 319 Cr.P.C. and also to add an accused whose name has been shown in Column 2 of the charge-sheet.

3. In view of the above position the word "evidence" in Section 319 Cr.P.C. has to be broadly understood and not literally i.e. as evidence brought during a trial.

Question (iii)--Whether the word "evidence" used in Section 319(1) Cr.P.C. could only mean evidence tested by cross-examination or the court can exercise the power under the said provisions even on the basis of the statement made in the examination-in-chief of the witness concerned?

Answer

4. Considering the fact that under Section 319 Cr.P.C. a person against whom material is disclosed is only summoned to face the trial and in such an event under Section 319(4) Cr.P.C. the proceedings against such person is to commence from the stage of taking of cognizance, the court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination.

Question (iv)--What is the nature of the satisfaction required to invoke the power under Section 319 Cr.P.C. to arraign an accused? Whether the power under Section 319(1) Cr.P.C. can be exercised only if the Court is satisfied that the accused summoned will in all likelihood be convicted?

Answer

5. Though under Section 319(4)(b) Cr.P.C. the accused subsequently impleaded is to be treated as if he had been an accused when the court initially took cognizance of the offence, the degree of satisfaction that will be required for summoning a person under Section 319 Cr.P.C. would be the same as for framing a charge. The difference in the degree of satisfaction for summoning the original accused and a subsequent accused is on account of the fact that the trial may have already commenced against the original accused and it is in the course of such trial that materials are disclosed against the newly summoned accused. Fresh summoning of an accused will result in delay of the trial therefore the degree of satisfaction for summoning the accused (original and subsequent) has to be different.

Question (v)--Does the power under Section 319 Cr.P.C. extend to persons not named in the F.I.R. or named in the F.I.R. but not charge-sheeted or who have been discharged?

Answer

6. A person not named in the F.I.R. or a person though named in the F.I.R. but has 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 the accused already facing trial. However, insofar as an accused who has been discharged is concerned the requirement of Sections 300 and 398 Cr.P.C. has to be complied with before he can be summoned afresh.

34. In the present case, I am more concerned with the discussion of the Supreme Court while answering the question No. 4 i.e. the degree of satisfaction required for invoking the power under Section 319 Cr.P.C.

35. The Bench observed as under:-

"93. Section 319(1) Cr.P.C. empowers the court to proceed against other persons who appear to be guilty of offence, though not an accused before the court. The word "appear" means "clear to the comprehension", or a phrase near to, if not synonymous with "proved". It imparts a lesser degree of probability than proof.

94. In *Pyare Lal Bhargava v. State of Rajasthan*, a four-Judge Bench of this Court was concerned with the meaning of the word "appear". The Court held that the appropriate meaning of the word "appears" is "seems". It imports a lesser degree of probability than proof. In *Ram Singh v. Ram Niwas*, a two-Judge Bench of this Court was again required to examine the importance of the word "appear" as appearing in the section. The Court held that for the fulfillment of the condition that it appears to the court that a person had committed an offence, the court must satisfy itself about the existence of an exceptional circumstance enabling it to exercise an extraordinary jurisdiction. What is, therefore, necessary for the court is to arrive at a satisfaction that the evidence adduced on behalf of the prosecution, if unrebutted, may lead to conviction of the persons sought to be added as the accused in the case.

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 Cr.P.C., 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*, 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.

96. In *Rajendra Singh*, the Court observed: (SCC p. 388, para 16)

"16. Be it noted, the Court need not be satisfied that he has committed an offence. It need only appear to it that he has committed an offence. In other words, from the evidence it need only appear to it that someone else has

committed an offence, to exercise jurisdiction under Section 319 of the Code. Even then, it has a discretion not to proceed, since the expression used is "may" and not "shall". The legislature apparently wanted to leave that discretion to the trial court so as to enable it to exercise its jurisdiction under this section. The expression "appear" indicates an application of mind by the court to the evidence that has come before it and then taking a decision to proceed under Section 319 of the Code or not."

97. In *Sarabjit Singh V. State of Punjab*, while explaining the scope of Section 319 Cr.P.C., a two-Judge Bench of this Court observed: (SCC pp. 54-55, paras 21-23)

"21.For the aforementioned purpose, the courts are required to apply stringent tests; one of the tests being whether evidence on record is such which would reasonably lead to conviction of the person sought to be summoned.

22. ...Whereas the test of prima facie case may be sufficient for taking cognizance of an offence at the stage of framing of charge, the court must be satisfied that there exists a strong suspicion. While framing charge in terms of Section 227 of the Code, the court must consider the entire materials on record to form an opinion that the evidence if unrebutted would lead to a judgment of conviction.

23. Whether a higher standard be set up for the purpose of invoking the jurisdiction under Section 319 of the Code is the question. The answer to these questions should be rendered in the affirmative. Unless a higher standard for the purpose of forming an opinion to summon a person as an additional accused is laid down, the ingredients thereof viz., (i) an extraordinary case, and (ii) a case for sparingly (sic sparing) exercise of jurisdiction, would not be satisfied.

(emphasis supplied)

99. In *Brindaban Das and Others Vs. State of West Bengal*, , a two-Judge Bench of this Court took a similar view observing that: (SCC p. 335, para 25)

"25 the court is required to consider whether such evidence would be sufficient to convict the person being summoned. Since issuance of summons under Section 319 Cr.P.C. entails a de novo trial and a large number of witnesses may have been examined and their re-examination could prejudice the prosecution and delay the trial, the trial court has to exercise such discretion with great care and perspicacity."

A similar view has been re-iterated by this Court in *Michael Machado and Another Vs. Central Bureau of Investigation and Another*, .

100. However, there is a series of cases wherein this Court while dealing with the provisions of Sections 227, 228, 239, 240, 241, 242 and 245 Cr.P.C., has consistently held that the court at the stage of framing of the charge has to apply its mind to the question whether or not there is any ground for presuming the

commission of an offence by the accused. The court has to see as to whether the material brought on record reasonably connect the accused with the offence. Nothing more is required to be enquired into. While dealing with the aforesaid provisions, the test of prima facie case is to be applied. The Court has to find out whether the materials offered by the prosecution to be adduced as evidence are sufficient for the court to proceed against the accused further. (Vide: State of Karnataka Vs. L. Muniswamy and Others, ; All India Bank Officers' Confederation and Others Vs. Union of India and Others, ; Stree Atyachar Virodhi Parishad Vs. Dilip Nathumal Chordia and Another, ; State of M.P. Vs. Dr Krishna Chandra Saksena, ; and State of Madhya Pradesh Vs. Mohanlal Soni, .

101. In Dilawar Balu Kurane Vs. State of Maharashtra, , this Court while dealing with the provisions of Sections 227 and 228 Cr.P.C., placed a very heavy reliance on the earlier judgment of this Court in Union of India (UOI) Vs. Prafulla Kumar Samal and Another, and held that while considering the question of framing the charges, the court may weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out and whether the materials placed before this Court disclose grave suspicion against the accused which has not been properly explained. In such an eventuality, the court is justified in framing the charges and proceeding with the trial. The court has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court but court should not make a roving enquiry into the pros and cons of the matter and weigh evidence as if it is conducting a trial.

102. In Suresh @ Pappu Bhudharmal Kalani etc. Vs. The State of Maharashtra, , this Court after taking note of the earlier judgments in Niranjana Singh Karam Singh Punjabi and Others Vs. Jitendra Bhimraj Bijja and others, and State of Maharashtra Vs. Priya Sharan Maharaj and Others, , held as under:

"9..... at the stage of Sections 227 and 228 the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. The Court may, for this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case. Therefore, at the stage of framing of the charge the Court has to consider the material with a view to find out if there is ground for presuming that the accused has committed the offence or that there is not sufficient ground for proceeding against him and not for the purpose of arriving at the conclusion that it is not likely to lead to a conviction."

(Emphasis supplied)

103. Similarly in State of Bihar Vs. Ramesh Singh, , while dealing with the issue, this Court held:

".....If the evidence which the Prosecutor proposes to adduce to prove the guilt

of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial....."

104. In *Palanisamy Gounder and Another Vs. State Represented by Inspector of Police*, this Court deprecated the practice of invoking the power under Section 319 Cr.P.C. just to conduct a fishing inquiry, as in that case, the trial court exercised that power just to find out the real truth, though there was no valid ground to proceed against the person summoned by the court.

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

106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court not necessarily tested on the anvil of Cross-Examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 Cr.P.C. In Section 319 Cr.P.C. 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 Cr.P.C. to form any opinion as to the guilt of the accused."

36. While answering question No. 5 as regard the situations, the power under Section 319 of the Code can be exercised:-not named in the F.I.R., named in the F.I.R. but not charge-sheeted or has been discharged.

"107. In *Joginder Singh and Another Vs. State of Punjab and Another*, a three-Judge Bench of this Court held that as regards the contention that the phrase "any person not being the accused" occurring in Section 319 Cr.P.C. excludes from its operation an accused who has been released by the police under Section 169 Cr.P.C. and has been shown in Column 2 of the charge-sheet, the contention has merely to be rejected. The said expression clearly covers any person who is not being tried already by the Court and the very purpose of enacting such a provision like Section 319(1) Cr.P.C. clearly shows that even persons who have been dropped by the police during investigation but against whom evidence showing their involvement in the offence comes before the criminal court, are

included in the said expression.

108. In *Anju Chaudhary Vs. State of U.P. and Another*, , a two-Judge Bench of this Court held that even in the cases where report under Section 173(2) Cr.P.C. is filed in the court and investigation records the name of a person in Column 2, or even does not name the person as an accused at all, the court in exercise of its powers vested under Section 319 Cr.P.C. can summon the person as an accused and even at that stage of summoning, no hearing is contemplated under the law.

109. In *Suman Vs. State of Rajasthan and Another*, , a two-Judge Bench of this Court observed that

"17.....there is nothing in the language of this sub-section from which it can be inferred that a person who is named in the F.I.R. or complaint, but against whom charge-sheet is not filed by the police, cannot be proceeded against even though in the course of any inquiry into or trial of any offence, the court finds that such person has committed an offence for which he could be tried together with the other accused."

110. In *Lal Suraj (supra)*, a two-Judge Bench held that there is no dispute with the legal proposition that even if a person had not been charge-sheeted, he may come within the purview of the description of such a person as contained in Section 319 Cr.P.C. A similar view had been taken in *Lok Ram (Supra)*, wherein it was held that a person, though had initially been named in the F.I.R. as an accused, but not charge-sheeted, can also be added to face the trial.

111. Even the Constitution Bench in *Dharam Pal (CB)* has held that the Sessions Court can also exercise its original jurisdiction and summon a person as an accused in case his name appears in Column 2 of the chargesheet, once the case had been committed to it. It means that a person whose name does not appear even in the F.I.R. or in the chargesheet or whose name appears in the F.I.R. and not in the main part of the chargesheet but in Column 2 and has not been summoned as an accused in exercise of the powers under Section 193 Cr.P.C. can still be summoned by the court, provided the court is satisfied that the conditions provided in the said statutory provisions stand fulfilled.

112. However, there is a great difference with regard to a person who has been discharged. A person who has been discharged stands on a different footing than a person who was never subjected to investigation or if subjected to, but not charge-sheeted. Such a person has stood the stage of inquiry before the court and upon judicial examination of the material collected during investigation; the court had come to the conclusion that there is not even a prima facie case to proceed against such person. Generally, the stage of evidence in trial is merely proving the material collected during investigation and therefore, there is not much change as regards the material existing against the person so discharged. Therefore, there must exist compelling circumstances to exercise such power. The Court should keep in mind that the witness when giving evidence against the

person so discharged, is not doing so merely to seek revenge or is naming him at the behest of someone or for such other extraneous considerations. The court has to be circumspect in treating such evidence and try to separate the chaff from the grain. If after such careful examination of the evidence, the court is of the opinion that there does exist evidence to proceed against the person so discharged, it may take steps but only in accordance with Section 398 Cr.P.C. without resorting to the provision of Section 319 Cr.P.C. directly.

113. In *Sohan Lal and others Vs. State of Rajasthan*, , a two-Judge Bench of this Court held that once an accused has been discharged, the procedure for enquiry envisaged under Section 398 Cr.P.C. cannot be circumvented by prescribing to procedure under Section 319 Cr.P.C.

114. In *Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others*, , this Court held that:

"19....if the prosecution can at any stage produce evidence which satisfies the court that those who have not been arraigned as accused or against whom proceedings have been quashed, have also committed the offence, the Court can take cognizance against them under Section 319 Cr.P.C. and try them along with the other accused."

115. Power under Section 398 Cr.P.C. is in the nature of revisional power which can be exercised only by the High Court or the Sessions Judge, as the case may be. According to Section 300(5) Cr.P.C., a person discharged under Section 258 Cr.P.C. shall not be tried again for the same offence except with the consent of the Court by which he was discharged or of any other Court to which the first-mentioned Court is subordinate. Further, Section 398 Cr.P.C. provides that the High Court or the Sessions Judge may direct the Chief Judicial Magistrate by himself or by any of the Magistrate subordinate to him to make an inquiry into the case against any person who has already been discharged. Both these provisions contemplate an inquiry to be conducted before any person, who has already been discharged, is asked to again face trial if some evidence appears against him. As held earlier, Section 319 Cr.P.C. can also be invoked at the stage of inquiry. We do not see any reason why inquiry as contemplated by Section 300(5) Cr.P.C. and Section 398 Cr.P.C. cannot be an inquiry under Section 319 Cr.P.C. Accordingly, a person discharged can also be arraigned again as an accused but only after an inquiry as contemplated by Sections 300(5) and 398 Cr.P.C. If during or after such inquiry, there appears to be an evidence against such person, power under Section 319 Cr.P.C. can be exercised. We may clarify that the word "trial" under Section 319 Cr.P.C. would be eclipsed by virtue of above provisions and the same cannot be invoked so far as a person discharged is concerned, but no more.

116. Thus, it is evident that power under Section 319 Cr.P.C. can be exercised against a person not subjected to investigation, or a person placed in the Column 2 of the Charge-Sheet and against whom cognizance had not been taken, or a

person who has been discharged. However, concerning a person who has been discharged, no proceedings can be commenced against him directly under Section 319 Cr.P.C. without taking recourse to provisions of Section 300(5) read with Section 398 Cr.P.C.

37. In the case of Babubhai Bhimabhai Bokhiria and Another Vs. State of Gujarat and Others, , the Supreme Court in para No. 9 made the following observations:-

"9. Section 319 of the Code confers power on the trial court to find out whether a person who ought to have been added as an accused has erroneously been omitted or has deliberately been excluded by the investigating agency and that satisfaction has to be arrived at on the basis of the evidence so led during the trial. On the degree of satisfaction for invoking power under section 319 of the Code, this Court observed that though the test of prima facie case being made out is same as that when the cognizance of the offence is taken and process issued, the degree of satisfaction under Section 319 of the Code is much higher." 38. I may also quote with profit a judgment of the Supreme Court in the case of Rajendra Singh Vs. State of U.P. and Another, more particularly, the observations of his lordship P.K. Balasubramanyan, J., while concurring with the reasoning and conclusion of his lordship G.P. Mathur, J. but by way of a separate judgment.

15. Section 319(1), which is relevant for our purpose reads:

"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."

As I see it, the words are plain and the meaning clear. When in the course of the enquiry or trial, it appears to the Court from the evidence that a person, not arrayed as an accused, appears to have committed any offence for which that person could be tried together with the accused, the Court may proceed against that person. Surely, it must appear to the Court from the evidence that someone not arrayed as an accused, appears to have committed an offence. Be it noted, the Court need not be satisfied that he has committed an offence. It need only appear to it that he has committed an offence. In other words, from the evidence it need only appear to it that someone else has committed an offence, to exercise jurisdiction under S. 319 of the Code. Even then, it has a discretion not to proceed, since the expression used is "may" and not "shall." The Legislature apparently wanted to leave that discretion to the trial Court so as to enable it to exercise its jurisdiction under this section. The expression "appears" indicates an application of mind by the Court to the evidence that has come before it and then taking a decision to proceed under S. 319 of the Code or not. With great

respect, I see no reason to describe the power as an extraordinary power or to confine the exercise of it only if compelling reasons exist for taking cognizance against any other person against whom action has not been taken. After all, the section only gives power to the Court to ensure that all those apparently involved in the commission of an offence are tried together and none left out. I see no reason to curtail this power of the Court to do justice to the victim and to the society. It appears to me that it is left to the judicial discretion of the Court, judicially trained, to decide to proceed or not to proceed against a person in terms of S. 319 of the Code."

16. The decision in *Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others*, which described the power as an extraordinary power to be exercised very sparingly and only if compelling reasons exist proceeded on its own peculiar facts. The broad statement contained in that decision cannot be understood out of context. That was a case where the very same proceeding against certain persons initially arrayed as accused, had been quashed. But, thereafter from the evidence, it appeared to the Court that some of them have to be tried as accused in exercise of power under S. 319 of the Code. This Court in that context after referring to *Joginder Singh and Another Vs. State of Punjab and Another*, held that if the prosecution can at any stage produce evidence which satisfies the Court that the other accused or those who have not been arrayed as accused against whom proceedings have been quashed, have also committed the offence, the Court can take cognizance against them and try them along with the other accused. This Court thus upheld the power of the Court to invoke S. 319 of the Code even in such a case. Their Lordships then added:

"But, we would hasten to add that this is really an extraordinary power which is conferred on the Court and should be used very sparingly and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken."

With respect, I understand this sentence as relating to exercise of the power under S. 319 of the Code in a case where the prosecution against the person sought to be arraigned, had earlier been quashed by the Court, but still he is to be roped in, in exercise of power under S. 319 of the Code.

17. These observations have unfortunately led to some decisions using these expressions, even in cases where there has not been a prior quashing of the charge and a proceeding is taken in terms of S. 319 of the Code. With respect, it appears to me that there is no warrant for such narrowing down of the power of the Court. After all, an authority has to be understood in the context of the facts based on which the observations therein are made. The ratio of a decision is generally *secundum subjectam materiam*.

18. In *Quinn v. Leathem* (1901) AC 495, Earl of Halsbury L.C. Stated:

"..... that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which

may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides."

The above dictum, as regards the first proposition, was "ed and adopted by the Privy Council in Punjab Co-operative Bank, Ltd. vs. Commissioner of(1940) 8 ITR 635 (Privy Council) .

19. The power under S. 319 of the Code is conferred on the Court to ensure that justice is done to the society by bringing to book all those guilty of an offence. One of the aims and purposes of the Criminal Justice System is to maintain social order. It is necessary in that context to ensure that no one who appears to be guilty escapes a proper trial in relation to that guilt. There is also a duty to render justice to the victim of the offence. It is in recognition of this that the Code has specifically conferred a power in the Court to proceed against others not arrayed as accused in the circumstances set out by this section. It is a salutary power enabling the discharge of a Court's obligation to the society to bring to book all those guilty of a crime.

20. Exercise of power under S. 319 of the Code, in my view, is left to the Court trying the offence based on the evidence that comes before it. The Court must be satisfied of the condition precedent for the exercise of power under S. 319 of the Code. There is no reason to assume that a Court trained in law would not exercise the power within the confines of the provision and decide whether it may proceed against such person or not. There is no rationale in fettering that power and the discretion, either by calling it extraordinary or by stating that it will be exercised only in exceptional circumstances. It is intended to be used when the occasion envisaged by the section arises.

39. I am not impressed with the submission canvased on behalf of the respondent No. 2, the proposed accused, that since the witnesses failed or omitted for any reason to name the respondent No. 2 as an accused in their statements recorded by the Investigating Officer under Section 161 of the Code, the oral evidence before the Trial Court involving the respondent No. 2 for the first time should be discarded.

40. The answer to the argument of the learned counsel appearing for the respondent No. 2 could be found in the observations made by the Supreme Court in para No. 8 in the case of Y. Saraba Reddy Vs. Puthur Rami Reddy and Another, .

"8. We find that the High Court has failed to notice the fact that there was in fact no delay in making the application. Though the charge sheet was filed on 7.11.1997, charges were framed on 25.8.2003. The order sheet shows that the delay cannot in any way be attributed to the complainant. There is a basic fallacy in the approach of the High Court. It called for the file to be satisfied as to whether the enquiry conducted was to be preferred to the evidence of PW-1. If

the satisfaction of the Investigating Officer or Supervising Officer is to be treated as determinative, then the very purpose of Section 319 of the Code would be frustrated. Though it cannot always be the satisfaction of the Investigating Officer which is to prevail, yet in the instant case the High Court has not found the evidence of PW-1 to be unworthy of acceptance. Whatever be the worth of his evidence for the purposes of Section 319 of the Code it was required to be analysed. The conclusion that the IO's satisfaction should be given primacy is unsustainable. The High Court was not justified in holding that there was belated approach."

41. In the present case while rejecting the application Exhibit-28, the learned trial Judge took into consideration the following aspects:

(i) the representation filed by the witnesses addressed to the Home Minister dated 1st July, 2009 as regards the perfunctory investigation and involvement of the respondent No. 2 in the crime did not inspire any confidence.

(ii) the Polygraph test conducted by the Investigating Officer and the witnesses revealed that the witnesses were not narrating the true version of the incident.

(iii) in the further statements recorded by the Investigating Officer the witnesses had not named the respondent No. 2 as one of the assailants alongwith his son.

(iv) the Investigating Officer and the other Police Officers' evidence is yet to be recorded.

42. It appears on plain reading of the impugned order that absolutely extraneous considerations weighed with the learned Judge in rejecting the application. The learned Judge has not only appreciated the entire evidence at this stage with a view to convince itself whether the respondent No. 2 should be arrayed as an accused or not but has doubted the veracity of the statements made by the witnesses in their oral evidence as a whole.

43. It appears that from day one the witnesses voiced a strong grievance that the respondent No. 2 although was involved in the crime yet for any reason was not charge-sheeted. A representation was also filed before the Highest Police Officer of the State including the Home Minister of the State Government in that regard. In the examination-in-Chief of all the four witnesses there is a clear statement that the respondent No. 2 was also present at the time of the incident alongwith his son, armed with an axe in his hand and had inflicted injuries on the body of the deceased. It is pertinent to note that the accused who is facing the trial at present is alleged to have been armed with a knife whereas the respondent No. 2, the proposed accused was armed with an axe.

44. The Doctor in his evidence has deposed that having regard to the nature of the injuries, it appears that two weapons were used in inflicting the injuries. This is prima facie suggestive of the fact that the axe alleged to be in the hand of the respondent No. 2 might have been used in inflicting the injuries.

45. As noted above although the power is an extraordinary and is used only if compelling reasons exists:-the factors which weighed with the trial Court does not appear to be relevant and, therefore, the trial Court did commit an error in rejecting the application Exhibit-28.

46. I have also noticed, one more infirmity in the impugned order. It appears that the Court issued notice and kept the application Exhibit-28 for reply and hearing. It also appears from the materials on record that the person sought to be arrayed appeared before the Court and filed his objections to the application Exhibit-28 in writing. Apart from that it also appears that his advocate made oral submissions before the Court opposing the application Exhibit-28. After taking into consideration the submissions made by the learned APP appearing for the State and also the submissions made by the learned advocate appearing for the person sought to be arrayed as an accused, the Court thought fit to reject the application.

47. In my view the procedure adopted by the trial Court was not only very unusual but something unprecedented. While deciding an application under Section 319 of the Code filed by the State or the first informant or any other person, the Court is not obliged to give an opportunity of hearing to the person who is sought to be arrayed as an accused. The person sought to be arrayed as an accused has no locus at that stage to appear before the Court and oppose such application. Mr. Bachani, the learned advocate appearing for the respondent No. 2, however, relying on a decision of this Court in the case of R.J. Lakhia Vs. State of Gujarat, , submitted that the Court committed no error in issuing notice and permitting the respondent No. 2 to file his reply and make oral submissions for the purpose of opposing the application Exhibit-28.

48. I am afraid the decision of this Court in the case of Lakhia (Supra) is no longer a good law in view of the two subsequent decisions of the Supreme Court (i) Raj Kishore Prasad Vs. State of Bihar and another, , wherein, the apex Court has observed as under:-

"addition of an accused by summoning or resummoning a discharged accused, and that too without hearing the accused, has only been permitted in the manner provided by Section 319, Cr.P.C. on evidence adduced during the course of trial, and in no other way." (ii) Anju Chaudhary Vs. State of U.P. and Another, in which the Supreme Court in paragraph No. 33 made the following observations:-

"Even in the cases where report under Section 173(2) of the Code is filed in the Court and investigation records the name of a person in column (2), or even does not name the person as an accused at all, the Court in exercise of its powers vested under Section 319 can summon the person as an accused and even at that stage of summoning, no hearing is contemplated under the law."

49. Thus, in view of the aforesaid two decisions of the Supreme Court, it is manifest that the person who is sought to be arrayed as an accused in exercise of the power under Section 319 of the Code has no right to be heard as he could

not be said to be an accused at that stage. The main purpose of Section 319 of the Code appears to be that the whole case against all known suspects should be proceeded with expeditiously. The provision thus intends to serve a laudable purpose. Not only the person who is sought to be arrayed as an accused has no right to be heard but even the person i.e. the accused who is already before the Court has also no say in the matter. The accused already facing the trial has also no right to oppose such application filed either by the State or by the first informant or by any witness.

50. It is quite disturbing to note that the incident is of the year 2009. The accused facing trial as on today is languishing in jail past almost six years. The disturbing part of the matter is that the impugned order is of year 2011 and this application remained pending up to 2015 without being heard.

51. In my view the High Court should not grant a blanket stay against the progress of the trial. By granting such a blanket stay while considering the matter arising from the provisions of Section 319 of the Code, the right to speedy trial of the accused already before the trial Court gets infringed. This is exactly what has happened in the present case. I am saying so considering the decision of the Supreme Court in the case of Babhubhai Bokheria (Supra). The Supreme Court has explained the expression "could be tried together" appearing in Section 319 of the Code. The Supreme Court by relying on its earlier decision in the case of Shashikant Singh Vs. Tarkeshwar Singh and Another, , took the view that it is not necessary or mandatory that the person who is sought to be arrayed as an accused under Section 319 should be tried with the accused already facing the trial.

52. I may quote the observations made by the Supreme Court in paragraphs Nos. 12, 13, 14, 16, 17, 18:-

"12. Time now to deal with the contention urged by Mr. Singhvi, that the expression "could be tried together" appearing in Section 319 of the Cr.P.C. means that the newly added accused must be tried along with the accused already sent up for trial. The question is no longer res integra in the light of the judgment of this Court in Shashikant Singh Vs. Tarkeshwar Singh and Another, , where this Court was examining a similar contention that failed to impress this Court and was rejected in the following words:

"9. The intention of the provision here is that where in the course of any enquiry into or trial of, an offence, it appears to the court from the evidence that any person not being the accused has committed any offence, the court may proceed against him for the offence which he appears to have committed. At that stage, the court would consider that such a person could be tried together with the accused who is already before the court facing the trial. The safeguard provided in respect of such person is that, the proceedings right from the beginning have mandatorily to be commenced afresh and the witnesses reheard. In short, there has to be a de novo trial against him. The provision of de novo trial is mandatory.

It vitally affects the rights of a person so brought before the court. It would not be sufficient to only tender the witnesses for the cross-examination of such a person. They have to be examined afresh. Fresh examination-in-chief and not only their presentation for the purpose of the cross-examination of the newly added accused is the mandate of Section 319(4). The words "could be tried together with the accused" in Section 319(1), appear to be only directory. "Could be" cannot under these circumstances be held to be "must be". The provision cannot be interpreted to mean that since the trial in respect of a person who was before the court has concluded with the result that the newly added person cannot be tried together with the accused who was before the court when order under Section 319(1) was passed, the order would become ineffective and inoperative, nullifying the opinion earlier formed by the court on the basis of the evidence before it that the newly added person appears to have committed the offence resulting in an order for his being brought before the court."

13. The Court distinguished the earlier decisions rendered in *Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and Others*, and *Michael Machado and Another Vs. Central Bureau of Investigation and Another*, in the following words:

"13. Reliance by learned counsel for Respondent 1 has been placed on *Municipal Corpn. of Delhi v. Ram Kishan Rohtagi* in support of the contention that Respondent could be tried only with Chandra Shekhar Singh and his trial having concluded, Respondent 1 cannot be now tried pursuant to order under Section 319(1) of the Code. This Court in the cited decision was not concerned with the issue which has fallen for consideration before us. The same is the position in respect of *Michael Machado v. Central Bureau of Investigation*. There this Court considered the scope of the provision as to the circumstances under which the court may proceed to make an order under Section 319 and not the question as to the effect of the conclusion of the trial after passing an order under Section 319(1). None of these decisions have any relevance for determining the point in issue."

14. To the same effect is the decision of this Court in *Rajendra Singh Vs. State of U.P. and Another*, , where too a similar question arose for consideration. Relying upon the decision of this Court in *Shashikant Singh Vs. Tarkeshwar Singh and Another*, this Court held:

"11....The mere fact that trial of co-accused Daya Singh has concluded cannot have the effect of nullifying or making the order passed by learned Sessions Judge on 26.5.2005 infructuous".

16. There is another angle from which the matter can and must be examined. The prosecution has already examined as many as 134 witnesses at the trial. In terms of the ratio of the direction of this Court in *Shashikant Singh's* case (*supra*) with the addition of the petitioner as accused all those witnesses shall have to be recalled for a fresh examination. If that be so, the trial would go on

for a few more years having regard to the number of witnesses that have to be examined. This would in turn mean that the right of the accused to a speedy trial, that they have laboured to complete within six years or so, will be in serious jeopardy on account of the entire process being resumed de novo. Such a result is manifestly unjust and unfair and would be perilously close to being in violation of the fundamental rights guaranteed to the accused persons who cannot be subjected to the tyranny of a legal process that goes on endlessly for no fault of theirs. This Court has in several pronouncements emphasised the need for speedy trials in criminal cases and recognised the same as an integral part of the right to life itself. In *Hussainara Khatoon and Others Vs. Home Secretary, State of Bihar, Patna*, this Court held that an expeditious trial is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21 of the Constitution. In *Abdul Rehman Antulay Vs. R.S. Nayak and another etc. etc.*, this Court declared that speedy trial is not only the right of the accused but is also in public interest and that the right to speedy trial flowing from Article 21 encompasses all the stages, namely, the stage of investigation, inquiry, trial, appeal, revision and retrial. In *Sher Singh and Others Vs. State of Punjab*, this Court sounded the following note of caution against delay of criminal trials:

"16...The essence of the matter is that all procedure, no matter what the stage, must be fair, just and reasonable...Article 21 stands like a sentinel over human misery...It reverberates through all stages the trial, the sentence, the incarceration and finally, the execution of the sentence."

17. To the same effect are the decisions of this Court in *Javed Ahmed Abdul Hamid Pawala Vs. State of Maharashtra*, and *Triveniben Vs. State of Gujarat*. Even in cases where the accused had been enlarged on bail the right to a speedy trial was held to be a part of the fundamental right under Article 21 of the Constitution. The decisions of this Court in *Biswanath Prasad Singh Vs. State of Bihar*, and *Mahendra Lal Das Vs. State of Bihar and Others*, may be referred to in this regard.

18. It is in the light of the settled legal position no longer possible to question the legitimacy of the right to speedy trial as a part of the right to life under Article 21 of the Constitution. The essence of Article 21 of the Constitution lies not only in ensuring that no citizen is deprived of his life or personal liberty except according to procedure established by law, but also that such procedure ensures both fairness and an expeditious conclusion of the trial. It is in that backdrop not possible to countenance a situation where addition of Babubhai Bhimabhai Bokhiria as an accused to the case at hand would lead to an indefinite suspension of trial and eventual recall of 134 witnesses already examined against the applicant who has been in jail for over six years now. There is, therefore, no reason for a blanket stay against the progress of the trial before the courts below qua other accused persons."

53. In the result, this application is allowed. The order passed by the learned 4th (Ad-hoc) Sessions Judge Deesa Camp Deodar dated 25th August, 2011 below

Exhibit-28 in Sessions Case No. 41 of 2011 is hereby quashed and set aside. The application Exhibit-28 filed by the prosecution for summoning the respondent No. 2 as an accused in Sessions Case No. 41 of 2010 is hereby allowed. The trial Court shall proceed further in accordance with law.

54. In such circumstances referred to above, the trial Court is directed to proceed further at the earliest and see to it that the entire trial is completed with judgment on or before 30th June, 2015. Rule is made absolute.

After the pronouncement of this order Mr. Bachani, the learned advocate appearing for the respondent No.2 prays for stay of the operation of this order.

Having regard to the facts and circumstances of the case, the operation of this order is stayed for a period of two weeks from today.