*** HONOURABLE SRI JUSTICE CHEEKATI MANAVENDRANATH ROY**

+ Criminal Revision Case No.533 of 2015

% Dated 21-5-2020

Boya Kajje Pedda Ambaraju
and 9 others

..... Petitioners/
Accused

Versus

$ 1. State of Andhra Pradesh, Rep. by Public Prosecutor,
High Court of Judicature at Hyderabad

..Respondent/State

2. Kuruva Seethakkagari Mallanna

... Respondent/
De facto Complainant

! Counsel for the petitioners : Sri S.D. Gowd

^ Counsel for respondent No.1 : Addl. Public Prosecutor

^ Counsel for respondent No.2: Sri J.Janakirami Reddy

<GIST:

> HEAD NOTE:

? Cases referred

1. (2014) 3 SCC 92
2. 2007 (6) Scale 555
3. AIR 1983 SC 288
4. AIR 1979 SC 339

HONOURABLE SRI JUSTICE CHEEKATI MANAVENDRANATH ROY

Criminal Revision Case No.533 of 2015

Judgment:

Challenge in this criminal revision case is to the order dated 13-3-2015 whereby the II Additional Sessions Judge, Kurnool at Adoni, has allowed the petition filed under Section 319 of Cr.P.C by the prosecution to add the revision petitioners also as accused 7 to 16 to face trial of the case along with accused 1 to 6.

2. Concise statement of facts relevant to dispose of this criminal revision case may be stated as follows:

(a) On 25-02-2010 at about 12.15 p.m., Kuruva Seethakkagari Ambanna (hereinafter called as 'the deceased') was murdered. So, his son Kuruva Seethakkagari Mallanna, P.W.1 lodged a report with the Police stating that about eleven persons i.e. accused No.1 and the revision petitioners who are ten in number named in his report attacked the deceased with deadly weapons near Electrical Sub Station at Gulyam Village on Gulyam – Halaharvi road while the deceased was returning from his agricultural lands and committed his murder. P.W.1 has stated in his report that he is following his father from their lands at that time and he has seen the said persons named in the FIR attacking his father with deadly weapons and killing him. The Station House Officer of Alur Police Station registered the said report as an FIR in Crime No.18/2010 for the offences punishable under Sections 147,

148, 302, 506 and 120B read with Section 149 of IPC against eleven accused named in the FIR and investigated the case.

(b) During the course of investigation, the witnesses L.Ws.1 to 11 have given their statements before the Police stating that they have witnessed the offence and that the eleven persons i.e. accused No.1 and the revision petitioners who are ten in number named in the FIR committed the murder of the deceased. However, L.Ws.12 to 18, who are also the alleged eyewitnesses to the offence, appears to have stated in their statements before the Police that accused 1 to 6 committed the murder of the deceased and that they have witnessed the same. Among these six accused, only accused No.1 was found to be named in the FIR. Therefore, the Investigating Officer has re-examined L.Ws.1 to 11 witnesses. In their re-examination, it is alleged that L.Ws.1 to 11 stated that on the advice of the caste elders in the village that they have given the statements against the revision petitioners as accused and in their re-examination, it is alleged that they have eliminated the role of the revision petitioners in committing the said offence and gave statements in their re-examination in tune with the statements of L.Ws.12 to 18 stating that accused 1 to 6 have committed the said offence of murder of the deceased.

(c) Therefore, after obtaining permission from the Superintendent of Police, Kurnool, the Investigating Officer

has filed charge-sheet only against accused 1 to 6. The revision petitioners were not charge-sheeted.

(d) After the charge-sheet was filed in the committal Court before the concerned Magistrate, the record reveals that notice was given to the *de facto* complainant, who is P.W.1, regarding deletion of names of the revision petitioners named in the FIR. It appears that the *de facto* complainant has filed a Memo in the committal Court stating that he has no objection for deletion of the names of the said accused. Therefore, the learned Magistrate has committed the case for trial to the Court of Sessions only against accused 1 to 6 as the offence under Section 302 of IPC is exclusively triable by Court of Sessions.

(e) The said case, on committal, was made over to the II Additional Sessions Judge, Kurnool at Adoni for trial. The learned II Additional Sessions Judge framed necessary charges against accused 1 to 6 and commenced trial against them.

(f) The *de facto* complainant, who is the son of the deceased, was examined as P.W.1 during the course of trial before the trial Court. At the time of giving his evidence in the trial Court, P.W.1 stated in his evidence that revision petitioners 1 to 10 herein have also attacked the deceased with deadly weapons and caused injuries to him and killed him and that he has personally witnessed the revision petitioners also committing murder of the deceased. He has

given a detailed account in his evidence as to how the revision petitioners also attacked the deceased with lethal weapons by giving specific overt acts against each of these revision petitioners in attacking the deceased and killing him. Therefore, he stuck to his guns as per the contents of FIR lodged by him with the Police.

(g) Before commencing the cross-examination of P.W.1, as can be seen from the deposition of P.W.1, the learned counsel for the accused i.e. accused 1 to 6 contended before the Court that as P.W.1 in his examination-in-chief attributed overt acts to the revision petitioners that unless they are brought on to the record that the true facts cannot be elicited. Therefore, the learned II Additional Sessions Judge held in the deposition that it is a fit case to initiate proceedings under Section 319 of Cr.P.C. The learned Additional Public Prosecutor sought time for taking steps under Section 319 of Cr.P.C. Therefore, the cross-examination of P.W.1 was deferred.

(h) Thereafter, the Additional Public Prosecutor Grade-I (FAC), on behalf of the prosecution, filed a petition under Section 319 of Cr.P.C stating that accused 1 to 6 are only facing trial in the case and as P.W.1 deposed during the course of trial that revision petitioners 1 to 10 have also committed the murder of the deceased and as he has given specific overt acts against the revision petitioners regarding their complicity in commission of the said crime that the

revision petitioners shall also be added as accused 7 to 16 to face trial along with accused 1 to 6 and thereby prayed to add the revision petitioners as accused 7 to 16 in the case to face trial along with accused 1 to 6.

(i) After hearing the learned Additional Public Prosecutor, the learned II Additional Sessions Judge by the impugned order allowed the said petition and ordered to issue summons to the revision petitioners, who are the proposed accused, to face the trial.

(j) Aggrieved thereby, the revision petitioners, who are added as accused 7 to 16 in Sessions Case No.670 of 2011 to face trial along with accused 1 to 6, have filed the criminal revision case assailing the legality and validity of the said order.

3. When the revision case came up for hearing before this Court, heard Sri S.D. Gowd, learned counsel for the revision petitioners; learned Additional Public Prosecutor for the 1st respondent/State and Sri J.Janakirami Reddy, learned counsel for the 2nd respondent/*de facto* complainant (P.W.1).

4. In the background of the facts narrated supra and in the light of the submissions made by both the parties to the revision case, it is to be now ascertained whether the learned II Additional Sessions Judge is justified in summoning the revision petitioners also as accused in the said case in

S.C.No.670 of 2011 to face trial along with accused 1 to 6 or not ?

5. Before adverting to the same, the historical background in incorporating Section 319 in the Code of Criminal Procedure needs to be considered for better understanding of the intention of the Legislature in incorporating this Section 319 with a drastic change when compared to its earlier Section 351 in the Old Code which is corresponding to Section 319 in the present Code.

6. Prior to 1973, before the Criminal Procedure Code is drastically amended, Section 351 in the Old Code is the corresponding section to Section 319 of the present Code. Clause (1) of Section 351 in the Old Code reads thus:

> "**Detention of offenders attending Court**.- (1) Any person attending a criminal Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of inquiry into or trial of any offence of which such Court can take cognizance and which, from the evidence may appear to have been committed, and may be proceeded against as though he had been arrested or summoned."

7. As per sub-clause (2) of Section 351 in the Old Code, when the detention takes place in the course of any inquiry under Chapter XVIII or after a trial has been begun, the proceedings in respect of such person shall be commenced afresh, and the witnesses reheard.

8. From a perusal of the above extracted provision, it is obvious that only against a person who is attending the Court

who also appears to have committed the offence from the evidence adduced before the Court, of which such Court can take cognizance may be detained by the Court for the purpose of enquiry or trial and in respect of that person, the proceedings shall have to be commenced afresh and the witnesses re-heard. The expression used, *inter alia*, in the Section is "any offence of which such Court can take cognizance and which, from the evidence, may appear to have been committed" clearly indicates two aspects, namely, (i) that it shall appear from the evidence that a person who is attending the Court has committed an offence; and (ii) that the offence is such that the Court can take cognizance. Therefore, it is obvious that there is a lacuna in the Section as it is not covering two important situations, namely, the situation where the person who appears to have committed an offence during the course of the enquiry into or trial was not attending the Court; and the manner in which the cognizance will be taken as against that person.

9. Therefore, to make the Section fairly a comprehensive one, realizing the above two grey areas, the Law Commission in its 41st report recommended for suitable amendment of the said provision. It is expedient to extract the relevant recommendation of the Law Commission. It reads thus:

> "24.80. It happens sometimes, though not very often, that a Magistrate hearing a case against certain accused finds from the evidence that some person, other than the accused before him, is also concerned in that very offence or in a connected

offence. It is only proper that a Magistrate should have the power to call and join him in the proceedings. Section 351 provides for such a situation, but only if that person happens to be attending the Court. He can then be detained and proceeded against. There is no express provision in Section 351 for summoning such a person if he is not present in Court. Such a provision would make Section 351 fairly comprehensive, and we think it proper to expressly provide for that situation.

24.81. Section 351 assumes that the Magistrate proceeding under it has the power of taking cognizance of the new case. It does not, however, say in what manner cognizance is taken by the Magistrate. The modes of taking cognizance are mentioned in Section 190, and are apparently exhaustive. The question is, whether against the newly added accused, cognizance will be supposed to have been taken on the Magistrate's own information under Section 190(1)(c), or only in the manner in which cognizance was first taken of the offence against the accused. The question is important, because the methods of inquiry and trial in the two cases differ. About the true position under the existing law, there has been difference of opinion, and we think it should be made clear. **It seems to us that the main purpose of this particular provision is, that the whole case against all known suspects should be proceeded with expeditiously and convenience requires, that cognizance against the newly added accused should be taken in the same manner as against the other accused**. We, therefore, propose to recast Section 351 making it comprehensive and providing that there will be no difference in the mode of taking cognizance of a new person is added as an accused during the proceedings."

10. Thus, it is clear that the Law Commission made two recommendations, namely, (i) to add an accused who is not before the Court but concerned with that offence and (ii) the mode of taking cognizance as against the newly added accused. These two additions, in the view of the Law

Commission, would make the provision fairly a comprehensive one. Pursuant to the above recommendation, Section 319 of the Code has been enacted amending the same in a suitable manner.

11. The new Section 319 in the 1973 Code reads thus:

> "**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—
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> (*a*) the proceedings in respect of such person shall be commenced afresh, and the 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."

12. A perusal of the present Section 319 of Cr.P.C makes it manifest now that any person not being the accused before the Court who also appears to have committed an offence from

the evidence adduced before the Court during the course of any enquiry into or trial of an offence for which cognizance has already been taken, whether that person is attending the Court or not, can be summoned and if he is added as an accused pursuant to the said decision of the Court, the mode of taking cognizance qua the newly added person is the same as in the case of the already arraigned accused. In other words, he is deemed to have been an accused when the Court has originally taken cognizance of the offence earlier. For this purpose, a legal fiction is created in Clause (b) of sub-section (4) of Section 319 of Cr.P.C.

13. Therefore, a critical examination of sub-section (1) of Section 319 of Cr.P.C shows that it should appear from the evidence before it to the Court during the course of enquiry into or trial of an offence that any person not being the accused has committed an offence for which such person could be tried together with the accused on record. The Section envisages two requirements, namely, (i) that some other person, who is not arraigned as an accused in that case has committed an offence; and (ii) that for such offence, that person could as well be tried along with the already arraigned accused.

14. While this is the historical background of Section 319 of the present Code from which legislative intent is apparent, it is also relevant to consider the observation made by the Constitution Bench of five Judges of the Apex Court in

Hardeep Singh v. State of Punjab[1] while dealing with the scope and extent of power of the Court under Section 319 of Cr.P.C., in the light of Articles 20 and 21 of the Constitution of India, which this Court is of the view germane to resolve the present controversy. The five-Judge Constitution Bench held as follows:

> "Section 319 Cr.P.C springs out of the doctrine *judex damnatur cum nocens absolvitur* (which means, 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 Cr.P.C."

15. The Constitution Bench further held as follows:

> "The Constitutional mandate under Articles 20 and 21 of the Constitution of India, 1950 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 the 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 the Cr.P.C. 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."

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[1] (2014) 3 SCC 92

16. Therefore, it is now clear that in incorporating Section 319 as it now stands in the Criminal Procedure Code, 1973 the entire effort is not to allow the real perpetrator of an offence to go scot-free and to get away unpunished. This is also part of a fair trial. Therefore, in order to achieve this very end the Legislature thought of incorporating Section 319 in the Code.

17. Incidentally, the Constitution Bench also held in the above decision as follows:

> "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 Cr.P.C.?"

18. It is also held that Section 319 of Cr.P.C is an enabling provision and an extraordinary power conferred on the Court which is to be exercised judiciously with circumspection.

19. Thus, from the historical background in incorporating Section 319 of Cr.P.C as discussed in detail supra coupled with the observations made by the Constitution Bench of the Apex Court, it is important to note that the whole idea behind incorporating it is that not to allow a person who deserves to be tried to go scot-free by being not arraigned in the trial inspite of possibility of his complicity in perpetrating

the crime emanating from the evidence both oral and documentary adduced during the course of enquiry or trial of the case by the prosecution.

20. Bearing in mind the above object, reasons, principles of law and the scope and extent of power of the Court under Section 319 of Cr.P.C., the present case is to be considered.

21. Now, while reverting to the facts of the case, it is significant to note at the outset that as per the version of the prosecution, P.W.1 is the *de facto* complainant, who is the son of the deceased and he is an eyewitness to the offence. It is this P.W.1 who has lodged the report with the Police after the murder took place and set the criminal law into motion. It is the said report that was registered as an FIR by the Police and investigated the case. This FIR lodged by P.W.1, the eyewitness to the offence originally disclosed the names of about eleven persons including the revision petitioners as the assailants who committed the said murder of the deceased. The record reveals that L.Ws.2 to 11 are also the eyewitnesses to the said offence. Though they stated the names of the revision petitioners as assailants in their statements given to the Police at the first instance during the course of investigation, surprisingly the Investigating Officer re-examined them and in their re-examination, they eliminated the role of the revision petitioners who are named in the FIR and they confined to only accused 1 to 6 as stated by L.Ws.12 to 18 as the assailants who committed the said offence of

murder. Therefore, the Investigating Officer has deleted the names of the other accused after taking permission from the Superintendent of Police and filed charge-sheet only against accused 1 to 6. The learned Magistrate of the committal Court issued notice to the *de facto* complainant regarding deletion of the names of the revision petitioners and it is the version of the prosecution that the *de facto* complainant filed a memo stating that he has no objection for deletion of the said names. Therefore, the learned Magistrate has committed the said case only against accused 1 to 6 to the Court of Sessions for trial.

22. The *de facto* complainant now disputed the fact that he has filed any such memo in the Court stating that he has no objection for deletion of the said names contending that when notice issued by the committal Court was served on him that the Police has taken his signatures on blank papers and that they might have fabricated it as a memo said to have been filed by him stating that he has no objection for deletion of the names. Thus the *de facto* complainant now disputes the very validity of the memo said to have been filed by him in the Court. This Court is not inclined to enter into the said controversy to resolve the said contentious issue which requires an elaborate enquiry to record a finding of fact regarding the genuineness of the said memo said to have been filed by the *de facto* complainant. It is suffice to consider whether despite filing of any such memo, even if true, whether the trial Court is powerless and precluded from adding the

revision petitioners also as accused to face trial along with accused 1 to 6 in view of the evidence given by P.W.1, an eyewitness to the offence, during the course of trial that these revision petitioners also have committed the said offence of murder or not. In other words, it is suffice to consider whether the said Memo, even if true, would operate as a bar for invoking Section 319 of Cr.P.C by the trial Court or not.

23. Learned counsel for the revision petitioners, taking complete advantage of the deletion of names of the revision petitioners by the Investigating Officer in the charge-sheet and taking advantage of the alleged memo available on record said to have been filed by the *de facto* complainant stating that he has no objection for deletion of the names of the revision petitioners named in the FIR and the order passed thereon by the committal Court and also based on the fact that the alleged other eyewitnesses L.Ws.2 to 11 have eliminated the role of the revision petitioners in commission of the said offence in their statements recorded under Section 161 of Cr.P.C at the time of their re-examination by the Investigating Officer vehemently contends that no reliance can be placed on the testimony of P.W.1 given during the course of trial to invoke Section 319 of Cr.P.C to summon the revision petitioners also to face trial in the case. He would submit that the order passed by the committal Court accepting deletion of names by the Investigating Officer also operates as a bar to again take cognizance of the case against the revision

petitioners. These are the principal grounds on which the revision petitioners contend that there are no valid legal grounds to add these revision petitioners as accused to face trial along with accused 1 to 6.

24. Thus, the contention of the revision petitioners, as per the above submissions, is two-fold. Regarding the first contention that the memo said to have been filed by the *de facto* complainant before the committal Court in response to the notice given to him by the said Court that he has no objection for deletion of the names of the revision petitioners who are named in the FIR at the time of filing charge-sheet by the Police and the order passed thereon by the committal Court would operate as a bar to invoke Section 319 of Cr.P.C by the trial Court, this Court has absolutely no hesitation to reject the said contention at the threshold as it is absolutely devoid of any merit.

25. In the case of ***Y.Saraba Reddy v. Puthur Rami Reddy***[2], the three-Judge Bench of the Supreme Court held at para-8 as follows:

> "... ... ... If the satisfaction of the Investigating Officer or Supervising Officer is to be treated as determinative, then the very purpose of Section 319 of the Code would be frustrated. Though it cannot always be the satisfaction of the Investigating Officer which is to prevail, yet in the instant case the High Court has not found the evidence of PW-1 to be unworthy of acceptance. Whatever be the worth of his evidence for the purposes of Section 319 of the Code it was required to be analysed. The conclusion that the IO's satisfaction should be

[2] 2007 (6) Scale 555

given primacy is unsustainable. The High Court was not justified in holding that there was belated approach."

26. In the case of *Kishore Prasad v. State of Bihar* (*AIR 1996 SC 1931*), the Supreme Court held that Section 319(1) of Cr.P.C operates in an ongoing enquiry into or trial of an offence and further held that that at the stage of Section 209 of Cr.P.C., the Court is neither at the stage of enquiry nor at the stage of trial. Even at the stage of ensuring compliance of Sections 207 and 209 Cr.P.C., it cannot be said that the Court is at the stage of enquiry because there is no judicial application of mind and all that the Magistrate is required to do is to make the case ready to be heard by the Court of Sessions.

27. Therefore, since the Magistrate of the committal Court, after the charge-sheet is filed in the said Court, has to only commit the case to the Court of Sessions for trial under Section 209 of Cr.P.C., as per the ratio laid down in the above judgment of the Supreme Court, the said proceedings relating to committal of the case under Section 209 of Cr.P.C cannot be construed as an enquiry for the purpose of Section 319 of Cr.P.C. Therefore, even if any order accepting the deletion of names of the other accused mentioned in the FIR in the charge-sheet albeit on the alleged memo said to have been filed by the *de facto* complainant, it does not preclude the trial Court in any manner to consider whether the persons who are named in the evidence given before it during the course of trial

also as assailants to be added as accused along with the other accused to face the trial or not. The said stage of considering whether to add any other person as accused comes into play only during the course of enquiry or the trial of the case. Since the proceedings of committal is not considered to be an enquiry for the purpose of Section 319 of Cr.P.C., in view of the ratio laid down in the above judgment, the said memo or the order if any passed on the said memo by the committal Court will not come in the way of exercising the power under Section 319 of Cr.P.C subsequently during the course of the trial by the trial Court on the basis of the evidence adduced in the said case from which it appears that some other person or persons also committed the offence. Considering the above judgment of the Apex Court in *Kishore Prasad v. State of Bihar*, the Constitution Bench of the Apex Court in ***Hardeep Singh***'s case (1 *supra*) also held that while considering the language employed in Section 319 of Cr.P.C., "in the course of any enquiry into, or trial of, an offence" and while considering the stage at which the power can be exercised under Section 319 of Cr.P.C in the light of the above phrase used in the Section, the Constitution Bench of the Apex Court held that the power under Section 319 of Cr.P.C can be exercised at any time after commencement of enquiry into an offence by the Court and before conclusion of trial, except during stage of Sections 207 to 209 of Cr.P.C which is not a judicial step in the true sense.

28. Therefore, in view of the above law, as the Magistrate of the committal Court at the time of committing the case under Section 209 of Cr.P.C to the Court of Sessions cannot make any enquiry as contemplated under Section 319 of the Code and as the said committal proceedings under Section 209 of Cr.P.C cannot be equated with enquiry as required under law for the said purpose, any order passed on the alleged memo said to have been filed by the *de facto* complainant regarding the deletion of names cannot operate as a bar for the Sessions Court being a trial Court to exercise its power under Section 319 of Cr.P.C when it is made to appear to the said Court from the evidence which was adduced before it that the other persons i.e. the revision petitioners herein also committed the said offence along with the accused who are already on record to add them as accused in the said case.

29. Now, it is also relevant to note that as per settled legal position that even if the accused are discharged earlier by an order of the competent Court from the case, still it will not operate as a bar to exercise the power of the Court under Section 319 of Cr.P.C subsequently or proscribe the Court from adding them as accused in the criminal case to face trial along with the other accused. So also, even when the case against the accused is quashed, subsequently if it comes to light during the course of trial before the Court as per the evidence adduced before it that they have also committed the

offence, it will not also preclude the Court or make the Court powerless or imposes a bar on the Court to invoke 319 of Cr.P.C to add them as accused. The legal position in this regard is not *res nova* and it is authoritatively settled by a Constitution Bench judgment in ***Hardeep Singh***'s case (1 *supra*). It is held at paras 107 to 109 that Section 319 of Cr.P.C can also be invoked even against a person who is discharged from the case. It is held that a person discharged can also be arraigned again as an accused but only after an enquiry as contemplated under Sections 300(5) and 398 of Cr.P.C. If during or after such enquiry, there appears to be an evidence against such person, power under Section 319 of Cr.P.C can be exercised.

30. In the case of *Municipal Corporation of Delhi v. Ram Kishan Rohtagi* (*AIR 1983 SC 67*), the Apex Court held that if the prosecution can at any stage produce evidence which satisfies the Court that those who have not been arraigned as accused or **against whom proceedings have been quashed**, have also committed the offence, the Court can take cognizance against them under Section 319 of Cr.P.C.

31. This judgment is again quoted with approval by the Constitution Bench in the above judgment in ***Hardeep Singh***'s case (1 *supra*) by the Apex Court at para-106.

32. Therefore, from the above legal position, it is now clear that even when the accused is discharged from the case previously and even when the proceedings against the

accused are quashed previously, when subsequently during the course of trial of the said case if it emanates from the evidence produced before the Court and appears to the Court that the said accused who is discharged from the case or even against whom proceedings were quashed or even against a person who is not at all shown as accused also committed the said offence, it is within the power and competence of the Court to invoke Section 319 of Cr.P.C to add the said persons also as accused under Section 319 of Cr.P.C to try them along with the other accused. There is absolutely no legal bar imposed on the Court to add them as accused. In the above Constitution Bench judgment, it is also held that the persons who are not subjected to investigation or **person who is subjected to investigation but not charge-sheeted and against whom cognizance had not been taken** also can be added as accused under Section 319 of Cr.P.C if it comes to light during the course of trial as per the evidence adduced before the Court that the said person also committed the said offence.

33. Therefore, when such is the law that an accused who was discharged previously and an accused against whom proceedings are previously quashed and a person against whom cognizance was not taken previously can also be added as an accused under Section 319 of Cr.P.C notwithstanding the said orders passed earlier, it is really beyond the comprehension of this Court as to how the mere order passed

by a committal Court accepting the deletion of the names in the charge-sheet on the basis of the alleged memo filed by the *de facto* complainant would come in the way of the trial Court in adding the revision petitioners also as accused in this case under Section 319 of Cr.P.C in view of the categorical evidence given by the eyewitness to the offence who is P.W.1 in the Court against the revision petitioners during the course of trial of the said case. Certainly it cannot operate as a bar for the trial Court to exercise its power under Section 319 of Cr.P.C. In fact, comparing the case on hand with other nature of cases like discharge and quash of proceedings, this case stands on a better footing. Therefore, that part of the contention of revision petitioners is rejected.

34. Learned counsel for the revision petitioners sought to assail the impugned order also on the ground that as P.W.1, who was examined as L.W.1, during the course of investigation by the Police along with other eyewitnesses L.Ws.2 to 11 in their re-examination by the Investigating Officer eliminated the role of the revision petitioners, though named in the FIR in commission of the said offence and they did not state anything against these revision petitioners that in view of the said earlier statements given to the Police that any evidence given by P.W.1 subsequently during the course of trial in his evidence against the revision petitioners implicating them also as accused in this case contrary to his earlier statement will not be a reliable evidence and

a trustworthy evidence on account of the said prevaricating statements given at various stages and the said evidence of P.W.1 cannot be made basis for forming an opinion by the trial Court that these accused also committed the said offence along with accused 1 to 6 and as such adding the revision petitioners as accused under Section 319 of Cr.P.C in the said case is legally unsustainable. The said contention again has no merit.

35. The fundamental tenet of Law of Evidence is that the statements given by the witnesses before the Police under Section 161 of Cr.P.C either at the first instance or in re-examination during the course of investigation is not an evidence and it has no evidentiary value. They can be used only to contradict the witnesses as per the evidence given by them in the Court with reference to the earlier statements of the accused. Except for the said purpose, the statements of witnesses under Section 161 of Cr.P.C cannot be used for any other purpose. It is only the evidence given by the witness in the Court during the course of trial is the substantive piece of evidence. The Court has to ultimately go by the evidence given by the witness during the course of trial which is a substantive piece of evidence to adjudicate whether the accused are guilty of the offence or not. After completion of the trial of the criminal case, the trial Court has to eventually appreciate the substantive evidence given before it in the course of trial with reference to any other contradictions that

were marked in the earlier statements said to have been given to the Police in the final adjudication of the case to find out the veracity of the testimony of the witnesses given in the course of trial and to find out whether the same is reliable and trustworthy or not and the Court has to record a finding to that effect. The Supreme Court in the case of ***Sri Mahant Amar Nath v. State of Haryana***[3] held that the fact that the details given by the eyewitness at the trial had not figured in his statement under Section 161 of Cr.P.C., was at that stage immaterial.

36. So, the contention of the revision petitioners that since the evidence given by P.W.1 in the Court now is inconsistent with his statement given under Section 161 of Cr.P.C before the Police and as such his evidence given in the Court cannot be considered, merits no consideration.

37. At the stage of considering the case under Section 319 of Cr.P.C after it appears to the Court from the evidence adduced before it that other persons also committed the said offence, all that the Court has to see is whether the said evidence is sufficient enough to call the said accused for trial leaving the aspect of appreciation of the said evidence to ascertain its veracity and trustworthiness to be decided in the final adjudication of the case. As per settled law, the enquiry in this regard under Section 319 of Cr.P.C is almost equal to the enquiry to be made by the Court while considering framing

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[3] AIR 1983 SC 288

of charges against the accused or discharge of the accused to find out whether there is a *prima facie* case to presume that the accused has committed the said offence and whether there are sufficient grounds to proceed against the accused to try them for the said case or not. However, a little more degree of satisfaction of the Court is required which is much stricter. It must be more than the *prima facie* case. It is the objective satisfaction of the Court that is required ultimately to exercise the power under Section 319 of Cr.P.C against the other persons to add them as accused.

38. The Constitution Bench in ***Hardeep Singh***'s case (1 *supra*) while dealing with what is the degree of satisfaction required for invoking the power under Section 319 of Cr.P.C held that the word "appear" used in Section 319 of Cr.P.C means "clear to the comprehension" or a phrase near to, if not synonymous with "proved". It imparts a lesser degree of probability than proof.

39. The Constitution Bench further held that at the time of taking cognizance, the Court has to see whether a *prima facie* case is made out to proceed against the accused. But under Section 319 of Cr.P.C, though the test of *prima facie* case is the same, the degree of satisfaction that is required is much stricter. The Supreme Court in *Vikas v. State of Rajasthan* (*2013 (11) Scale 23*), which is quoted with approval by the Constitution Bench in the above case, held:

> "That on the objective satisfaction of the Court a person may be 'arrested' or 'summoned', as the circumstances of the case may require, if it appears from the evidence that any such person not being the accused has committed an offence for which such person could be tried together with the already arraigned accused persons."

40. In *Ram Singh v. Ram Niwas* [*(2009) 14 SCC 25*], the Apex Court while considering the importance of the word "appear" as appearing in the Section, held:

> "... ... ... the court must satisfy itself about the existence of an exceptional circumstance enabling it to exercise an extraordinary jurisdiction. What is, therefore, necessary for the court is to arrive at a satisfaction that the evidence adduced on behalf of the prosecution, if unrebutted, may lead to conviction of the persons sought to be added as the accused in the case."

41. Therefore, the evidence of P.W.1 which is given during the course of trial in the trial Court against the revision petitioners is to be considered in the light of the law enunciated by the Apex Court in various judgments cited supra. A perusal of the evidence of P.W.1 given in the trial Court clearly shows that he has clearly and unequivocally and emphatically stated that these revision petitioners have also attacked the deceased with lethal weapons and caused injuries to him and killed him. He has given a vivid account regarding complicity of the revision petitioners in his evidence by giving individual overt acts of each of these ten revision petitioners regarding the manner in which they have attacked the deceased and killed him. The said evidence, if remains

unrebutted, certainly will lead to conviction against the persons sought to be added as accused in this case. While considering the said evidence of P.W.1 which was given in the Court during the course of trial, one should not ignore the fact that the said evidence given by P.W.1 in the Court during trial was given on oath and it is a substantive piece of evidence. If the said evidence ultimately remains unchallenged and if it is not impeached in any way, it would certainly be a valid evidence under law to hold that the revision petitioners are guilty of commission of the said offence. So, more than a *prima facie* case and a strong case is made out against the revision petitioners who are sought to be added as accused in this case. The said evidence given by P.W.1 as it stands now clearly proves the complicity of these revision petitioners in commission of the said offence with their individual overt acts as spoken to by P.W.1. Therefore, there is valid evidence on record as required under law for the purpose of invoking Section 319 of Cr.P.C to record a subjective satisfaction of the trial Court to add these revision petitioners also as accused along with accused 1 to 6 to face the trial in the case.

42. The said evidence cannot be now subjected to strict judicial scrutiny or scanned or appreciated at this stage as required in the final adjudication of the case while considering the said evidence under Section 319 of Cr.P.C. It is for the revision petitioners after they are added as accused to impeach the said evidence of P.W.1 after subjecting him to

cross-examination. Therefore, the contention of the revision petitioners that on account of the previous statement given by P.W.1 which stands contradictory to the evidence given by P.W.1 now in the Court that it is to be held that the said evidence is not sufficient or trustworthy to add them as accused is devoid of merit and is liable to be rejected.

43. At this juncture it is apposite to reiterate the observations made by the Constitution Bench which are extracted at the inception of this order that a fair trial requires the Court to see that the guilty is not escaped and the real perpetrators of the crime whose role came to light during the course of trial of the case cannot be left scot-free and the Court has to take care of such a situation when it comes to its notice. In fact, that is the object of incorporating Section 319 of Cr.P.C in the Code. Taking any other view in the facts and circumstances of the case would have the effect of frustrating the object of Section 319 of Cr.P.C. Therefore, the said contention is not legally sustainable.

44. It is also relevant to note here that the Constitution Bench of the Apex Court in ***Hardeep Singh***'s case (1 *supra*) while considering what is the meaning of the word "evidence" used in Section 319(1) of Cr.P.C held that the Court can exercise the power under Section 319(1) of Cr.P.C even on the basis of the statement made in the examination-in-chief of the witness concerned. It is further held that the Court need not wait for the evidence against the accused proposed to be

summoned to be tested by cross-examination. So, it is evident that even on the basis of the examination-in-chief alone, the Court can exercise the power under Section 319 of Cr.P.C.

45. Finally, even though the case is now committed to the Court of Sessions for trial and the trial commenced, the cognizance of the case against the revision petitioners who are now sought to be added as accused is deemed to have been taken at the time of taking cognizance of the case against accused 1 to 6 in view of the legal fiction created in Section 319(4) of Cr.P.C. It is held that under Section 319(4)(b) of Cr.P.C the accused subsequently impleaded is to be treated as if he has been accused when the Court initially took cognizance of the offence. So, there is no difficulty in adding the revision petitioners as accused during the trial of the case in the Sessions Court. The Apex Court in the case of ***Joginder Singh v. State of Punjab***[4] observed as follows:

> "A plain reading of Section 319(1), which occurs in Chap. XXIV dealing with general provisions as to inquiries and trials, clearly shows that it applies to all the Courts including a Sessions Court and as such a Sessions Court will have the power to add any person, not being the accused before it, but against whom there appears during trial sufficient evidence indicating his involvement in the offence as an accused and direct him to be tried along with the other accused; ... ..."

46. Ultimately, at the cost of repetition, it is reiterated that the Apex Court in the above Constitution Bench judgment also held as follows:

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[4] AIR 1979 SC 339

> "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 it appears that such person can be tried along with the accused already facing trial."

47. Therefore, the revision petitioners, though named in the FIR but not charge-sheeted can also be added as accused under Section 319 of Cr.P.C as it appears from the evidence on record that they have also committed the said offences.

48. In view of the foregoing discussion and the settled proposition of law relating to scope and extent of power of the Court under Section 319 of Cr.P.C as discussed, the revision case lacks merit. The impugned order is perfectly sustainable under law and it calls for no interference in this criminal revision case. Resultantly, the criminal revision case is dismissed. Pending applications, if any, shall stand closed.

CHEEKATI MANAVENDRANATH ROY, J.

21st May, 2020.
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HONOURABLE SRI JUSTICE CHEEKATI MANAVENDRANATH ROY

Criminal Revision Case No.533 of 2015

21st May, 2020.
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