

IN THE HIGH COURT OF MADHYA PRADESH**AT JABALPUR****BEFORE****HON'BLE SHRI JUSTICE RAJENDRA KUMAR (VERMA)****CRIMINAL REVISION NO.4482 OF 2022****BETWEEN :-**

1. CHHAYA TIWARI D/O SHRI
KRIPARAM TIWARI, AGED ABOUT 27
YEARS. OCCUPATION –
UNEMPLOYED R/O GRAM MUHARA,
JATARA DISTRICT TIKAMGARH.

2. ROHAN TIWARI S/O SHRI
JAGDISH TIWARI, AGED ABOUT 17
YEARS, OCCUPATION- STUDENT R/O
GRAM MUHARA, JATARA DISTRICT
TIKAMGARH M.P. (THROUGH ITS
NATURAL FUARDIAN FATHER
NAMELY JAGDISH TIWARI)

.....PETITIONERS

(BY SHRI RAVI SHANKAR PATEL – ADVOCATE)

AND

**1. STATE OF MADHYA PRADESH
THROUGH POLICE STATION -JATARA,
DISTRICT TIKAMGARH (M.P)**

**2. JITENDRA MISHRA S/O SHRI
RAJESH MISHRA R/O GRAM
MUHARA, JATARA DISTRICT
TIKAMGARH, M.P.**

.....RESPONDENT

***(BY MS. EKTA GUPTA – PANEL LAWYER FOR THE STATE) & (SHRI
SOURABH SINGH THAKUR – ADVOCATE FOR RESPONDENT NO.2)***

Reserved On : 23.02.2023

Delivered On : 18.04.2023

This Criminal revision having been heard and reserved for judgment, coming on for pronouncement this day, *Hon'ble Shri Justice Rajendra Kumar (Verma)* delivered the following :-

ORDER

This criminal revision under section 397/401 of Code of criminal procedure is preferred against the order dated 03-11-2022 passed by learned 2nd Additional Session Judge, Jatara, District Tikamgarh, whereby the application under Section 319 of the Criminal Procedure Code 1973 filed by the

complainant has been allowed and petitioners have been added as accused and has summoned them.

2. The facts in brief are that as per FIR lodged by complainant bearing crime No.42/2021 dated 25.01.2021 at Police Station Jatara the petitioner with other co-accused assaulted complainant Mr. Jitendra Mishra on 25-01-2021 but the Police during the investigation of the case, the police did not arrayed as accused in the charge sheet and found that petitioners were not present at the place of incident and police did not filed charge sheet against the petitioners. During the trial, the complainant filed an application under Section 319 of the Criminal Procedure Code 1973 to implead petitioners as accused in the trial which was allowed by the impugned order.

3. Learned Counsel for the petitioners submits that at the time of the commission of the offence, petitioners were at Gram Budera and further petitioner No.2 Rohan Tiwari was admitted at Primary health Centre, Budhera, It is submitted that as per the CDR it was found that mobile tower location of petitioner No.1 was traced at Lakshman Pura Tower which is 70 km away from the place of commission of offence and it is not possible that she could reach at the place of incident within 35 minutes.

4. Learned counsel for the respondent supported the impugned order passed by the trial Court.

5. Heard learned counsel for the parties and perused the material available on record.

6. In *Sukhpal Singh Khaira Vs. State of Punjab (2023) 1 SCC 289*, the Apex Court refreshed the guidelines to be followed by the competent Court while exercising te powers under Section 319 of Cr.P.C. as pointed below :-

(i) To pause the trial before passing the order on acquittal or sentence, if evidence or application under Section 319 of Cr.P.C. is filed.

(ii) To first decide and pass the order.

(iii) To pass the order for summoning under Section 319 of Cr.P.C before proceeding further with the trial.

(iv) To apply its mind for trying such summoned accused separately or along with the other accused

(v) To commence fresh trial fresh trial only after securing presence of summoned accused, if joint trial is decided.

7. In *Juhru and others Vs. Karim and another 2023 SCC Online SC 171* it is held that the power of summoning under Section 319 of Cr.P.C. should not be exercised routinely, and the existence of more than a *prima facie* case is *sine qua non* for summoning an additional accused.

8. The Hon'ble Apex Court in case of *Hardeep Singh vs. State of Punjab reported in (2014) 3 SCC 92* has laid down that:

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

106. Thus, we hold that though only a *prima facie* case is to be established from the evidence led before the court, not necessarily tested on the anvil of cross-examination, it requires much stronger evidence than mere probability of his complicity. The test that has to be applied is one which is more than *prima facie* case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes un rebutted, would lead to conviction. In the absence of such satisfaction, the court should refrain from exercising power under Section 319 CrPC.”

9. On perusal of the impugned order, it is clear that learned trial Court has found that no time of admission has been mentioned on the IPD ticket of the petitioner No.2 Rohan. It is also found that in CDR produced by police, there is no information regarding name of SIM card holder and there is no information regarding application form. Petitioners were named in the FIR. Jitendra Mishra PW-2, injured Rupesh @ Piyush Mishra PW-4 clearly stated that petitioners were present on the spot and they have also assaulted the injured by kick and

fist. In *State of Haryana Vs. Sher Singh and others AIR 1981 SC 1021*, it is settled law that burden to prove plea of alibi is on defence/accused. In FIR petitioner are named. In IPD ticket of Primary Health Centre, no time is mentioned of admission so it cannot be said that at the time of occurrence, petitioner Rohan was admitted in PHC, Budhera. No document regarding sim holder or application form was produced with the CDR report, so it cannot be said that the petitioner Chhaya Tiwari is the SIM holder of that mobile phone. Looking to the facts and circumstances and material available on record. No illegality or irregularity is found in the order passed by the learned trial Court.

10. Accordingly, the present revision petition is being dismissed.

(Rajendra Kumar (Verma))

Judge