Reserved On: 17.10.2019

Delivered On: 22.11.2019

Court No. - 85

Case :- CRIMINAL REVISION No. - 3633 of 2017

Revisionist :- Dwijendra Nath Mishra
Opposite Party :- State Of U.P. And 6 Others
Counsel for Revisionist :- Sarvesh
Counsel for Opposite Party :- G.A.,Ram Sajiwan Mishra

Hon'ble Narendra Kumar Johari,J.

1. The present revision has been filed against the order dated 16.10.2017 passed by the Additional Sessions/Special Judge E.C. Act, Kanpur Nagar in Session Trial No. 569 of 2016, under Sections 498A, 304B, 506 I.P.C. and 3/4 Dowry Prohibition Act. Learned Sessions Judge by order dated 16.10.2017 has rejected the application of complainant under Section 319 Cr.P.C. for summoning opposite party nos. 2 to 7 for trial as accused.

2. Heard learned counsel for the revisionist, learned counsel for respondent nos. 2 to 7 and learned A.G.A. appearing for the State and perused the record.

3. In support of his case learned counsel for the revisionist has submitted the case laws:- **Bhure & Ors. Vs. State of U.P. & Anr. [2018 (2) JIC 77 (All), Rajesh and Others Vs. State of Haryana [2019 (108) ACC 978, Hardeep Singh and Others Vs. State of Punjab and Others 2014 (3) SCC 92, Sugreev Kumar Vs. State of Punjab and Others [2019 0 AIR (SC) 2903], Michael Machado and Another Vs. Central Bureau of Investigation and Another AIR 2000 Supreme Court 1127, Krishnappa Vs. State of Karnataka AIR 2004 Supreme Court 4298, Kailash Vs. State of Rajasthan and Another AIR 2008 Supreme Court 1564, Smt. Rani Zahir Ahmad and Others Vs. State of Haryana and Another 2006 CriLJ 1757**

4. It has been submitted by learned counsel for the revisionist that marriage of revisionist/complainant's daughter was solemnized on 20.02.2014 with Sunil Tiwari. In the marriage complainant has given sufficient articles in dowry but her husband and family members of in-laws including opposite party nos. 2, 4 and 5 who are the maternal uncle of her husband and their wives opposite party nos. 3, 6 and 7 started torture to his daughter for Rupees one lakhs cash and golden chain as additional dowry. In furtherance of their demand they started abusing and beating to his daughter. Complainant tried to resolve the dispute but they continued their ill behaviour with her. In furtherance of their ill behaviour her husband, mother-in-law, father-in-law, maternal uncle and aunt in-laws beaten to his daughter badly and murdered her by hanging. He lodged the F.I.R. During the investigation, investigating officer did not find any role of opposite party nos. 2 to 7 and submitted final report against them. In the proceeding of trial complainant recorded his examination-in-chief on 22.06.2017, wherein he mentioned in his evidence about involvements of opposite party nos. 2 to 7 also in aforesaid offence and submitted his application under Section 319 Cr.P.C. for summoning to opposite party nos. 2 to 7 to face the trial as accused. The application of complainant was rejected by court concerned vide order dated 16.10.2017.

5. Learned counsel for the revisionist has further contended that the ground which has been mentioned in impugned order for rejection of his application under Section 319 Cr.P.C. is against law. The proposed accused persons/opposite party nos. 2 to 7 should have been summoned on the basis of examination-in-chief only which is sufficient evidence on record to summon aforesaid opposite parties. The opposite party nos. 2 to 7 are named in F.I.R. as well as their complicity is proved by oral evidence of witness P.w.-1/complainant.

6. For the summoning of any person who appears to be guilty of offence, the provision has been enacted in Section 319 of Cr.P.C. which is reproduced as under:-

"319 Power to proceed against other persons appearing to be guilty of offence.

> *(1)Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.*

(2)Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.
(3) Any person attending the Court although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under Sub-Section (1), then—
(a) the proceedings in respect of such person shall be commenced afresh, and witnesses re-heard;
(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

7. Learned counsel for the applicant has submitted that it has been mentioned in impugned order that after investigation police has submitted final report against opposite party nos. 2 to 7. Learned court concerned has not informed to complainant about closure report of opposite party nos. 2 to 7 as was necessary by implication of law. Learned counsel has relied upon the case law **Rajesh and Others Vs. State of Haryana [2019 (108) ACC 978,** wherein it has been held that:-

" 6.1 At the outset, it is required to be noted that, in the present case, what is under challenge is the impugned order passed by the High Court dismissing the revision application and confirming the order passed by the learned Trial Court summoning the accused in exercise of powers under Section 319 of the CrPC and to face the trial for the offences under Sections 148, 149, 323, 324, 325, 302, 307 and 506 of the IPC. It is required to be noted that, in the present case, the original complainant first informant specifically named ten persons as accused, including the appellants herein. However, thereafter after the investigation, the investigating officer filed the charge-sheet/challan against four accused persons only and no challan/charge-sheet was filed against the appellants herein. Nothing is on record whether at that time any specific closure report was submitted by the investigating officer or not. Nothing is on record whether at that stage an opportunity was given to the complainant/original informant to submit any protest application or not. Assuming that nonfiling of the charge- sheet/challan against the remaining accused named in the FIR can be said to be a closure report, in that case also, as per the settled proposition of law and more particularly, the decision of this Court in the case of Bhagwant Singh (supra), before accepting the closure report, the Magistrate is bound to issue notice to the complainant/original informant and the complainant/original informant is required to be given an opportunity to submit the protest application and, thereafter, after

giving an opportunity to the complainant/original informant, the Magistrate may either accept the closure report or may not accept the closure report and direct to proceed further against those persons for whom the closure report was submitted. In the present case, nothing is on record that such a procedure was followed by the learned Magistrate. That, thereafter the trial proceeded against the four accused persons against whom the charge-sheet/challan was filed. During the trial, the depositions of P.W.1 and P.W.2 were recorded. Both of them were even cross-examined. In the deposition, P.W.1 and P.W.2 specifically stated the overacts by the appellants herein and the role played by them and categorically stated that at the time of the incident/commission of the offence, the appellants herein were also present and they participated in the commission of the offence. That, thereafter, on the application submitted by the original complainant submitted under Section 319 of the CrPC, the learned Magistrate found a prima facie case against the appellants herein and summoned the appellants herein to face the trial along with other co-accused. The said order has been confirmed by the High Court. Therefore, the short question posed for the consideration of this Court is whether, in the facts and circumstances of the case, the Trial Court was justified in summoning the appellants herein to face the trial in exercise of powers under Section 319 of the CrPC?"

8. That after receiving closure report of investigating officer regarding opposite party nos. 2 to 7 it was incumbent on the court concerned to issue notice to complainant for protest if any. Records indicates that court concerned had not issued any such application to complainant.

9. Learned counsel has further submitted that at the time of passing order dated 16.10.2017 the examination-in-chief of witness P.w-1 (complainant) on record, which was sufficient to allow his application under Section 319 Cr.P.C. on this point he relied upon Paragraphs- **90 and 92** of case law **Rajesh and Others (Supra)**, which are as under:-

"90. *As held in Mohd. Shafi [Mohd. Shafi v. Mohd. Rafiq, (2007) 14 SCC 544 : (2009) 1 SCC (Cri) 889 : AIR 2007 SC 1899] and Harbhajan Singh [(2009) 13 SCC 608 : (2010) 1 SCC (Cri) 1135], all that is required for the exercise of the power under Section 319, CrPC is that, it must appear to the court that some other person also who is not facing the trial, may also have been involved in the offence. The prerequisite for the exercise of this power is similar to the prima facie view which the Magistrate must come to in order to take cognizance of the offence. Therefore, no straitjacket formula can and should be laid with respect to conditions precedent for arriving at such an opinion and, if the Magistrate/court is convinced even on the basis of evidence appearing in examination-in-chief, it can exercise the power under Section 319, CrPC and can proceed against such other person(s). It is essential to note that the section also uses the words "such person could be tried" instead of should be tried. Hence, what is required is not to have a minitrial at this stage by*

having examination and cross-examination and thereafter rendering a decision on the overt act of such person sought to be added. In fact, it is this minitrial that would affect the right of the person sought to be arraigned as an accused rather than not having any cross-examination at all, for in light of sub-section (4) of Section 319, CrPC, the person would be entitled to a fresh trial where he would have all the rights including the right to cross-examine prosecution witnesses and examine defence witnesses and advance his arguments upon the same. Therefore, even on the basis of examination-in-chief, the court or the Magistrate can proceed against a person as long as the court is satisfied that the evidence appearing against such person is such that it prima facie necessitates bringing such person to face trial. In fact, examination-in-chief untested by cross-examination, undoubtedly in itself, is an evidence.

92. *Thus, in view of the above, we hold that power under Section 319, CrPC can be exercised at the stage of completion of examination-in-chief and the court does not need to wait till the said evidence is tested on cross-examination for it is the satisfaction of the court which can be gathered from the reasons recorded by the court, in respect of complicity of some other person(s), not facing the trial in the offence."*

10. Learned counsel for applicant has also submitted that the same view has been taken by Hon'ble Apex Court in the case of **Hardeep Singh and Others Vs. State of Punjab and Others 2014 (3) SCC 92** in Paragraphs- 84 and 85:-

*"**84.** Further, in our opinion, there does not seem to be any logic behind waiting till the cross-examination of the witness is over. It is to be kept in mind that at the time of exercise of power under Section 319 Cr.P.C., the person sought to be arraigned as an accused, is in no way participating in the trial. Even if the cross-examination is to be taken into consideration, the person sought to be arraigned as an accused cannot cross examine the witness(s) prior to passing of an order under Section 319 Cr.P.C., as such a procedure is not contemplated by the Cr.P.C. Secondly, invariably the State would not oppose or object to naming of more persons as an accused as it would only help the prosecution in completing the chain of evidence, unless the witness(s) is obliterating the role of persons already facing trial. More so, Section 299 Cr.P.C. enables the court to record evidence in absence of the accused in the circumstances mentioned therein.*

85. *Thus, in view of the above, we hold that power under Section 319 Cr.P.C. can be exercised at the stage of completion of examination in chief and court does not need to wait till the said evidence is tested on cross-examination for it is the satisfaction of*

the court which can be gathered from the reasons recorded by the court, in respect of complicity of some other person(s), not facing the trial in the offence."

11. According to law laid down by Hon'ble Apex Court, the complainant has moved the application under Section 319 Cr.P.C. to summon the opposite party nos. 2 to 7 for trial as accused on the basis of examination-in-chief recorded by him before the court concerned as P.w. 1, at that time the aforesaid opposite party nos. 2 to 7 were not arrayed as accused and there was no occasion to cross-examine the witness Pw. 1. In other words, they cannot cross-examine witness P.w. 1, prior to put their appearance in court, therefore the examination-in-chief cannot excluded from the wording of "evidence" the term used in Section 319 (1) of Cr.P.C.

12. The wording used in Section 319 of Cr.P.C. that "*where, in the course of any inquiry or trial of offence, it appears from the evidence that any person not been the accused has committed any offence*……..." shows the intention of law that there must be some cogent evidence on record for summoning any person under the Section. In this context, Hon'ble Apex Court has held in **Rajesh and Others (Supra),** in Paragraphs- 83, 84 and 85 as under:-

"83. *It is, therefore, not any material that can be utilised, rather it is that material after cognizance is taken by a court, that is available to it while making an inquiry into or trying an offence, that the court can utilise or take into consideration for supporting reasons to summon any person on the basis of evidence adduced before the court, who may be on the basis of such material, treated to be an accomplice in the commission of the offence. The inference that can be drawn is that material which is not exactly evidence recorded before the court, but is a material collected by the court, can be utilised to corroborate evidence already recorded for the purpose of summoning any other person, other than the accused. .....*

84. *The word "evidence" therefore has to be understood in its wider sense both at the stage of trial and, as discussed earlier, even at the stage of inquiry, as used under Section 319, CrPC. The court, therefore, should be understood to have the power to proceed against any person after summoning him on the basis of any such material as brought forth before it. The duty and obligation of the court becomes more onerous to invoke such*

powers cautiously on such material after evidence has been led during trial.

85. *In view of the discussion made and the conclusion drawn hereinabove, the answer to the aforesaid question posed is that apart from evidence recorded during trial, any material that has been received by the court after cognizance is taken and before the trial commences, can be utilised only for corroboration and to support the evidence recorded by the court to invoke the power under Section 319, CrPC. The "evidence" is thus, limited to the evidence recorded during trial."*

13. The evidence available on record regarding complicity of person sought to be summoned, be assessed by the court cautiously. It has been held by Hon'ble Apex Court in **Sugreev Kumar Vs. State of Punjab and Others [2019 0 AIR (SC) 2903],** in Paragraphs- 12, 13 and 14 that:-

"12. *Thus, the provisions contained in Section 319 CrPC sanction the summoning of any person on the basis of any relevant evidence as available on record. However, it being a discretionary power and an extraordinary one, is to be exercised sparingly and only when cogent evidence is available. The prime facie opinion which is to be formed for exercise of this power requires stronger evidence than mere probability of complicity of a person. The test to be applied is the one which is more than a prime facie case as examined at the time of framing charge but not of satisfaction to the extent that the evidence, if goes uncontroverted, would lead to the conviction of the accused.*

13. *While applying the above-mentioned principles to the facts of the present case, we are of the view that the consideration of the application under Section 319 CrPC in the orders impugned had been as if the existence of a case beyond reasonable doubt was being examined against the proposed accused persons. In other words, the Trial Court and the High Court have proceeded as if an infallible case was required to be shown by the prosecution in order to proceed against the proposed accused persons. That had clearly been an erroneous approach towards the prayer for proceeding against a person with reference to the evidence available on record.*

14. *The appellant (PW-1) has made the statement assigning specific roles to the proposed accused persons. At the stage of consideration of the application under Section 319 CrPC, of course, the Trial Court was to look at something more than a prima facie case but could not have gone to the extent of enquiring as to whether the matter would ultimately result in conviction of the proposed accused persons."*

14. In case of **Michael Machado and Another Vs. Central Bureau of Investigation and Another AIR 2000 Supreme Court 1127** that Paragraphs- 12.

> ***"12.*** *But even then, what is conferred on the court is only a discretion as could be discerned from the words "the court may proceed against such person." The discretionary power so conferred should be exercised only to achieve criminal justice. It is not that the court should turn against another person whenever it comes across evidence connecting that another person also with the offence. A judicial exercise is called for, keeping a conspectus of the case, including the stage at which the trial has proceeded already and the quantum of evidence collected till then, and also the amount of time which the court had spent for collecting such evidence. It must be remembered that there is no compelling duty on the court to proceed against other persons."*

15. The court should apply the aforesaid power under Section 319 Cr.P.C. springily and in appropriate case It has been held by Hon'ble Apex Court in **Krishnappa Vs. State of Karnataka AIR 2004 Supreme Court 4298,** in Paragraphs- 6 that:-

> ***"6.*** *It has been repeatedly held that the power to summon an accused is an extraordinary power 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."*

16. In the case law **Kailash Vs. State of Rajasthan and Another AIR 2008 Supreme Court 1564** Hon'ble Apex Court has held in Paragraphs- 9 that:-

> ***"9.*** *The powers under Section 319 Cr.P.C. to proceed against any person who is not the accused are couched in the following words:*
>
> *"319 Power to proceed against other persons appearing to be guilty of offence. (1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the court may proceed against such person for the offence which he appears to have committed.*

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

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

(4) Where the court proceeds against any person under sub-section (1) then

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

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

A glance at these provisions would suggest that during the trial it has to appear from the evidence that a person not being an accused has committed any offence for which such person could be tried together with the accused who are also being tried. The key words in this Section are "it appears from the evidence".."any person"……."has committed any offence". It is not, therefore, that merely because some witnesses have mentioned the name of such person or that there is some material against that person, the discretion under Section 319 Cr.P.C. would be used by the court. This is apart from the fact that such person against whom such discretion is used, should be a person who could be tried together with the accused against whom the trial is already going on. This Court has, time and again, declared that the discretion under Section 319 Cr.P.C. has to be exercised very sparingly and with caution and only when the concerned court is satisfied that some offence has been committed by such person. This power has to be essentially exercised only on the basis of the evidence. It could, therefore, be used only after the legal evidence comes on record and from that evidence it appears that the concerned person has committed an offence. The words "it appears" are not to be read lightly. In that the court would have to be circumspect while exercising this power and would have to apply the caution which the language of the Section demands.

17. Learned counsel for the opposite party nos. 2 to 7 has submitted that opposite party nos. 2 to 7 are residing separately with other accused person, the court has recorded the evidence of complainant only and no specific role of opposite party nos. 2 to 7 has been assigned either in F.I.R. or in evidence of examination-in-chief of P.w.1. Therefore, it is not be justified to summon accused under Section 319 Cr.P.C. only on

suspicion as it has been held in the case of **Smt. Rani Zahir Ahmad and Others Vs. State of Haryana and Another 2006 CriLJ 1757.**

18. This court cannot give finding on the above point as argued by learned counsel for the respondents. It is the subject matter of scrutiny of trial court who has to decide the application under Section 319 Cr.P.C. in accordance with law.

19. In view of the above, Revision is liable to be allowed. Order dated 16.10.2017 passed by the Additional Sessions/Special Judge E.C. Act, Kanpur Nagar in Session Trial No. 569 of 2016, being contrary to law is set aside. The case is remanded back to court concerned to decide the application under Section 319 Cr.P.C. afresh, in accordance with law.

Revision allowed.

Order Date :- 22.11.2019
Israr