**IN THE HIGH COURT OF JUDICATURE AT PATNA**
**CRIMINAL MISCELLANEOUS No.56895 of 2019**

Arising Out of PS. Case No.-305 Year-2012 Thana- BHAGALPUR KOTWALI District-Bhagalpur

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DEEPAK KUMAR @ DEEPAK SAH S/o Late Surendra Prasad Sah R/o Lohapatti, P.S.- Kotwali, Distt.- Bhagalpur

... ... Petitioner/s

Versus

The State of Bihar Bihar

... ... Opposite Party/s

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**Appearance :**
For the Petitioner/s : Mr.----------
For the Opposite Party/s : Mr.Mohammed Arif, APP

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**CORAM: HONOURABLE MR. JUSTICE ANSUL**
**CAV JUDGMENT**
**Date : 27-05-2026**

Heard learned counsel for the petitioner as well as learned APP for the Opposite parties.

**2.** The petitioner has challenged order dated 22.08.2019 passed in Sessions Trial Case No. 492 of 2015 arising out of Kotwali P.S. Case No. 305 of 2012 registered for the offences punishable under Section 302/34 IPC and under Section 27 of the Arms Act by learned A.D.J.-7, Bhagalpur whereby the petitioner has been summoned to face trial under Section 319 of the Indian Penal Code.

**3.** The case of the prosecution is that one Manoj Kumar Gupta lodged FIR on 03.06.2012 at 02:40 PM before the Sub Inspector of Barai Police Station alleging therein that on

02.06.2012 at around 05:45AM his younger brother Bishwanath Kumar Gupta had gone to fruit shop. He went to take tea at Bhariti Chauk. While returning after taking tea two unknown persons fired upon him. He sustained gun shot in his stomach and on 03.06.2012 he was declared dead.

**4.** Information reached police station on 02.06.2012 at 07:30PM but the FIR seems to have been lodged at 09:45 PM on 03.06.2012 and it reached the learned Magistrate on 06.06.2012.

**5.** The counsel for the petitioner submits that the murder was committed due to business rivalry. The deceased were munsi-cum-care taker in the partnership firm as his brother Manoj Kumar Gupta and one Md. Nasim. This firm was situated in the tenancy of joint family of the petitioner. Bishwanath Gupta while working as member in his brother's partnership firm started his own independent business of fruit. His growing business invited the rivalry of his brother's partner Md. Nasim and probably he got murdered him.

**6.** Counsel for the petitioner further submits that this misfortune of Bishwanath Gupta was lapped by the then Senior Superintendent of Police, Bhagalpur K.S. Anupam, who was related to the petitioner and was having serious financial and property disputes with the petitioner. On his instruction the SHO,

Kotwali namely Kumod Kumar acted quickly to implicate the petitioner.

**7.** The counsel further submits that the Kotwali police arrested Md. Saddam and Md. Rustam. Md. Saddam took the name of Md. Rustam who gave him money to kill. Md. Rustam stated that he was financed by the petitioner. Immediately after their arrest on a court holiday they were taken by the police to the house of a judicial magistrate where they were forced to make confessional statement under Section 164 Cr.P.C. As per the counsel the motive assigned was preposterous. The police claimed that the petitioner had directed all his tenants to vote for a particular candidate in the municipal election of a ward of which the petitioner was not a resident. The said candidate lost by a margin of ten votes and the petitioner suspected that the deceased did not vote for him and he got him killed.

**8.** The petitioner moved before the Director General of Police, Bihar with detailed facts who took away the supervision of this case from the control of the then SSP, Bhagalpur and handed it over to a DIG Rank IPC Officer posted in the police Headquarters Dr.Kamal Kishore Singh who was then DIG CID (AD) Patna. In the meantime, the SSP in his henchmen proceeded to implicate the petitioner in a number of criminal cases. The supervision of which

was taken away and handed over to the same officer. On the complaint of the petitioner, the SHO Kumod Kumar had to face the proceedings before National Human Rights Commission where a fine of Rs. 50,000/- was imposed on him. Departmental proceeding 50/2013 was held against Kumod in which he was awarded a major punishment of three black marks and stoppage of three incriminates for wrongly investigating the Kotwali Police Station Case No. 305/2012 i.e. the instant case.

**9.** As per petitioner in the meanwhile Md. Rustam filed a complaint against the SHO Kotwali and two other SHOs claiming that he was forced to give his statement under Section 164 of the Cr.P.C.

**10.** The petitioner counsel further submits that on the investigation carried out on the orders of DGP, Bihar final form in all cases including Kotwali P.S. Case No. 305 of 2012 was submitted against the petitioner by Bhagalpur Police all of which were accepted by the competent court.

**11.** Subsequently, Trial No. 492 of 2015 arising out of Kotwali P.S. Case No. 305 of 2012 was initiated in the court of Rakesh Malviya, ADJ-VI, Bhagalpur. Subsequently, the case was transferred to the court of A.D.J.-VII, Vinay Kumar Mishra on 20.06.2017.

**12.** The case of the petitioner is that Vinay Kumar Mishra in late 2017 sent one APP namely Sri Pawan Thakur who told the petitioner that the learned judge has asked him to add the petitioner as an accused under Section 319 Cr.P.C. during Sessions Trial No. 492 of 2013. He also told that something must be paid as Kumod Kumar has managed several witnesses for the purposes. The petitioner was taken to the APP on one evening and he was told by the learned Magistrate himself to pay attention to the APP under Eurus on extreme mental pressure the petitioner kept on paying money. Details of which has given in Para-19.

**13.** The petitioner further asserts that during the course of a conversation with the judge himself one to one it was revealed by the judge he has only received Rs. 2 lacs out of 4.5 lacs paid on his behalf to the APP. The petitioner recorded this conversation in which he has found to be accepting Rs. 2 lacs. The petitioner had also videographed the APP Pawan Thakur stating that he had called Rs. 4.5 lacs as advance on behalf of ADJ-VII Vinay Kumar Mishra. The petitioner was also forced to spend for the family of the judge.

**14.** However, in Sessions Trial No. 549 of 2013 where Md. Rustam was the complainant and three S.H.Os. were accused the complainant came to know that the learned judge has been

gained over by the accused persons leading to filing of transfer petition No. 46 of 2019 on 28.06.2019 in the court of District and Sessions Judge, Bhagalpur. The same was transferred to the court of A.D.J.-V, Bhagalpur. The learned A.D.J.-VII then called the petitioner at Patna and demanded Rs. 35 lacs as he suspected that the petitioner ____ the file of Transfer Petition No. 46 of 2019 and he has suffered a loss of Rs. 20 lacs.

**15.** The petitioner further states that the petitioner was unable to meet the demand and thus, on 09.08.2019 the learned Sessions judge started prompting the witnesses against the petitioner and started adding text in the deposition which they have not stated.

**16.** Fade up with all this, the petitioner on 19.08.2019 represented and met the Inspecting Judge of Patna High Court of Bhagalpur. He handed over a petition on affidavit explaining in brief how large sum of money was extracted from him by A.D.J.-VII through his A.P.P. He also played the video before the court and handed over the video in a pan drive to the Hon’ble Judge. The petition dated 19.08.2019 has been brought on record. The learned sessions judge, however, unaware of these developments passed order on 22.08.2019 adding him as an accused in the case No. 492 of 2015 and thereafter attempted to proceed very

expeditiously. The petitioner was forced to file Cr. Misc. No. 40242 of 2012 before the Hon'ble Patna High Court. It was mentioned on the date it was filed and it was notified on the same date and taken up. It is relevant to state that the learned counsel representing the informant in this case has tried to make much of this by stating that the petitioner was a very influential person and he managed to do so to file the case and get it heard on the same date.

**17.** In the opinion of this Court this borders on contempt. There are number of occasions where a case is mentioned on the date of filing and is taken up by notifying the same and imputing motive to the Hon'ble Court in such situation is the postorus and border on contempt.

**18.** The petitioner by filing a supplementary affidavit has stated upon his compliant and enquiry was conducted and the concerned judge was found guilty by the Hon'ble High Court. He submits that though the details of proceeding was many time requested by the petitioner but such details of the proceeding was refused to be provided by the Hon'ble Patna High Court and prayed before this Court to call for the records of the proceeding. The counsel for the informant states that this too is an example of over reach and control of the petitioner. This again seems to this

Court to be a statement bordering on contempt. The O.P. No. 2 seems to be imputing motives on the Court again. The Court considered the requirement of calling for the records of the disciplinary proceedings. In the considered opinion of this Court calling for the proceeding in which a judicial officer has been punished would only amount to washing the dirty linon in public. This is a case which has the look of malafide written all over it.

**19.** The petitioner was not named in the FIR. His name transpires three months after the occurrence. A person who confessed his involvement files a compliant case in which cognizance was taken that he was forced to make such statements. The investigation of the case was taken away from a senior official like SSP. The police submitted final form in all the cases. The Investigating Officer of the case was penalized by National Human Rights Commission as well as Departmently. The judicial officer who passed the instant order was punished in a proceeding before the Hon'ble Patna High Court as per the statement on affidavit made by the petitioner.

**20.** These materials may be extraneous to the instant proceeding and thus, the Court is more interested in paying attention to the statement which laid to summoning of the petitioner under Section 319 and the law on the subject. The only

material that can be looked into at this stage by the Court is statement of witnesses based on which the petitioner was summoned. When a matter has come up before this Court for final disposal complete copy of trial court records had already been called for and the court has the opportunity of going through all the depositions. They are being reproduced here:-

**I.** P.W.-1 Md. Mujamin deposed on 29.09.2016. He has not stated anything relevant. He has tried to create some sort of alibi for Md. Rustam.

**II.** P.W.-2 Md. Gulam Shabbit deposed on 27.01.2017 and was declared hostile.

**III.** P.W.-3 Md. Sikandar deposed on 28.02.2017. He was also declared hostile.

**IV.** P.W.-4 Md. Aftab Warsi deposed on 08.03.2017 and was declared hostile.

**V.** P.W.-5 Mukesh Kumar Gupta deposed on 04.04.2017 and was declared hostile.

**VI.** P.W.-6 Ramawatar Prasad Singh deposed on 12.04.2017. In his chief examination he states that they had a fight with one Pratap Sah after election. The election was of Ward Commissioner and he filed a case against one Pratap Sah. Thereafter, he compromised with Pratap Sah and the case was

ended. He states that in that case his statement was recorded under Section 164 by ASI Kumod and he asked him to take the name of Deepak Sah (petitioner) though he had no acquaintance with Deepak Kumar Sah. Thereafter, he was declared hostile. He stated that he was not aware regarding death or killing of Bishwanath Gupta in any manner.

**VII.** P.W.-7 Tirath Prasad Gupta deposed on 17.04.2017 and was declared hostile.

**VIII.** P.W. 8 Radhe Prasad Sah deposed on 20.05.2017 and was declared hostile.

**IX.** P.W.-9 Shankar Prasad Gupta deposed on 15.06.2017. He was declared hostile on 15.06.2017.

**X.** P.W.-10 Md. Sahabuddin deposed on 09.08.2019. His evidence also relates to alibi of Md. Rustam.

**XI.** P.W.-11 Manjula Devi (mother of the deceased) deposed in the case. She stated that Deepak Sah (the petitioner) had given Rs. 50,000/- to Minu Miya. In her cross-examination she stated that she did not know Minu Miya alias Rustam. In para 5 of her deposition that the fact of giving Rs. 50,000/- by Deepak Sah to Minu Miya was not told to her by some persons but it was there in the newspaper.

**21.** The depositions upto P.W. 11 was before the court. The learned sessions judge apart from dealing with a host of other matter like transfer petitioner of Rustam Sah and all other details in para 4 of the Order states that when P.W. 11 the mother of the deceased namely Manjula Devi deposed in her chief that it was Deepak Kumar Sah who gave Rs. 50,000/- to Minu Miya to get her son killed. He failed to refer to or look at para 5 where she states that this information come to her through newspaper.

**22.** Thereafter, the court in the exercise of complete illegality starts refering to the statement of five witnesses under Section 164 Cr.P.C. and he has extensively refered to the same. He states that this is the statement which is very specific and there is a good ground to invoke Section 319 IPC.

**23.** The law with regard to Section 319 IPC is well settled. First of all it has to be clarified that the Hon'ble Supreme Court constitutional bench in the case of Hardeep Singh Vs. State of Punjab reported in (2014) 3 SCC 92 **have held that materials which have come before the Court in the course of inquiry can be used only for corroboration and settled that the word evidence under Section** 319 Cr.P.C. means the oral or documentary evidence brought before the court during the trial. To the understanding of this Court Section 164 is not a substantive

evidence. They are recorded during investigation and they can only be used after the witnesses testified during trial to corroborate or contradict their statement and nothing more. The foundational trigger for Section 319 must be the evidence produced on oath in the trial itself. It has also been made clear that the decree of specific for invoking Section 319 should be of more than a *prima facie* case as exercised at the time of framing of charge but short of satisfaction to an extent that evidence if not rebutted may lead to conviction of a person shought to be added as accused.

**24.** In this framework the order, the facts of this case and the judgment on this issue are to be analyzed.

**I. *Kailash v. State of Rajasthan*, (2008) 14 SCC 51 : (2009) 1 SCC (Cri) 1006 : 2008 SCC OnLine SC 414 at page 56**

> ***"9.*** *The powers under Section 319 CrPC to proceed against any person who is not the accused are couched in the following words:*
>
> > *"319. Power to proceed against other persons appearing to be guilty of offence. —(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the court may proceed against such*

*person for the offence which he appears to have committed.*

*(2) Where such person is not attending the court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.*

*(3) Any person attending the court, although not under arrest or upon a summons, may be detained by such court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.*

*(4) Where the court proceeds against any person under sub-section (1) then—*

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

*A glance at these provisions would suggest that during the trial it has to appear from the evidence that a person not being an accused has committed any offence for which such person could be tried together with the accused who are also being tried. The key words in this section are "it appears from the evidence" ... "any person" ... "has committed any offence". It is not, therefore, that merely because some*

*witnesses have mentioned the name of such person or that there is some material against that person, the discretion under Section 319 CrPC would be used by the court. This is apart from the fact that such person against whom such discretion is used, should be a person who could be tried together with the accused against whom the trial is already going on. This Court has, time and again, declared that the discretion under Section 319 CrPC has to be exercised very sparingly and with caution and only when the court concerned is satisfied that some offence has been committed by such person. This power has to be essentially exercised only on the basis of the evidence. It could, therefore, be used only after the legal evidence comes on record and from that evidence it appears that the person concerned has committed an offence. The words "it appears" are not to be read lightly. In that the court would have to be circumspect while exercising this power and would have to apply the caution which the language of the section demands.*

***10.*** *In Mohd. Shafi v. Mohd. Rafiq [(2007) 14 SCC 544 : JT (2007) 5 SC 562] to which one of us (Sinha, J.) was a party, this Court had observed in para 7 as under: (SCC p. 546)*

> *"7. Before, thus, a trial court seeks to take recourse to the said provision, the requisite ingredients therefor must be fulfilled. Commission of an offence by a person not facing trial, must, therefore, appear to the court concerned. It cannot be ipse dixit on the part of the court. Discretion in*

*this behalf must be judicially exercised. It is incumbent that the court must arrive at its satisfaction in this behalf."*

*In the above case this Court referred to the decision in MCD v. Ram Krishan Rohtagi [(1983) 1 SCC 1 : 1983 SCC (Cri) 115] and highlighted the following remarks made in SCC para 19 therein which are to the following effect: (Ram Kishan Rohtagi case [(1983) 1 SCC 1 : 1983 SCC (Cri) 115] , SCC p. 8)*

*"19. ... But, we would hasten to add that this is really an extraordinary power which is conferred on the court and should be used very sparingly and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken."*

*It was further stated in para 12: (Mohd. Rafiq case [(2007) 14 SCC 544 : JT (2007) 5 SC 562] , SCC p. 547)*

*"12. ... it is evident that before a court exercises its discretionary jurisdiction in terms of Section 319 of the Code of Criminal Procedure, it must arrive at the satisfaction that there exists a possibility that the accused so summoned is in all likelihood would be convicted. Such satisfaction can be arrived at inter alia upon completion of the cross-examination of the said witness. For the said purpose, the court concerned may also like to consider other evidence."*

*(emphasis supplied)*

***11.*** *In Krishnappa v. State of Karnataka [(2004) 7 SCC 792 : 2004 SCC (Cri) 2093] this Court, while relying on another decision in Michael Machado v. CBI [(2000) 3 SCC 262 : 2000 SCC (Cri) 609] went on to hold that the power under Section 319 CrPC is discretionary and should be exercised only to achieve criminal justice and that the court should not turn against another person whenever it comes across evidence connecting that other person also with the offence. The Court further observed: (Krishnappa case [(2004) 7 SCC 792 : 2004 SCC (Cri) 2093] , SCC p. 795, para 9)*

> *"9. ... a judicial exercise is called for, keeping a conspectus of the case, including the stage at which the trial has already proceeded and the quantum of evidence collected till then, and also the amount of time which the court had spent for collecting such evidence."*

*The Court further observed: (Krishnappa case [(2004) 7 SCC 792 : 2004 SCC (Cri) 2093] , SCC p. 795, para 9)*

> *"9. The court, while examining an application under Section 319 CrPC, has also to bear in mind that there is no compelling duty on the court to proceed against other persons. In a nutshell, it means that for exercise of discretion under Section 319 CrPC, all relevant factors, including the one noticed above, have to be kept in view and an order is not required*

*to be made mechanically merely on the ground that some evidence had come on record implicating the person sought to be added as an accused."*

**II. *Brindaban Das v. State of W.B.*, (2009) 3 SCC 329 : (2009) 2 SCC (Cri) 79 : 2009 SCC OnLine SC 99 at page 335**

***"24.*** *It was further observed in Bholu Ram case [(2008) 9 SCC 140 : (2008) 3 SCC (Cri) 710] that the primary object of Section 319 CrPC is that the whole case against all the accused should be tried and disposed of not only expeditiously, but also simultaneously. The power under Section 319 CrPC must be regarded and considered as incidental and ancillary to the main power to take cognizance as part of the normal process in the administration of justice and that the same could be exercised either on an application made to the court or by the court suo motu and it was in the discretion of the court to take action under the said section having regard to the facts and circumstances of each case. Mr Puri also urged that the decision of the High Court could not be faulted and the appeal was liable to be dismissed.*

***25.*** *The common thread in most matters where the use of discretion is in issue is that in the exercise of such discretion each case has to be considered on its own set of facts and circumstances. In matters relating to invocation of powers under Section 319, the court is not merely required to take*

*note of the fact that the name of a person who has not been named as an accused in the FIR has surfaced during the trial, but the court is also required to consider whether such evidence would be sufficient to convict the person being summoned. Since issuance of summons under Section 319 CrPC entails a de novo trial and a large number of witnesses may have been examined and their re-examination could prejudice the prosecution and delay the trial, the trial court has to exercise such discretion with great care and perspicacity.*

***27.*** *The fulcrum on which the invocation of Section 319 CrPC rests is whether the summoning of persons other than the named accused would make such a difference to the prosecution as would enable it not only to prove its case but to also secure the conviction of the persons summoned.*

***29.*** *Section 319 CrPC contemplates a situation where the evidence adduced by the prosecution not only implicates a person other than the named accused but is sufficient for the purpose of convicting the person to whom summons is issued. The law in this regard was explained in Ram Kishan Rohtagi case [(1983) 1 SCC 1 : 1983 SCC (Cri) 115] and as pointed out by Mr Ghosh, consistently followed thereafter, except for the note of discord struck in Rajendra Singh case [(2007) 7 SCC 378 : (2007) 3 SCC (Cri) 375] . It is only logical that there must be substantive evidence against a person in order to summon him for trial, although, he is not named in the*

*charge-sheet or he has been discharged from the case, which would warrant his prosecution thereafter with a good chance of his conviction."*

**III. *Sarojben Ashwinkumar Shah v. State of Gujarat*, (2011) 13 SCC 316 : (2012) 3 SCC (Civ) 546 : (2012) 1 SCC (Cri) 867 : 2011 SCC OnLine SC 1076 at page 320**

*"**12.** In Shashikant Singh v. Tarkeshwar Singh [(2002) 5 SCC 738 : 2002 SCC (Cri) 1203] this Court considered the scope of Section 319 of the Code at p. 743 of the Report in the following words: (SCC para 9)*

*"9. The intention of the provision here is that where in the course of any enquiry into, or trial of, an offence, it appears to the court from the evidence that any person not being the accused has committed any offence, the court may proceed against him for the offence which he appears to have committed. At that stage, the court would consider that such a person could be tried together with the accused who is already before the court facing the trial. The safeguard provided in respect of such person is that, the proceedings right from the beginning have mandatorily to be commenced afresh and the witnesses reheard. In short, there has to be a de novo trial against him. The provision of de novo trial is mandatory. It vitally affects the rights of a person so brought*

*before the court. It would not be sufficient to only tender the witnesses for the cross-examination of such a person. They have to be examined afresh. Fresh examination-in-chief and not only their presentation for the purpose of the cross-examination of the newly added accused is the mandate of Section 319(4). The words 'could be tried together with the accused' in Section 319(1), appear to be only directory. 'Could be' cannot under these circumstances be held to be 'must be'. The provision cannot be interpreted to mean that since the trial in respect of a person who was before the court has concluded with the result that the newly added person cannot be tried together with the accused who was before the court when order under Section 319(1) was passed, the order would become ineffective and inoperative, nullifying the opinion earlier formed by the court on the basis of the evidence before it that the newly added person appears to have committed the offence resulting in an order for his being brought before the court."*

***13.*** *In Krishnappa v. State of Karnataka [(2004) 7 SCC 792 : 2004 SCC (Cri) 2093] this Court reiterated what has been repeatedly stated that: (SCC p. 794, para 6)*

*"6. ... the power to summon an accused is an extraordinary power conferred on the court and should be used very sparingly*

*and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken."*

***14.*** *In Palanisamy Gounder v. State [(2005) 12 SCC 327 : (2006) 1 SCC (Cri) 568] this Court referred to two earlier decisions of this Court in Michael Machado [(2000) 3 SCC 262 : 2000 SCC (Cri) 609] and Krishnappa [(2004) 7 SCC 792 : 2004 SCC (Cri) 2093] and observed that power under Section 319 of the Code cannot be exercised so as to conduct a fishing inquiry.*

***15.*** *In Guriya v. State of Bihar [(2007) 8 SCC 224 : (2007) 3 SCC (Cri) 521] most of the above decisions were referred to and it was observed that the parameters for dealing with an application under Section 319 of the Code have been laid down in these cases.*

***16.*** *The legal position that can be culled out from the material provisions of Section 319 of the Code and the decided cases of this Court is this:*

*(i) The court can exercise the power conferred on it under Section 319 of the Code suo motu or on an application by someone.*

*(ii) The power conferred under Section 319(1) applies to all courts including the Sessions Court.*

*(iii) The phrase "any person not being the accused" occurring in Section 319 does not exclude from its operation an accused who has been released by the police under*

*Section 169 of the Code and has been shown in Column 2 of the charge-sheet. In other words, the said expression covers any person who is not being tried already by the court and would include person or persons who have been dropped by the police during investigation but against whom evidence showing their involvement in the offence comes before the court.*

*(iv) The power to proceed against any person, not being the accused before the court, must be exercised only where there appears during inquiry or trial sufficient evidence indicating his involvement in the offence as an accused and not otherwise. The word "evidence" in Section 319 contemplates the evidence of witnesses given in court in the inquiry or trial. The court cannot add persons as accused on the basis of materials available in the charge-sheet or the case diary but must be based on the evidence adduced before it. In other words, the court must be satisfied that a case for addition of persons as accused, not being the accused before it, has been made out on the additional evidence let in before it.*

*(v) The power conferred upon the court is although discretionary but is not to be exercised in a routine manner. In a sense, it is an extraordinary power which should be used very sparingly and only if evidence has come*

*on record which sufficiently establishes that the other person has committed an offence. A mere doubt about involvement of the other person on the basis of the evidence let in before the court is not enough. The court must also be satisfied that circumstances justify and warrant that the other person be tried with the already arraigned accused.*

*(vi) The court while exercising its power under Section 319 of the Code must keep in view full conspectus of the case including the stage at which the trial has proceeded already and the quantum of evidence collected till then.*

*(vii) Regard must also be had by the court to the constraints imposed in Section 319(4) that proceedings in respect of newly added persons shall be commenced afresh from the beginning of the trial.*

*(viii) The court must, therefore, appropriately consider the above aspects and then exercise its judicial discretion."*

**IV. *Periyasami v. S. Nallasamy*, (2019) 4 SCC 342 : (2019) 3 SCC (Cri) 230 : 2019 SCC On Line SC 379 at page 346**

*"**14.** In the first information report or in the statements recorded under Section 161 of the Code, the names of the appellants or any other description has not been given so as to identify them. The allegations*

*in the FIR are vague and can be used any time to include any person in the absence of description in the first information report to identify such person. There is no assertion in respect of the villages to which the additional accused belong. Therefore, there is no strong or cogent evidence to make the appellants stand the trial for the offences under Sections 147, 448, 294(b) and 506 IPC in view of the judgment in Hardeep Singh case [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] . The additional accused cannot be summoned under Section 319 of the Code in casual and cavalier manner in the absence of strong and cogent evidence. Under Section 319 of the Code additional accused can be summoned only if there is more than prima facie case as is required at the time of framing of charge but which is less than the satisfaction required at the time of conclusion of the trial convicting the accused."*

**V. *S. Mohammed Ispahani v. Yogendra Chandak*, (2017) 16 SCC 226 : (2018) 2 SCC (Cri) 138 : 2017 SCC OnLine SC 1230 at page 242**

*"**34.** The aforesaid reasons given by the High Court do not stand the judicial scrutiny. The High Court has not dealt with the subject-matter properly and even in the absence of strong and cogent evidence against the appellant, it has set aside the order of the Chief Metropolitan Magistrate and*

*exercised its discretion in summoning the appellants as accused persons. No doubt, at one place the Constitution Bench observed in Hardeep Singh case [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] that the word "evidence" has to be understood in its wider sense, both at the stage of trial and even at the stage of inquiry. In para 105 of the judgment, however, it is observed that "only where strong and cogent evidence occurs against a person from the evidence led before the court that such power should be exercised and not in a casual and cavalier manner". This sentence gives an impression that only that evidence which has been led before the Court is to be seen and not the evidence which was collected at the stage of inquiry. However there is no contradiction between the two observations as the Court also clarified that the "evidence", on the basis of which an accused is to be summoned to face the trial in an ongoing case, has to be the material that is brought before the Court during trial. The material/evidence collected by the investigating officer at the stage of inquiry can only be utilised for corroboration and to support the evidence recorded by the Court to invoke the power under Section 319 CrPC.*

***35.*** *In Raj Kishore Prasad [Raj Kishore Prasad v. State of Bihar, (1996) 4 SCC 495 : 1996 SCC (Cri) 772 : AIR 1996 SC 1931] , this Court said that as soon as the Prosecutor is present before the court and that court hears the parties on framing of charges and discharge, trial is said to have commenced and that*

*there is no intermediate stage between committal of case and framing of charge.*

***36.*** *In view of the above, it was not open to the High Court to rely upon the statements recorded under Section 161 CrPC as independent evidence. It could only be corroborative material. In the first instance, "evidence" led before the Court had to be taken into consideration. As far as deposition of PW 1 which was given in the Court is concerned, on going through the said statement, it becomes clear that he has not alleged any conspiracy on the part of the appellant landlords. In fact, none of the witness has said so. In the absence thereof, along with the important fact that these appellant landlords were admittedly not present at the site when the alleged incident took place, we do not find any "evidence" within the meaning of Section 319 CrPC on the basis of which they could be summoned as accused persons. PW 1 and PW 4 have deposed about the incident that took place at the site and the manner in which the persons who are present allegedly behaved. In the statement of PW 4, he has alleged that "Subsequently I came to know the said people is not police officials the people was sent by landlords of the building…". That statement may not be enough for roping in the appellants/landlords to face the charge under those provisions of IPC with which others are charged. The standard of evidence mentioned in Hardeep Singh case [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 :*

*(2014) 2 SCC (Cri) 86] , namely, "strong and cogent evidence", is lacking."*

**VI. *Hardeep Singh v. State of Punjab*, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86 : 2014 SCC OnLine SC 26 at page 138**

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

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

*appears from the evidence that any person not being the accused has committed any offence" is clear from the words "for which such person could be tried together with the accused". The words used are not "for which such person could be convicted". There is, therefore, no scope for the court acting under Section 319 CrPC to form any opinion as to the guilt of the accused.*

***115.*** *Power under Section 398 CrPC is in the nature of revisional power which can be exercised only by the High Court or the Sessions Judge, as the case may be. According to Section 300(5) CrPC, a person discharged under Section 258 CrPC shall not be tried again for the same offence except with the consent of the court by which he was discharged or of any other court to which the first-mentioned court is subordinate. Further, Section 398 CrPC provides that the High Court or the Sessions Judge may direct the Chief Judicial Magistrate by himself or by any of the Magistrates subordinate to him to make an inquiry into the case against any person who has already been discharged. Both these provisions contemplate an inquiry to be conducted before any person, who has already been discharged, is asked to again face trial if some evidence appears against him. As held earlier, Section 319 CrPC can also be invoked at the stage of inquiry. We do not see any reason why inquiry as contemplated by Section 300(5) CrPC and Section 398 CrPC cannot be an inquiry under Section 319 CrPC. Accordingly, a person discharged can also be*

*arraigned again as an accused but only after an inquiry as contemplated by Sections 300(5) and 398 CrPC. If during or after such inquiry, there appears to be an evidence against such person, power under Section 319 CrPC can be exercised. We may clarify that the word "trial" under Section 319 CrPC would be eclipsed by virtue of above provisions and the same cannot be invoked so far as a person discharged is concerned, but no more.*

***116.*** *Thus, it is evident that power under Section 319 CrPC can be exercised against a person not subjected to investigation, or a person placed in Column 2 of the charge-sheet and against whom cognizance had not been taken, or a person who has been discharged. However, concerning a person who has been discharged, no proceedings can be commenced against him directly under Section 319 CrPC without taking recourse to provisions of Section 300(5) read with Section 398 CrPC.*

***117.*** *We accordingly sum up our conclusions as follows:*

*Questions (i) and (iii)*

*— What is the stage at which power under Section 319 CrPC can be exercised?*

*And*

*— Whether the word "evidence" used in Section 319(1) CrPC has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?"*

**VII. *Rajesh v. State of Haryana*, (2019) 6 SCC 368 : (2019) 2 SCC (Cri) 801 : 2019 SCC OnLine SC 638 at page 385**

*"**6.9.** In S. Mohammed Ispahani v. Yogendra Chandak [S. Mohammed Ispahani v. Yogendra Chandak, (2017) 16 SCC 226 : (2018) 2 SCC (Cri) 138] , SCC para 35, this Court has observed and held as under: (SCC p. 243)*

*"35. It needs to be highlighted that when a person is named in the FIR by the complainant, but police, after investigation, finds no role of that particular person and files the charge-sheet without implicating him, the Court is not powerless, and at the stage of summoning, if the trial court finds that a particular person should be summoned as accused, even though not named in the charge-sheet, it can do so. At that stage, chance is given to the complainant also to file a protest petition urging upon the trial court to summon other persons as well who were named in the FIR but not implicated in the charge-sheet. Once that stage has gone, the Court is still not powerless by virtue of Section 319 CrPC. However, this section gets triggered when during the trial some evidence surfaces against the proposed accused."*

***6.10.*** *Thus, even in a case where the stage of giving opportunity to the complainant to file a protest petition urging upon the trial court to summon other persons as well who were named in the FIR but not implicated in the charge-sheet has gone, in that case also, the Court is still not powerless by virtue of Section 319 CrPC and even those persons named in the FIR but not implicated in the charge-sheet can be summoned to face the trial provided during the trial some evidence surfaces against the proposed accused.*

*7. Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand, we are of the opinion that, in the facts and circumstances of the case, neither the learned trial court nor the High Court have committed any error in summoning the appellants herein to face the trial along with other co-accused. As observed hereinabove, the appellants herein were also named in the FIR. However, they were not shown as accused in the challan/charge-sheet. As observed hereinabove, nothing is on record whether at any point of time the complainant was given an opportunity to submit the protest application against non-filing of the charge-sheet against the appellants. In the deposition before the Court, PW 1 and PW 2 have specifically stated against the appellants herein and the specific role is attributed to the appellant-accused herein. Thus, the statement of PW 1 and PW 2 before the Court can be*

*said to be "evidence" during the trial and, therefore, on the basis of the same and as held by this Court in Hardeep Singh [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86] , the persons against whom no charge-sheet is filed can be summoned to face the trial. Therefore, we are of the opinion that no error has been committed by the courts below to summon the appellants herein to face the trial in exercise of power under Section 319 CrPC.*

***8**. Now, so far as the submissions made on behalf of the appellants herein relying upon the orders passed by the learned Magistrate dated 1-9-2016 and 28-10-2016 that once the appellants herein were discharged by the learned Magistrate on an application submitted by the investigating officer/SHO and, therefore, thereafter it was not open to the learned Magistrate to summon the accused to face the trial in exercise of power under Section 319 CrPC is concerned, it appears that there is some misconception on the part of the appellants. At the outset, it is required to be noted that the orders dated 1-9-2016 and 28-10-2016 cannot be said to be the orders discharging the accused. If the applications submitted by the investigating officer/SHO and the orders passed thereon are considered, those were the applications to discharge/release the appellants herein from custody as at that stage the appellants were in judicial custody. Therefore, as such, those orders cannot be said to be the orders of discharge in stricto sensu. Those are the orders discharging the appellants from custody. Under*

*the circumstances, the submission on behalf of the accused that as they were discharged by the learned Magistrate and therefore it was not open to the learned Magistrate to exercise the power under Section 319 CrPC and to summon the appellants to face the trial, cannot be accepted.*

***9**. In view of the above and for the reasons stated above, we see no reason to interfere with the impugned judgment and order [Rajesh v. State of Haryana, 2018 SCC OnLine P&H 5035] passed by the High Court confirming the order passed by the learned Magistrate summoning the appellant-accused herein to face the trial in exercise of the power under Section 319 CrPC. We are in complete agreement with the view taken by the High Court. No interference is called for by this Court."*

**VIII. *Juhru v. Karim*, (2023) 5 SCC 406 : 2023 SCC OnLine SC 171 at page 412**

*"**16.** It is, thus, manifested from a conjoint reading of the cited decisions that power of summoning under Section 319CrPC is not to be exercised routinely and the existence of more than a prima facie case is sine qua non to summon an additional accused. We may hasten to add that with a view to prevent the frequent misuse of power to summon additional accused under Section 319CrPC, and in conformity with the binding judicial dictums referred to above, the procedural safeguard can be that ordinarily the*

*summoning of a person at the very threshold of the trial may be discouraged and the trial court must evaluate the evidence against the persons sought to be summoned and then adjudge whether such material, more or less, carry the same weightage and value as has been testified against those who are already facing trial. In the absence of any credible evidence, the power under Section 319CrPC ought not to be invoked.*

*This extract is taken from Juhru v. Karim, (2023) 5 SCC 406 : 2023 SCC OnLine SC 171 at page 413*

***22**. The information available on record suggests that the trial is at the stage of defence evidence. The guidelines that the trial court must follow, while commencing the trial against Appellant 1 have been extensively iterated by the Constitution Bench in Sukhpal Singh Khaira [Sukhpal Singh Khaira v. State of Punjab, (2023) 1 SCC 289 : (2023) 1 SCC (Cri) 454] , in the following terms : (SCC p. 312, para 41)*

> *"**41**. (III) What are the guidelines that the competent court must follow while exercising power under Section 319CrPC*
>
> ***41.1**. If the competent court finds evidence or if application under Section 319CrPC is filed regarding involvement of any other person in committing the offence based on evidence recorded at any stage in the trial*

*before passing of the order on acquittal or sentence, it shall pause the trial at that stage.*

***41.2**. The Court shall thereupon first decide the need or otherwise to summon the additional accused and pass orders thereon.*

***41.3.** If the decision of the court is to exercise the power under Section 319CrPC and summon the accused, such summoning order shall be passed before proceeding further with the trial in the main case.*

***41.4.** If the summoning order of additional accused is passed, depending on the stage at which it is passed, the Court shall also apply its mind to the fact as to whether such summoned accused is to be tried along with the other accused or separately.*

***41.5.** If the decision is for joint trial, the fresh trial shall be commenced only after securing the presence of the summoned accused.*

***41.6**. If the decision is that the summoned accused can be tried separately, on such order being made, there will be no impediment for the Court to continue and conclude the trial against the accused who were being proceeded with."*

**IX. *Ajay Kumar v. State of Uttarakhand*, (2021) 4 SCC 301 : 2021 SCC OnLine SC 48 at page 304**

*"**4**. The principles for exercise of power under Section 319 CrPC by the criminal court are well settled. The Constitution Bench of this Court in Hardeep Singh v. State of Punjab [Hardeep Singh v. State of Punjab, (2014) 3 SCC 92 : (2014) 2 SCC (Cri) 86], has elaborately considered all contours of Section 319 CrPC. This Court has held that power under Section 319 CrPC is a discretionary and extraordinary power which has to be exercised sparingly. This Court further held that the test that has to be applied is one which is more than prima facie case as exercised at the time of framing of charge, but short of satisfaction to an extent that the evidence, if goes unrebutted, would lead to conviction. In paras 105 and 106, the following has been laid down : (SCC p. 138)*

> *"105. Power under Section 319 CrPC is a discretionary and an extraordinary power. It is to be exercised sparingly and only in those cases where the circumstances of the case so warrant. It is not to be exercised because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty of committing that offence. Only where strong and cogent evidence occurs against a person from the evidence led before the Court that such power should be exercised and not in a casual and cavalier manner.*
>
> *106. Thus, we hold that though only a prima facie case is to be established from the evidence led before the court, not necessarily*

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

*(emphasis in original)"*

**25.** The learned counsel for the petitioner submits that from beginning to end in this case smacks of malafide and malafide. A person is killed. Nobody is named in the FIR. One SHO gets the statement of witnesses under Section 164 recorded in which the petitioner is implicated. This happens after three months. The S.H.O. pays the penalty before National Human

Rights Commission and faces major departmental proceeding for wrongly investigating the case. The investigation of the case is taken away from Senior Superintendent of Police on materials presented by the petitioner and handed over to another officer. The A.D.J., issuing summons, is proceeded against by the Hon'ble High Court for his alleged corruption.

**26.** If these facts are not enough a simple look at the depositions would show that out of eleven witnesses ten have not stated anything against the petitioner. Eleventh witness states that it was the petitioner who paid the killer to kill her son. Learned Sessions Judge took this into consideration without even looking at para-5 of the deposition where the lady states that this information came to her through newspaper.

**27.** If her deposition is tested on the angle of the law laid down by the Hon'ble Supreme Court then it will be found that this may not even constitute the *prima facie* case. Whereas the Hon'ble Supreme Court has raised level of satisfaction of the court. Above the materials sufficient to frame charge and below a satisfaction that the allegation if uncontested would result in conviction.

**28.** The allegation that from a newspaper report one witness come to know that a person has paid someone to kill her son is a material which in any case is not going to get even the

charges framed. Thus, the materials, the crux of the allegation is wholly insufficient for issuance of a summon under Section 319 to face the trial. The counsel for the informant apart from raising questions on the Hon'ble Patna High Court has tried to argue that the petitioner is a very rich person and a very influential person and submission of final form, transfer of investigation, punishment of SHO and punishment of judicial officer by the Hon'ble High Court clearly point towards his high reach and influence. He has also argued that the materials i.e. the allegation of mother gathering from newspaper regarding the petitioner paying the money to kill her son is sufficient to attract Section 319 IPC. The Court presumes that the learned counsel must be addressing the court on the instruction of his client and thus, resists from making any further comment on the issue.

**29.** Apart from complete absence of materials, this Court finds that the case is attended and actuated by *malafide* from the very beginning and the petitioner has been implicated in this case in the mode and manner which apparently seems *malafide*. Thus, the court has no hesitation in quashing the order of Section 319 dated 22.08.2019 summoning the petitioner under Section 319 by holding that the action is actuated by *malafide* at many levels and

the materials over which the summons have been issued are, to say the least, are extremely insufficient to exercise the power.

**(Ansul, J)**

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