THE HIGH COURT OF MADHYA PRADESH
CRR-3816-2019
Radheshyam Kushwah Vs. State of MP and another

Gwalior, Dated : 06/04/2022

Shri R.K. Sharma, Senior Counsel with Shri V.K. Agarwal, Counsel for the applicant.

Shri A.K. Nirankari, Counsel for the respondent No. 1/State.

Shri Sanjay Gupta, Counsel for the respondent No. 2.

This criminal revision under Section 397, 401 of CrPC has been filed against the order dated 19.07.2019 passed by Fourth Additional Sessions Judge, Morena in Sessions Trial No.84/2018, by which the Trial Court by exercising its power under Section 319 of CrPC has summoned the applicant as an additional accused.

2. It is submitted by the counsel for the applicant that the complainant lodged an FIR on 28.06.2017 at 22:50 on the allegations that there is a public way in front of the house of the applicant and whenever the said public way is used by his family members, then the family members of the applicant used to abuse them and, accordingly, on 28.06.2017 the Revenue Officers had come from Tahsil Office for demarcation purposes. Her husband Kapil, father-in-law Kamlesh and younger brother-in-law Sahdev were sitting in front of their house at 06:30 PM. On the issue of demarcation, the applicant as well as Raju armed with *Farsa,* Laxman armed with *Sabbal,* Sudama armed with spade, Pradeep armed with axe, Khachera armed with *lathi* and three more persons whose names are known to them, came to the house of

the complainant and the applicant and Raju started scolding her father-in-law that now he would deal with the demarcation and, accordingly, the applicant and Raju gave a *Farsa* blow on the head of father-in-law Kamlesh, as a result, he sustained injuries. When her husband Kapil and younger brother-in-law Sahdev tried to save their father, then Laxman, Sudama, Pradeep, Khachera and three persons who had come with them started assaulting them, as a result, they have sustained multiple injuries. When the complainant and her mother-in-law tried to intervene in the matter, then they too were assaulted by fists and blows. It is submitted that the statement of the complainant was recorded under Section 161 of CrPC and in the said statement also, she had levelled the said allegations.

3. During pendency of the investigation, a parallel enquiry was conducted by the Dy. Superintendent of Police, who gave a finding that at the time of incident, the applicant was not present on the spot and it appears from the mobile location that he was in Jaura Khurd. Accordingly, on 21.09.2017 the SHO Police Station – Station Road, Morena, after relying upon the enquiry report submitted by C.S.P., Morena, came to a conclusion that the applicant was not present on the spot and, accordingly, the mobile location of the applicant was collected and the statements of the witnesses were recorded, who stated that the applicant is suffering from paralysis and was under

treatment at the time of incident, therefore, permission was sought not to file charge-sheet against the applicant as well as to file charge-sheet against the remaining co-accused persons. Accordingly the applicant was not charge-sheeted.

4. It is submitted that injured Kamlesh (PW-1) in her examination-in-chief, made the same allegations, which were alleged by her in the FIR, but he improved her version by stating that blunt side of the *Farsa* was used for assaulting him on the head. Thus, it is clear that there is a material departure from the allegations made by the complainant Smt. Neelam Dandotiya in the FIR as she has not alleged that the blunt side of *Farsa* was used. It is submitted that as per the pre-MLC, lacerated wound was found on the right parietal region of skull. It is further submitted that while deciding the application filed under Section 319 of CrPC, this Court can always take the question of plea of alibi into consideration. To buttress his contention, counsel for the applicant has relied upon the judgment passed by the Supreme Court in the case of **Brijendra Singh and others Vs. State of Rajasthan** reported in **AIR 2017 SC 2839**.

5. Per contra, the revision is vehemently opposed by the counsel for the State as well as the counsel for the complainant. It is submitted by Shri Sanjay Gupta that a parallel enquiry under Section 36 of CrPC during pendency of investigation is not maintainable. It is true that the

Investigating Officer claims that he had also verified the enquiry report by collecting the mobile location of the applicant as well as by recording the statement of the witnesses, but no documentary evidence was collected to show that the applicant was under treatment at the time of incident. Merely because earlier he had suffered paralytic stroke, it cannot be said that he was confined to bed. Furthermore, the plea of alibi is to be proved by the accused by leading cogent and reliable evidence and mere mobile location is not conclusive to hold that the holder of the said mobile was also at that particular place and at the most, it can be said that particular mobile was kept at a particular place.

6. Heard the learned counsel for the parties.

7. The Supreme Court in the case of **Sagar Vs. State of U.P. and another decided on 10/3/2022 in Criminal Appeal No.397/2022** has held as under:-

> "**8.** The scope and ambit of Section 319 of the Code has been well settled by the Constitution Bench of this Court in **Hardeep Singh v. State of Punjab and others** and paras 105 and 106 which are relevant for the purpose are reproduced hereunder:
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> > "**105.** Power under Section 319 CrPC is a discretionary and an extra-ordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be

guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner.

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

8. The Supreme Court in the case of **Sartaj Singh vs. State of Haryana & Anr.** reported in **(2021) 5 SCC 337** has held as under:-

"**13.1.7.** While answering Question (*v*), namely, in what situations can the power under Section 319 CrPC be exercised: named in the FIR, but not charge-sheeted or has been discharged, this Court has observed and held as under: (*Hardeep Singh case* [*Hardeep Singh* v. *State of Punjab*, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] , SCC pp. 139-41, paras 112 & 116)

"*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 CrPC without resorting to the provision of Section 319 CrPC directly.

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116. Thus, it is evident that power under Section 319 CrPC can be exercised against a person not subjected to investigation, or a person placed in 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 CrPC without taking recourse to provisions of Section 300(5) read with Section 398 CrPC."

13.2 Considering the law laid down by this

Court in *Hardeep Singh* [*Hardeep Singh* v. *State of Punjab*, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] and the observations and findings referred to and reproduced hereinabove, it emerges that (*i*) the court can exercise the power under Section 319 CrPC even on the basis of the statement made in the examination-in-chief of the witness concerned and the court need not wait till the cross-examination of such a witness and the court need not wait for the evidence against the accused proposed to be summoned to be tested by cross-examination; and (*ii*) a person not named in the FIR or a person though named in the FIR but has not been charge-sheeted or a person who has been discharged can be summoned under Section 319 CrPC, provided from the evidence (may be on the basis of the evidence collected in the form of statement made in the examination-in-chief of the witness concerned), it appears that such person can be tried along with the accused already facing trial.

15. At this stage, it is required to be noted that right from the beginning the appellant herein-injured eyewitness, who was the first informant, disclosed the names of private respondents herein and specifically named them in the FIR. But on the basis of some enquiry by the DSP they were not charge-sheeted. What will be the evidentiary value of the enquiry report submitted by the DSP is another question. It is not that the investigating officer did not find the case against the private respondents herein and therefore they were not charge-sheeted. In any case, in the examination-in-chief of the appellant-injured eyewitness, the names of the private respondents herein are disclosed. It might be that whatever is stated in the examination-in-chief is the same which was stated in the FIR. The same is bound to be there and ultimately the appellant herein-injured eyewitness is the first informant and he is bound to again state what was stated in the FIR, otherwise he would be accused of contradictions in the FIR and the statement before the court. Therefore, as such, the learned trial court was justified in directing to issue summons against the private respondents herein to

face the trial."

9. Thus, the only question which is relevant for consideration is as to whether the evidence which is available on record is sufficient to summon the applicant as an additional accused in exercise of power under Section 319 of CrPC or not ?

10. From the FIR, it is clear that the applicant was the mastermind as he was obstructing the family members of the complainant to use public way for passing in front of his house.

11. So far as the question of parallel enquiry by a Senior Officer during pendency of the investigation is concerned, this Court in the case of **Deepak @ Preetam Verma and another vs. State of M.P. and another by order dated 11/9/2018 passed in M.Cr.C. No.12592/2018** had held that a parallel enquiry by a superior officer under Section 36 of CrPC is not maintainable during the pendency of investigation. The said order has been affirmed by the Supreme Court **by order dated 18/1/2022 passed in SLP (Criminal) No.1345/2019 (Surendra Singh Gaur vs. State of M.P. and others)** and held as under:-

> "The present petitioners have approached in their own rights to question the observations/remarks which have been recorded by the learned Judge in the order impugned in reference to the manner in which an inquiry was conduced parallel to the investigation which was undertaken by the Investigating Officer in reference to FIR in Crime

No. 75/2017.

We have heard the learned Counsel for the parties at length and we are of the view that neither Section 36 of the Code nor the circulars of which a reference has been made during the course of arguments in any way provides for holding an independent and parallel inquiry along with the investigation going ahead in reference to the FIR in Crime No. 75/2017.

In the instant case, a complaint was made for holding fair investigation in reference to the FIR in Crime No. 75/2017, we find no reason the officers under whose instructions an independent inquiry was initiated apart from the investigation which was going ahead in reference to the crime, in contravention of the procedure prescribed by law.

After the matter is examined at length by the High Court under the impugned judgment(s) for which reference has been made that an independent inquiry which was conducted in reference to the FIR in Crime No. 75/2017 was in no manner contemplated by law and in this reference observations have been made in regard to the conduct of the officers in holding an inquiry in reference to the FIR in Crime No. 75/2017.

The learned Counsel appearing on behalf of the State filed their counter affidavit and has placed on record a circular dated 26th June, 2010 under the instructions of the Inspector General of Police, Madhya Pradesh. We find that the circular of the State Government is in conformity with Section 36 of the Code, but the procedure which was followed by the officers in holding inquiry was not in consonance with the circular of which a reference has been made by the High Court under the impugned judgment.

After hearing the learned Counsel for the parties and taking note of the material on record, we find no error being committed by the High Court in the judgment impugned, which may call for our interference under Article 136 of the Constitution. Consequently, both the petitions fail and are dismissed.

> Pending application(s), if any, shall stand disposed of."

12. Thus, during pendency of the investigation, a parallel enquiry by the Senior Police Officer is not permissible.

13. So far as the contention of the counsel for the applicant that since the Investigating Officer had also taken note of the enquiry report and had also conducted the investigation on his own with regard to the presence of the applicant at Jaura Khurd, therefore, it cannot be said that non-filing of the charge-sheet against the applicant was solely based on the enquiry report submitted by the Senior Police Officer is concerned. As already pointed out, the police had relied upon the circumstances of location of mobile as well as ocular statement of some witnesses to show that the applicant was under treatment in Jaura Khurd and was not present at the place of incident. Mobile location cannot be a conclusive evidence to show that the holder of the mobile was also at that particular place. A clever person may hand over his mobile to some other person with an instruction to go to a distant place so that the location of the mobile may be recorded at that particular place. Thus, the location of the mobile by itself does not mean that holder of the mobile was also at that particular place. Therefore, by no stretch of imagination, it can be said that since the location of the mobile was found at a particular place, therefore, the

holder of the mobile was also at that place only.

14. So far as the ocular statement of the witnesses with regard to the treatment of the applicant is concerned, the same cannot be appreciated unless and until they are found correct on the anvil of cross-examination. The police did not rely upon any documentary evidence to show that the applicant was under treatment at different place at the time of incident. No medical prescription, hospital admission register, discharge ticket etc. have been collected. Although the applicant has relied upon the judgment passed by the Supreme Court in the case of **Brijendra Singh (supra)** to submit that the plea of alibi found proved by the police can always be taken into consideration while deciding the application under Section 319 of CrPC, but the facts of the said case are distinguishable from the facts of the present case. In the case of **Brijendra Singh (supra),** the Supreme Court after relying upon the duty certificate, duty log book, prescription, evidence of doctor revealing visit of additional accused for sickness, medicines slip collected during the investigation *prima facie* found proved that the accused persons were not present at the place of incident and were at Jaipur which was 175 km away from the place of incident. However, as already pointed out, in the present case, there is nothing on record to show that the applicant was under treatment at the time of incident. Accordingly, the submission made by

the counsel for the applicant that the applicant was under treatment at the time of incident and was not present on the spot is hereby rejected. However, it is made clear that the rejection of plea of alibi at this stage would not preclude the applicant to prove his defence of plea of alibi before the Trial Court by leading cogent and reliable evidence and it is made clear that the aforementioned observation has been made in the light of limited scope of interference by this Court at this stage and the Trial Court shall not get prejudiced or influenced in any manner by any of the observation made in this order with regard to plea of alibi of the applicant.

15. It is next contended by the counsel for the applicant that the complainant had merely mentioned that *Farsa* was used for assaulting on the head of Kamlesh, whereas Kamlesh in his Court evidence has stated that blunt side of *Farsa* was used with a solitary intention to bring the injury in conformity with the medical evidence as only lacerated wound has been found on the head of Kamlesh. It is further submitted that Kamlesh in his statement recorded under Section 161 of CrPC had not mentioned that blunt side of *Farsa* was used.

16. Heard the learned counsel for the parties.

17. In chapter 29 of Modi's Jurisprudence under the heading Regional Injuries, it has been mentioned that a scalp wound by a blunt weapon may resemble an incised wound, hence the edges and ends of

wound must be carefully seen...."

18. The Supreme Court in the case of **Putchalapalli Naresh Reddy v. State of A.P.** reported in **(2014) 12 SCC 457** has held as under:-

> "**15.** In the first place, we find that other witnesses have given the same deposition. It is possible that the statement of the witness [PW 3] is slightly inaccurate or the witness did not see properly which side of the axe was used. It is equally possible that the sharp edge of the axe is actually very blunt or it was reversed just before hitting the head. It is not possible to say what is the reason. That is however no reason for discarding the statement of the witness that A-1 Puchalapalli Parandhami Reddy hit the deceased with a battleaxe, as is obvious from the injury. Moreover, it is not possible to doubt the presence of this witness, who has himself been injured. Dr M.C. Narasimhulu, PW 13, Medical Officer, has stated in his evidence that on 25-11-1996 at about 3.30 p.m., he examined this witness PW 3 P. Murali Reddy and found the following injuries:
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> "(*1*) Diffused swelling with tenderness over middle ⅓rd and back of left forearm.
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> (*2*) A lacerated injury skin-deep of about ½″ over the back of head. Bleeding present with tenderness and swelling around."

19. Since the skull bone is the hardest bone of a human body and therefore, sometimes lacerated wound may appear as incised wound. Similarly, incised wound may also appear as lacerated wound because of the location of injury. Furthermore, it cannot be presumed that the *Farsa* would always contain a sharp blade. With continuous use of *Farsa,* its blade may become blunt, which may cause lacerated wound also.

20. Furthermore, the injured Kamlesh has specifically stated in the Court evidence that blunt side of *Farsa* was used. It is not out of place to mention that Kamlesh is not the complainant, but he is the injured. What would be the effect of the Court evidence, is yet to be considered by the Trial Court, but this discrepancy in the evidence of the witnesses cannot be taken to his discredit for rejecting the application filed under Section 319 of CrPC.

21. It is next contended by the counsel for the applicant that since the applicant is suffering from paralysis, therefore, he cannot use *Farsa*.

22. Counsel for the applicant could not point out the part of the body which has suffered paralytic stroke. Every paralytic stroke would not incapacitate the patient, although it may restrict the movement of the adversely affected part of the body.

23. Considering the fact that in the present case, the applicant was cited as a mastermind in the FIR, his active role has also been specifically mentioned in the statement of the witnesses recorded under Section 161 of CrPC and his active role has also been alleged in the evidence recorded in the trial, coupled with the fact that the parallel enquiry conducted by Senior Police Officer during pendency of the investigation is not maintainable and the degree of satisfaction of the Investigating Officer with regard to plea of alibi of the applicant

is not sufficient to hold that the material collected by the Investigating Officer was reliable to hold that the applicant was not present on the spot, this Court is of the considered opinion that the Trial Court did not commit any mistake by exercising its power under Section 319 of CrPC.

24. Accordingly, the order dated 19.07.2019 passed by Fourth Additional Sessions Judge, Morena in Sessions Trial No.84/2018 is hereby affirmed.

25. The revision fails and is hereby **dismissed.**

26. However, by way of abundant caution, it is once again observed that any observation made by this Court in this order is in the light of the limited scope of interference and the Trial Court shall decide the trial strictly on the basis of material which would come on record without getting influenced or prejudiced by any of the observations.

(G.S. Ahluwalia)
Judge

Abhi