

IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

Appellate Side

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 888 of 2020

With

CRAN 1 of 2021

With

CRAN 2 of 2021

Rabia Khatun

Vs.

State of West Bengal & Ors.

For the petitioner : Mr. Satadru Lahiri,
Mr. Safdar Azam,
Mr. Syed Wasim Faruque,
Mr. Jyotirmoy Talukder.

For the State : Mr. S. G. Mukerji, Ld. P.P
Ms. Faria Hossain,
Ms. Baisali Basu.

Hearing concluded on : 29.08.2023

Judgment on : 26.09.2023

Shampa Dutt (Paul), J.:

1. The present revision has been preferred against an order dated 19th December, 2019 passed by the learned Judge, Special court, (POCSO) Act, Basirhat, North 24 Parganas in connection with Special Case No.03/2017 arising out of GR Case No.5672/15 corresponding to Baduria Police Station

Case No.910/15 dated 30.12.2015 under Sections 376(2)(f)/201/325 of the Indian Penal Code, 1860 and under Section 4 of the Protection of Children from Sexual Offences Act, thereby refusing to implicate the proposed accused/opposite parties as accused in connection with the instant case by exercising power under Section 319 of Code of Criminal Procedure, 1973.

2. The petitioner (alleged victim) being a minor is represented by her elder sister (custodian).

3. The petitioner's case is that on the basis of a Letter of Complaint lodged by one Nazrul Islam Gazi (hereinafter referred to as the proposed accused/opposite party no.3), with the Officer-in-Charge of Baduria Police Station, the instant case being Baduria Police Station Case No.910/15 dated 30.12.2015 was registered for investigation against one Abdul Aziz Gazi and another for commission of the alleged offences punishable under Sections 376(2)(f) of the Indian Penal Code, 1860 and under Section 4 of the Protection of Children from Sexual Offences Act.

4. After the registration of the instant case, in course of investigation, the victim girl was recovered and kept at Liluah Home. Subsequently, her statement was recorded under Section 164 of the Code of Criminal Procedure, 1973 before the learned Magistrate in presence of her paternal Aunt i.e. the proposed accused/opposite party no.2 and after recording of the statement, she was again sent back to Liluah Home. The medical examination of the victim girl in connection with the instant case was also conducted in presence of the proposed accused/opposite party nos. 2 and 3 and in the said report both the proposed accused/opposite party nos. 2 and 3 signed as witnesses. Therefore, it is apposite to state that the victim girl

never got any reasonable opportunity to divulge the actual incident before any authority.

5. On or about 8th February, 2016 **the elder sister of the victim girl** preferred an application before the learned Judge, Special Court, (POCSO) Act, Barasat, North 24 Parganas, thereby **praying for custody of the victim girl**. The learned court vide an order dated 8th February, 2016 was pleased to hand over the custody of the victim girl to her elder sister and brother-in-law and thereafter the victim girl disclosed the real fact to her elder sister. The proposed accused persons did not even bother to take custody of the victim girl.

6. That on or about 2nd April, 2016 after being aware of the changed circumstances as well as upon receipt of a 'no objection' petition filed on behalf of the petitioner, the learned court was pleased to pass necessary order directing the learned Chief Judicial Magistrate, Barasat to make arrangement for recording a second judicial statement of the victim girl. The learned Chief Judicial Magistrate, Barasat pursuant to such direction was pleased to direct the learned Judicial Magistrate, 1st Court, Barasat, to record the **second statement** of the victim girl under Section 164 of Code of Criminal Procedure, 1973. Subsequently, the same was recorded, wherein the victim girl narrated the facts and circumstances and divulged the reason for delay in divulging these facts. After such statement was recorded, accused Abdul Aziz Gazi (brother of the victim) was released on bail.

7. The petitioner states that although both the statement(s) of the victim girl was recorded during the pendency of investigation in connection with the instant case, the investigating agency did not collect the further

statement of the victim and in a most perfunctory and mechanical manner with undue haste, submitted charge sheet vide charge sheet No.520/16 dated 31.08.2016 against Abdul Aziz Gazi (brother of the victim) for commission of the offences punishable under Sections 376(2)(f) of the Indian Penal Code, 1860 and under Section 4 of the Protection of Children from Sexual Offences Act and under Sections 201/325 of the Indian Penal Code, 1860 against the accused, Monajat Gazi (father of the victim). The investigating agency in the said charge sheet cited the proposed accused/opposite party no.2 and 3 as witness to the incident.

8. The allegations made in the charge sheet against the accused persons of the instant case are as follows:-

“That on 30th December, 2015, one Nazrul Islam Gazi submitted a written complaint to the effect that after 2/3 days of Bakra Idd Festival, his niece i.e. the victim girl was allegedly raped by her elder brother, Abdul Aziz Gazi at her house in absence of her parents, which was allegedly narrated by the victim before her mother on the very next day but her mother as well as her father allegedly suppressed the entire fact and her father also assaulted her.”

9. Upon receipt of the charge sheet, the learned Judge, Special Court, (POCSO) Act, Barasat, North 24 Parganas was pleased to take cognizance against accused Abdul Aziz Gazi and Monajat Gazi for commission of the alleged offences and framed charge against the present accused persons for the said offences to which the accused persons pleaded not guilty and claimed to be tried.

10. On or about 22nd January, 2019 in connection with the instant case the trial commenced and the victim girl was examined as PW-1 in part and was discharged without being cross-examined, as the prosecution preferred

an application for adjournment as name of other accused persons transpired. The learned Judge was pleased to adjourn the case and was further pleased to fix the next date on 30th January, 2019. In course of her evidence, the judicial statements as recorded subsequently under Section 164 of Code of Criminal Procedure, 1973 as well as the medical report has been marked as exhibit in connection with the instant case.

11. The prosecution on or about 22nd February, 2019 preferred an application under Section 319 of Code of Criminal Procedure, 1973, thereby praying for arraigning the proposed accused/opposite parties as accused in this case. After hearing the learned advocates appearing for the respective parties, the learned Judge was pleased to turn down the prayer of the prosecution on the grounds stated therein. While rejecting the said prayer the learned Judge was of the specific opinion that the version of the PW-1 is contradictory to the result of investigation and the Police have submitted charge sheet in this case after considering the 2nd statement of the victim as recorded under Section 164 of Code of Criminal Procedure, 1973. Such observation of the learned Judge is blatantly contrary to the materials on record. The learned Judge was further pleased to observe that it would be unsafe to exercise the power under Section 319 of the Code of Criminal Procedure, 1973 on the evidence of the PW-1 until and unless the alleged star witness Rahim Gazi is examined in connection with this case.

12. The petitioner states that while rejecting the prayer of the prosecution under Section 319 of the Code of Criminal Procedure, 1973, the learned Judge failed to appreciate the very object and purpose of incorporating such provision within the scope and ambit of Code of Criminal Procedure, 1973.

Section 319 of the Code of Criminal Procedure, 1973 clearly provides that if in course of any inquiry or trial of an offence, it appears from the evidence adduced, that any person not being the accused, has committed any offence for which he could be tried together with the other accused, the court may arraign him as an accused in connection with the said criminal proceeding. True and proper appreciation of the second 164 statement of the victim girl as well as her examination-in-chief would unerringly reveal that a prima facie case has been made out against the proposed accused/opposite parties and if the same remain un-rebutted, that is sufficient to convict the proposed accused/opposite parties for commission of the complained offences.

13. The petitioner further states that while rejecting the prayer of the prosecution, the learned Judge erroneously observed that the investigating officer submitted charge sheet after considering the second 164 statement of the victim girl. True and proper appreciation of the case records and other materials available would clearly reveal that before submitting the charge sheet in connection with the instant case, the investigating officer did not even collect the said second statement of the victim girl, far less consider the same. Hence, the observation of the learned Judge, which weighed him to restrain himself from exercising his power under Section 319 of Code of Criminal Procedure, 1973 in connection with the instant case is suffering from manifest error as well as total non-appreciation and/or wrong appreciation of factual aspects of the case. Hence, the same is liable to be interfered with.

14. **Mr. Satadru Lahiri, learned counsel for the petitioner** has submitted that while passing the impugned order, the learned Judge refused to consider the enormous threat hurled by the proposed accused/opposite parties, the antagonistic circumstances in which victim's first statement under Section 164 of Code of Criminal Procedure, 1973 was recorded and/or under what precarious situation she had to undergo the medical examination. The victim in her further (second) statement as recorded under Section 164 of Code of Criminal Procedure, 1973 as well as in course of her examination-in-chief narrated every detail, however, the learned Judge refused to pay any heed to that. True and proper appreciation of the medical examination of the victim girl as well as her first statement as recorded under Section 164 of Code of Criminal Procedure, 1973 would clearly indicate that at both the instances, some of the proposed accused persons accompanied her. Resultantly she could not narrate the name of the real culprits and/or author of the crime. From the materials on record, it is palpable that immediately after she was rescued from the clutches of the proposed accused/opposite parties and could be back to her normal life, she divulged the true incidents.

15. It is further submitted that the second issue i.e. non-examination of Rahim Gazi as witness in connection with the instant case is also irrelevant. True and proper appreciation of the materials on record would clearly indicate that Rahim Gazi was never cited, as witness in this case and there is sufficient impasse regarding the status of the said person. On the peculiar factual matrix of this case, it is yet to be adjudged whether Rahim Gazi is to be adduced as a witness in this case or subsequently, he may also

be implicated as Accused herein. Hence, rejecting any application as preferred by the prosecution under Section 319 of the Code of Criminal Procedure, 1973 considering a person as witness whose status/involvement in the case in hand is yet to be adjudged is non-est in the eyes of law. Since, cumulative appreciation of the deposition of PW-1 and other materials on record unerringly indicate the obvious involvement of the proposed accused persons as accused in this case, the learned Judge absolutely in mechanical and casual manner refused to exercise his power under Section 319 of the Code of Criminal Procedure, 1973, which is liable to be deprecated.

16. That true and proper appreciation of the second 164 statement of the victim girl as well as her examination-in-chief would unerringly reveal that the prima facie case has been made out against the proposed accused/opposite parties and if the same remains un-rebutted, that is sufficient to convict the proposed accused/opposite parties for commission of the complained offences.

17. That keeping in view the said settled principles of law, it is needless to mention that the second statement of the victim girl as recorded under Section 164 of Code of Criminal Procedure, 1973 in connection with the impugned proceeding not only corroborates the evidence as adduced by the victim girl but also negates necessity of recording of any further evidence before exercising the power under Section 319 of Code of Criminal Procedure, 1973 by the learned Judge against the proposed accused persons. 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.

18. That there is, therefore, no scope for the court acting under Section 319 of Code of Criminal Procedure, 1973 to form any opinion as to the guilt of the accused. The accused subsequently impleaded are 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 of the Code of Criminal Procedure, 1973 would be the same as for framing a charge.

19. **Mr. Lahiri has relied upon the following judgments in support of the petitioner's case:-**

- i) *Hardeep Singh vs. State of Punjab & Ors. reported in (2014) 3 SCC 92.*
- ii) *Naveen Kumar vs. Rishipal & Ors. reported in (2021) 11 SCC 563.*
- iii) *Sartaj Singh vs. State of Haryana & Anr. reported in (2021) 5 SCC 337.*
- iv) *Pyare Lal Bhargava vs. State of Rajasthan reported in 1963 Supp.(1) SCR 689: AIR 1963 SC 1094 : (1063) 2 Cri L J 178.*

20. **The opposite party nos. 2 to 4 have refused service.**

21. **Mr. Saswata Gopal Mukherjee, learned Public Prosecutor** has appeared for the State and placed the case diary and relied upon the judgment in CRR 1462 of 2021 of a Co-ordinate Bench of this court and has supported the case of the petitioner (alleged victim).

22. The order challenged in revision dated 19.12.2019 is reproduced here for the sake of convenience:-

“ **POCSO (Spl) 03/17(R4/17)**”

12/19.12.2019

Both the accused are present by filing hazira.

Ld. P.P in charge also files hazira.

Today is fixed for order.

An application u/s 319 Cr.P.C. had been filed on behalf of the prosecution on 22.02.2019 stating inter alia that the V.G of this case was examined and in her examination in chief she stated that one Kayum Gazi had committed rape upon her and she disclosed it to her father and mother and thereafter her father and mother brought her to the house of the accused persons but the father of Kayum Gazi lodged FIR against the brother and father of the V.G and she stated all these things in her statement before the Magistrate u/s 164 Cr.P.C. That the I.O of this case did not mention the name of Kayum Gazi, Saleha Bibi and Najrul Islam Gazi in his charge sheet as accused but he mentioned the name of Najrul Islam Gazi and Saleha Bibi as witness in this case. In such circumstances, the prosecution prays for proceeding against the above noted persons as accused of this case and issue WA against them as per provisions of Sec. 319 Cr.P.C....

Upon hearing both sides and on perusal of materials on record and the C.D, I find that even after considering the 2nd statement of the V.G recorded u/s 164 Cr.P.C., the I.O submitted charge sheet against the present accused persons upon completion of investigation, as prima facie case has been made out.

The V.G has been examined in this case and in her evidence in chief she made allegation of rape against Abdul Kayum Gazi. She also made allegation of confinement against Abdul Kayum Gazi and his mother Saleha Bibi and also against the father of Abdul Kayum Gazi stating that he lodged this case entangling her father Monajat Gazi and her brother Abdul Ajj Gazi. She stated that she narrated false incident involving her father and brother under pressure and from Pisi i.e. Saleha Bibi and agent of police. From her evidence it appears that her statement is completely contradictory to the result of the investigation. She also stated that her cousin brother Abdul Kayum Gazi and his friend Rahim Gazi forcibly took her in a bicycle to a mango grove at Katiahat at 7p.m in the evening and there Abdul Kayum Gazi raped her against her will and Rahim Gazi stood at a distance and on hearing her screams, he rushed scolded Abdul Kayum Gazi after which she was escorted by him to her home. Thus, it appears from evidence of V.G that Rahim Gazi is an important witness in this case but he has not yet been examined. Said Rahim Gazi has also not been cited as a witness in this case.

In such circumstances, I am of the view that it would not be wise and proper to pass any order u/s 319 Cr.P.C. at this stage of trial without taking evidence of witnesses.

Hence, fix 05.03.2020 for cross-examination of P.W 1.

The petition u/s 319 Cr.P.C. will be taken up for consideration at a later stage, after evidence of material/relevant witnesses.

Sd/-
Judge, Spl. Court, (POCSO Act)
Basirhat, North 24 Parganas”

23. **From the materials on record** including the evidence before the trial court and the case diary, it appears that:-

- a) The petitioner (alleged victim and a minor, about 13 years of age, date of birth 15.09.2002) filed a complaint through her pishi's husband on 30.12.2015, against her own brother, Abdul Gazi and father Monajat Gazi alleging that:-

“after 2/3 days of Bakra Idd festival 2015, his niece namely Rabia Khatun (13 years) was raped by her elder brother namely Abdul Aziz Gazi at her house in absence of her parents which was narrated by the V.G before her mother on the very next day but her mother as well as her father suppressed the entire fact by scolding her and her father namely Monajat Gazi assaulted her brutally. Later she was taken by the complainant at their home at Fatillyapur Fakirpara under P.S. Baduria, North 24 Parganas.”

- b) The petitioner has reiterated the contents of the written complaint in her statement under Section 161 and 164 of Cr.P.C. dated 30.12.2015 and 31.12.2015 respectively.
- c) **She also reiterated that as her uncle and pishi did not allow her parents to give her in marriage, her parents filed case against them and that her elder brother Abdul Aziz Gazi had raped her on several occasions.**

- d) Medical report dated 04.01.2016 show history of being sexually assaulted by her own elder brother in her own house.
- e) On 08.02.2016, the petitioner, alleged victim's custody (safe) was given to her elder sister Rokiya Bibi and her husband Abdul Kayem Gazi.
- f) **On 08.04.2016, itself a second statement** under Section 164 of Cr.P.C. was recorded (while in the custody of her own sister). In the said subsequent statement, **the petitioner (alleged victim) has taken a 360 degree turn and implicated the opposite parties number 2 to 4 alleging the same offences and stating that she had been forced to make the statements against her elder brother and father who are the accuseds presently facing trial.**
- g) In the said statement she has also stated that she had been raped by the opposite party no.2, her cousin brother, Abdul Kayem Gazi son of the complainant, and the opposite party no.4, Najrul Islam Gazi and Rahim Gazi, friend of Kayem Gazi stood at a distance.
- h) The learned Special Judge was thus of the view that in such circumstances, as Rahim Gazi was an important witness, who was yet to be brought in as a witness, the petition under Section 319 Cr.P.C. should not allowed **at that stage.**
- i) **Section 319 of Cr.P.C., lays down:-**
- “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.”*

24. The Judgment of the Supreme court in **Sartaj Singh vs. The State of Haryana & Anr., Criminal Appeal Nos. 298299 of 2021**, is relevant here:-

“6. Heard learned counsel for the respective parties at length. What is under challenge in the present appeals is the impugned judgment and order passed by the High Court allowing the revision applications filed by the private respondents herein and quashing and setting aside the order passed by the learned Trial Court summoning the accused in exercise of powers under Section 319 CrPC and to face the trial.

6.1 *While considering the rival submissions, the law on the scope and ambit of Section 319 CrPC is required to be considered and for that few decisions of this Court are required to be referred to. 6.1.1 In Hardeep Singh (supra), this Court had an occasion to consider in detail the scope and ambit of the powers of the Magistrate under Section 319 CrPC, the object and purpose of Section 319 CrPC etc. It is observed in the said decision that the entire effort is not to allow the real perpetrator of an offence to get away unpunished. It is observed that this is also a part of fair trial and in order to achieve this very end that the legislature*

thought of incorporating the provisions of Section 319 CrPC. It is further observed that for the empowerment of the courts to ensure that the criminal administration of justice works properly, the law has been appropriately codified and modified by the legislature under the CrPC indicating as to how the Courts should proceed to ultimately find out the truth so that the innocent does not get punished but at the same time, the guilty are brought to book under the law. It is also observed that it is the duty of the court to find out the real truth and to ensure that the guilty does not go unpunished. In Paragraphs 8 and 9, this Court observed and held as under:

“8. The constitutional mandate under Articles 20 and 21 of the Constitution of India provides a protective umbrella for the smooth administration of justice making adequate provisions to ensure a fair and efficacious trial so that the accused does not get prejudiced after the law has been put into motion to try him for the offence but at the same time also gives equal protection to victims and to society at large to ensure that the guilty does not get away from the clutches of law. For the empowerment of the courts to ensure that the criminal administration of justice works properly, the law was appropriately codified and modified by the legislature under CrPC indicating as to how the courts should proceed in order to ultimately find out the truth so that an innocent does not get punished but at the same time, the guilty are brought to book under the law. It is these ideals as enshrined under the Constitution and our laws that have led to several decisions, whereby innovating methods and progressive tools have been forged to find out the real truth and to ensure that the guilty does not go unpunished.

9. The presumption of innocence is the general law of the land as every man is presumed to be innocent unless proven to be guilty. Alternatively, certain statutory presumptions in relation to certain class of offences have been raised against the accused whereby the presumption of guilt prevails till the accused discharges his burden upon an onus being cast upon him under the law to prove himself to be innocent. These competing theories have been kept in mind by the legislature. The entire effort, therefore, is not to allow the real perpetrator of an offence to get away unpunished. This is also a part of fair trial and in our opinion, in order to achieve this very end that the legislature thought of incorporating provisions of Section 319 CrPC. It is with the said object in mind that a constructive and

purposive interpretation should be adopted that advances the cause of justice and does not dilute the intention of the statute conferring powers on the court to carry out the abovementioned avowed object and purpose to try the person to the satisfaction of the court as an accomplice in the commission of the offence that is the subject matter of trial.”

6.1.2 *In the said case, the following five questions fell for consideration before this Court.*

(i) What is the stage at which power under Section 319 CrPC can be exercised?

(ii) Whether the word “evidence” used in Section 319(1) CrPC 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) CrPC 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 CrPC to arraign an accused? Whether the power under Section 319(1) CrPC 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 CrPC extend to persons not named in the FIR or named in the FIR but not charged or who have been discharged?” 6.1.3 *While considering the aforesaid questions, this Court in Hardeep Singh (supra) observed and held as under:*

*12. Section 319 CrPC springs out of the doctrine *judex damnatur cum nocens absolvitur* (Judge is condemned when guilty is acquitted) and this doctrine must be used as a beacon light while explaining the ambit and the spirit underlying the enactment of Section 319 CrPC.*

13. *It is the duty of the court to do justice by punishing the real culprit. Where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in calling the said accused to face trial. The question remains under what circumstances and at what stage should the court exercise its power as contemplated in Section 319 CrPC?*

14. *The submissions that were raised before us covered a very wide canvas and the learned counsel have taken us through various provisions of CrPC and the judgments that have been relied on for the said purpose. The controversy centres around the stage at which such powers can be invoked by the court and the material on the basis whereof such powers can be exercised.*

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17. *Section 319 CrPC allows the court to proceed against any person who is not an accused in a case before it. Thus, the person against whom summons are issued in exercise of such powers, has to necessarily not be an accused already facing trial. He can either be a person named in Column 2 of the chargesheet filed under Section 173 CrPC or a person whose name has been disclosed in any material before the court that is to be considered for the purpose of trying the offence, but not investigated. He has to be a person whose complicity may be indicated and connected with the commission of the offence.*

18. *The legislature cannot be presumed to have imagined all the circumstances and, therefore, it is the duty of the court to give full effect to the words used by the legislature so as to encompass any situation which the court may have to tackle while proceeding to try an offence and not allow a person who deserves to be tried to go scotfree by being not arraigned in the trial in spite of the possibility of his complicity which can be gathered from the documents presented by the prosecution.*

19. *The court is the sole repository of justice and a duty is cast upon it to uphold the rule of law and, therefore, it will be inappropriate to deny the existence of such powers with the courts in our criminal justice system where it is not uncommon that the real accused, at times, get away by*

manipulating the investigating and/or the prosecuting agency. The desire to avoid trial is so strong that an accused makes efforts at times to get himself absolved even at the stage of investigation or inquiry even though he may be connected with the commission of the offence.

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22. In our opinion, Section 319 CrPC is an enabling provision empowering the court to take appropriate steps for proceeding against any person not being an accused for also having committed the offence under trial. It is this part which is under reference before this Court and therefore in our opinion, while answering the question referred to herein, we do not find any conflict so as to delve upon the situation that was dealt with by this Court in *Dharam Pal (CB) [Dharam Pal v. State of Haryana, (2014) 3 SCC 306 : AIR 2013 SC 3018]*.

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47. Since after the filing of the chargesheet, the court reaches the stage of inquiry and as soon as the court frames the charges, the trial commences, and therefore, the power under Section 319(1) CrPC can be exercised at any time after the chargesheet is filed and before the pronouncement of judgment, except during the stage of Sections 207/208 CrPC, committal, etc. which is only a pretrial stage, intended to put the process into motion. This stage cannot be said to be a judicial step in the true sense for it only requires an application of mind rather than a judicial application of mind. At this pre trial stage, the Magistrate is required to perform acts in the nature of administrative work rather than judicial such as ensuring compliance with Sections 207 and 208 CrPC, and committing the matter if it is exclusively triable by the Sessions Court. Therefore, it would be legitimate for us to conclude that the Magistrate at the stage of Sections 207 to 209 CrPC is forbidden, by express provision of Section 319 CrPC, to apply his mind to the merits of the case and determine as to whether any accused needs to be added or subtracted to face trial before the Court of Session.

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53. It is thus aptly clear that until and unless the case reaches the stage of inquiry or trial by the court, the power under Section 319 CrPC cannot be exercised. In fact, this proposition does not seem to have been disturbed by the Constitution Bench in *Dharam Pal (CB) [Dharam Pal v. State of Haryana, (2014) 3 SCC 306 : AIR 2013 SC 3018]*. The dispute therein was resolved visualising a situation wherein the court was concerned with procedural delay and was of the opinion that the Sessions Court should not necessarily wait till the stage of Section 319 CrPC is reached to direct a person, not facing trial, to appear and face trial as an accused. We are in full agreement with the interpretation given by the Constitution Bench that Section 193 CrPC confers power of original jurisdiction upon the Sessions Court to add an accused once the case has been committed to it.

54. In our opinion, the stage of inquiry does not contemplate any evidence in its strict legal sense, nor could the legislature have contemplated this inasmuch as the stage for evidence has not yet arrived. The only material that the court has before it is the material collected by the prosecution and the court at this stage *prima facie* can apply its mind to find out as to whether a person, who can be an accused, has been erroneously omitted from being arraigned or has been deliberately excluded by the prosecuting agencies. This is all the more necessary in order to ensure that the investigating and the prosecuting agencies have acted fairly in bringing before the court those persons who deserve to be tried and to prevent any person from being deliberately shielded when they ought to have been tried. This is necessary to usher faith in the judicial system whereby the court should be empowered to exercise such powers even at the stage of inquiry and it is for this reason that the legislature has consciously used separate terms, namely, inquiry or trial in Section 319 CrPC.

55. Accordingly, we hold that the court can exercise the power under Section 319 CrPC only after the trial proceeds and commences with the recording of the evidence and also in exceptional circumstances as explained hereinabove.

56. There is yet another set of provisions which form part of inquiry relevant for the purposes of Section 319 CrPC i.e. provisions of Sections 200, 201, 202, etc. CrPC applicable in the case of complaint cases. As has been discussed herein, evidence means evidence adduced before the court. Complaint case is a distinct category of criminal trial where some sort of evidence in the strict legal sense of Section 3 of the Evidence Act 1872 (hereinafter referred to as "the Evidence Act") comes before the court. There does not seem to be any restriction in the provisions of Section 319 CrPC so as to preclude such evidence as coming before the court in complaint cases even before charges have been framed or the process has been issued. But at that stage as there is no accused before the court, such evidence can be used only to corroborate the evidence recorded during the trial (sic or) for the purpose of Section 319 CrPC, if so required. What is essential for the purpose of the section is that there should appear some evidence against a person not proceeded against and the stage of the proceedings is irrelevant. Where the complainant is circumspect in proceeding against several persons, but the court is of the opinion that there appears to be some evidence pointing to the complicity of some other persons as well, Section 319 CrPC acts as an empowering provision enabling the court/Magistrate to initiate proceedings against such other persons. The purpose of Section 319 CrPC is to do complete justice and to ensure that persons who ought to have been tried as well are also tried. Therefore, there does not appear to be any difficulty in invoking powers of Section 319 CrPC at the stage of trial in a complaint case when the evidence of the complainant as well as his witnesses are being recorded. 6.1.4 While answering Questions (iii), namely, whether the word "evidence" used in Section 319(1) CrPC 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, this Court, in the aforesaid decision has observed and held as under:

"58. To answer the questions and to resolve the impediment that is being faced by the trial courts in exercising of powers under Section 319 CrPC, the issue has to be investigated by examining the circumstances which give rise to a situation for the court to invoke such powers. The circumstances that lead to such inference being drawn up by the court for summoning a person arise out of the availability of the facts and material that come up before the court and are made the basis for summoning such a person as an accomplice to the offence alleged to have been committed. The material

should disclose the complicity of the person in the commission of the offence which has to be the material that appears from the evidence during the course of any inquiry into or trial of offence. The words as used in Section 319 CrPC indicate that the material has to be “where ... it appears from the evidence” before the court.

59. Before we answer this issue, let us examine the meaning of the word “evidence”. According to Section 3 of the Evidence Act, “evidence” means and includes:

“(1) all statements which the court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry;

such statements are called oral evidence;

(2) all documents including electronic records produced for the inspection of the court;

such documents are called documentary evidence.”

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78. It is, therefore, clear that the word “evidence” in Section 319 CrPC means only such evidence as is made before the court, in relation to statements, and as produced before the court, in relation to documents. It is only such evidence that can be taken into account by the Magistrate or the court to decide whether the power under Section 319 CrPC is to be exercised and not on the basis of material collected during the investigation.

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82. This pretrial stage is a stage where no adjudication on the evidence of the offences involved takes place and therefore, after the material along with the chargesheet has been brought before the court, the same can be inquired into in order to effectively proceed with framing of charges. After the charges are framed, the prosecution is asked to lead evidence and till that is done, there is no evidence available in the strict legal sense of Section 3 of the Evidence Act. The actual trial of the offence by bringing the accused before the

court has still not begun. What is available is the material that has been submitted before the court along with the charge sheet. In such situation, the court only has the preparatory material that has been placed before the court for its consideration in order to proceed with the trial by framing of charges.

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. This would harmonise such material with the word “evidence” as material that would be supportive in nature to facilitate the exposition of any other accomplice whose complicity in the offence may have either been suppressed or escaped the notice of the court.

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. 6.1.5 While answering Question (ii) namely, whether the word “evidence” used in Section 319(1) CrPC means as arising in examination in chief or also

together with crossexamination, in the aforesaid decision, this Court has observed and held as under:

86. The second question referred to herein is in relation to the word "evidence" as used under Section 319 CrPC, which leaves no room for doubt that the evidence as understood under Section 3 of the Evidence Act is the statement of the witnesses that are recorded during trial and the documentary evidence in accordance with the Evidence Act, which also includes the document and material evidence in the Evidence Act. Such evidence begins with the statement of the prosecution witnesses, therefore, is evidence which includes the statement during examination in chief. In *Rakesh* [(2001) 6 SCC 248 : 2001 SCC (Cri) 1090 : AIR 2001 SC 2521], it was held that: (SCC p. 252, para 10) "10. ... It is true that finally at the time of trial the accused is to be given an opportunity to cross examine the witness to test its truthfulness. But that stage would not arise while exercising the court's power under Section 319 CrPC. Once the deposition is recorded, no doubt there being no cross examination, it would be a prima facie material which would enable the Sessions Court to decide whether powers under Section 319 should be exercised or not."

87. In *Ranjit Singh* [*Ranjit Singh v. State of Punjab*, (1998) 7 SCC 149 : 1998 SCC (Cri) 1554 : AIR 1998 SC 3148], this Court held that: (SCC p. 156, para 20) "20. ... it is not necessary for the court to wait until the entire evidence is collected for exercising the said powers."

88. In *Mohd. Shafi* [*Mohd. Shafi v. Mohd. Rafiq*, (2007) 14 SCC 544 : (2009) 1 SCC (Cri) 889 : AIR 2007 SC 1899], it was held that the prerequisite for exercise of power under Section 319 CrPC is the satisfaction of the court to proceed against a person who is not an accused but against whom evidence occurs, for which the court can even wait till the crossexamination is over and that there would be no illegality in doing so. A similar view has been taken by a two Judge Bench in *Harbhajan Singh v. State of Punjab* [(2009) 13 SCC 608 : (2010) 1 SCC (Cri) 1135]. This Court in *Hardeep Singh* [*Hardeep Singh v. State of Punjab*, (2009) 16 SCC 785 : (2010) 2 SCC (Cri) 355] seems to have misread the judgment in *Mohd. Shafi* [*Mohd. Shafi v. Mohd. Rafiq*, (2007) 14 SCC 544 : (2009) 1 SCC (Cri) 889 : AIR 2007 SC 1899], as it construed that the said judgment laid

down that for the exercise of power under Section 319 CrPC, the court has to necessarily wait till the witness is cross-examined and on complete appreciation of evidence, come to the conclusion whether there is a need to proceed under Section 319 CrPC.

89. We have given our thoughtful consideration to the diverse views expressed in the aforementioned cases. Once examination in chief is conducted, the statement becomes part of the record. It is evidence as per law and in the true sense, for at best, it may be rebuttable. An evidence being rebutted or controverted becomes a matter of consideration, relevance and belief, which is the stage of judgment by the court. Yet it is evidence and it is material on the basis whereof the court can come to a prima facie opinion as to complicity of some other person who may be connected with the offence.

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 mini-trial 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 mini-trial 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 subsection (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.

91. 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 CrPC, 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(es) prior to passing of an order under Section 319 CrPC, as such a procedure is not contemplated by CrPC. 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(es) is obliterating the role of persons already facing trial. More so, Section 299 CrPC enables the court to record evidence in absence of the accused in the circumstances mentioned therein.

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.

6.1.6 While answering Question (iv), namely, what is the degree of satisfaction required for invoking the power under Section 319 CrPC, this Court after considering various earlier decisions on this point, has observed and held as under:

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. 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.

6.1.7 *While answering Question (v), namely, in what situations can the power under Section 319 CrPC be exercised: named in the FIR, but not chargesheeted or has been discharged, this Court has observed and held as under:*

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 chargesheeted. 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.

6.2 *Considering the law laid down by this Court in Hardeep Singh (supra) 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 chargesheeted 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. 6.3 In S. Mohammed Ispahani v. Yogendra Chandak (2017) 16 SCC 226, this Court has observed and held as under: (SCC p. 243) “35. It needs to be highlighted that when a person is named in the FIR by the complainant, but police, after investigation, finds no role of that particular person and files the chargesheet without implicating him, the Court is not powerless, and at the stage of summoning, if the trial court finds that a particular person should be summoned as accused, even though not named in the chargesheet, it can do so. At that stage, chance is given to the complainant also to file a protest petition urging upon the trial court to summon other persons as well who were named in the FIR but not implicated in the chargesheet. Once that stage has gone, the Court is still not powerless by virtue of Section 319 CrPC. However, this section gets triggered when during the trial some evidence*

surfaces against the proposed accused.” 6.4 In the case of Rajesh v. State of Haryana (2019) 6 SCC 368, after considering the observations made by this Court in Hardeep Singh (supra) referred to hereinabove, this Court has further observed and held that even in a case where the stage of giving opportunity to the complainant to file a protest petition urging upon the trial court to summon other persons as well who were named in FIR but not implicated in the chargesheet has gone, in that case also, the Court is still not powerless by virtue of Section 319 CrPC and even those persons named in FIR but not implicated in charge sheet can be summoned to face the trial provided during the trial some evidence surfaces against the proposed accused.”

25. **Thus as held by the Supreme Court, the purpose of Section 319 Cr.P.C. is to find the truth so that the innocent is not punished and also to ensure that the guilty does not go unpunished.**

26. The Supreme Court also held that:-

“In our criminal justice system, it is not uncommon that the real accused, at times, get away by manipulating the prosecution, when he may be actually connected with the commission of the offence. It has also been held that the power under Section 319 of Cr.P.C should be exercised sparingly and only where strong and cogent evidence is present from the evidence before the court and not in a casual manner. The Court further held that to exercise such power, very strong evidence is required than mere probability of complicity. (Para 6.1.2 (19), Sartaj Singh vs. The State of Haryana & Anr.)”

27. The observation of the court that **the court should keep in mind, that the witness when giving evidence against such persons, is not doing so merely to seek revenge or is naming him at the behest of someone (herein the petitioner’s sister and brother-in-law).**

28. **In the present case**, when her (the petitioner's) custody was given to her sister and brother-in-law, she has implicated the son of the complainant, her uncle and aunt, her cousin, with the same allegations as

made in the written complaint which is in total contradiction to the allegations against her brother and father. In such circumstances the angle of seeking revenge or naming the opposite parties at the behest of her sister and brother in law cannot be ruled out.

29. The learned Trial Judge also held rightly that Rahim Sheikh is an important witness and as such the court should proceed to bring Rahim Sheikh as a witness in the present case and on taking his evidence during trial, proceed with the trial in accordance with law and if an application is preferred at the appropriate stage, dispose same in accordance with law.

30. The order under revision thus being in accordance with law requires no interference by this court and is affirmed.

31. **The revisional application being CRR 888 of 2020 is dismissed.**

32. The learned Special Judge is to proceed with the trial expeditiously.

33. All connected applications, if any, stands disposed of.

34. Interim order, if any, stands vacated.

35. Copy of this judgment be sent to the learned Trial Court for necessary compliance.

36. Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)