

HIGH COURT OF MADHYA PRADESH
BENCH AT GWALIOR

(SB : SHEEL NAGU, J)

M.Cr.C. No. 24766/2017

Amar Singh Kamria and Ors.

Vs.

State of M.P. & Anr.

For petitioner

Shri Naval Gupta, Advocate for the petitioner.

For Respondents

Mrs. Sangeeta Pachauri, Public Prosecutor for the respondent / State.

WHETHER REPORTABLE : Yes No

Law Laid Down:

1. An application u/s 319 Cr.P.C is entertainable only when implicative evidence (documentary or oral) having probative value more convincing than grave suspicion is brought on record during trial. The other pieces of evidence which have already been brought on record between the stages of taking cognizance and the commencement of trial can be used only for corroborative purpose. Meaning thereby that if any evidence is considered during the investigative process and is not brought on record between the stage of taking

cognizance and commencement of trial, cannot be considered even for corroborative purpose while invoking Sec. 319 Cr.P.C.

2. For the purpose of ascertainment of scope, purport and sweep of the expression “evidence” found in Sec. 319 Cr.P.C. law laid down by the five Judge Bench decision in the case of **Hardeep Singh Vs. State of Punjab and Ors.** reported in **(2014) 3 SCC 92** prevails upon the subsequent Division Bench decision of Apex Court in the case of **Brijendra Singh and Ors. Vs. State of Rajasthan** reported in **(2017) 7 SCC 706**.

Significant Paragraph Numbers: Para No. 8 & 9

O R D E R

(06 .12. 2017)

1. The inherent powers of this Court are invoked u/s 482 Cr.P.C. for assailing the interlocutory order dated 15.11.2017 passed in S.T. No. 112/2015 by which the trial Judge has dismissed an application u/s 91 Cr.P.C. whereby the petitioners- accused sought to bring on record the documents which were considered by the investigating agency for finding the plea of alibi of the petitioners to be correct which led the petitioners being not arrayed as accused in the charge sheet filed by the prosecution, despite petitioners having been implicated in the FIR.

2. Brief facts giving rise to the present case are that against the petitioners and other co-accused offence of murder was alleged in Crime No. 99/2014 wherein the petitioners were specifically named in the FIR but after conduction of investigation, the plea of alibi raised by the petitioners -accused was found to be correct by the investigating agency which led to the charge sheet being filed without petitioners being arrayed as accused. During conduction of trial, the testimony of witnesses were recorded which revealed that the petitioners were

involved in the crime of murder which impelled the complainant / victim to file an application u/s 319 Cr.P.C. praying for arraying the petitioners as accused. This application was allowed by interlocutory order dated 03.12.2016 in the said sessions trial which came to be assailed in M.Cr.C.2241/2017. This Court while adjudicating the M.Cr.C.2241/2017 allowed the same by quashing the impugned order solely on the ground that prior to passing of the order of arraying the petitioner as accused, no opportunity of hearing was afforded. While so holding this Court relied upon the decision of the Apex Court in the case of **Brijendra Singh and Ors. VS. State of Rajasthan** reported in **(2017) 7 SCC 706** which was attended with similar circumstances and had taken into account the earlier Constitutional Bench decision in the case of **Hardeep Singh Vs. State of Punjab and Ors.** reported in **(2014) 3 SCC 92**. Thereafter when the matter was taken up by the trial court for re-consideration of application u/s 319 Cr.P.C. the petitioners moved an application u/s 91 Cr.P.C. seeking production of those documents on the basis of which the investigating agency had found the plea of the petitioners of alibi to be true. The said application has suffered dismissal by the impugned order on the ground that the evidence made available by the prosecution in the trial does not contain any such documents of which the petitioners have sought production u/s 91 of the Cr.P.C. and therefore, it was impliedly held that if Sec. 91 application is allowed then the court would travel beyond the purview of Sec. 319 Cr.P.C.

3. Learned counsel for the rival parties are heard.
4. The Constitution Bench in the case of **Hardeep Singh** (supra) while considering the scope and ambit of Section 319 inter alia framed several question including question No.3 which reads as under :-

“Question (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?”

The above said question after due consideration of all the judicial verdicts on the point was answered in the following manner :-

“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 utilized only for corroboration and to support the evidence by the court to invoke the power under Section 319 CrPC. The “evidence” is thus limited to the evidence during trial.”

5. From the above, it is evident that for the purpose of deciding application u/s 319 Cr.P.C. the expression “evidence” used in the said provision means the evidence which has come during the trial in shape of oral and documentary evidence and any other piece of evidence which has come on record of the trial court between the stage of taking cognizance and commencement of trial can be utilized for corroborative purpose. The necessary inference which can be drawn from the above said answer of the said question rendered by the Constitution bench is that any material which formed part of investigating process but was not part of the charge sheet or was not brought on record between the stage of taking cognizance and commencement of trial, cannot be utilized for the purpose of invoking Sec. 319 Cr.P.C. However, the Apex Court in the subsequent decision rendered by the Division Bench in the case of **Brijendra Singh (supra)** appears to have slightly enlarged the scope and ambit of Sec. 319 Cr.P.C. laid down by the decision in the case of Hardeep Singh.

6. A bare perusal of the decision of Division Bench of the Apex Court in the case of Brijendra Singh reveals that though earlier decision of Hardeep Singh was considered, however, the scope, ambit and sweep of the expression “evidence” contained in Section 319 laid down in para 85 of the judgment of Hardeep Singh was not considered by the Apex Court in the case of Brijendra Singh.

7. In the case of Brijendra Singh a similar plea of alibi was raised which was accepted by the investigating agency which led to filing of

charge sheet without arraying the petitioners therein as accused despite the petitioners having been named as one of the assailants in the FIR. When the testimonies were recorded in the trial court, the petitioner was named as one of the assailants. Sec. 319 Cr.P.C. was invoked by the prosecution which led to allowing of the application which was assailed in the High Court unsuccessfully whereafter the matter traveled to the Supreme Court where in the case of Brijendra Singh the challenge raised by the accused therein was upheld by holding that since a detailed enquiry had been conducted by the investigating agency where the plea of alibi was found to be true the trial Court was not correct in allowing the application u/s 319 in perfunctory and cursory manner without applying its mind to the exonerative evidence collected by the investigating officer during investigation.

8. This Court cannot comment upon the decision of the Apex Court in the case of Brijendra Singh but since two conflicting views appear to exist on the same point of meaning of expression "evidence" used in Sec. 319 Cr.P.C, the decision of the Apex Court in the case of Hardeep Singh rendered by a bench of larger composition shall prevail upon Brijendra's decision.

9. In view of the above, this Court has no hesitation to hold that the expression "evidence" found in Sec. 319 Cr.P.C is to be understood to mean the evidence collected during the trial in shape of oral and documentary evidence. However, the other evidence which has come on record between the stage of taking cognizance by the Court till the commencement of the trial can merely be used for corroborative purposes as laid down by the Apex Court in five Judge Bench decision in the case of Hardeep Singh. In other words, an application u/s 319 Cr.P.C. is maintainable only when implicative evidence of probative value more than strong suspicion comes on record in shape of documentary or oral evidence in trial. While considering such application u/s 319 Cr.P.C. the trial court can take

assistance, for corroboration only, of any evidence which is already on record introduced between the stage of taking cognizance and the stage of commencement of trial. However, the trial court is not empowered to invoke Sec. 319 Cr.P.C. merely based on evidence which is part of investigation stage unless the same is already brought on record between the period of taking cognizance and before the trial begins.

10. Consequently, the view taken by the learned trial Judge in the impugned order does not suffer from any illegality or rampant irregularity. In the absence of any failure of justice occasioned, this Court declines interference and present petition stands dismissed.

sarathe

**(Sheel Nagu)
Judge**