KISHUN SINGH AND ORS. A

v.

STATE OF BIHAR

JANUARY 11, 1993

[A.M. AHMADI AND N.P. SINGH, JJ.] B

Code of Criminal Procedure, 1973—Section 319—Application and procedure of—Power under—Invokability.

Code of Criminal Procedure, 1973—Sections 154, 156, 173, 190, 191, 193, 200, 204, 209, 227, 228—Setting Criminal Law into motion—Modes of—Cognizance of offence—Duty of Court—'Take Cognizance'—Meaning of. C

On the evening of 27th February, 1990, informant's younger brother was attacked by twenty persons including the present two appellants with sticks, etc. First Information Report was lodged at about 9.30 p.m. on the same day in which all the twenty persons were named as the assailants. The injured died in the hospital on the next day. D

In course of investigation statements of the informant and others were recorded and a charge-sheet was forwarded to the Court of the Magistrate wherein eighteen persons, were shown as the offenders. The names of the present two appellants were not included in the report, as in the opinion of the investigating officer their involvement in the commission of the crime was not established. E

The eighteen persons named in the report were committed to the Court of Session under Section 209 of the Code of Criminal Procedure to stand trial. F

When the matter came up before the Sessions Judge, an application was presented under Section 319 of the Code praying to implead the appellants also as accused persons. G

To the show cause notice issued to the appellants, they submitted that though they were not present at the place of occurrence, they were falsely named in the First Information Report and the investigating officer had rightly omitted their names from the charge-sheet filed in Court. H

A The Sessions Judge rejected the plea of the appellants and impleaded them as co-accused along with the eighteen others. This was done before the commencement of the actual trial.

The appellants' revision filed before the High Court was dismissed.

B The appellants moved this Court by special leave under Article 136 of the Constitution of India, against the High Court's order contending that unless evidence was recorded during the course of trial, the Sessions Judge had no jurisdiction under Section 319 of the Code of Criminal Procedure to take cognizance and implead the appellants as co-accused C solely on the basis of the material collected in the course of investigation and appended to the report forwarded under Section 173 of the Code in view of the clear mandate of Section 193 of the Code; that since the trial had not commenced and the prosecution had not led any evidence, the stage for the exercise of the power had not reached.

D Dismissing the appeal, this Court

HELD : 1.01. On a plain reading of sub-section (1) of Section 319 there can be no doubt that it must appear from the evidence tendered in the course of any inquiry or trial that any person not being the accused has committed any offence for which he could be tried together with the E accused.

1.02. This power, can be exercised only if it so appears from the evidence at the trial and not otherwise. Therefore, the sub-section contemplates existence of some evidence appearing in the course of trial wherefrom the Court can *prima facie* conclude that the person not arF raigned before it is also involved in the commission of the crime for which he can be tried with those already named by the police.

1.03. Even a person who has earlier been discharged would fall within the sweep of the power conferred by Section 319 of the Code. G Therefore, *stricto sensu* Section 319 of the Code cannot be invoked in a case where no evidence has been led at a trial wherefrom it can be said that the appellants appear to have been involved in the commission of the crime along with these already sent up for trial by the prosecution.

1.04. Section 319 covers the post-congnizance stage where in the H course of an inquiry or trial the involvement or complicity of a person or

persons not named by the investigating agency has surfaced which necessitates the exercise of the discretionary power conferred by the said provision. A

1.05. Section 319 can be invoked both by the Court having original jurisdiction as well as the Court to which the case has been committed or transferred for trial. The sweep of Section 319 is, therefore, limited in that, it is an enabling provision which can be invoked only if evidence surfaces in the course of an inquiry or a trial disclosing the complicity of a person or persons other than the person or persons already arraigned before it. B

1.06. Section 319 deals with only one situation, namely, the complicity coming to light from the evidence taken and recorded in the course of an inquiry or trial. This may happen not merely in cases where despite the name of a person figuring in the course of investigation the investigating agency does not send him up for trial but even in cases where the complicity of such a person comes to light for the first time in the course of evidence recorded at the inquiry or trial. C D

1.07. The scope of its operation or the area of its play would also be limited to cases where after cognizance the involvement of any person or persons in the commission of the crime comes to light in the course of evidence recorded at the inquiry or trial. Thus the Section does not apply to all situations and cannot be interpreted to be the repository of all power for summoning such person or persons to stand trial along with others arraigned before the Court. E

1.08. Once the case is committed to the Court of Session by a magistrate under the Code, the restriction placed on the power of the Court of Session to take cognizance of an offence as a court of original jurisdiction gets lifted. On the magistrate committing the case under Section 209 to the Court of Session the bar of section 193 is lifted thereby investing the Court of Session complete and unfettered jurisdiction of the court of original jurisdiction to take cognizance of the offence which would include the summoning of the person or persons whose complicity in the commission of the crime can *prima facie* by gathered from the material available on record. F G

1.09. The stage for the exercise of power under section 319 of the Code had not reached, inasmuch as, the trial had not commenced and H

A evidence was not led. The Court of Session had, however, the power under Section 193 of the Code to summon the appellants as their involvement in the commission of the crime *prima facie* appeared from the record of the case. Once it is found that the power exists the exercise of power under a wrong provision will not render the order illegal or invalid.

B *Joginder Singh* v. *State of Punjab,* AIR 1979 SC 339 - [1979] 2 SCR 306 and *Sohan Lal & Ors.* v. *State of Rajasthan,* [1990] 4 SCC 584, referred to.

2.01. The two alternative modes in which the Criminal Law can be C set in motion are: by the filing of information with the police under Section 154 of the Code or upon receipt of a complaint or information by a Magistrate. The former would lead to investigation by the police and may culminate in a police report under Section 173 of the Code on the basis whereof cognizance may be taken by the Magistrate under Section 190(1)(b) of the Code. In the latter case, the Magistrate may either order D investigation by the police under Section 156(3) of the Code or himself hold an inquiry under Section 202 before taking cognizance of the offence under Section 190(1)(a) or (c), as the case may be, read with Section 204 of the Code. Once the Magistrate takes cognizance of the offence he may proceed to try the offender (except where the case is transferred under E section 191 or commit him for trial under Section 209 of the Code if the offence is triable exclusively by a Court of Session.

2.02. Once cognizance of an offence is taken it becomes the Court's duty to find out who the offenders really are and if the Court finds that F apart from the persons sent up by the police some other persons are involved, it is his duty to proceed against those persons by summoning them because 'the summoning of the additional accused is part of the proceeding initiated by his taking cognizance of an offence'.

2.03. After cognizance is taken under Section 190(1) of the Code, in G warrant cases the Court is required to frame a charge containing particulars as to the time and place of the alleged offence and the person (if any) against whom, or the thing (if any) in respect of which, it was committed. But before framing the charge section 227 of the Code provides that if, upon a consideration of the record of the case and the H documents submitted therewith, the Sessions Judge considers that there

is not sufficient ground for proceeding against the accused, he shall, for reasons to be recorded, discharge the accused. A

2.04. It is only when the Judge is of opinion that there is ground for presuming that the accused was committed an offence that he will proceed to frame a charge and record the plea of the accused (vide, section 228). It becomes immediately clear that for the limited purpose of deciding whether or not to frame a charge against the accused, the judge would be required to examine the record of the case and the documents submitted therewith, which would comprise the police report, the statements of witnesses recorded under Section 161 of the Code, the seizure- memoranda, etc. etc. B C

2.05. Once the court takes cognizance of the offence (not the offender) it becomes the court's duty to find out the real offenders and if it comes to the conclusion that besides the persons put up for trial by the police some others are also involved in the commission of the crime, it is the court's duty to summon them to stand trial along with those already named, since summoning them would only be a part of the process of taking cognizance. D

2.06. Even though the expression 'take cognizance' is not defined, it is well settled that when the Magistrate takes notice of the accusations and applies his mind to the allegations made in the complaint or police report or information and on being satisfied that the allegations, if proved, would constitute an offence decides to initiate judicial proceedings against the alleged offender he is said to have taken cognizance of the offence. It is essential to bear in mind the fact that cognizance is in regard to the offence and not the offender. Mere application of mind does not amount to taking cognizance unless the magistrate does so for proceeding under Section 200/204 of the Code. E F

Jamuna Singh & Ors. v. *Bhadai Sah,* [1964] 5 SCR 37 at 40-41; *Raghubans Dubey* v. *State of Bihar* [1967] 2 SCR 423 - AIR 1967 SC 1167 and *Hariram Satpathy* v. *Tikaram Agarwala,* [1979] 1 SCR 349 - AIR 1978 SC 1568, referred to. G

S.K. Latfur Rahman & Ors. v. *The State,* (1985) PLJR 640 - (1985) Criminal Law Journal 1238, approved. H

A CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 24 of 1993.

From the Judgment and Order dated 6.8.1991 of the Patna High Court in Criminal Rev. No. 307 of 1991.

B Uday Sinha and M.P. Jha for the Appellants.

B.B. Singh Adv. for the Respondent.

The Judgment of the Court was delivered by

C **AHMADI, J.** Special leave granted.

Whether a Court of Session to which a case is committed for trial by a Magistrate can, without itself recording evidence, summon a person not named in the Police Report presented under Section 173 of the Code of Criminal Procedure, 1973 ('The Code' for short) to stand trial along with D those already named therein, in exercise of power conferred by Section 319 of the Code? This neat question of law arises in the backdrop of the following allegations.

On the evening of 27th February, 1990 Umakant Thakur, younger brother of the informant, was attacked by twenty persons including the E present two appellants with sticks, etc. A First Information Report was lodged at about 9.30 p.m. on the same day in which all the twenty persons were named as the assailants. The injured Umakant Thakur died in the Patna Hospital on the next day. In the course of investigation statements of the informant as well as others came to be recorded and a charge-sheet dated F 10th June, 1990 was forwarded to the Court of the learned Magistrate on 17th June, 1990 wherein eighteen persons other than the two appellants were shown as the offenders. The names of the present two appellants were not included in the said report as in the opinion of the investigating officer their involvement in the commission of the crime was not established. A final report to that effect was submitted on 4th September, 1990 to the Chief G Judicial Magistrate on which no orders were passed. The concerned Magistrate committed the eighteen persons named in the report to the Court of Session, Dharbanga, under Section 209 of the Code to stand trial. When the matter came up before the learned Sessions Judge, Dharbanga, an application was presented under Section 319 of the Code praying that the H material on record annexed to the report under Section 173 of the Code

revealed the involvement of the two appellants also and hence they should be summoned and arraigned before the Court as accused persons along with the eighteen already named in the charge-sheet. Thereupon a show cause notice was issued to the present two appellants in response whereto they contended that though they were not present at the place of occurrence, they were falsely named in the First Information Report and the investigating officer had rightly omitted their names from the charge-sheet filed in Court. The learned Sessions Judge rejected the plea put forth by the appellants and exercised the discretion vested in him under Section 319 of the Code by impleading the appellants as co- accused along with the eighteen others. Indisputably this was done before any evidence was recorded i.e. before the commencement of the actual trial. The appellants thereupon filed a Criminal Revision Application before the High Court of Patna assailing the order passed by the learned Sessions Judge taking cognizance against them. The High Court after hearing counsel for the parties dismissed the Revision Application relying on the ratio of the Full Bench decision of that Court in *S.K. Latfur Rahman & Ors.* v. *The State,* [(1985) PLJR 640 = (1985) Criminal Law Journal 1238]. It is against this order passed by the learned Single Judge of the High Court that the appellants have moved this Court by special leave under Article 136 of the Constitution of India.

The learned counsel for the appellants contended that unless evidence was recorded during the course of trial. The Sessions Judge had no jurisdiction under Section 319 of the Code to take cognizance and implead the appellants as co-accused solely on the basis of the material collected in the course of investigation and appended to the report forwarded under Section 173 of the Code in view of the clear mandate of Section 193 of the Code. The question which arises for consideration in the backdrop of the aforestated facts is whether the learned Sessions Judge was justified in law in invoking Section 319 of the Code at the stage at which the proceedings were pending before him solely on the basis of the documents including statements recorded under Section 161 of the Code during investigation without commencing trial and recording evidence therein?

Section 319 corresponds to Section 351 of the repealed Code of Criminal Procedure, 1898 (hereinafter called 'the old Code'). That Section must be read in juxta-position with Section 319 of the Code. Before we do so it is necessary to state that Section 319 of the Code as it presently stands is the recast version of Section 351 of the old Code based on the recommendations

A made by the Law Commission in its 41st Report as under :

> "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
B only proper that the 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
C person if he is not present in Court. Such a provision would made section 351 fairly comprehensive, and we think it proper to expressly provide for that situation. (para 24.80)
>
> About the true position under the existing law, there has been difference of opinion, and we think it should be made clear. It
D 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,
E propose to re-cast section 351 making it comprehensive and providing that there will be no difference in the mode of taking cognizance if a new person is added as an accused during the proceedings." (para 24.81)

It will be seen from the above paragraphs that the Law Commission
F suggested that section 351 should be recast with a view to (i) empowering the court to summon a person not present in court to stand trial along with the named accused and (ii) enabling the court to take cognizance against the newly added accused by making it explicit that there will be no difference in the mode of taking cognizance against the added accused.
G Pursuant to the said recommendations made by the Law Commission Section 351 of the old Code was replaced by Section 319 in the present Code. We may now read the two provisons in juxta-position :

> *"Old Code*
>
H Section 351 - (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.

(2) When the detention takes place in the course of an 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 re-heard.

New Code

Section 319 - (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 should 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 the witnesses re-heard;

(b) subject to the provisions of Cl.(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."

A Section 351 of the old Code empowered detention of any person attending a Criminal Court, although not under arrest or upon a summon, for the purpose of inquiry into or trial of any offence of which such Court could take cognizance, if it appeared from the evidence so recorded that he may have committed an offence along with others. Sub-section (2) of section 319 came to be inserted in response to the Law Commission's B recommendation in paragraph 24.80 of its report to enlarge the Court's power to arrest or summon any person who appears to be involved in the commission of the crime along with others but who is not present in court. Next, it is significant to note that the words 'of which such Court can take cognizance' have been omitted by the Legislature. Instead the newly added C sub-section 4(b) expressly states that the case against the added accused may proceed as if such person had been an accused person when the court took cognizance of the offence. This takes care of the Law Commission's recommendation found in paragraph 24.81 extracted earlier. It is, therefore, manifest that Section 319 of the Code is an improved version of D Section 351 of the old Code; the changes having been introduced therein on the suggestion of the Law Commission to make it comprehensive so that even persons not attending the Court can be arrested or summoned as the circumstances of the case may require and by deleting the words 'of which such Court can take cognizance' and by adding clause (b) it is clarified that the impleadment of a new person as an accused in the pending proceedings E will not make any difference insofar as taking of cognizance is concerned. In other words it is made clear that cognizance against the added person would be deemed to have been taken as originally against the other co-accused. It is thus clear that the difficulty in regard to taking of cognizance which would have been experienced by the Court has been done F away with. The section comes into operation at the post-cognizance stage when it appears to the court from the evidence recorded at the trial that any person other than those named as offenders appears to have committed any offence in relation to the incident for which the co-accused are on trial.

G But counsel for the appellants contended that section 319 being a self contained provision, the power thereunder can be exercised strictly in terms of the section which permits the exercise of power only if 'it appears from the evidence' in the course of the inquiry or trial of an offence, that any person, besides the accused already put up for trial, has committed any H offence arising from the incident in question. Counsel submitted that the

power cannot be exercised before 'evidence' is led as the involvement of the person must appear from the evidence tendered at the trial because it is at that stage that the court must apply its mind about the complicity of the person not arraigned before it in the commission of the crime. He, therefore, submitted that in the present case since the trial had not commenced and the prosecution had not led any evidence, the stage for the exercise of the power had not reached.

In order to appreciate the contention urged before us, it is necessary to notice a few provisions. Section 190 of the Code sets out the different ways in which a Magistrate can take cognizance of an offence, that is to say, take notice of an allegation disclosing commission of a crime with a view to setting the law in motion to bring the offender to book. Under this provision cognizance can be taken in three ways enumerated in clauses (a), (b) & (c) of the *offence* alleged to have been committed. The object is to ensure the safety of a citizen against the vagaries of the police by giving him the right to approach the Magistrate directly if the police does not take action or he has reason to believe that no such action will be taken by the police. Even though the expression 'take cognizance' is not defined, it is well settled by a catena of decisions of this Court that when the Magistrate takes notice of the accusations and applies his mind to the allegations made in the complaint or police report or information and on being satisfied that the allegations, if proved, would constitute an offence decides to initiate judicial proceedings against the alleged offender he is said to have taken cognizance of the offence. It is essential to bear in mind the fact that cognizance is in regard to the offence and not the offender. Mere application of mind does not amount to taking cognizance unless the magistrate does so for proceeding under Section 200/204 of the Code [See *Jamuna Singh & Ors.* v. *Bhadai Sah,* [1964] 5 SCR 37 at 40-41. It is, therefore, obvious that if on receipt of a complaint under Section 154 of the Code in regard to a cognizable offence, an offence is registered and the concerned Police Officer embarks on an investigation and ultimately submits a police report under Section 173 of the Code, the Magistrate may take cognizance and if the offence is exclusively traiable by a Court of Sessions, he must follow the procedure set out in Section 209. That section provides that when in a case instituted on a police report, as defined in section 2(r), or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable

A exclusively by the Court of Session, he shall commit the case to the Court of Session and remand the accused to custody. Section 193 of the Old Code and as it presently stands have a bearing and may be extracted at this stage:

> *"Old Code*
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> B Section 193 - Cognizance of offences by Courts of Session - (1) Except as othewise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the accused has been committed to it by a
> C Magistrate duly empowered in that behalf.
>
> *New Code*
>
> Section 193 - Cognizance of offences by Court of Sessions - Except as otherwise expressly provided by this Code or by any
> D other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code."

E It may immediately be noticed that under the old provision a Court of Session could not take cognizance of an offence as a Court of original jurisdiction unless *the accused* was committed to it whereas under the recast section as it presently stands the expression *the accused* has been replaced by the words *the case.* As has been pointed out earlier. Under section 190 cognizance has to be taken for the offence and not the offender:
F so also under section 193 the emphasis now is to the committal of *the case* and no more on *the offender.* So also section 209 speaks of committing *the case* to the Court of Session. On a conjoint reading of these provisions it becomes clear that while under the Old Code in view of the language of section 193 unless an accused was committed to the Court of Session the
G said court not take cognizance of an offence as a court of original jurisdiction; now under section 193 as it presently stands once *the case* is committed the restriction disappears. More of it later but first the case law.

Section 193 of the Old Code placed an embargo on the Court of Session from taking cognizance of any offence as a Court of original
H jurisdiction unless the accused was committed to it by a Magistrate or there

was express provision in the Code or any other law to the contrary. In the context of the said provision this Court in *P.C. Gulati* v. *L.R. Kapur,* [1966] 1 SCR 560 at p.568 observed as under :

> "When a case is committed to the Court of Session, the Court of Session has first to determine whether the commitment of the case is proper. If it be of opinion that the commitment is bad on a point of law, it has to refer the case to the High Court which is competent to quash the proceeding under section 215 of the Code. It is only when the Sessions Court considers the commitment to be good in law that it proceeds with the trial of the case. It is in this context that the Sessions Court has to take cognizance of the offence as a Court or original jurisdiction and it is such a cognizance which is referred to in section 193 of the Code."

In *Joginder Singh* v. *State of Punjab,* AIR 1979 SC 339 = [1979] 2 SCR 306 the facts were that a criminal case was registered against Joginder Singh and four others on the allegation that they had committed house tresspass and had caused injuries to two persons. During the investigation the police found Joginder Singh and Ram Singh (the appellants in the case) to be innocent and submitted a charge-sheet against the remaining three persons only. The learned Magistrate who held a preliminary inquiry committed the three accused to the Court of Session whereupon the Additional Sessions Judge, Ludhiana, framed charges against them. At the trial evidence of two witnesses came to be recorded during the course of which the complicity of the two appellants came to light. Thereupon, at the instance of the informant the Public Prosecutor moved an application for summoning and trying the two appellants along with the three accused who were already arraigned before the court. The application was opposed principally on the ground that the Sessions Judge had no jurisdiction or power to summon the two appellants and direct them to stand their trial along with the three persons already named in the police report. This objection was negatived and the learned Additional Sessions Judge passed an order, presumably under section 319 of the Code, directing the attendance of the two appellants and further directing that they stand trial together with the three accused arraigned before the court. The High Court dismissed the Revision Application whereupon the appellants approached this Court by special leave. The real question centered round the

A scope and ambit of section 319 of the Code. This Court after considering the relevant provisions of the Old Code in juxta-position with similar provisions in the New Code observed as under :

> "It will thus appear clear that under Section 193 read with Section 209 of the Code when a case is committed to the Court
B of Session in respect of an offence the Court of Session takes cognizance of the offence and not of the accused and once the Sessions Court is properly seized of the case as a result of the committal order against some accused the power under Section 319(1) can come into play and such Court can add any person,
C not an accused before it, as an accused and direct him to be tried along with the other accused for the offence which such added accused appears to have committed from the evidence recorded at the trial."

D This view came to be reiterated in a recent decision of this Court in *Sohan Lal & Ors.* v. *State of Rajasthan,* [1990] 4 SCC 580. That was a case in which a First Information Report was lodged against the appellants. On completion of the investigation the police forwarded a charge- sheet under section 173 of the Code. The Judicial Magistrate after taking cognizance ordered discharge of appellants 4 and 5 and directed that the remaining 3 appel-
E lants be charged only under section 427 IPC and not under Sections 147, 323, 325 and 336 in respect whereof the charge-sheet was forwarded. The Additional Public Prosecutor, therefore, submitted an application signed by one of the victims praying that on the basis of the entire evidence a *prima facie* case was made out under sections 147, 325 and 336, IPC and
F requested that the charge be amended and the accused persons be charged accordingly. After recording the plea of the accused the prosecution led evidence and examined witnesses. The learned Magistrate after hearing the Additional Public Prosecutor and counsel for the defence and after discussing the evidence took cognizance of the other offences against the appellants. The Revision Application preferred to the High Court was
G dismissed. This Court after considering the relevant provisions of the Code concluded as under :

> "Section 319 empowers the court to proceed against persons not being the accused appearing to be guilty of offence. Sub-
H sections (1) and (2) of this section provide for a situation when

a court hearing a case against certain accused person finds from the evidence that some person or persons, other than the accused before it, is or are also connected in this very offence or any connected offence; and it empowers the court to proceed against such person or persons for the offence which he or they appears or appear to have committed and issue process for the purpose. It provides that the cognizance against newly added accused is deemed to have been taken in the same manner in which cognizance was first taken of the offence against the earlier accused. It naturally deals with a matter arising from the course of the proceeding already initiated. The scope of the section is wide enough to include cases instituted on private complaint."

The learned counsel for the appellants submitted that once a Court of Session takes cognizance in the limited sense explained in *Gulati's* case, the power to summon or arrest a person not named in the police report can be exercised under Section 319 of the Code only if the condition precedent, namely, the commencement of the trial and recording of evidence, is satisfied. This, he contends, is manifest from the last-mentioned two cases in which the power was exercised only after the condition precedant was satisfied and the complicity of a person not shown as an offender in the police report surfaced from the evidence recorded in the course of the trial. That *prima facie* appears to be so but it must at the same time be remembered that in both the cases the Court was not called upon to consider whether a Court of Session to which a case is committed for trial under Section 209 of the Code can, while taking cognizance, summon a person to stand trial along with others even though he is not shown as an offender in the police report if the court on a perusal of the case papers *prima facie* finds his complicity in the commission of the crime and the omission of his name as an offender by the investigating officer not proper.

On a plain reading of sub-section (1) of Section 319 there can be no doubt that it must appear from the evidence tendered in the course of any inquiry or trial that any person not being the accused has committed any offence for which he could be tried together with the accused. This power, it seems clear to us, can be exercised only if it so appears from the evidence at the trial and not otherwise. Therefore, this sub-section comtemplates

A existence of some evidence appearing in the course of trial wherefrom the Court can *prima facie* conclude that the person not arraigned before it is also involved in the commission of the crime for which he can be tried with those already named by the police. Even a person who has earlier been discharged would fall within the sweep of the power conferred by Section 319 of the Code. Therefore, *stricto sensu,* Section 319 of the Code cannot B be invoked in a case like the present one where no evidence has been led at a trial wherefrom it can be said that the appellants appear to have been involved in the commission of the crime along with those already sent up for trial by the prosecution.

C But then it must be conceded that Section 319 covers the post-cognizance stage where in the course of an inquiry or trial the involvement or complicity of a person or persons not named by the investigating agency has surfaced which necessitates the exercise of the discretionary power conferred by the said provision. Section 319 can be invoked both by the D Court having original jurisdiction as well as the Court to which the case has been committed or transferred for trial. The sweep of Section 319 is, therefore, limited, in that, it is an enabling provision which can be invoked only if evidence surfaces in the course of an inquiry or a trial disclosing the complicity of a person or persons other than the person or persons already arraigned before it. If this is the true scope and ambit of Section E 319 of the Code, the question is whether there is any other provision in the Code which would entitle the Court to pass a similar order in similar circumstances. The search for such a provision would be justified only on the premiss that Section 319 is not exhaustive of all post-cognizance stituations. Now as pointed out earlier Section 319 deals with only one F situation, namely, the complicity coming to light from the evidence taken and recorded in the course of an inquiry or trial. This may happen not merely in cases where despite the name of a person figuring in the course of investigation the investigating agency does not send him up for trial but even in cases where the complicity of such a person comes to light for the first time in the course of evidence recorded at the inquiry or trial. Once G the purport of Section 319 is so understood it is obvious that the scope of its operation or the area of its play would also be limited to cases where after cognizance the involvement of any person or persons in the commission of the crime comes to light in the course of evidence recorded at the inquiry or trial. Thus the Section does not apply to all situations and cannot H be interpreted to be repository of all power for summoning such person or

persons to stand trial along with others arraigned before the Court. A

The question then is whether dehors Section 319 the Code, can similar power be traced to any other provision in the Code or can such power be implied from the scheme of the Code? We have already pointed out earlier the two alternative modes in which the Criminal Law can be set in motion: by the filing of information with the police under Section 154 of the Code or upon receipt of a complaint or information by a Magistrate. The former would lead to investigation by the police and may culminate in a police report under Section 173 of the Code on the basis whereof cognizance may be taken by the Magistrate under Section 190(1)(b) of the Code. In the latter case, the Magistrate may either order investigation by the police under Section 156(3) of the Code or himself hold an inquiry under Section 202 before taking cognizance of the offence under Section 190(1)(a) or (c), as the case may be, read with Section 204 of the Code. Once the Magistrate takes cognizance of the offence he may proceed to try the offender (except where the case is transferred under Section 191) or commit him for trial under Section 209 of the Code if the offence is triable exclusively by a Court of Session. As pointed out earlier cognizance is taken of the offence and not the offender. This Court in *Raghubans Dubey* v. *State of Bihar,* [1967] 2 SCR 423 = AIR 1967 SC 1167 stated that once cognizance of an offence is taken it becomes the Court's duty 'to find out who the offenders really are' and if the Court finds 'that apart from the persons sent up by the police some other person are involved, it is his duty to proceed against those persons' by summoning them because 'the summoning of the additional accused is part of the proceeding initiated by his taking cognizance of an offence'. Even after the present Code came into force, the legal position has not undergone a change; on the contrary the ratio of *Dubey's* case was affirmed in *Hariram Satpathy* v. *Tikaram Agarwala,* [1979] 1 SCR 349 = AIR 1978 SC 1568. Thus far there is no difficulty. B C D E F

We have now reached the crucial point in our journey. After cognizance is taken under section 190(1) of the Code, in warrant cases the Court is required to frame a charge containing particulars as to the time and place of the alleged offence and the person (if any) against whom, or the thing (if any) in respect of which, it was committed. But before framing the charge section 227 of the Code provides that if, upon a consideration of the record of the case and the documents submitted therewith, the G H

A Sessions Judge considers that there is not sufficient ground for proceeding against the accused, he shall, for reasons to be recorded, discharge the accused. It is only when the Judge is of opinion that there is ground for presuming that the accused has committed an offence that he will proceed to frame a charge and record the plea of the accused (vide, section 228). B It becomes immediately clear that for the limited purpose of deciding whether or not to frame a charge against the accused, the judge would be required to examine the record of the case and the documents submitted therewith, which would comprise the police report, the statements of witnesses recorded under section 161 of the Code, the seizure-memoranda, etc., etc. If, on application of mind for this limited purpose, the Judge finds C that besides the accused arraigned before the him the complicity or involvement of others in the commission of the crime *prima facie* surfaces from the material placed before him, what course of action should he adopt?

The learned counsel for the State, therefore, argued that even if two D views are possible, this being a matter of procedure not likely to cause prejudice to the person or persons proposed to be summoned, the court should accept the view which would advance the cause of justice, namely, to bring the real offender to book. If such an approach is not adopted, the matter will slip into the hands of the investigation officer who may or may not send up for trial an offender even if *prima facie* evidence exists, which E may in a given situation cause avoidable difficulties to the trial court. Take for example a case where two persons A and B attach and kill X and it is found from the material placed before the Judge that the fatal blow was given by A whereas the blow inflicted by B had fallen on a non-vital part of the body of X. If A is not challaned by the police, the Judge may find F it difficult to charge B for the murder of X with the aid of section 34, IPC. If he cannot summon A, how does he frame the charge against B? In such a case he may have to wait till evidence is laid at the trial to enable him to invoke section 319 of the Code. Then he would have to commence the proceedings afresh in respect of the added accused and recall the witnesses. This, submitted counsel for the State, would result in avoidable G waste of public time. He, therefore, submitted that this Court should place a construction which would advance the cause of justice rather than stiffle it.

We have already indicated earlier from the ratio of this Court's H decisions in the cases of *Raghubans Dubey* and *Hariram* that once the court

takes cognizance of the offence (not the offender) it becomes the court's duty to find out the real offenders and if it comes to the conclusion that besides the persons put up for trial by the police some others are also involved in the commission of the crime, it is the court's duty to summon them to stand trial along with those already named, since summoning them would only be a part of the process of taking cognizance. We have also pointed out the difference in the language of section 193 of the two Codes; under the old Code the Court of Session was precluded from taking cognizance of any offence as a Court of original jurisdiction unless *the accused* was committed to it whereas under the present Code the embargo is diluted by the replacement of the words *the accused* by the words *the case*. Thus, on a plain reading of section 193 as it presently stands once *the case* is committed to the Court of Session by a magistrate under the Code, the restriction placed on the power of the Court of Session to take cognizance of an offence as a court of original jurisdiction gets lifted. On the magistrate committing the case under section 209 to the Court of Session the bar of section 193 is lifted thereby investing the Court of Session complete and unfettered jurisdiction of the Court of original jurisdiction to take cognizance of the offence which would include the summoning of the person or persons whose complicity in the commission of the crime can *prima pacie* be gathered from the material available on record. The Full Bench of the High Court of Patna rightly appreciated the shift in section 193 of the Code from that under the old Code in the case of *S.K. Lutfur Rahman* (supra) as under :

> "Therefore, what the law under section 193 seeks to visualise and provide for now is that the whole of the incident constituting the offence is to be taken cognizance of by the Court of Session on commitment and not that every individual offender must be so committed or that in case it is not so done then the Court of Session would be powerless to proceed against persons regarding whom it may be fully convinced at the very threshold of the trial that they are *prima facie* guilty of the crime as well.
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> *** *** *** ***
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> Once the case has been committed, the bar of section 193 is removed or, to put it in other words, the condition therefore

A stands satisfied vesting the Court of Session with the fullest jurisdiction to summon and individual accused of the crime."

We are in respectful agreement with the distinction brought out between the old section 193 and the provision as it now stands.

B For the reasons stated above while as are in agreement with the submission of the learned counsel for the appellants that the stage for the exercise of power under section 319 of the Code had not reached, inasmuch as, the trial had not commenced and evidence was not led, since the Court of Session had the power under section 193 of the Code to summon the appellants as their involvement in the commission of the crime *prima* C *facie* appeared from the record of the case, we see no reason to interfere with the impugned order as it is well-settled that once under it is found that the power exists the exercise of power under a wrong provision will not render the order illegal or invalid. We, therefore, dismiss this appeal.

V.P.R. Appeal dismissed.